

A Way Forward with the International Criminal Court

by Tod Lindberg

Koret-Taube Task Force on National Security and Law

www.futurechallengesessays.com

The International Criminal Court (ICC) is an institution that sits uneasily at the dangerous intersection of law and politics, both international and domestic. Created by a treaty, the Rome Statute, opened for signature in 1998 and commencing operation after ratification by sixty state signatories in July 2002, the Court has as the subject matter of its jurisdiction the most horrible acts of violence that political conflict can produce: genocide, war crimes, ethnic cleansing, crimes against humanity. The notion that atrocities on such a scale can be brought to heel or ameliorated by the law acting across national borders necessarily entails the Court inserting itself into some of the worst and most vexing conflicts the world sees.

The involvement of the Court may take place for the purpose of rendering judgments after a conflict has ended, as in the case of the Nuremberg tribunals following World War II, or once conflict has substantially abated, as in the ICC's ongoing proceedings in the Central African Republic. Criminal proceedings such as these are controversial enough when minds are still reeling from the horror of what has just happened. The Court's involvement need not be retrospective, however; the conflict or crisis may be going full tilt when the Court becomes involved, adding yet more layers of complexity and controversy to its actions. For example, the ICC has issued a warrant for the arrest of the president of Sudan, Omar al Bashir, charging him with orchestrating the atrocities in Sudan's Darfur region, at a time when the crisis there is very much unfolding in real time and stubbornly eluding the efforts of would-be peacemakers.

An international court looking into a situation like Darfur could never hope to escape controversy. Those who find themselves under its scrutiny usually seek grounds to attack its legitimacy and impartiality. Some well-intended observers worry that the ICC prosecutor's efforts to bring cases will hamper the work of diplomats trying to make peace. Some will argue that criminal accountability may hinder rather than further reconciliation efforts. Others, citing for example the experience of the International Criminal Tribunal for the former Yugoslavia, will be concerned that legal proceedings will drag on and on without resolution. Some will say that "international justice" is

task force on national security and law



inevitably a poor substitute for locally administered justice, however defective the latter may be.

Situations involving atrocities constitute politics at its most extreme. Even people or governments that agree on basic values, such as the worthiness of the principles expressed in the Universal Declaration of Human Rights, will disagree over the best means of pursuing and protecting them. Nor is it always possible to reconcile two different ends that are good in themselves, even or perhaps especially if there is agreement that both are desirable. Sometimes the pursuit of justice and the pursuit of reconciliation and social reconstruction conflict. The situation grows only more complicated when there is no agreement on basic values, as in the case of a government complicit in atrocities and seeking to evade accountability by any means available.

The U.S. and the ICC

But of course it is not only for the crimes the International Criminal Court has within its purview that it is controversial, especially in the United States. The way in which the ICC may take jurisdiction over a situation, and thus put individuals at risk of prosecution, has been if anything more incendiary. Here, the controversy has at times overwhelmed the more basic question of whether perpetrators of atrocities should be held accountable.

The United States government supported in principle the creation of an international criminal court in the years leading up to the Rome conference. However, overwhelming sentiment among treaty drafters favored two provisions to which the United States took strong exception. The first was the authority of the Court's prosecutor to bring cases on his own initiative, subject only to review by a panel of the Court's judges. Rather than vesting the prosecutor with this *proprio motu* power, the United States wanted the Court to take up investigations on the basis of referrals from the United Nations Security Council and not otherwise (except for self-referrals, whereby a state party would ask the ICC to investigate conduct that took place on its own territory, presumably owing to a lack of confidence in its ability to prosecute such cases effectively). The Rome Statute *allows* the prosecutor to take a case on referral from the Security Council but does not require that cases come before the Court that way. One reason for the U.S. objection would be to preserve the principle that a Security Council resolution under Chapter VII of the UN Charter is the last word in international law on matters of peace and security. Clearly, however, the United States was also seeking to ensure that no situation would be investigated by the prosecutor without U.S. approval, given U.S. veto power on the Security Council. The United States—and the four other permanent members of the Council—would have a veto over the Court's jurisdiction, which could be used as any of them saw fit to protect supposed national interests that might be compromised by the Court's intervention. The notion that the Security Council might become blocked by a veto threat, and the cause of accountability for perpetrators of atrocities thereby impeded—the same view of the Security Council

referral requirement as that of the United States, but construed negatively rather than positively—was precisely what proponents of *proprio motu* authority were hoping to overcome. A “court worth having,” as proponents argued, could not permit a gap in its jurisdiction at the behest of the powerful.

The second main U.S. objection was the Court’s authority to assert jurisdiction in certain circumstances over nationals of a state not party to the Rome Statute. This objection had a principled component, namely that states cannot be bound by “international law” unless they have freely consented, either by treaty or related instrument, or by the general conformity of their conduct to evolving “customary international law.” It also had a practical component: The United States has far-flung security commitments and deploys troops globally in accordance with them. There was substantial concern from the U.S. military about U.S. soldiers potentially being brought before the ICC for obeying lawful orders from their commanders, even though the United States was not a party to the treaty. Things go wrong in war: distinguishing between a tolerable though regrettable degree of “collateral damage” and a war crime was a prerogative the United States government sought to keep for itself, at least insofar as risk of criminal culpability is concerned.

The United States sought a twofold test for whether an action could fall within the court’s ambit: that it took place on the territory of a state party and that it was committed by a national of a state party. The Rome Statute incorporated an either/or standard instead. Thus, the unwillingness of the United States or any other state to become a state party would offer no protection for soldiers at risk of prosecution for acts committed in the performance of their lawful duties if they were committed on the territory of a state that had ratified the treaty. True, the United States could choose to become a state party, thus mooting the objection with regard to its own nationals. But in doing so, the United States would be buying into a treaty whose provisions claimed to bind nonparties, thus compromising the general principle. Perhaps the United States could enter a reservation, as is common in treaty ratification, declaring its position on jurisdiction over nonparty nationals—except that the Rome Statute, in a departure from common practice, explicitly forbids ratification with reservations.

There were—and for many, there remain—a number of additional concerns with the Rome Statute on such nontrivial matters as protection of defendants’ rights and how well the ICC fits U.S. constitutional strictures. Most of them, as well as the two main concerns just discussed, are lawyerly. Yet it would be a mistake to characterize the controversy over the ICC in the United States as primarily a technocratic one—with the implication that treaty negotiators simply failed in the achievable task of reaching an agreement satisfactory to all parties. By the time of the Rome conference, it was clear that many of the “like-minded nations” driving the opposition to U.S. positions would rather have a treaty faithful to their principles than a treaty the U.S. could vote for in Rome or sign.

The Ideological Element

On one hand, there is a certain incongruousness to the creation of an international criminal court to which the world's most powerful country will not become a party—especially when the opposition is not categorical but perfectly susceptible to a negotiated resolution. On the other, for proponents, perhaps one can fairly say that they viewed the moment of institutional architecture to be at hand. The court that emerged from the Rome conference would be the international criminal court the world would have for all time, or at least as long as “permanent” is in world affairs. Flaws in the design of the court could easily be permanent as well—impossible to fix because of the vested interests that would emerge around the status quo. More important going forward than the support and participation of the United States, perhaps, was getting the architecture right, as the drafters saw the right. If the price of the acquiescence of the powerful was affirmation of the privileges of power, it was too high. Besides, maybe the United States would eventually come along anyway.

Thus we can see that the purpose of the creation of the Court, in the view of some of its framers, was actually rather broader than the already ambitious undertaking of providing a practical international institutional mechanism for holding perpetrators of atrocities to account. The ICC would be *the* institution of the international system for criminal justice. It should accordingly not be subservient to the political judgments of the United Nations Security Council or anyone else (beyond the decision-making authority the Rome Statute grants its Assembly of States Parties). The ICC would fulfill a fundamental requirement of global governance: the investigation and prosecution of crimes under international law.

If many of the framers of the Court viewed it more ambitiously, through the prism of the architecture of global governance, the emerging view of the Court among the swelling ranks of its critics in the United States was through the other side of the same prism. Here, in the critics' view, was a blatant attempt to trample on U.S. sovereignty: The United States, by participating in such a court, would be surrendering its freedom of action to an unaccountable international body whose intentions and ambitions were uncertain at best. Would such a Court second-guess the way the United States fights its wars? Would American service members and officials be hauled off to the Hague for kangaroo-court proceedings whose real purpose was simply to stymie American power whenever possible? Why should the United States put up with any such possibility?

Such conclusions are far, far down a chain of speculative extrapolation about the intentions of the framers of the Rome Statute. Yet the differences between the United States government and the “like-minded governments” who gave the Rome Statute its final stamp were both official, in the narrow but important disputes over the prosecutor's powers and the Court's jurisdiction, and unofficial and ideological, to the extent the Court became the focal point for a broader dispute about “sovereignty” versus “global governance.”

It was for the official reasons that the United States government voted against the Rome Statute in 1998, during the Clinton administration, citing the basic flaws in the structure of the proposed operation of the Court discussed above. At the end of his term and on the deadline day for submission of signatures, President Clinton nevertheless signed the treaty. He did so while reiterating the fundamental U.S. objections. He articulated the view that the United States would be in a better position as a signatory to address the treaty's flaws. Clinton also said he would not present the treaty to the Senate for ratification nor recommend that his successor do so until the United States' "fundamental concerns are satisfied."

On the eve of the establishment of the court by sixty national ratifications in 2002, the George W. Bush administration ceremoniously "unsigned" the treaty by sending a letter to the secretary-general of the United Nations declaring that the United States no longer intended to become a party. Here, the ideological view of the Court as a threat to U.S. sovereignty seemed to be emerging as the new official view in an administration bent on testing the policy prospects of a doctrine of unilateralism.

If anything, sentiment against the Court ran even higher in the GOP-controlled Congress, which in 2002 passed the Armed Service-Members Protection Act (ASPA), essentially an attempt to forestall legislatively any possibility of U.S. cooperation with the Court. Memorably, ASPA granted authority to the president to use "all means necessary" to spring U.S. citizens from custody of the Court, should any ever happen to fall into its clutches. The inclusion of this authority in ASPA led not only critics but also gleeful proponents to dub the legislation the "Hague Invasion Act." ASPA also mandated a cutoff of U.S. military assistance funding for parties to the Rome Statute that refused to sign bilateral agreements with the United States pledging never to turn U.S. nationals over to the Court. United States diplomats subsequently expended much time and energy making a top priority of extracting these politically-touchy agreements from reluctant and bewildered allies.

And there matters stood and looked to be stuck—a kind of one-way cold war between the United States and the ICC, in which carefully articulated objections to the Rome Statute metastasized in the political arena into implacable hostility. To be sure, there were divisions within the Bush administration over the ICC. But no one could mistake which side had the microphone and spotlight.

Surprise: The Darfur Referral

It came as a huge surprise to many, therefore, when in spring 2005, confronted with a deteriorating situation in the Darfur region of Sudan and an adamant view on the Security Council that a legal framework was urgently necessary to cope with the horrors of the conflict, the United States declined to veto a resolution referring the situation in Darfur to the International Criminal Court.

In 2004, Secretary of State Colin Powell put the U.S. government on record that what was transpiring in western Sudan was “genocide.” The Khartoum regime, citing concerns about rebel groups operating in Darfur, armed a local militia called the Janjaweed drawn from the Arabic-speaking nomadic population of western Sudan. The Janjaweed, with additional military assistance from the government, set about driving the sedentary Fur population from their villages, which were subsequently looted and burned. With international demands for action mounting, the secretary-general of the United Nations appointed a fact-finding “commission of inquiry.” It reported in January 2005. Although the report did not include a finding of genocide, citing insufficient evidence of intent, it did find the Sudan government and the Janjaweed militia “responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law.” The report recommended a referral to the International Criminal Court. Some members of the Security Council were reluctant to go forward with other resolutions addressing Sudan without a legal framework in place.

The United States initially indicated support for the creation of a special tribunal along the lines of the one created for former Yugoslavia. Again, one must note the divergence between the official U.S. position and the ideological position running ahead of it. The United States has a long record of support for mechanisms to bring perpetrators of war crimes and like atrocities to account across national borders if necessary. This record has antecedents dating back to the Lieber Code of wartime conduct during the Civil War, for violations of which the Confederate commander of the notorious Andersonville prisoner of war camp was tried and hanged. The record of U.S. support for “international justice” has always been imperfect on its own terms, has always stood in tension with U.S. concerns about its own sovereign rights, and has often found a need to balance the pursuit of justice against other competing interests. Nevertheless, weighed against the standards of the day historically, the United States has been relatively forward-leaning in pursuit of accountability for perpetrators of atrocities. This was true even during the emergence of opposition to the International Criminal Court. There was never any serious U.S. government opposition to international mechanisms for trying and punishing war crimes and other atrocity crimes when local measures were unavailing. Support for the Security Council-chartered special tribunals handling cases from former Yugoslavia and Rwanda never came into question, and the response to Darfur was not an expression of hostility to the idea that the likes of Bashir should face justice, but an initial preference for a new special tribunal to avoid entanglement with the ICC.

Nevertheless, the U.S. position looked to others like it might be emerging as hostility in principle to international legal accountability for crimes under international law, at least insofar as any such mechanism might threaten to constrain U.S. action. This impression was not without foundation. The statements of some U.S. officials invited such a conclusion. The insistence of the United States that Iraqi courts, without international participation, handle the prosecution of officials of the Baathist regime, including Saddam Hussein himself, lent further credence to the view that the United States was turning its back on “international justice,” now construed as a pejorative. The overweening assertion

during the first Bush term of executive branch prerogative in relation to legal issues surrounding the “global war on terror,” notwithstanding treaty and other obligations, was another worrisome indicator. At a minimum, the question of whether the U.S. official position was coming into line with the ideological opposition to the International Criminal Court was worth a serious test.

It came at the Security Council, chiefly as the handiwork of the capable French mission to the United Nations. France has obvious equities in the Security Council as well as the International Criminal Court. Of the five permanent members of the Council, France and the United Kingdom are the only two to become parties to the Rome Statute, thus forswearing whatever protection their veto power might have provided were the ICC chartered to act only by Security Council referral, as the United States wanted. The draft resolution circulated in spring 2005 was carefully crafted to meet the two major official objections the United States government consistently espoused: It explicitly protected nationals from nonparty states from the jurisdiction of the court in relation to any investigation of Darfur. And the Security Council would be the body taking action to refer the matter to the Court, the procedure the United States had always supported for authorizing a Court investigation. Other U.S. objections to the Rome Statute amounted to a problem for U.S. *membership* in the Court, but that was not the subject under consideration at the Security Council.

Framed in this way, the choice for the Bush administration was whether the United States was willing to acquiesce in the work of the ICC at all. Did the United States have other, heretofore unarticulated objections, perhaps an unstated objection in principle, to the International Criminal Court? If so, this ideological view would emerge with clarity in a U.S. veto threat directed at the resolution. It would make the ideological opposition official, so to speak.

Yet the Bush administration chose not to veto the resolution, thus allowing it to pass. True, the United States did not take occasion to endorse the work of the Court or to endorse the resolution as a precedent in the pursuit of international justice: just the opposite. U.S. officials reiterated official objections and claimed that the United States would not regard the Security Council action as a precedent. Even so, in retrospect, it is hard to view the sequence of events as anything but a precedent: Faced with a future unfolding crisis involving crimes under international law that would certainly go unaddressed by local courts, what would be the basis for the United States to threaten to veto a Security Council referral, having gone along in the case of Darfur? The era of a default option favoring creation of ad hoc “special tribunals” is over (though we may see more such tribunals when there is a compelling political reason for some sort of hybrid mechanism involving international and local actors).

Nor was the abstention the end of the matter, even for the Bush administration. U.S. Officials consistently spoke out in support of the work of the ICC prosecutor as the investigation developed. When the prosecutor in July 2008 announced he was asking

the Court to approve the warrant for Bashir, some strong supporters of the Court worried about the potential for destabilization of conditions in Darfur if the prosecutor went forward. Under Article 16 of the Rome Statute, the Security Council can require the Court to defer investigation and prosecution for a one-year period, renewable annually. A number of European governments favored such a deferral in exchange for concessions from the Sudanese government. The U.S. government, to the contrary, spoke up in behalf of letting the proceedings against Bashir go forward, as indeed they did.

The episode was illuminating not only for the spectacle—the skeptical United States arguing on behalf of the Court’s work and European proponents of the Court arguing for its work to be interrupted—but also for the window it opened on potentially different views of the role of the Court. The United States, once it was committed to the Darfur referral, saw itself as fully committed to whatever might legitimately follow from the referral, including the issuance of a warrant for a sitting head of state with unforeseeable—and frankly, possibly deleterious—consequences. The “European” view, if one may be permitted a generalization, saw the Court more as a tool in a broader process aimed at putting pressure on the Khartoum regime: The Court might be most useful to a diplomatic process by dangling its arrest warrant like a sword of Damocles over the Sudanese president. The American view of how international criminal law will *in fact* work is remarkably similar to the uncompromising NGO view among Court proponents of how international criminal law *should* work—by putting accountability first. The United States is accordingly wary. The “European” view finds this absolutism puzzling and fear of it unreasonable, given that considerations of *force majeure* or realism are always relevant: Bashir deserves indictment, of course; the law is clear. But whether a warrant should be issued is also a political question for the European view in a way that Americans find hard to swallow.

Though it was little appreciated at the time, the Darfur referral was a new beginning for the United States in its relations with the International Criminal Court. It derailed the ascension of ideologically based opposition to the Court as U.S. policy (though it has hardly derailed the ideological opposition to the Court in domestic U.S. politics). The official objections the United States has long raised with regard to the Court’s founding treaty yet remain, but a new question has been asked and answered: Notwithstanding those official objections, can the United States conclude that working with the Court is in the American interest, at least some of the time? Yes.

The Court in Action

Part of the reason for the newfound ability of the United States to do business with the Court lies in the practice of the Court itself since it came into operation. Rather than feed or justify the suspicions of skeptics or opponents, the Court by its actions has done much to dispel them.

Most importantly, the prosecutor has been very restrained in the assertion of his *proprio motu* power. The Darfur referral came from the Security Council, and the previous three

situations into which he has opened investigations—Uganda, the Democratic Republic of the Congo, the Central African Republic—were “self-referrals,” requests from parties to the Rome Statute for the ICC prosecutor to investigate.

Tellingly, in the case of the DRC, the prosecutor received sufficient information about atrocities from individuals and non-governmental organizations to tell the Assembly of States Parties that he was prepared to act on his own motion, but “that a referral and active support from the DRC would facilitate” his office’s work. It was forthcoming. Late in 2009, the prosecutor announced he was asking the Court’s Pre-Trial Chamber to authorize an investigation into the violence that followed the 2007 election in Kenya. Though acting on his own motion in the case of Kenya, the prosecutor noted that a high-level delegation of the Kenyan government had committed to self-referral in the event the Kenyan Parliament was unable to agree on what the prosecutor’s office called “a genuine national mechanism to prosecute those responsible for the crimes.” He also said his office intended to pursue cases against only the two or three worst perpetrators, leaving other offenders to local accountability measures, including prosecutions as well as “truth and reconciliation” approaches.

In all these cases, the prosecutor has demonstrated a clear sense of focus on the perceived legitimacy of his investigations. He seems to take the authority he has under the Rome Statute not as the answer to the question of the legitimacy of his actions but as a starting point upon which to build legitimacy.

It is true, as opponents anticipated, that the Court’s headquarters in the Hague has become a magnet for those who see in the Court an opportunity to advance a political agenda. There have been thousands of instances in which individuals and non-governmental organizations have referred cases to the ICC, including demands for the prosecution of former British Prime Minister Tony Blair, George W. Bush, former U.S. Defense Secretary Donald Rumsfeld, and other high-profile figures. Press conferences have been called and dossiers deposited. What seems most relevant, however, is that the prosecutor has dispatched all of these cases summarily. He has given them the level of scrutiny necessary to determine whether they are worthy of pursuit and has rejected them. In most cases, the office has declined the referrals without public announcement, thus preventing additional opportunities for publicity-seeking. It seems reasonable to infer that most of the decisions not to proceed have been based on his office’s determination that the Court lacks jurisdiction under the terms specified in the Rome Statute.

An especially interesting outside referral concerned Iraq. In this case, in rejecting the referral, the prosecutor issued a letter explaining why he was not pursuing the case. The most important allegation was that British soldiers were complicit with American soldiers in the mistreatment of prisoners held in Iraq. The first thing to note is that the UK is a party to the Rome Statute, and its nationals therefore potentially subject to the jurisdiction of the Court. It seems likely that one element motivating the referral was

the prospect of implicating Americans in the activity under investigation, causing at least embarrassment if not legal jeopardy. The prosecutor's letter rightly noted that neither the United States nor Iraq was a state party, and therefore that the Court would have no jurisdiction over U.S. personnel. If there was any expectation that a prosecutor with an expansive view of the project of the Court would invent some sort of theory of "collateral" jurisdiction that would drag the Americans in, the prosecutor dispelled it. As for the British soldiers, the prosecutor made several observations relevant to an assessment of his view of the proper reach of his powers. He noted that the allegations, while grave and indeed within the scope of the court's subject-matter jurisdiction, nevertheless did not take place on a scale comparable to that of the crimes already under investigation by his office. He also noted that the crimes alleged were also crimes under the national jurisdiction of the UK and indicated he had received communications from the British government that domestic investigations of criminal conduct were taking place. This was sufficient to trigger the "complementarity" provision of the Rome Statute. As a court of last resort, the ICC takes jurisdiction when national courts are unable or unwilling to prosecute atrocity crimes. It is not, contrary to the wishes of some, the first or universal stop for the pursuit of accountability for such crimes.

The complementarity provision of the Rome Statute is of particular relevance to the United States for the simple reason that the United States has a criminal justice system and a military justice system designed to hold American perpetrators of atrocities to account. Although there are some gaps between international criminal law and U.S. domestic law, which Congress has actually been working to close, there is no action that would be triable by the ICC that could not be tried in a U.S. military or civilian court. According to the standards for complementarity the prosecutor has set forth, the United States would certainly be among the states protected by the complementarity principle from seeing their nationals hauled off to the Hague. It is true that the Court itself has final say on the question of complementarity: A state, whether party or not, cannot simply assert that it has criminal justice procedures of its own and is therefore beyond the reach of the ICC. It is also true that activists will be prepared to argue that domestic U.S. proceedings are chiefly designed to protect senior U.S. officials and military personnel rather than put them behind bars. It is further true that a future prosecutor could overturn the precedents set by his predecessors, and that Court review panels could decide to go along. But to this point, there is no indication whatsoever that such a politicized project is in the offing at the Court.

The Court (both the prosecutor and the judges) has also set forth elaborate procedures to protect the rights of defendants. These protections differ in certain ways from the protections American citizens enjoy in criminal court; for example, there is no right to trial by jury at the ICC. However, the ICC procedures here, as in other areas, are well within contemporary legal norms, differing in specifics but not in kind from those of other governments where an American citizen or any other national could be reasonably assured of a fair trial and adequate due process.

Wishful Outcomes

The descriptions here of the Court's pattern of practice have a rather heavy epistemological burden to bear, namely, showing that the Court *is not* something that some supposed it might be. One can show instances of seeming restraint, but one cannot prove that instances of restraint amount to a settled policy of restraint. One can show that what has transpired at the Court to date does not bear out the critics' fears, but one cannot infer future conduct from past. Moreover, a candid assessment of the nexus between the Court and the advocacy community associated with the broader question of international justice and human rights must acknowledge that many members of that community do indeed harbor visions of the workings of international law in general and the ICC in particular that are far more expansive than the role the Court has shaped for itself so far. In certain respects, the terms of the Rome Statute may indeed be sufficiently elastic to allow for more expansive aspirations (albeit by this point a project that would entail overturning the young Court's own precedents, with an attendant price to be paid for the credibility of the institution). Nevertheless, it seems fair to say that the operation of the Court, though it has not removed and probably cannot ever remove all doubt, has done much to dispel critics' doubts. The "official objections" of the U.S. government retain a validity that can only be overcome by confidence derived from the practice of the Court. What one can say now, at a minimum, is that the Court is building that confidence.

It will take time. For some critics, no pattern of practice will be dispositive so long as the Court itself, whether at the nexus of the prosecutor and the judges' chambers or in the Assembly of States Parties, remains the final arbiter of what the Rome Statute means. One rightly detects here a wariness that extends well beyond the Court to call into question the extent to which the United States should ever cede to others any of the decision-making authority that formally attaches to "sovereignty." Again, however, the United States government in the Darfur referral seems to have stepped decisively away from this more ideological view of the Court (or, perhaps, a more philosophical view of sovereign right). The evolving modus vivendi between the United States government and the ICC that has emerged from the Darfur referral is something the United States will benefit from building on.

The International Criminal Court is intended to be a permanent court. Some have suggested that the key points of "official" U.S. objection in the Rome Statute may be subject to renegotiation, and that the United States would have sufficient leverage to obtain these changes as the condition for U.S. membership in the Court. Yet the prosecutor's *proprio motu* power was a hard-won victory for its proponents, and one they knew might cost them the support of the United States. Why they would be willing to give it up for a promise of U.S. membership now when they were unwilling to give it up then is at best uncertain. Moreover, Senate approval of a treaty is something no president can guarantee. The record of the renegotiated Law of the Sea Treaty is not a positive precedent for this approach. The United States eventually obtained the changes it began to seek during the Reagan administration, but Senate skepticism during the

George W. Bush administration remained strong despite the efforts of the conservative administration to press for ratification.

Moreover, it is not entirely clear that the United States will always and in all instances be opposed to the prosecutor using his statutory discretion. The international criminal equivalent of a Kosovo-like situation might arise: Most if not all of the rights-regarding governments in the world would be united in their view that accountability for horrendous crimes was essential, yet the Security Council might find itself blocked by a veto threat. Under those circumstances, the United States might well wish to participate in or support (or at least not oppose) a referral from outside the Security Council seeking the decision of the prosecutor to act on his own motion. The legitimacy of such an action would rest not with the Rome Statute power as such but with a shared view of the circumstances under which it was exercised.

Real Choices

The United States has essentially four policy options with regard to the ICC. It could turn its back on the Darfur referral and embrace a policy of opposition to the ICC of the sort initially contemplated in the now largely toothless ASPA, seeking to undermine the Court and imposing a cost on those who support it and its work. Or the United States could adopt a policy of “benign neglect,” paying the Court little heed and not bothering to clarify the U.S. position. The Darfur referral might then be retroactively classified as having been driven purely by contingent circumstances of a kind that might or might not arise again. A third option would be to build on the Darfur referral by adopting a policy of cooperation with the Court. The United States could withdraw the “unsigned” letter of 2002, support the work of the Court in bringing perpetrators of atrocity crimes to justice, and participate as an observer in the Assembly of States Parties and in other Court deliberations. A fourth option would be to press for swift ratification through approval of the Rome Statute by the United States Senate.

The first policy, hostility, would do serious harm to the U.S. interest in fostering human rights abroad and in holding the world’s worst offenders to account. As we have seen, legal accountability has not been and is unlikely ever to be the overriding purpose of U.S. policy. At the same time, it is difficult to imagine a future conflict in which the United States would be prepared to turn its back entirely on the considerations of justice rather than let the International Criminal Court investigate and prosecute.

The second policy, indifference, might yield future U.S. acquiescence in referrals to the ICC and ad hoc decisions to cooperate (or to withhold cooperation), but would leave unexplored the possible benefits the United States might obtain from active cooperation.

A policy of cooperation would enable the United States to offer a more coherent statement of its views on the ICC and how the ICC fits into the context of an American

interest in pursuing the world's worst perpetrators across national borders when necessary. The American debate over the ICC has badly distorted this issue, almost turning it upside-down. The pursuit of international justice is a broad question of which the International Criminal Court is only a part. Yet the ICC is not the only means for the pursuit of justice, which may be better pursued locally, nor the only policy measure ongoing atrocity crimes may demand, from concentrated diplomatic efforts to military intervention (with or without the authorization of the Security Council).

A policy of cooperation would place the United States in the room as the Assembly of States Parties takes up important questions about the operation of the Court. The most important and immediate of these is the question of the definition of the crime of "aggression," which the Assembly is currently considering. The Rome Statute places the crime of aggression within the subject-matter jurisdiction of the Court, but the signatories were unable to agree on a definition in 1998, leaving the issue to be resolved at a review conference meeting in 2010. This is a matter in which the United States has an obvious interest as the world's leading military power. More important than the definition itself is the question of whether and how the Court may act in the absence of a Security Council finding of aggression. Some of the proposed definitions and procedures are better from the U.S. point of view than others, and the presence of a cooperation-minded United States might be conducive to acceptance of a definition that meets U.S. concerns.

A policy of cooperation would enable the United States to determine whether the U.S. interest in holding perpetrators to account and ultimately in deterring atrocities in the first place can be furthered through the Court. The United States will be in a position to ask what it can do to help. Are there resources the United States can provide to the Court to improve the Court's operations? The United States may be able to assist with investigations by providing forensic expertise or evidence of atrocities. There may be opportunities to assist in certain instances in the apprehension of perpetrators. The United States, working through the Court, may be able to help victims of atrocities. The United States may be able to use its special diplomatic influence in tandem with pressure from the Court to encourage local accountability, assisting with local capacity-building as needed. But U.S. officials can explore the efficacy of none of these without first deciding to cooperate and discussing with Court officials the way to do so.

A policy of cooperation will also test the ability of the U.S. government to protect the particular interests of a global superpower with extensive security commitments abroad. It is likely, in the course of discussions and negotiations, that parties to the ICC or the Court itself will ask for more from the United States than it should agree to or go along with. To pick obvious examples, cooperation with the Court must command the support of senior U.S. military officers, intelligence officials, and law enforcement officials. To obtain such support, their particular concerns with regard to the scope of their own activities must be taken into consideration.

The Obama administration, after a slow start revolving partly around getting personnel in place, has undertaken a policy review and begun to participate in the Court's working-group discussion. But it has made no formal announcement of a new policy centered on cooperation. There is a price to pay for this lack of clarity: U.S. government officials are generally wary of getting out in front of U.S. policy. In addition, many have only a vague and erroneous working understanding of ASPA as a law that precludes all possibility of cooperation with the Court. Officials are unlikely to actively seek avenues of cooperation in the absence of clear guidance from senior officials that their action are lawful and welcome.

Unripe for Ratification

The Obama administration's wariness so far should be telling for those who would seek to put the question of ratification on the table sooner rather than later. The time is not right. There are two main reasons, one substantive, one a product of domestic U.S. politics.

On substance, it's an open question how welcoming the Court will be to U.S. cooperation. If the debate over aggression goes badly in a way that seems to put the United States in particular legal jeopardy, for example, then one might well see the emergence of a new element of "official opposition" to the Court that can be overcome only by good Court practice over time, if at all. One would want to see the outcome of the review conference on this and other matters and the quality of U.S. participation as an observer before thinking about ratification.

In addition, the Court has had but one prosecutor, whose non-renewable term expires in 2012. The United States will be very interested in the process by which the Assembly of States Parties selects a replacement, the record of the new prosecutor prior to coming to the Court, and what the new prosecutor has to say about the actions and policies of the first prosecutor.

Whether and how the Court chooses to involve itself in some of the perennially neuralgic areas of international politics is also an open question. The prosecutor has a preliminary inquiry underway on the conflict last year in Gaza between Israel and Hamas. For the United States, this is a highly charged issue.

Pushing early toward ratification without a clear view of the Court's approach to some of these questions would be a mistake in policy terms. The political problem is, however, even more acute. Republicans remain deeply skeptical about the Court. Democrats are more favorably disposed. But it is a very serious undertaking to bring a treaty before the Senate for approval. The constitutional requirement of a two-thirds vote is a high hurdle. And if there happened to be as many as thirty-three senators inclined toward opposition, it is unlikely that any Senate majority leader would be willing to press ahead. This would be especially so if the sixty-seven who supported ratification reflect a lopsided balance between Democrats and Republicans, creating opportunities in partisan electoral politics.

And, of course, in the event the vote came up short, the record suggests it could be decades before the Senate would be willing to reconsider the treaty, if at all. At such a time, the Senate's previous rejection would continue to weigh on deliberations.

To get past the partisan considerations, it will be necessary for senators to be far more aware of and comfortable with the workings of the Court than they are now. A U.S. policy of cooperation with the International Criminal Court, pursued carefully over time and accompanied by demonstrable substantive benefits to American interests, may or may not lead to eventual U.S. ratification. But it is the only good path, and perhaps the only path at all, for those who want to go farther.

Copyright © 2010 by the Board of Trustees of the Leland Stanford Junior University.

This publication is for educational and private, non-commercial use only. No part of this publication may be reprinted, reproduced, or transmitted in electronic, digital, mechanical, photostatic, recording, or other means without the written permission of the copyright holder. For permission to reprint, reproduce, or transmit, contact Ms. Tin Tin Wisniewski (tintinyw@stanford.edu).

The preferred citation for this publication is
Tod Lindberg, "A Way Forward with the International Criminal Court (March 2010)," in *Future Challenges in National Security and Law*, edited by Peter Berkowitz, <http://www.futurechallengesessays.com>.

About the Author



Tod Lindberg

Tod Lindberg is a research fellow at the Hoover Institution and editor of Policy Review. He is coauthor of Means to an End: U.S. Interest in the International Criminal Court and coeditor of Bridging the Foreign Policy Divide. Lindberg is a member of the Hoover Institution's Boyd and Jill Smith Task Force on the Virtues of a Free Society and a contributing editor to the Weekly Standard. The New Ideas Fund provided support for this essay.

Koret-Taube Task Force on National Security and Law

The National Security and Law Task Force examines the rule of law, the laws of war, and American constitutional law with a view to making proposals that strike an optimal balance between individual freedom and the vigorous defense of the nation against terrorists both abroad and at home. The task force's focus is the rule of law and its role in Western civilization, as well as the roles of international law and organizations, the laws of war, and U.S. criminal law. Those goals will be accomplished by systematically studying the constellation of issues—social, economic, and political—on which striking a balance depends.

The core membership of this task force includes Kenneth Anderson, Peter Berkowitz (chair), Philip Bobbitt, Jack Goldsmith, Stephen D. Krasner, Jessica Stern, Matthew Waxman, Ruth Wedgwood, and Benjamin Wittes.

For more information about this Hoover Institution Task Force please visit us online at <http://www.hoover.org/taskforces/national-security>.

