

COMMENTARY

Is Participation in the ICC in the Strategic Interest of the United States?

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I. INTRODUCTION

After a controversial start, the International Criminal Court¹ (“ICC” or “the Court”) dropped out of the headlines and ceased to be a hot topic in public debate in the United States. However, with the recent change of U.S. presidential administrations, and the even more recent public comments in support of the ICC by U.S. Secretary of State Hillary Clinton, the ICC is poised to reenter U.S. headlines and again occupy a prominent place in U.S. foreign policy debates. In August 2009, while traveling in Nairobi, Kenya, Secretary Clinton said she had “great regret” the United States was not a signatory to the Rome Statute establishing the ICC.² Likewise, the newly appointed legal advisor to the State Department, Yale Law School Dean and Professor Harold Hongju Koh, has expressed his support for the United States to ratify the Rome Statute (hereinafter the “Statute”).³ In the current U.S. presidential administration, these remarks appear to indicate renewed interest in engaging with the ICC, as well as greater sympathy for joining the Court.

Following World War II, the victors established international tribunals to try crimes against peace, war crimes and, crimes against humanity.⁴ For many years

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¹ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, 17 Jul. 1998, U.N. Doc. A/CONF 183/9 (1998), available at www.un.org/law/icc/statute/rome.htm (hereinafter “Rome Statute”).

² *Clinton Says She Regrets U.S. Is Not a Member of ICC*, REUTERS, 6 Aug. 2009. Secretary Clinton reportedly used the word “signatory.” The United States signed the Rome Statute establishing the ICC on December 31, 2000 (see note 14, *infra*), but the Clinton Administration never submitted it to the U.S. Senate for ratification. Subsequently, the Bush Administration “unsigned” the treaty on May 6, 2002. See note 17, *infra*.

³ *Restoring the Rule of Law, Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 14-32 (2008) (statement of Harold Kongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School) (urging the Obama Administration to “withdraw” the Bush Administration letter to the United Nations Secretary General “unsigned” the Rome Statute, and proposing diplomatic engagement with the States Party to the Statute in order to “pave the way for eventual ratification.”), available at http://ftp.fas.org/irp/congress/2008_hr/091608koh.pdf. The U.S. Senate confirmed Dean Koh as U.S. State Department Legal Advisor on June 25, 2009. Roll-call Vote No. 213Ex, 155 Cong. Rec. 97 (25 June 2009) at S.7050.

⁴ Generally speaking, crimes against peace involved violation of treaty obligations (the Kellogg-Briand Pact, in particular) renouncing the use of war as an instrument of national policy. War crimes involved violations of both customary norms of international law and treaty obligations (such as the Hague Convention of 1907) governing conduct between warring parties. Crimes against humanity involved gross violations of the human rights of civilian