
MEMORANDUM

TO: ERIC SCHWARTZ

FROM: JOHN WASHBURN, DIRECTOR, INTERNATIONAL CRIMINAL COURT PROGRAMS, UNITED NATIONS ASSOCIATION OF THE USA; AND DON KRAUS, CEO, CITIZENS FOR GLOBAL SOLUTIONS (CGS)

SUBJECT: INTERNATIONAL CRIMINAL COURT - MEETING WITH ERIC SCHWARTZ: TALKING POINTS AND LEAVE-BEHIND PAPER

DATE: DECEMBER 5, 2008

There are **three priority actions** open to the incoming Obama administration for creating a new relationship with the International Criminal Court (ICC). The premise for these initial actions is that the U.S. policy and tactics for the ICC must recognize that the Court is now established and will continue regardless of how the United States chooses to deal with it.

The initial actions are:

- reinstating the U.S. signature of the Rome Statute;
- participating in the preparations for, and then in, the 2010 Review Conference; and
- expanding, deepening and further formalizing the official channel of U.S. cooperation with the Court which now operates only for Darfur.

These actions would not require new funds and only small investments of time and attention, although there would naturally have to be careful preparation for the Review Conference meetings. Only cooperation with the Court might require presidential waivers or use of the Dodd Amendment under the American Servicemembers' Protection Act (ASPA). If carried out, these actions taken together would open the way to further steps by the Obama administration to strengthen its relationship with the Court and to demonstrate its commitment to international justice and accountability.

Reinstating the signature and participation in the Review Conference process in particular would have a **strong symbolic impact** in distinguishing the new administration from its predecessor. They would express its **commitment to multilateralism** and contribute to **smoother relations with EU countries and others** alienated by the Bush administration's hostility to the Court. However, this symbolic significance could also **arouse and direct conservative opposition**.

The United States is already entitled to **participate as an observer in the Review Conference and its preparations**. It will have all the privileges of other participants except the vote. No further action to obtain this status is necessary; the United States can simply show up and take its seat. Its participation should begin at the latest with the February 9-13 meeting of the Court's Assembly of States Parties.

In participating, the new administration could explain its continuing concerns about the Court, explore solutions for them, become familiar and comfortable with the Court and influence the continuing work on defining the crime of aggression, an important issue and potential problem for the United States. This kind of participation would be a much more effective way to protect American interests than complaining about the Review Conference process from the outside or ignoring it.

The United States can **reinstate its signature of the Rome Statute** simply by a note to the United Nations Secretary-General so requesting. He would report this note as a footnote to the name of the United States on the list of signatories for which he is responsible. He would also advise government missions to the United Nations about this in a circular diplomatic note. Reinstatement of the signature would oblige the United States not to act counter to the purposes of the Rome Statute. It would also substantially strengthen the credibility and influence of the United States in its participation in the Review Conference preparations.

U.S. national interests are already engaged to varying degrees in the Court's current cases and will increase further if the prosecutor current preliminary examinations of Colombia and Afghanistan become formal investigations. **Cooperation with the Court** can both clarify and help protect those interests.

ASPA is about cooperation on specific cases and therefore will not affect reinstatement of the signature or participation in ICC meetings. Support to and cooperation with the Court on particular cases as recommended above can be exempted from ASPA through presidential waivers or use of the Dodd Amendment.

The standard statement on the ICC by the Obama campaign calls for **consultation with the U.S. military**. Our findings are that the military accept the permanence of the ICC and thus the need for a new approach to it, but remain concerned about protecting servicemembers and senior officers. Servicemembers abroad can be protected by new or suitably adjusted SOFAs which can without difficulty meet the requirements of Article 98 of the Rome Statute. Reassurance about senior officers must come from familiarization with the Court from experiences such as the Review Conference process. The JAG component of the military in particular are traumatized by the difficulty of ratifying the Law of the Sea Treaty and may need to hear more than once that **ratification of the Rome Statute** is a middle-term prospect at best.

A September 2008 poll by the Chicago Council on Global Affairs shows 68% of respondents agreeing strongly that the United States should participate in the Rome Statute. This level of **public support for the ICC** has held steady for most of the past five years. As with most international issue, this support is passive and does not much affect political behavior in any way. It does indicate, however, that any public outcry over a new approach to the ICC would be by a noisy minority and that public opinion is ready to be prepared for and accept such an approach.