

Why the U.S. Should Be Positively Engaged with the ICC and Eventually Join the Court¹

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INTRODUCTION

The creation and operation of the International Criminal Court are important, positive developments in world affairs. The United States as a non-member observer should participate in the Court's activities as recently has been the case. Eventually, barring unforeseen difficulties, the U.S. should ratify the Rome Statute and become a full-fledged member of the Court. Here are the main reasons:

1. The Court stands ready to prosecute and convict individuals guilty of the most serious crimes of international concern.
2. The Court helps to deter national leaders from committing such crimes.
3. The Court helps to promulgate the truth about such crimes.
4. The Court helps the victims of such crimes.
5. The Court is an active and apparently permanent institution. It is pragmatic for the U.S. to be involved in its activities.
6. U.S. involvement with, and membership in, the ICC is proper under the U.S. Constitution.

ARGUMENT

A. Punishment of Violators

In reaction to the outrages of World War II, and especially the Holocaust, we the peoples of the world, acting through our nation-state governments, have codified or created numerous international human rights norms.³ The most serious of these are the norms against genocide, crimes against humanity and war crimes. All of these norms stem from the elemental recognition, in the words of the 1948 Universal Declaration of Human Rights, that "all human beings are born free and equal in dignity and rights" and are "endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Given the world's nation-state sovereignty basis, however, we the peoples of the world have grappled with the very real problem of how to enforce such norms. The response has been the creation of various mechanisms, none of which is perfect.⁴

One of these responses has been seeking to subject violators to criminal sanctions in domestic courts under ordinary jurisdictional principles as well as the principle of universal jurisdiction or in international criminal tribunals like the Nuremberg and Tokyo War Crimes Tribunals at the end of World War II and more recently so called *ad hoc* tribunals created by the U.N. Security Council (the

International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)). Now we have the International Criminal Court (ICC) with jurisdiction over the crime of genocide, crimes against humanity and war crimes.⁵

For too long violators of these international law norms have acted as if no one could call them to account for their actions. They acted with impunity. They committed horrendous crimes and got away with it.

As a matter of elemental justice, such impunity must end. One of the ways towards this goal is the operation of the ICC when it brings charges against such violators, gains custody of them, puts them to trial and convicts and imprisons them. Punish the violators with imprisonment up to 30 years or for life.

Such punishment, I submit, enhances U.S. security and is in our national interest.

B. Deterrence of Future Violations

One of the purposes of all criminal law, both domestic and international, is deterrence. We as a society hope that laws banning certain conduct, say like murder, will deter some people from engaging in the prohibited conduct. Yet murders still occur. But we do not give up our belief in the importance of deterrence.

Moreover, University of Minnesota political scientist and Regents Professor, Kathryn Sikkink, will soon publish a new book--***The Justice Cascade: How Human Rights Trials Are Changing World Politics***. The book summarizes intensive empirical research on the impact of international and domestic legal systems' criminal prosecutions for violations of international human rights norms. The conclusion that emerges from this research is that such prosecutions are correlated with less repression over time. In short, there is evidence of deterrence of violations of international human rights norms.⁶

The ICC with its prosecutions and threatened prosecutions adds additional weight to the forces of deterrence.⁷

There is another way, I submit, that the ICC helps with deterrence. The ICC is a court of last resort. The ICC is structured so that domestic criminal prosecutions are preferred under what is known as the principle of complementarity, and the ICC acts only when domestic judicial systems are incapable of acting. In furtherance of this goal, the ICC is promoting what is known in ICC parlance as "positive complementarity." The ICC is urging and helping national court systems, with the assistance of the U.S. and others, to improve their ability to handle criminal prosecutions for war crimes, crimes against humanity and genocide. The better able such systems are to handle these kinds of cases, the stronger are the forces of deterrence.

This too is in our national interest.

C. Promulgation of the Truth

A byproduct of any criminal prosecution, domestic or international, is promulgating at least the partial truth of past atrocities. This, of course, is the primary objective of truth commissions that have been established in some countries and of holocaust museums. Such truth telling, I submit, adds to the forces of deterrence and enhances U.S. security and is in our national interest.

D. Helping Victims

Another goal of many, if not most, domestic legal systems is to provide compensation or some form of redress for the victims of crimes. In the U.S. this is not usually done through the criminal law. A relatively unknown feature of the ICC is a mechanism for compensating victims and providing other ways of helping them combat the adverse effects of such crimes.⁸

Such compensation and redress, I submit, enhances U.S. security and is in our national interest.

E. Pragmatic Considerations

The ICC is now nearly nine years old. The Court is alive and functioning. It has conducted or is still conducting investigations of situations in six countries, all in Africa; three are referrals from states (Uganda, Democratic Republic of Congo and Central African Republic); two are referrals by the U.N. Security Council (Sudan (Darfur) and Libya); and one is the Prosecutor's initiation as authorized by the Pre-Trial Chamber (Kenya). Twenty-three individuals have been subjects of arrest warrants. Four are on trial with the first case expected to conclude early this summer while earlier this month two more accuseds were committed to stand trial. The alleged crimes in these trials include genocide, crimes against humanity (including rape, torture and murder) and war crimes (including rape, pillaging, torture and conscription of child soldiers).⁹

As a matter of pragmatic international relations, the U.S. should be positively engaged with the ICC.

That in fact is what happened at least once in the George W. Bush Administration when the U.S. abstained on the U.N. Security Council's reference of the Sudan (Darfur) situation to the ICC.¹⁰ The Obama Administration has continued the U.S. support of the Court's handling the Sudan (Darfur) situation.¹¹ The U.S. in the current Administration as an observer also has been attending meetings of the ICC's governing body (the Assembly of States Parties)¹² as well as its June 2010 Review Conference.¹³

After the Review Conference, U.S. Ambassador for War Crimes, Steven Rapp, added another important argument for U.S. engagement with the ICC. Even though the U.S. was not going to join the ICC at this time, he said, the era of the U.N.'s establishing ad hoc and short-lived tribunals like the International Criminal Tribunal for Rwanda to address specific problems was over. Only the ICC would be in business for future problems. Therefore, the U.S. needed to be positively engaged with the Court.¹⁴

The recent and still developing situation in Libya is another instance in which the U.S. has supported the use of the ICC. U.N. Security Council Resolution 1970 that referred the Libyan situation to the ICC Prosecutor was prepared by the U.S. and 10 other Council members.¹⁵ During the Council's discussion of the resolution, U.S. Ambassador Susan Rice stated, "For the first time ever, the Security Council has **unanimously** referred an egregious human rights situation to the [ICC]." (Emphasis added.)¹⁶

These U.S. actions, in my opinion, have enhanced the standing of the U.S. in the world community of nations and facilitated our country's obtaining certain decisions that are in our national interest. To ignore the ICC and to sit on the sidelines eliminates any advantages for the U.S. in this aspect of international relations.

F. U.S. Involvement with, and Membership in, the ICC Is Valid under U.S. Constitution

As has been argued elsewhere, the U.S. Constitution does not prohibit the U.S. from participation in, or eventual ratification of, the Rome Statute. This conclusion rests on the power of the President under the Constitution's Article II, Section 2(2) "to make treaties" (with concurrence of two-thirds of the Senate) and the power of Congress under Article I, Section 8 (10) "to define and punish . . . Offenses against the Law of Nations."¹⁷ Indeed, Dean Wippman reported at the March 22nd Federalist Society debate that the Clinton Administration Justice Department had concluded in 1998-99 that the U.S. constitutionally could become a party to the Rome Statute.

Professor Eugene Kontorovich has advanced a novel contrary argument in a 2009 law review article. This argument is based upon the U.S. refusal in the early 19th century to join so-called British-led courts of mixed commission with jurisdiction over ships involved in slave trading.¹⁸ In that same article, however, Kontorovich admitted that "the preponderance of scholarly opinion concludes that the Constitution does **not** bar the United States from joining international courts, including the ICC." (Emphasis added.)¹⁹ He also admitted in that article that "there is no clear originalist evidence about the constitutionality of international criminal courts."²⁰

Professor Kontorovich's argument against the constitutionality of the ICC does **not** rest on any Supreme Court or lower federal court precedents. Instead it relies on the early 19th century U.S. refusal to join so-called "mixed courts of commissions" promoted by Great Britain to punish slave trading. No one else in the debates over the ICC has referred to this history as relevant.²¹ I have not attempted to check his sources.²² At least two questions, in my opinion, need to be probed in any such historical analysis: (1) to what extent was U.S. resistance to such "mixed courts" due to Southern power and influence to prolong slavery? and (2) to what extent was U.S. resistance due to a desire to avoid entanglement with Great Britain, against whom we fought the Revolutionary War and the War of 1812?

This interpretation of the history of the mixed courts of commissions has been challenged as flawed in an article forthcoming in the next issue of the University of Pennsylvania Law Review. Jenny S. Martinez, Professor of Law and Justin M. Roach, Jr. Faculty Scholar, Stanford Law School, asserts that Kontorovich overstated the significance and sincerity of constitutional objections raised by some early 19th century U.S. government officials; that he erroneously claimed that these tribunals were criminal courts whereas they in fact exercised a type of civil *in rem* jurisdiction; and that he misunderstood the nature of those earlier constitutional objections. These earlier constitutional objections were based on the fact that slave-trading at that time was violative of U.S. federal law, but not of the law of nations and

that the officials rightly believed that the U.S. Constitution would not permit the U.S. to delegate the power to try an U.S. citizen for violating U.S. law to an international court. On the other hand, in the early 19th century it would have been, and was, permissible for the U.S. to have its citizens tried by an international tribunal for violating the law of nations.²³

Kontorovich 's argument for unconstitutionality does **not** explicitly acknowledge the panoply of due process rights under the Rome Statute that were prepared by U.S. diplomats at the Rome Conference and that sound like our constitutional criminal procedural requirements. Indeed, a careful review of these protections by an independent task force established by the American Society of International Law concluded that the ICC "is compliant with the fundamental elements [of fair trial] in established international norms, such as those set out in the International Covenant on Civil and Political Rights to which the United States is a party."²⁴ Here is a summary of those procedural rights at the ICC:

Presumption of Innocence

“Everyone shall be presumed to be innocent until proven guilty before the Court . . .”(Art. 66)

Speedy & Public Trial

“ . . .the accused shall be entitled to a public hearing . . .”

“the accused shall be entitled . . . to be tried without undue delay; . . .” (Arts. 67(1), 67(1)(c))

Assistance of Counsel

“ . . .the accused shall be entitled . . .to communicate freely with counsel of accused’s choosing . . .”

“ . . .the accused shall be entitled . . .to have legal assistance assigned by the Court where the interests of justice so require, and without payment if he accused lacks sufficient means to pay for it; . . .” (Arts. 67(1)(b), (d))

Right to Remain Silent

“ . . .the accused shall be entitled . . .not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; . . .” (Art. 67(1)(g))

Privilege Against Self-Incrimination

“ . . .the accused shall be entitled . . .not to be compelled to testify or to confess guilt . . .” (Arts. 54(1)(a), 67(1)(g))

Right to Written Statement of Charges

“ . . .the person shall be provided with a copy of the . . .charges . . .” (Art. 61(3))

Right to Examine or Have Examined Adverse Witnesses

“ . . .the accused shall be entitled . . .to examine, or to have examined . . .the witnesses against him or

her...” (Art. 67(1)(e))

Right to Compulsory Process to Obtain Witnesses

“...the accused shall be entitled...to obtain the attendance and examination of witnesses on his or her behalf...” (Art. 67(1)(e))

Prohibition against Ex Post Facto Crimes

“A person shall not be criminally responsible...unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” (Art. 22)

Protection against Double Jeopardy

“No person who has been tried by another court...shall be tried by the Court with respect to the same conduct...” (Art. 20)

Freedom from Warrantless Arrest & Searches

“...the Pre-Trial Chamber may...issue...warrants as may be required...”

“...if it [the Pre-Trial Chamber] is satisfied that there are reasonable grounds to believe that the person has committed a crime...and the arrest of the person appears necessary...” (Arts. 57 bis (3),(58))

Right to be Present at Trial

“The accused shall be present during the trial.” (Art. 63)

Exclusion of Illegally Obtained Evidence

“Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible...” (Art. 69(7))

Prohibition against Trials *in absentia*

“The accused shall be present during the trial.” (Art. 63)

Nor does Kontorovich take into account the Rome Statute's creation of multiple internal checks and balances. The Prosecutor is subject to controls over investigations and the issuance of arrest warrants by a Pre-Trial Chamber of three judges, and they in turn are subject to review by the Appeals Chamber of five judges. All of them are subject to the supervision of the Assembly of States Parties, and the judges and the Prosecutor are limited to one term of nine years. In addition, the U.S. Security Council may order the suspension of any investigation or trial for one year subject to renewal. U.S. can veto a proposed reference to ICC by the Security Council, but when such referrals are made, the Prosecutor regularly gives an in-person report on the status of the investigation and cases to the Council. (The Rome Statute, however, does not provide for a grand jury indictment or a jury trial as our Fifth and Sixth Amendments do.)²⁵

Moreover, Kantorovich overlooks the ICC's principle of complementarity, and the U.S.' ability as a State Party to preempt any ICC jurisdiction over a U.S. citizen by the U.S.' conducting an honest investigation or prosecution or honestly deciding **not** to prosecute.²⁶

Yet even Professor Kantorovich says the "slave-trade story does not rule out all [U.S.] participation in international criminal tribunals." There would or should be an exception, he suggests, for "universal-jurisdiction crimes" that he says include genocide, crimes against humanity and war crimes, the precise crimes for ICC jurisdiction in the Rome Statute. However, he adds, without specificity, the Statute's definition of "genocide" is broader than in customary international law while the Statute's definition of "war crimes" goes beyond "grave breaches" of the Geneva Conventions.²⁷ These comments do not seem well founded:

- The Rome Statute's definition of "genocide" is identical with the term's definition in the 1948 Genocide Convention that has been ratified by 141 of the 192 U.N. members.²⁸
- The Rome Statute's Article 8's definition of "war crimes" specifically mentions "**grave** breaches" of the Geneva Conventions or "**other serious** violations of the laws and customs applicable in international armed conflict [or armed conflicts not of an international character] within the established framework of international law" and, in addition, requires that such crimes have to be "**committed as part of a plan or policy or as part of a large-scale commission of such crimes.**" (Emphasis added.)²⁹

In summary, Kontorovich's arguments for the unconstitutionality of the U.S.' joining the ICC are not persuasive.

CONCLUSION

In conclusion, U.S. positive engagement with the ICC is in our national interest. Given the constitutional requirement for two-thirds of the Senate to vote in favor of ratification of treaties, its demonstrated reluctance to ratify any multilateral treaties and the current makeup of the Senate, the U.S. will not become a member of the ICC in the near future. Such ratification, however, is more likely with continued positive results from continued U.S. engagement with the ICC. Although the Rome Statute does not permit a state to ratify the treaty with reservations (Art. 120), some states have ratified with declarations or understandings, and the previously mentioned independent task force of the American Society of American Law recommended that any such U.S. ratification be with understandings and declarations similar to those that already have been made, such as "United States' ratification of the Rome Statute is with the understanding that the U.S. was not undertaking any obligations contrary to the U.S. Constitution."³⁰

ENDNOTES

¹ An earlier version of this paper was the text for the author's remarks made at a debate about the ICC at a meeting of the University of Minnesota Federalist Society on March 22, 2011. Eugene Kontorovich, Associate Professor, Northwestern University School of Law, argued against the ICC along the lines of one of his law review articles that will be discussed in the last section of this paper. Also participating in the debate was David Wippman, Dean, University of Minnesota Law School, who in 1998–99 served as a director in the National Security Council's Office of Multilateral and Humanitarian Affairs, where he worked on war crimes issues, the ICC, economic sanctions, and U.N. political issues. In the debate Dean Wippman said that people on both sides of the U.S. debate about the ICC frequently overstated the merits and demerits of the ICC.

² Adjunct Professor, University of Minnesota Law School, and Provisional Organizer of the Minnesota Alliance for the International Criminal Court.

³ The modern era of human rights started with 1945's Charter of the United Nations and 1948's Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. Other multilateral human rights treaties have followed, including the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. David Weissbrodt, Fionnuala Ní Aoláin, Joan Fitzpatrick, and Frank Newman, *International Human Rights: Law, Policy and Process*, ch. 1 (4th ed. 2009) ["Weissbrodt"].

⁴ These mechanisms include state reporting to U.N. Charter and treaty bodies for review, comment and recommendations; complaints by states and individuals to such bodies for recommended solutions; international investigations of specific countries or problems; civil litigation against violators in domestic courts and international courts like the Inter-American Court of Human Rights; and truth commissions. *Id.*, chs. 4-6, 9, 11, 12, 14, 15, 16.

⁵ *Id.* at 11, 483-586. The text of the Rome Statute, which will be referenced throughout this article, is available at: http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

⁶ Dancy, *Sikkink's The Justice Cascade*, Univ. Minnesota Human Rights Program Newsletter, Spring 2011, at 5.

⁷ Professor Kontorovich has suggested in a short blog comment that the ICC might actually reduce deterrence because its maximum punishment is 30-years imprisonment, not the death penalty.

⁸ ICC, Victims and witnesses, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims>.

⁹ ICC, Situations and cases, <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases>.

¹⁰ *E.g.*, AMICC, U.S. Administrative Update, <http://www.amicc.org/usinfo/administration.html>.

¹¹ In January 2009, Susan E. Rice, the new U.S. Ambassador to the United Nations, in her first appearance in the Security Council, said that that 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." Regarding Darfur, Ambassador Rice stated at that time, "It is our view that we support the ICC investigation and the prosecution of war crimes in Sudan, and we see no reason for an Article 16 deferral" by the Council. Following the issuance of an arrest warrant for Omar Al Bashir, President of Sudan, in March 2009, Ambassador Rice reiterated U.S. support for the Court on Darfur and the requirement of Sudan to cooperate with the ICC. U.S. support for the ICC's charges against Bashir has continued. *E.g.*, Statement by President Obama on the Promulgation of Kenya's New Constitution (Aug. 27, 2010), <http://www.whitehouse.gov/the-press-office/2010/08/27/statement-president-obama-promulgation-kenyas-new-constitution>("I am disappointed that Kenya hosted Sudanese President Omar al-Bashir in defiance of International Criminal Court arrest warrants for war crimes, crimes against humanity, and genocide. The Government of Kenya has committed itself to full cooperation with the ICC, and we consider it important that Kenya honor its commitments to the ICC and to international justice, along with all nations that share those responsibilities"); U.N. Security Council, Press Release: Briefing Security Council on Sudan, United Nations, African Union Officials Tout Unified Strategy, Linking Peace in Darfur to Southern Sudan Referendum (June 14, 2010), (U.S. Ambassador Rice told Security Council that there was a need "to bring to justice all those responsible for crimes in Darfur, calling on Sudan to cooperate with the [ICC] and expressing deep concern at the Court's Pretrial Chamber judges recent decision to refer the issue of Sudan's non-cooperation to the Council").

¹² In November 2009 the U.S. for the very first time attended as an observer a meeting of the ICC's governing body, the Assembly of States Parties. The 12-member U.S. delegation listened to the discussion and had extensive meetings with other governments and with NGO's. The leader of the delegation, Stephen Rapp, the new U.S. Ambassador-at-Large for War Crimes, in a speech to the Assembly, commented on the U.S. commitment to ending impunity for brutal crimes and commended the work of international criminal tribunals. He also said that the U.S. was particularly concerned with the forthcoming definition of the crime of "aggression" and that the U.S. supported such an amendment so long as ICC jurisdiction would only attach after "a Security Council determination that aggression has occurred." In that regard, the ICC, he added, "has an interest in not being drawn into a political thicket that could threaten its perceived impartiality." (AMICC, Report on the Eighth Session of the Assembly of States Parties, The Hague, November 2009 <http://www.amicc.org/docs/ASP8.pdf>; Stephen J. Rapp, Speech to Assembly of States Parties (Nov. 19, 2009), http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf.)

In late January 2010, Ambassador Rapp publicly stated that no U.S. president was likely to present the Rome Statute to the U.S. Senate for ratification in the "foreseeable future." Rapp cited fears that U.S. officials would be unfairly prosecuted and the U.S.'s strong national court system as reasons it would be difficult to overcome opposition to ratification. He did not mention the virtual political impossibility in this Session of Congress to obtain the two-thirds (67) vote in the Senate that would be necessary for ratification. Rapp also said that the U.S. has a role to play in a three-part system for ending international impunity. First, the US must work to strengthen other national court systems, particularly in the Democratic Republic of Congo. Second, the U.S. must work with countries that exercise universal jurisdiction (like Spain) when there is some relation between the country and the crime. Third, he said, the U.S. should continue to support the work of international criminal tribunals. (Belczyk, US war crimes ambassador says US unlikely to join ICC in 'foreseeable future,' *Jurist* (Jan. 28, 2010), <http://jurist.law.pitt.edu/paperchase/2010/01/us-war-crimes-ambassador-says-us.php>.)

In March 2010 the U.S. again attended as an observer the resumed meeting of the Assembly of States Parties. U.S. Ambassador Rapp publicly praised the work being done to prepare for the Review Conference. He offered U.S.

assistance for enhancing states' cooperation with the Court and stated the U.S. desire to meet with the ICC to see how the U.S. could support its current investigations. The U.S. experience in foreign assistance judicial capacity-building and rule-of-law programs, he said, could help the ICC in its "positive complementarity" efforts. Similarly the U.S. experience in helping victims and reconciling peace and justice demands could be of assistance. Harold Koh, Legal Advisor, U.S. Department of State, made a public statement expressing U.S. criticisms and skepticism about the then pending proposed amendment on the crime of aggression. (AMICC, Report on the Resumed Eighth Session of the Assembly of States Parties, New York, March 2010 (March 31, 2010), <http://www.amicc.org/docs/ASP8r.pdf>; U.S. Dep't of State, Statement by Stephen J. Rapp . . . at the Session of the Assembly of States Parties of the [ICC], (March 23, 2010), <http://usun.state.gov/briefing/statements/2010/138999.htm>; U.S. Dep't of State, Statement by Harold Honju Koh . . . at the . . . Session of the Assembly of States Parties of the [ICC], (March 23, 2010), <http://usun.state.gov/briefing/statements/2010/139000.htm>.)

¹³ In late May/early June 2010 the U.S. sent a high-level delegation to the ICC's Review Conference that participated as an observer in many of its discussions and debates. This reflected the Obama Administration's policy of engagement with the Court and seeking to affect its future development as an important international institution that is in accord with the long-standing U.S. policy against impunity for perpetrators of genocide, crimes against humanity and war crimes that already are subject to ICC jurisdiction. In late May/early June 2010 the U.S. sent a high-level delegation to the ICC's Review Conference that participated as an observer in many of its discussions and debates. This reflected the Obama Administration's policy of engagement with the Court and seeking to affect its future development as an important international institution that is in accord with the long-standing U.S. policy against impunity for perpetrators of genocide, crimes against humanity and war crimes that already are subject to ICC jurisdiction. (AMICC, Report on the Review Conference of the International Criminal Court (June 25, 2010), <http://www2.icc-cpi.int/Menus/ICC/Home>; <http://www.amicc.org>.)

At the Conference the U.S. pledged to "renew its commitment to support projects to improve judicial systems around the world. Such improvements would enable national courts to adjudicate national prosecutions of war crimes, crimes against humanity and genocide and thereby make ICC involvement unnecessary. The U.S. also pledged to "reaffirm President Obama's recognition . . . that we must renew our commitments and strengthen our capabilities to protect and assist civilians caught in the [Lord Resistance Army's] wake [in Uganda], to receive those that surrender, and to support efforts to bring the LRA leadership to justice." (*Id.*)

Immediately after the Review Conference the U.S. State Department held a press briefing by Ambassador Rapp and Legal Advisor Koh about U.S. participation at the Review Conference. They emphasized the diligent work of the U.S. delegation in resuming engagement with the Court, States Parties, other observer nations and NGOs. This effort, they said, "worked to protect our interest, to improve the outcome, and to bring us renewed international goodwill." All of this reflected U.S. (a) "support for policies of accountability, international criminal justice, and ending impunity," (b) the U.S. "policy of principled engagement with existing international institutions" and (c) ensuring that lawful uses of military force are not criminalized. Even though the U.S. thought the definition of "aggression" was flawed, Koh stated, the U.S. successfully pressed for the addition of safeguards that "ensure total protection for our Armed Forces and other U.S. nationals" with respect to this crime. (U.S. Dep't of State, U.S. Engagement with The International Criminal Court and The Outcome of The Recently Concluded Review Conference (June 15, 2010), http://www.state.gov/s/wci/us_releases/remarks/143178.htm.)

Even more importantly, U.S. participation at the Review Conference was a major factor in the creation of additional steps that must be taken before the ICC may exercise jurisdiction over the crime of aggression. Indeed, the U.S. with the world's largest military force deployed around the world was legitimately concerned with the Conference's adoption of an "aggression" amendment. And the resulting amendment means that nationals of the U.S., while it is not a party to the Rome Statute, would not be subject to ICC jurisdiction over this crime, and even if the U.S. were to join the Court by ratifying the Statute, no U.S. national could be charged with such a crime if the U.S. also filed a declaration that it did not accept such jurisdiction. (*Id.*)

¹⁴ *Id.* With the existence of the ICC, there is no need to create future ad hoc tribunals. This fact also avoids the administrative problems ad hoc tribunals face when they near the end of their lives and professional and other staff leave to pursue other opportunities with greater future prospects. (See Amann, Prosecutorial Parlance (9/121/10), <http://intlwgrrls.blogspot.com> (comments by officials of ICTY and ICTR).

¹⁵ U.N. Security Council 6491st meeting (Feb. 26, 2011). The other four Council members who did not join in drafting the resolution were Brazil, China, India and the Russian Federation. In the meeting, the Indian representative noted that "only" 114 of the 192 U.N. Members were parties to the Rome Statute and that five of the 15 Council members, including three permanent members (China, Russia and U.S.), were not such parties. He went on to emphasize the importance of the resolution's exemption from ICC jurisdiction of nationals of States like India that were not parties to the Rome Statute and its preamble's stating that the Statute's Article 16 allowed the Council to postpone any investigation or prosecution for 12 months. (*Id.*)

¹⁶ U.N. Security Council 6491st meeting (Feb. 26, 2011). Three days later (March 1st), the U.S. Senate unanimously approved a resolution deploring the situation in Libya and Colonel Gadhafi. This resolution also stated that the Senate "welcomes the unanimous vote of the United Nations Security Council on resolution 1970 referring the situation in Libya to the [ICC] . . ." (Cong. Record S1068-69 (March 1, 2011) (S. Res. 85).)

¹⁷ *E.g.*, Am. Soc'y of Int'l Law, U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement 41-46 (2009), <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>; Scheffer & Cox, The Constitutionality of the Rome Statute of the International Criminal Court, 98 J. Crim. L. & Criminology 983 (2008); Wedgwood, The Constitution and the ICC in The United States and the International Criminal Court (Sarah Sewall & Carl Kaysen, eds. 2000); Marquandt, Law Without Borders: The Constitutionality of an International Criminal Court, 33 Columbia J. Transnat'l L. 73 (1995); AMICC, The ICC Statute and US Constitutional Questions, <http://www.amicc.org/docs/US%20Constitutional%20Questions.pdf>.

¹⁸ Kontorovich, The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals, 158 U. Penn. L. Rev. 39 (2009).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Kontorovich, The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals, 158 U. Penn. L. Rev. 39 (2009).

²² A quick Internet search found a website by the New York Public Library entitled "Abolition of the Slave Trade." (New York Public Library, The Abolition of the Slave Trade (The Courts of Mixed Commission), <http://abolition.nypl.org/essays/suppression/3>.) It said that the courts of mixed commission "could confiscate vessels, equipment, and merchandise, as well as release captives, but could exact no penalties against crews or owners. Given that slave traders could often repurchase these items (except for the captives) at the subsequent prize auction, these provisions were not a huge deterrent. . . . Like all other nations, [the U.S. and several other nations that did not participate in these courts] were prepared to arrest and try their own nationals, but would allow foreign powers (usually, in practice, Britain) only to hand over any suspects for adjudication in their own domestic courts."

²³ Martinez, International Courts and the U.S. Constitution: Reexamining the History, 159 U. Pa. L. Rev. 1069 (2011), <http://www.pennumbra.com/issues/article.php?aid=306>.

²⁴ Am. Soc'y of Int'l Law, U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement at 45 (2009), <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>. Compare Kontorovich, The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals, 158 U. Penn. L. Rev. 39 (2009) with AMICC, Comparison: The U.S. Constitution vs. The International Criminal Court's Rome Statute, <http://www.amicc.org/docs/Rome%20Statute%20and%20US%20Constitution.pdf>.

²⁵ E.g., Am. Soc'y of Int'l Law, U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement at 42-44 (2009), <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>.

²⁶ Rome Statute, Art. 17.

²⁷ Kontorovich, The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals, 158 U. Penn. L. Rev. 39 (2009).

²⁸ Compare Rome Statute, Art. 6 with Convention on the Prevention and Punishment of the Crime of Genocide, Art. II.

²⁹ Rome Statute, Art. 8.

³⁰ Am. Soc'y of Int'l Law, U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement at 46 (2009), <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>.