The Relationship of the US with States Parties to the Rome Statute of the International Criminal Court (ICC):

An Evolution from Active Opposition to Positive Engagement as Non-State Party

Background Information Paper for Members of Parliaments (MPs)[1]

First prepared in 2006
(*Revised in June 2011*)

I. OBJECTIVE

The goal of this Background Information Paper is to share with Parliamentarians an overview of the marked change in trajectory of United States (US) policy and legislation with respect to the International Criminal Court (ICC) over the course of the past 4 years. While the United States continues to remain outside the growing group of countries that have become State Parties to the Rome Statue of the ICC (115 at time of writing of this Background Information Paper), and this status may not alter in the immediate term, it has nevertheless exhibited almost a 'sea change' in its attitude and approach to the ICC, which started to manifest itself tentatively four years ago and is evolving still further in a positive direction at this time.

It will be recalled that, starting with the US-negative vote when the Rome Statute was adopted on July 17, 1998, and asserting itself with much greater vigour following its signature by President Clinton at the end of 2000[2] and even more so after it formally entered into force in 2002 during the course of the first Bush Administration, US policy towards the ICC was not only negative, but also outright obstructionist and one of profound 'knee-jerk' hostility. In the years 2002-2006, and as was well documented and publicized during this entire period, the first Bush Administration, together with its supporters in the US Congress, endorsed and embarked on an unprecedented diplomatic assault, ultimately unsuccessful, on this still nascent, fledgling institution. In so doing, and in particular in employing the 'strong arm' tactics and threats that it did against many small developing nations, it incurred both the wrath and contempt of many member countries and regional organizations of the international community and inflicted grave damage on its reputation around the world

As it became increasingly apparent in 2005 and 2006 that the very considerable efforts taken by the United States to undermine the ICC were not having the intended effect (and, indeed, were proving to be damaging to the United States), during this latter part of the 2nd Bush Administration a discernable 're-think' and change in tactics began to manifest themselves in Washington. The most significant modification at this time was a newly anointed policy, and political u-turn of sorts, where the US Government and Congress set about ending its theretofore practice of sanctioning States that joined the ICC system and declined to enter into Bilateral Non Surrender Agreements with the US, which had the objective of exempting US nationals and foreign contractors of the US Government from the reach of the Court. *This policy was in evidence in legislation approved in October 2007 and January 2008 removing the basis for certain sanctions.*

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[1] **Disclaimer:** The information contained in this Background Information Paper reflects PGA's understanding of available sources and public materials, as well as communications with experts and other relevant stakeholders. While every effort has been made to maintain the highest standards of accuracy, therefore, PGA is not responsible or liable for any omission or error of reporting or fact arising there-from.

[2] When President Clinton signed the Rome Statute on December 30, 2000, the President issued an official communquè of the White House in which he announced that he would have not transmitted the treaty to the Senate for its ratification, thus triggering the applicability of article 18(a) of the Vienna Convention on the Law of the Treaties, which stipulates that "*a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear **not** to become a party to the treaty;*" (Emphasis added.)

II. Evolution and Demise of certain US Measures against ICC States Parties that Affect the integrity of the Rome Statute

- In 2002, the United States imposed unilateral negative measures ("sanctions") against some States that ratified or acceded to the Rome Statute of the ICC and refused to sign with the US a Bilateral Non-Surrender Agreement. These sanctions fell into 3 categories:

  1. On the basis of the American Servicemembers Protection Act (ASPA, 2002), cuts in **military training assistance** provided by the US International Military Education and Training (IMET) program, and
  2. Cuts in **military assistance** provided by the US Foreign Military Financing (FMF) program.
  3. On the basis of the Nethercutt Amendment to the US Foreign Appropriations Act, cuts in the **economic aid** provided by the US Economic Support Fund (ESF).

- In 2006/07, realising the negative impact of these sanctions on the national interests of the United States, and in light of the opposition of some States to this policy, the measures contained in categories 1 and 3 were no longer applied and were finally eliminated from US legislation in 2007. Similarly, the Executive branch, through Presidential power, issued waivers to several countries that had been affected by category 2 sanctions, thus allowing the resumption of military aid programmes.

- In 2007, the then new Legal Advisor of the US Department of State, Mr. John B. Bellinger III, stated publicly that the Administration had somewhat mitigated its position on the ICC. As reported by the Washington Post, Mr. Bellinger affirmed in early June 2007 that [even] *"If we have differences with the ICC, we share its goals of accountability in crimes against humanity, particularly in Darfur."* He also said the US has *"worked hard to demonstrate that [it] shares the main goals and values of the Court."*[3] At a meeting with European Union Legal Advisors held in Brussels on June 7, 2007, Mr. Bellinger excluded the possibility that the US may join the ICC in the near future and affirmed that the US Government's current policy is to continue to propose *Bilateral Non Surrender Agreements* (BNSA) to ICC Member States. However, he indicated that <u>waivers from cuts in military assistance</u> would be applied to States that would join the Statute without entering into such an agreement. He also clarified that US diplomatic missions had not been instructed to discourage ratification or accession to the Rome Statute. This statement signalled a clear policy change in Washington, which could be defined as one of mild or benign opposition to the ICC.

- The policy of not imposing sanctions to States refusing to sign a BNSA was finally backed by an amendment to ASPA, approved by the US President on 28 January 2008, eliminating permanently type 1 and 2 sanctions.

- Conversely, the possibility to impose sanctions for ESF funds was reinstated into legislation through the Nethercutt Amendment in the Foreign Appropriations Act for 2008 tabled on 17 December 2007 and signed into law on 26 December 2007. However, on the basis of the declarations of Mr. Bellinger in June 2007, it was expected that waivers would be granted to sustain the possibility of States joining the ICC and refusing NSA without fearing cuts on this type of economic aid. Additionally, and most importantly, the Nethercutt provision ceased to have effect at the end of the Fiscal Year 2008 (on September 30, 2008) and it was not re-introduced in Foreign Appropriations Acts by the US Congress.

- In April 2008, in comments marking the 10th Anniversary of the Rome Statute of the ICC, Mr. Bellinger further affirmed and amplified earlier comments - *"Any who thought that the ICC could or should be prevented from coming to existence must acknowledge that the ICC is a reality and will remain so for the foreseeable future. Similarly, the United States must acknowledge that the ICC enjoys a large body of international support, and that <u>many countries will look to the ICC as the preferred mechanism for addressing serious crimes that cannot be addressed at the national level.</u> In addition, the United States must also recognize that, in some cases such as <u>Darfur</u>, the ICC's success in investigating and prosecuting serious crimes may advance goals we share, and that in such cases we may have an interest in facilitating the ICC's work."*[4]

[3] Boustany, Nora. "Official Floats Possibility of Assistance to Hague Court." Washington Post Foreign Service, Tuesday, June 12, 2007; A20.

III. Specific US Legislation against ICC States Parties that Affect the integrity of the Rome Statute

A. The American Servicemembers' Protection Act (ASPA), passed by the US Congress and signed into law by President Bush *in* ***August 2002*** contained provisions restricting US cooperation with the ICC; made US support of peacekeeping missions approved by the UN Security Council largely contingent on achieving immunity from ICC jurisdiction for all US personnel; and granted the US President permission to use "any means necessary" to free US citizens and allies from ICC custody, including in situations in which US nationals and foreign contractors are detained by the ICC in the Hague.

- Moreover, the ASPA also contained, when originally adopted, negative measures or sanctions to be imposed against certain countries (e.g. non-NATO "allies") that joined the ICC without reaching a Bilateral Non-Surrender Agreement with the US. The ASPA, however, also provided for three means to exclude some States from the prohibition of Military Assistance[5], namely through a National Interest Waiver[6], the Article 98 Waiver[7], and Exemptions to specific countries[8].

- In reality, the application of the anti ICC legislation became limited since 2006, reflecting a partial modification of the US position on the ICC. For example, on ***2 October 2006***, President Bush waived IMET aid prohibitions to 21 ICC State Parties that had not reached a Bilateral Non-Surrender Agreement with the US. Waivers were provided to Barbados, Bolivia, Brazil, Costa Rica, Croatia, Ecuador, Kenya, Mali, Malta, Mexico, Namibia, Niger, Paraguay, Peru, Samoa, Serbia, South Africa, St. Vincent and the Grenadines, Tanzania, Trinidad and Tobago, and Uruguay.

- On ***17 October 2006***, IMET funding (sanctions type 1) previously denied to ICC State Parties under ASPA was restored through the US Defence Authorization Act for 2007 signed by President Bush.

- Finally, on 28 January 2008, the US President signed into law the US Congress bill that repealed all military sanctions, including the FMF (type 2 sanctions) from ASPA.[9]

- ASPA may still be interpreted as restricting certain forms of US cooperation with the ICC and US participation in certain peacekeeping missions or UN Security Council's authorized military operations if exemptions from the ICC jurisdiction are not provided for US personnel (as is the case in Libya, regarding which there has been a referral to the ICC by UN Security Council 1970, which includes a controversial exemption clause for Nationals of Non States Parties). ASPA still authorizes the use of military force to free US nationals under custody in the ICC. But under ASPA, *no State Party to the Rome Statute may be threatened by cuts in military funds if they refuse to sign a Non Surrender Agreement, which appear to be in a "frozen" status under the current Administration.*

It is understood, in this regard, that the elimination of legislation and such sanctions on military aid encouraged Suriname to become the 107th State Party to the ICC on July 15, 2008, with assurances received from US officials that no sanctions would be applied and no non surrender bilateral agreement would be further sought.

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[4] See comments delivered at DePaul University Law School in Chicago on April 25, 2008 at: http://www.cfr.org/publication/16110/

[5] Sec. 2007 of ASPA.

[6] "The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition."

[7] The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate Congressional Committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel present in such country.

[8] The prohibition of subsection (a) shall not apply to the government of a NATO member country; a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or Taiwan

[9] See Section 1212 of HR 4986 of

B. History of The "Nethercutt" Amendment

- On ***July 15, 2004***, the US House of Representatives attached an anti-ICC amendment to the Foreign Operations Appropriations bill. The amendment, presented by Rep. George Nethercutt (a Republican from Washington State not re-elected in the 2004 elections), allowed the administration to cut aid from the Economic Support Fund (ESF) to all countries which had ratified the Rome Statute of the ICC without signing a Bilateral Non-Surrender Agreement with the US. The amendment - which became known as the Nethercutt Amendment **-** was passed by the Senate and then signed into law by President Bush on ***8 December 2004***.

- However, on ***28 November 2006***, President Bush waived ESF aid prohibitions to 14 State Parties that had lost ESF aid under the Nethercutt Amendment.[10]

- Following on the positive change of policy, the Nethercutt Amendment was not reinstated in the **2007** Foreign Appropriations Bill eliminating any cuts to ESF aid (type 3 sanctions).

- Regrettably, cuts to ESF were reintroduced via the Appropriations Act for 2008 on December 17, 2007. Hence, cuts under the ESF funds for States Parties who refused to sign a Non Surrender Agreement seemed to remain valid during 2008. However, the Appropriations Act allowed for waivers under the following provisions:[11]

> [...]The President may, with prior notice to Congress, waive the prohibition of subsection (a) with respect to a North Atlantic Treaty Organization (`NATO') member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), Taiwan, or such other country as he may determine if he determines and reports to the appropriate congressional committees that it is important to the national interests of the United States to waive such prohibition.
>
> [...] The prohibition of this section shall not apply to countries otherwise eligible for assistance under the Millennium Challenge Act of 2003, notwithstanding section 606(a)(2)(B) of such Act.

- Indeed, on 20 June 2008, on the basis of the national interest of the United States, US President George Bush issued Presidential Determination 2008-21, waiving from ESF restrictions under the Nethercutt Amendment the following States Parties: that Bolivia, Costa Rica, Cyprus, Ecuador, Kenya, Mali, Mexico, Namibia, Niger, Paraguay, Peru, Samoa, South Africa, and Tanzania.[12]

- ***Effective 30 September 2008, the Nethercutt provision has been no longer in force.***

IV. Chronology of the Position of the US - 1998-2011

A. US position at the Rome Conference in 1998

The US actively participated in the negotiations leading to the adoption of the Rome Statute, yet it was one of the 7 States (with China, Israel and Iraq) that voted against the newly created Treaty on July 17, 1998. The US opposed the jurisdictional regime of the Rome Statute (article 12), as well as the *proprio motu* powers of the

[10] http://www.whitehouse.gov/news/releases/2006/11/20061128-12.html

[11] See HR 2764, Division J - Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008, Title VI, Sec. 671.

[12] See Memorandum for the Secretary of State, http://www.whitehouse.gov/news/releases/2008/06/20080620-9.html, last accessed June 21, 2008.

Prosecutor, wanting instead a court whose jurisdiction could be invoked exclusively by the United Nations Security Council (where the US can exercise its veto power as a permanent member of the Council). However, the vast majority of UN Member States favoured the creation of a truly independent court as adopted under the Rome Statute.

B. Signature of the Rome Statute by the Clinton Administration

On ***31 December 2000***, just a few days before the transfer of power to the incoming Bush Administration, President Clinton, although maintaining strong reservations, signed the Rome Statute on behalf of the US:.

> "*In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of states that have not.*" He discussed the need to "*limit the likelihood of politicized prosecutions*" and continued, "*Court jurisdiction over US personnel should come only with US ratification of the Treaty. The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.*"[13]

C. Anti-ICC Campaign by the Bush Administration (2002-2005)

The success of the ICC ratification campaign and the relatively fast entry into force of the Rome Statute in 2002 caused the US policy shifted from being 'sceptical but willing to negotiate' to a 'proactive opposition' which was maintained until 2005.

On ***May 10, 2002***, John Bolton, then Undersecretary of State for Arms Control and International Security, sent a letter to Kofi Annan "unsigning" the Rome Statute on behalf of the US. Also, in line with the ASPA, to be approved in August 2002, the US lobbied for a UN Security Council resolution to offer "immunity" from ICC jurisdiction to all US peace-keepers (Resolution 1422 of 12 July 2002, renewed as Resolution 1487 on 12 June 2003)[14] and launched a global campaign to secure Bilateral Non-Surrender Agreements (so-called "Article 98 Agreements") with individual countries.

D. The Intervention of the ICC in Darfur (2005-2007)

The refusal by the US to veto the referral of the situation in Darfur, Sudan to the ICC by the UN Security Council on ***March 31, 2005*** was perhaps the first important development indicating some change of course in US policy – from 'dismissive' to 'cautious pragmatism' so long as it did not trigger any possibility of ICC jurisdiction over US nationals or US territory. The US abstained to the Resolution 1573 (2005) that referred the Darfur situation to the ICC, allowing the Prosecutor to initiate investigations of crimes allegedly committed in the territories of a State Non Party to the Rome Statute, the Sudan.

In ***May 2006*****:** remarks made by Mr. John Bellinger, Legal Advisor of the US State Department, in an interview, reflected the slightly shifting stance of the US toward the International Criminal Court. In doing so, the US was *de facto* gradually strengthening the important role of the Court in the system of international justice. In a speech given in May, Mr. Bellinger stated that *"divisiveness over the ICC distracts from our ability to pursue these common goals"* of fighting genocide, crimes against humanity and war crimes.[15]

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[13] http://www.amicc.org/docs/Clinton_sign.pdf.

[14] Resolution 1422 came into force for a period of one year, and it was renewed for twelve months under United Nations Security Council Resolution 1487. While States Parties seating at the Security Council at that time initially rejected these resolutions, the adoption was made possible given the threat of the US to veto the renewal of the mandate of peacekeeping operations, starting with the operation in Bosnia. The Resolutions contained a request to the ICC to exempt all nationals from contributing States that were not parties to the Rome Statute from (potential) investigations and prosecutions. In 2004, the United States failed to gather support on this matter, thus a proposal for renewal was not submitted to the Council. PGA Members from all regions of the world advocated for the non-renewal of Resolutions 1422 and 1487 between July 2002 and May 2004. See *Collection of Legal Scholars Opinions on the Legal and Political Implications of Resolution 1422* – PGA document (2003) available at www.amicc.org/docs/PGA_**1422**ExpertOps.pdf.

In 2005 and 2006, the US maintained a low key level of attention on the work of the ICC in Darfur; past briefings by the Prosecutor of the ICC to the UN Security Council were generally only attended by junior US diplomats. But on 11 June 2007, at the Sixth briefing by the ICC Prosecutor to the UN Security Council, the US Permanent Representative himself was in attendance. Only days later, the US administration signalled that it would be amenable to assisting the ICC in its work – something that would have been unthinkable in 2005.

As an indication that US opposition to the ICC remains in place, even if restrained, as indicated above, at a meeting with European Union Legal Advisors held in Brussels on **June 7, 2007**, Mr. Bellinger excluded the possibility of the US joining the ICC in the near future and will continue to propose Bilateral Non Surrender Agreements to ICC Member States. However, more positively, he also indicated that States that join the ICC and do not enter into bilateral agreements may not be subject to sanctions. The modification of the ASPA in 2008, and the waivers given to States Parties of the ICC confirms this trend.

Senator Patrick Leahy, Chairman of the Appropriations Subcommittee on Foreign Operations of the US Senate observed in 2008 that *"The ICC has refuted its critics, who confidently and wrongly predicted that it would be politicized and manipulated by our enemies to prosecute U.S. soldiers."*

E. Relations with Latin America and the Question of Military Assistance

On ***March 12, 2006***, with the objective of improving relations with Latin America, US Secretary of State Condoleeza Rice was Bush Administration's first senior US Cabinet Member to open the door to the reconsideration of US anti-ICC policies. According to the New York Times (as quoted in *United Press International* (UPI)),

> "U.S. officials may look for ways to resume military aid to Latin American nations who failed to exempt U.S. citizens from the International Criminal Court… Secretary of State Condoleeza Rice… told reporters that eliminating or reducing military assistance to countries like Chile and Bolivia that are seeking to combat terrorism or drug trafficking is '*sort of like shooting ourselves in the foot*.' "[16]

On ***March 14, 2006*****:** General B. Craddok, Head of the U.S. Military in Latin America, testified before the U.S. Senate Armed Service Committee that current US anti-ICC policies based on the American Service-members Protection Act (ASPA) of 2002, which bans military assistance to ICC States Parties that do not enter into a Bilateral Non Surrender Agreement with the US, have *"unintended consequences"*. Craddok detailed that *"more and more military commanders and officers [were] going to China for education and training"* as a result of the void created by ASPA which posed a "*serious threat to [American] interests."* Key Senate leaders from both parties, including Senators Hillary Clinton, John McCain and John Warner expressed concern over this matter and urged a review of certain provisions in the ASPA. Some members of Congress suggested a repeal amendment to be included in an emergency supplemental legislation currently being considered by the US Congress. In a move from rhetoric to action, Representative Eliot Engel (a Democrat from the state of New York) brought forth a bill in the US House of Representatives to "Repeal [the] prohibition on United States military assistance to parties to the International Criminal Court" on ***July 28, 2006***. The adoption of the provisions of this bill (signed into law by President Bush on January 28, 2008) encouraged Suriname´s accession to the Rome Statute on 15 July 2008 without the country having to subsequently confront US sanctions.

F. 2008 - Restrained Opposition to the ICC and *Ad Hoc* Support for ICC interventions

After the 14 July 2008 announcement of the ICC Prosecutor of an application made to the ICC judges for an arrest warrant against Sudanese President for alleged crimes of genocide, against humanity, and war crimes, the United States abstained on the vote in the adoption of the Security Council Resolution renewing the mandate of the UN mission to Darfur (SC Resolution 1828, 31 July 2008). The US indicated that could not agree to a compromise Resolution, which included a non-binding reference to the possibility of future Security Council's request to the Court to defer the investigation and prosecution of one prominent suspect,

[15] The Wall Street Journal, June 14, 2006. The full text of Mr. Bellingher's statement in The Hague is available at http://www.state.gov/s/l/rls/86123.htm.

[16] "US May Reconsider Aid to Chile, Bolivia." United Press International (UPI), Sunday, March 12, 2006.

thus sending "the wrong signal to Sudanese President Al-Bashir and undermine efforts to bring him and others to justice." (Cf. Statement of the United States upon the adoption of Res. 1828, 31 July 2008).

US Representative, Amb. Wolff also indicated that the United States "…continue to attach [importance] to the Council's role in connection with investigations and prosecutions of the International Criminal Court (ICC)." This action, combined with other statements of support for ICC interventions that US envoys have made in connection with the cases of Northern Uganda and the DR Congo, reflected a more pragmatic attitude on the part of the US Government to express support for ICC interventions on an ad hoc basis.

G. 2009-2011 – Intensified *rapprochement* between the United States and the ICC

In September 2009, approximately nine months after the inauguration of the Obama Administration, Ambassador Stephen Rapp was appointed as Ambassador-at-Large for War Crimes Issues in the US State Department. Even prior to his appointment, the newly minted Obama Administration had begun to send informal/unofficial signals of greater cooperation with the ICC, and a heartfelt wish to repair the damage caused by the heavy-handed and highly divisive policies of the first Bush Administration.

The appointment of Harold Koh as Legal Advisor at the US State Department, together with Ambassador Rapp's appointment, heralded in a new era of 'willingness to engage' with the ICC, even in the absence of any clear signal of the United States becoming a party to the Rome Statute of the ICC in the near future.

This 'new dawn' of greater cooperation has since manifested itself concretely on several occasions and in a number of different ways.

On October 23, 2009, two hours before to swear in as Ambassador-at-large at the White House, former Special Court for Sierra Leone's Prosecutor Stephen Rapp addressed a meeting of the PGA International Council and Executive Committee of Parliamentarians for Global Action (PGA) showing for the first time the willingness of the US Administration to move to a policy of "positive engagement" with the ICC (see www.pgaction.org/Amb_Rapp.html). On December 10, 2009, on the occasion of International Human Rights Day, Amb. Rapp featured as a key-note speaker at PGA's International Conference on Justice and Peace in the African Great Lakes Regions, held in Kinshasa at the seat of the National Assembly of the DR Congo.

Kampala Review Conference – May/June 2010

For the first time, the United States participated and intervened in a constructive manner at this special meeting of the Assembly of States Parties to review the Rome Statute to which the United States sent a large delegation in Kampala in May/June 2010. The delegation was led by two high-level representatives of the Department of State, the Legal Advisor and the Ambassador-at-large for War Crimes Issues, and also by a Deputy Assistant Secretary of Defence, Department of Defence.

Two experts from the US Senate, Foreign Relations Committee, joined the Delegation and submitted a report to the Committee. On September 2, 2010, in the letter of transmittal to the Committee, the Chairperson of the Committee, Senator John Kerry wrote:

> "As this report highlights, the Kampala Conference adopted a complicated decision that envisions the future addition of a crime of aggression to the ICC's jurisdiction. The proposed aggression regime is flawed in several respects, but nonetheless contains important protections for U.S. interests. Most significantly, U.S. persons, including U.S. officials and military members, could not be investigated or prosecuted for aggression by the ICC without the consent of the United States. The proposed regime will not enter into force for at least seven years, and will do so only after a further decision by the ICC's parties to bring it into force. U.S. participation at the Kampala Conference played an important role in securing these protections."

And at its page 12, the report reads as follows:

"*Effectiveness of U.S. Participation*—U.S. participation at the conference was well-received, had a significant impact on the outcome and served to protect important U.S. interests. While there has been significant past friction between the United States and the ICC, and while the Obama administration has made clear that it does not support the United States becoming a party to the ICC, ICC parties nonetheless are welcoming of increased U.S. engagement with the ICC. Absent U.S. participation and engagement before and during the Kampala Conference, it is unlikely that the conference would have specifically exempted non-ICC parties from key portions of the proposed aggression regime. It is also unlikely that the conference would have adopted understandings to address ambiguities in aspects of the definition of aggression. While there were limits to the lengths ICC parties were willing to go to address U.S. concerns and interests—there was no willingness, for example, to consider revising the definition of aggression itself—ICC parties did accommodate United States concerns in important respects."[17]

United Nations Security Council Resolution 1970 (February 2011) concerning the situation in Libya

It was previously noted that that the theretofore intransigent position of the US vis-à-vis towards the ICC witnessed an important shift when the United States chose to abstain on UNSC Resolution 1593 (March 2005) referring the situation in Sudan to the ICC.

This 'first precedent' went one step further when the United States supported UNSC Resolution 1970 (March 2011) referring the situation in Libya to the ICC.

Direct relations between the ICC and the United States – 2009-2011

The President of the International Criminal Court, Judge Sang-Hyun Song, at several meetings of Legislators during the course of 2009-2011, including in events organized by PGA in Nepal and Malaysia, has attested first hand, and at some length, to the much closer and more cordial relations that now exist between the US and the ICC, citing much more frequent contacts and meetings, including with the US State Department Legal Advisor.

Remarks by Ambassador Stephen Rapp, US Ambassador-at-Large for War Crimes Issues

In a marked departure from the much more cautious remarks, even if positive, of his immediate predecessor, as detailed earlier in this paper, Ambassador Rapp, upon his appointment, has made abundantly clear in many different fora that while US policy on becoming party to the Rome Statute remains unchanged, because it attaches the same importance to international justice and accountability, the US is now embarking on 'supportive engagement' with the Court, providing occasional information/intelligence as appropriate and, of particular importance, not seeking in any way to hinder any country that wishes to become party to the Rome Statute of the ICC. [18]

Possibility of Referral of the Situation in Syria by the UN Security Council, at the behest of the United States – June 2011

There were unconfirmed reports in June 2011 that the United States was giving consideration to seeking the referral of the situation in Syria by the UNSC to the ICC. [19] While these reports remain uncorroborated, such

[17] Cf. International Criminal Court Review Conference, Kampala, Uganda, May 31-June 11, 2010: A joint committee staff trip report prepared for the use of the Committee on Foreign Relations, UNITED STATES SENATE, One Hundred Eleventh Congress, second session, September 2, 2010.

[18] See in particular comments made by Ambassador Rapp in May 2011 in The Philippines at: http://www.state.gov/s/wci/us_releases/remarks/165259.htm

[19] See further comments made at US State Department Public Briefing on 20 June, 2011 where US State Department Spokesperson Ms.Victoria Nuland commented, in response to a question on US exploring the possibility of prosecution of possible war crimes in Syria, as follows: *"No conclusions yet. I would simply reiterate what our senior Administration briefers told you on Friday, which is that the United States, working with partners, is collecting the kind of information that one might need in order to make ICC cases*." (emphasis added) – the full transcript from this Briefing is available at: http://www.state.gov/r/pa/prs/dpb/2011/06/166559.htm#SYRIA

a step, even if only one option being contemplated, represents a further extension and evolution of the support for, and the importance the US attaches to, the ICC as an vital peace-building instrument within the still highly volatile international community of today. It would also represent a step by the United States that would have been completely unthinkable only 7 or 8 years ago.

Closing Observation

The United States currently stands at a crossroads of sorts vis-à-vis its relations and status with the ICC. While it has taken significant remedial steps to repair its relations with the international community and the International Criminal Court itself, and in spite of growing calls for the Obama Administration to become a party to the Rome Statute before the end of 2012 [20], the prospects of the US joining the other current 115 States Parties to the Rome Statute in the near future seem uncertain. It is to be hoped that the highly positive and substantive steps that have taken place over the past 6 years, accompanied by the positive dialogue that now exists between the US State Department and the ICC, will help lay the foundation for this historic step to be taken not before too long.

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[20] 'Time right for US to recognize true importance of ICC' at: http://www.chinapost.com.tw/commentary/the-china-post/special-to-the-china-post/2011/05/28/304007/p1/Time-right.htm