U.S. Department of State
Diplomacy in Action

The Challenges and Future of International Justice

Remarks
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Thank you, Vera Jelinek, Ambassador Milos Koterec, Jennifer Trahan, and the NYU Center for Global Affairs and Eva Surkova of the Permanent Mission of Slovakia for the invitation to participate in this most timely and important event. I am greatly honored to be on a panel with such distinguished jurists as President Sang-Hyun Song of the International Criminal Court (ICC) and Vice-President Peter Tomka of the International Court of Justice (ICJ) and I am particularly touched by the Slovak/Korean flavor of this panel! I always look forward to good discussions with my colleague, the Greek Legal Adviser Phani Daskalopoulou-Livada, and my longtime friend Richard Dicker of Human Rights Watch, whose tireless advocacy for human rights has been a great service to us all.

Let me speak about the challenges of international justice – and more specifically international criminal justice –from where I sit as the Legal Adviser for the US Department of State. The Obama administration has been working hard on this issue. I think you are starting to see the results of that process play out. And you will continue to do so in three areas:

First, the integrated approach to international criminal justice that the Obama administration is striving to achieve;

Second, how this integrated approach has played out with respect to our developing relationship with the International Criminal Court;

And third, some immediate challenges to international criminal justice that I think will face all of us in the coming year.

First, by an integrated approach to international criminal justice I mean that the United States has an historic commitment to the cause of international justice that dates back to the Nuremburg and Tokyo Tribunals, and which has continued with strong commitment to the *ad hoc* tribunals regarding the former Yugoslavia, Rwanda, Cambodia, Sierra

Leone and Lebanon. Our country has never been silent in the face of war crimes, crimes against humanity and genocide -- crimes against the basic code of humanity that call for condemnation in the strongest possible way.

What has this meant in concrete terms? Funding the *ad hoc* tribunals. Supporting their work, politically and diplomatically. Providing evidence and concrete support to the prosecutors. And, in the interest of human rights, due process and the proper administration of justice, supporting defendants as well when they seek information and other assistance from us.

An integrated approach has also meant providing steadfast assistance to countries around the world aimed at promoting the rule of law. Assisting countries where the rule of law has been shattered to rebuild and restore their own system of protection and accountability. Reducing the need for international bodies to act by ensuring justice at home. Those programs have become an increasingly important part of our efforts to ensure justice in the aftermath of mass atrocities and prevent their repetition.

At the same time, however, we should frankly acknowledge that the United States has at times not extended to the International Criminal Court the same support we have provided to the ad hoc tribunals, even as our commitment to international justice in other areas remained strong. There were, and there remain, fundamental concerns about the Rome Statute that have prevented us from becoming a party. And we all lived through a period that could be described as one of outright hostility towards the ICC.

That having been said, the United States has always recognized that there are certain times when justice will be found only when the international community unites in ensuring it. It was with this principle in mind that during the Bush Administration, the United States first encouraged the ICC investigation of the situation in Darfur starting in 2005.

Nonetheless, the two halves of our international justice policy presented an incongruous approach to international justice. We supported the *ad hoc* tribunals, whose days were numbered, but we remained equivocal toward the court that no doubt will become the standing institution for international criminal justice. Our approach to the ICC was incongruent not just with our support for the *ad hoc* tribunals, but in many ways with respect to some of the work being done by the ICC itself. We supported the court's work in Darfur—which from early on we wanted to succeed—but were too often silent as to the other investigations, even though the U.S. government had no real objection to what those other ICC investigations were trying to achieve.

So when I began my work as Legal Adviser in the State Department, one of my goals was to find a way to rationalize our international justice policy, and as much as possible, to align, integrate, and make congruent our approach towards these institutions

That brings me to my second point: what has the Obama Administration done thus far to make our approach to the ICC more congruent with our broader approach to international criminal justice. Three things:

First, in the time we have been in office we have ended the hostility and the harsh rhetoric. As you know, much of that harshness had already begun to temper in the waning years of the Bush Administration, particularly in the public statements of my predecessor as Legal Adviser, John Bellinger. With this Administration, you saw a clean break. Even during the election campaigns, you saw then-Senators Obama and Clinton taking a far different tone toward the ICC, one that was more practical in recognizing the ways in which the work of the court can in some cases advance U.S. interests. And when they took office, they brought that practicality to our policy.

Second, we began to engage the Assembly of States Parties. Last November, along with Ambassador-at-Large for War Crimes Issues Stephen Rapp, I was fortunate enough to co-lead the first US observer delegation to the Assembly of States Parties. Too many years had gone by since our attendance at formal ICC events, and frankly, we had a lot of catching up to do. We approached that session with a view towards listening and learning about the ICC, learning what was working, what wasn't working, and looking for ways that we might be able to help. We later attended the resumed session of the ASP in March of this year in The Hague, and then sent a large observer delegation to the Review Conference in Kampala this past summer, with the goal of engaging on all the issues on the agenda, including but in no way limited to the crime of aggression. The US government co-sponsored a side-event on positive complementarity in the Democratic Republic of the Congo, which has provided an important foundation for our work on this issue since Kampala. We sent our experts to every session, side event, and meeting that took place. We were the only non-party State to make pledges. The United States would like to thank all of the States Parties to the Rome Statute for the very gracious way that our renewed participation in the Court's work has been received over the past year after such a long absence from ASP meetings. In particular, we would also like to thank the government of Uganda for its warm hospitality and generosity throughout the Kampala Review Conference. While we may not have made up for being away from the process for so long, we at least did our very best to catch up.

A third and final area in which we sought to realign our approach was to state our support for all of the court's prosecutions that are currently underway. We made that announcement in March of this year, at the same time that we announced our desire to meet with the ICC Prosecutor and court officials to find ways we may be able to support the ICC's current prosecutions.

Since then, we have held a number of these meetings and have found them mutually productive. And although for obvious reasons I am not at liberty to discuss the details, we help where we can, consistent with our laws. One way we have particularly sought to help is through our public diplomacy. You have seen this administration be both quite vocal in its support for bringing persons accused of atrocities by the ICC to justice, and be critical of those who try to thwart that justice. This public diplomacy will continue.

But what you see is an important difference in approach. You just heard President Song describe our new policy toward the court as one of "positive engagement." That is his term. We would use the express words of President Obama's national security strategy, which so clearly explained:

"The end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs."

What you quite explicitly do not see from this Administration is U.S. hostility towards the Court. You do not see what international lawyers might call a concerted effort to frustrate the object and purpose of the Rome Statute. That is explicitly not the policy of this administration. Because although the United States is not a party to the Rome Statute, we share with the States parties a deep and abiding interest in seeing the Court successfully complete the important prosecutions it has already begun.

This brings me to my final point, some of the challenges we are likely to face in the coming year.

One important challenge is to deal with some lingering matters from Kampala. And of course here I am speaking of the amendments concerning the crime of aggression.

Those who were at the Review Conference know that the negotiations lasted late into the very last night. Some of the things left until those final moments of the conference were in fact complicated issues relating to the manner in which the amendments would enter into force. A further decision of the states parties is required to bring the crime of

aggression within the active jurisdiction of the court. But most fundamentally, the amendments must still be adopted by states parties in accordance with the terms of the Rome Statute. And after we all returned home from Kampala, and reread the outcome document, some people began to ask questions about how these complicated provisions would work in practice. One question, for example, relates to how the amendments would interplay with article 121, paragraph 5 of the original Rome Statute, which states that:

"In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."

Some asserted that the "opt-out" provisions adopted in Kampala must mean that article 121.5 did not apply to aggression. Yet the very resolution adopted by the Review Conference quite clearly stated that the amendments:

"are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5" of the Rome Statute.

The United States has been and remains of the firm view that those states parties who do not ratify or accept the aggression amendments are not bound by them, and the court, as article 121.5 states, "shall not exercise its jurisdiction" with respect to aggression committed by that state's nationals or on its territory. To read the amendments any other way is to make article 121.5 a nullity.

Whether and how a treaty is amended is a most serious matter, and I am sure more will be said on this topic. Ambiguity may be inevitable in some treaty negotiations, but uncertainty about the amendment procedures – and how the rights of a party under a treaty can be changed without that party's consent -- is decidedly not a good selling point for a treaty, particularly not a treaty conferring jurisdiction to prosecute the most serious international criminal offenses.

So that is one area of challenge. A second area is more technical: planning for the wrap-up of the *ad hoc* tribunals and, at the same time, helping the ICC deal with a growing case load and the challenges that accompany it. These are the fairly technical and sometimes mundane challenges such as budgets and oversight mechanisms and changes to court rules. They don't get the headlines, but they are important. To give just one example, we must continue to work with others on the Security Council to create a residual mechanism for the *ad hoc* tribunals that will safeguard their legacy and ensure against impunity for fugitives still at large.

And a third area of challenge is with respect to arresting fugitives from criminal tribunals. The ICC, the ICTY and the ICTR all have very important and high-profile suspects still at large. Some of those individuals are in hiding. Some are in plain sight. And some are given a red carpet welcome, even by states that are legally bound to arrest them. These are sensitive and difficult matters. And it will take a concerted effort by the international community to solve them.

Addressing these three challenges—lingering questions from Kampala, planning for the phaseout of the ad hoc tribunals and arresting fugitives—will be an important part of this Administration's agenda toward the Court going forward. For the U.S. relationship with the International Criminal Court, Kampala marked the end of the beginning, and we have much important work now to do to develop that relationship in the months and years ahead.

Thank you.