

THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

THE CLINTON ADMINISTRATION

Active proponent but final skepticism:

- **The United States** had been an active proponent of international criminal justice (*ad hoc* tribunals) and the establishment of a permanent international criminal court.
- **Clinton signed** the Rome Statute on the last day the treaty was open for signature (December 31, 2000), *but* indicated that he did not recommend his successor submit the treaty for ratification.

THE BUSH ADMINISTRATION

1st TERM: Policy of ‘active opposition’ to the ICC:

- **US fears / concerns:**
 1. Risk of politically-motivated prosecutions against US nationals.
 2. Alleged incompatibilities with the Constitution, i.e. immunities and safeguards.
- **Bush ‘*unsigns*’** the Rome Statute in May 2002 in a terse letter sent to Secretary-General Kofi Annan from Ambassador John Bolton. Technically, this letter was a notification of the US intent not to ratify. The reason probably was that, even without ratification, the US owed certain obligations to the ICC based on having signed the treaty (according to Article 18 of Vienna, states are obliged to *refrain from acts which would defeat the object and purpose of a treaty* once they have signed, *until [they make their] intention clear not to become a party to the treaty*).
- **Article 98 BIAs.** The Administration signs over 100 bilateral immunity agreements whereby states pledge not to surrender each other’s citizens to the ICC. Opponents have reasoned that Article 98 was drafted to accommodate pre-existing agreements between states such as Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs) that permit a state sending troops into another to retain jurisdiction over those personnel.

- **The ‘*Hague Invasion Act*’.** U.S. Congress passes the American Servicemembers’ Protection Act of 2002 (ASPA), which authorizes the President to use military force to ‘liberate’ any American detained by the Court, prevents US participation in UN peacekeeping missions unless US personnel are granted immunity from prosecution by the Court, mandates the withholding of military aid from parties to the Rome Statute that do not agree to enter into Article 98 agreements or otherwise qualify for a waiver. The Act also limits US involvement with the court in the following ways:
 1. Prohibition to *cooperate* with the ICC.
 2. Prohibition to provide *support* to the ICC.
 3. Prohibition to send *funds* that may be used for the purpose of assisting the investigation, arrest, detention, extradition, or prosecution of any US citizen or permanent resident alien by the ICC.
 4. Prohibition for any agent of the ICC to conduct, in the US or any territory subject to the jurisdiction of the US, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the ICC.

2nd TERM: Rethinking ‘active opposition’ in favor of acquiescence:

- **Darfur referral.** The U.S. abstains in the Security Council vote on the referral of the Darfur situation to the ICC, after having been the first country to publicly label the atrocities ‘*genocide*’. Bush wanted to do something about Sudan because the situation had caught the attention of the religious communities in the US.
- **Allies in US military campaigns start to pressure.** The
- **President Bush issues waivers** to a number of ICC members that did not enter into Article 98 agreements.
- **Congress amends the ASPA** to eliminate the prohibition to send military aid to ICC parties, although the anti-cooperative provisions remain in force.

JOHN BOLTON, *Speech Two: Reject and Oppose the ICC* (1999)

The Rome Statute is a “pernicious and debilitating agreement, harmful to the national interests of the United States”:

- I. **Substantive problems.** The ICC’s authority is *vague* and *excessively elastic*. There is a real risk that an *activist* court and prosecutor will broaden their language essentially without limit.

II. Structural problems. US top civilian and military leaders are potential targets of the ICC's politically *unaccountable* prosecutor.

III. General problems. Deficiencies that will affect all nations:

1. ***Lack of deterrence.*** The ICC's authority is far too attenuated to make the slightest bit of difference either to the criminals or the outside world.
2. ***Politics.*** It is not clear that 'justice' is everywhere and always consistent with the attainable political resolution of serious military disputes.
3. ***Security Council role.*** The Rome Statute substantially minimizes the Security Council's role in ICC affairs. In allowing only a vote to *stop* a case, the Statute shifts the balance of authority from the Council to the Court.
4. ***Permanent.*** Experience strongly favors a case-by-case approach, politically and legally, rather than the inevitable resort to adjudication contemplated by the ICC.
5. ***Complementarity.*** Advocates of the ICC usually disregard the possibility of states trying their own war criminals.

PREDICTION: *"Whether the International Criminal Court survives and flourishes depends in large measure on the United States".*

THE OBAMA ADMINISTRATION

Positive (and selective) engagement with the ICC

HAROLD H. KOH, *International Justice 5.0* (2012)

General remarks:

- **Nuanced skepticism.** Do not misread our skepticism of certain institutions as hostility to the bedrock norms and values of international criminal justice.
- **Justification of US position.** The United States is very concerned about the risk of politicized prosecutions, given its unique posture of having more troops and other personnel deployed overseas than any other nation (because it is frequently called upon to help ensure global peace, justice and security).

- **US national interest.** The United States has long recognized that international criminal justice is in its own national interest because, by promoting a culture of accountability, stability increases and the need for costly military interventions is thereby reduced.

Positive engagement with the ICC:

'Do the ICC's efforts in this context complement U.S. efforts to ensure that perpetrators of this particular atrocity be held accountable and advance U.S. interests and values?'

“Smart power” approach = Not to shut ourselves off to those with whom we disagree, but to engage and work for mutually beneficial improvements that advance US interests.

1. End of hostile rhetoric.
2. Engagement with the Assembly of States Parties.
3. Public support for *all* the ongoing situations in which the Court has begun formal investigations or prosecutions, both in diplomacy and multilateral settings.
4. Expression of concern around the fact that nine individuals who are the subject of pending arrest warrants have not yet been apprehended.
5. Suggestion that states can lend expertise and logistical assistance to apprehend them

SHOULD THE U.S. JOIN THE ICC?

- Risk of **overdeterrence** of US officials.
- Uncertainty about rules governing disclosure of **classified information**.
- **Prosecutorial independence:** no executive and no legislative check. US General Attorney can be fired by the President and subpoenaed by the Congress. Congress has cut off funds for any Guantanamo prisoner to be sent to be tried in the US.
- **Constitutional issues:** no confrontation (evidence), no jury.