

## THE OPPORTUNITY

THE TIME IS AT HAND for a major reassessment of the relationship between the United States, the International Criminal Court, and the broader issue of U.S. policy toward international justice. Long opposed by the senior U.S. military leadership, signed onto only with grave reservations by the United States during the administration of President Bill Clinton, and ceremoniously unsigned by the administration of President George W. Bush, the ICC has been a political third rail in the United States. Yet recent developments in Washington, New York, and The Hague suggest that a policy of formal U.S. government opposition to the Court may yield to a policy of de facto acceptance and, we hope, active U.S. cooperation with the Court in its important mission.

The turning point for a broad policy shift in the United States was little appreciated when it occurred. In March 2005, without fanfare, rather than veto a UN Security Council resolution referring allegations of war crimes in Darfur, Sudan, to the ICC, as many expected, the United States abstained, allowing the referral

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to go through. Although hardly an expression of newfound affection for the ICC, let alone a willingness to re-sign the Rome Statute creating the Court, the abstention by the Bush administration did acknowledge for the first time its recognition of the Court's utility in an actual case of international justice. Properly understood, which it has not been, the Darfur referral constituted an important precedent for the U.S. government and the international community. That initial abstention was followed by several noteworthy actions by the Bush administration and, since then, the administration of Barack Obama: senior Bush administration officials, from the State Department's chief legal adviser to the U.S. permanent representative to the United Nations, took the opportunity to reaffirm U.S. support for the work of the ICC prosecutor in the Darfur case. Officials from the Bush administration repeatedly expressed U.S. opposition to a proposal that the UN Security Council postpone the possible ICC indictment of Sudan's president, Omar al-Bashir, an option the Sudanese government was actively pursuing through diplomatic channels—an indication of the seriousness with which the Court's activities are taken by perpetrators with little or nothing to fear from local judicial systems, and therefore of the leverage the ICC brings to the rights-regarding elements of the international community in its dealings with the world's worst human rights abusers.

The Bush administration's emergence as a principal defender of letting justice run its course—a position supported by the Obama administration—ironically has put the United States at odds with other members of the Security Council, including parties to the Rome Statute, who cite concern about damage to unfruitful peace negotiations that have dragged on for many years. But there can be no question that the ICC's engagement has substantially increased the pressure on the Sudanese government.

This turn of events does not constitute a role reversal for the United States and Europe on the ICC, even in a new administration. It is, for example, difficult to envision early advice and consent to ratification of the ICC. During the presidential campaign, neither nominee, in fact, committed the United States to joining the Court (although both emphasized the need for the United States to take a leading international role in preventing and stopping mass atrocities).

What these events do mean is that many Americans, as a matter of conscience, principle, and national interest, believe it is time to end America's policy of formal hostility to the Court and replace it with a clear and unequivocal policy to support the Court in its important mission of bringing perpetrators of mass atrocities to justice.<sup>1</sup>

This is a principle embraced by the Obama administration, and one with historical roots. The authors glimpsed the first signs of cross-ideological support for this premise during the Bush administration in their work on the 2005 congressionally mandated U.S. Institute for Peace task force on U.S.–UN relations, co-chaired by former House speaker Newt Gingrich and former Senate majority leader George Mitchell. That task force did not seek to reach consensus on the ICC, nor would it have been able to, but its members understood the significance of their unanimous recommendation, unprecedented for a group of prominent Democrats and Republicans, that “perpetrators must be held accountable for war crimes and crimes against humanity.”<sup>2</sup>

Another, more recent, bipartisan report went further still: the Genocide Prevention Task Force, a privately funded project of the U.S. Holocaust Memorial Museum, the U.S. Institute of Peace, and the American Academy of Diplomacy, co-chaired by former secretary of state Madeleine Albright and former secretary of

defense William S. Cohen, included among its recommendations a call for reaffirmation of the principle of non-impunity, further elaborating: “Although the stated concerns of the U.S. government preclude the United States from becoming a party to the Rome Statute at present, the United States must acknowledge, embrace, and build on the emerging *modus vivendi* between the U.S. government and the ICC.” This was the first major bipartisan statement in support of building a positive relationship between the United States and the Court.<sup>3</sup>

Finally, following our work on the Gingrich-Mitchell task force, the two of us began to try to think through the implications of the Darfur referral to the ICC. Having consulted extensively with U.S., UN, and European officials in Washington, New York, Brussels, The Hague, and Geneva both in the run-up to the Darfur referral and in its aftermath, we concluded that the potential significance of the referral was underappreciated both at home and abroad. Through the Council on Foreign Relations, we approached the John D. and Catherine T. MacArthur Foundation (among others) to explore its interest in supporting a project on U.S. relations with the ICC.<sup>4</sup> We discovered that MacArthur’s grantmaking strategy for ICC matters allowed for support for work on the ICC abroad, but not in the United States, according to the reasoning that the U.S. debate on the Court was so polarized and politicized that no meaningful work was likely to result. Based on the preliminary research we had done, we set about to persuade the foundation otherwise—either to change its strategy or to allow for an exception in this case, on account of changing circumstances. This effort was ultimately successful. However, shortly before we had proposed to begin work, one of us accepted a position with a presidential campaign, and we agreed to defer our joint research until we were mutually available.<sup>5</sup> In the

interim, however, the MacArthur Foundation funded an independent, bipartisan task force convened by the American Society for International Law (ASIL), co-chaired by William H. Taft IV and Patricia M. Wald. Its report, issued in March 2009, recommended “engagement with the ICC and the Assembly of States Parties in a manner that enables the United States to help further shape the Court into an effective accountability mechanism. The Task Force believes that such engagement will also facilitate future consideration of whether the United States should join the Court.” We were pleased to share the first draft of this book with some members of the ASIL task force as it was preparing its report and recommendations.

Building a sustainable basis for ending U.S. hostility to the Court, and adopting instead a policy of cooperation in support of its mission, requires a reframing of the debate about the Court that can build on the bipartisan spirit of Gingrich-Mitchell, the Genocide Prevention Task Force, and contributions from the legal community such as the ASIL report. In the past, proponents of the Court have often led with the argument that the United States needs to subordinate itself to an international institution, asserting broad jurisdiction without clarity about the benefits to the United States. For many supporters, the frame of the ICC debate was “global governance,” a matter of some controversy for a nation with a vast military, extensive global responsibilities, and a historically ingrained proclivity for zealous protection of its own sovereign rights. Largely absent from the global governance perspective, if not from the formal U.S. government statements on the matter, was clarity about the return benefits to U.S. national interests and American values of participation in the Court.<sup>6</sup>

With this book we reframe the discussion on the International Criminal Court in two ways. First, we broaden the focus to

address not simply the International Criminal Court, but the broader issue of U.S. policy toward international justice. The International Criminal Court is a court of last resort—a potential means to the end of putting the perpetrators of mass atrocities behind bars where no other option exists. Accordingly, the role of the ICC in U.S. foreign policy should be evaluated in the context of the degree to which it helps to bring *génocidaires* and other war criminals to justice. Second, we focus on the foreign policy, national security, and moral case for shifting U.S. policy toward the Court—not on the important but, for these purposes, tangential question of global governance. This book evaluates the ICC by the degree to which it advances the interests of international justice, which the United States has supported enthusiastically, imperfectly, and at times skeptically over its 250-year history.

We note that the pursuit of “justice” in this sense is not and never will be the only goal of U.S. foreign policy, nor the only goal of an American foreign policy that aspires to be morally worthy. Other ends are important as well, ranging from the pursuit of peace in situations of conflict to the protection of vital interests. These ends sometimes come into conflict, and it is not always possible to avoid trade-offs. But we do say that no American foreign policy is complete any more without due regard for justice, and it is as a means to the pursuit of justice as an important end of U.S. policy, not necessarily as the sole end of U.S. policy, that we ought to be looking at the ICC.

Toward that aim, we address five areas. First, we remind readers that the United States has a long, though hardly perfect, record in support of the advance of human and political rights and the proposition that violators of those rights and perpetrators of mass atrocities should be held to account for their actions. The term “international justice” is relatively new, but the ideas that under-

lie it are not. The questions posed by participation in the ICC do not come out of a vacuum. They arise, above all, from the unwillingness of the rights-regarding members of the international community to accept impunity for perpetrators of mass atrocities in the name of sovereign right.

Paradoxically, the United States, as a zealous guardian of sovereign rights, is uniquely well positioned to demonstrate through argument and deed that with sovereign rights come sovereign responsibilities of the sort recognized in the protections afforded Americans in their own founding documents. At the heart of these is, quite simply, the right to live. A sovereign power that fails to protect this most basic right is failing its most basic obligation.<sup>7</sup> And a leader of a state or a political movement or an armed gang whose activities include the perpetration of genocide, crimes against humanity, and war crimes deserves to be held to account.

Second, we describe the elements of the Court most ardently criticized by its opponents and trace the elements that led the Bush administration to adopt a policy of acquiescence toward the Court. In doing so, we reinforce support among activist groups and religious and other communities from the political left and right for the principle of prosecuting war crimes, and make the foreign policy and national security arguments that led the United States to realign its position.

Third, we assess the operation of the ICC since it entered into force in 2002. We evaluate the performance of the Court against the various scenarios envisioned by critics of U.S. membership or cooperation and consider the degree to which the ICC, established as a Court of last resort, has succeeded in promoting capacity and will in states and regions to prosecute cases themselves, without appeal to an international institution, and what steps the Court—

in concert with other actors, including the United States—can take to promote the building of local capacity.

Fourth, we take up the question of U.S. national interests. We touch on the foreign policy consequences of a U.S. posture that has opposed the Court, including the impact on relations with close allies, military partners, and America's overall international reputation among rights-regarding members of the international community. We consider what the costs of continued opposition might be internationally and weigh those costs against the supposed benefits of U.S. opposition in light of the Court's history and practice to date. We explain the potential benefits to Americans of greater participation in and cooperation with the Court and look candidly at concerns about the costs of U.S. participation and the ways in which such concerns can be mitigated and the costs reduced. In the conclusion we call for the United States to end a policy of opposition or hostility toward the Court and to adopt instead a policy of cooperation to help the Court with its important work of bringing the most heinous perpetrators of war crimes to justice.

Finally, we make recommendations for the United States to act on legislatively and within the Executive Branch to advance a policy of cooperation, including how the United States should develop a productive working relationship with the Court short of ratification of the Rome Statute—a decision we do not think will be ripe for consideration before the conclusion of the 2010 Review Conference of the Rome Statute. The interim period will give the United States and the Court time to adopt a pattern of cooperation and a basis for Washington to decide on next steps.

Most fundamentally, *A Means to an End* argues that the United States should actively support the International Criminal Court, not as an act of international charity, not as a project of "global

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governance,” not even principally to send a strong message of international cooperation to our close allies and others (though adoption of our proposal will send such a message). This book argues that the United States should support the Court because it serves our interests and is consistent with the values that animated the founding of the country, and to which we continue to aspire.