

Testimony of Ambassador (ret.) Stephen J. Rapp

Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet

Committee on the Judiciary

US House of Representatives

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***Active US Engagement with the International Criminal Court Can Further the American
Commitment to Accountability for Atrocity Crimes While Protecting American
Interests***

Mr. Chairman, Mr. Ranking Member, and Honorable Members of the Subcommittee,

I am honored to appear before you to state that the International Criminal Court (ICC) is not a threat to US sovereignty, and that US engagement with the ICC can further our longstanding commitment to accountability for atrocities while protecting American security interests and those of our allies.

I base this on my experience as a former international prosecutor who led the trial teams at the Rwanda tribunal, served as the chief prosecutor of the Special Court for Sierra Leone, and worked closely with many individuals who now serve in key positions at the ICC. I have found a cooperative approach to be uniformly successful from the time that the Special Court used ICC facilities to try Liberian dictator and warlord Charles Taylor, to my six years representing US interests at the ICC as Ambassador-at-Large for War Crimes Issues and Global Criminal Justice. During my tenure, from 2009 to 2015, even though there were preliminary examinations of US conduct in Afghanistan and Israeli conduct in Gaza, we were able to persuade court officials not to open formal investigations.

First, in deciding the best US approach to the ICC, we must remember that international criminal justice is a US-initiated project, launched by us after World War II, with the Nuremberg prosecution led by US Supreme Court Justice Robert Jackson. That process resulted in precedent-setting guilty verdicts against the major surviving Nazi leaders 80 years ago this month. More than four decades later, the US led successful efforts in the UN Security Council to establish international tribunals under Chapter 7 of the UN Charter for the former Yugoslavia and Rwanda. Later, the US led efforts to negotiate a treaty between the UN and Sierra Leone to establish an internationalized Special Court for Sierra Leone. Those courts were successful in bringing to justice Rwandan Prime Minister Kambanda,

Yugoslav President Milosevic, Republic Srpska President Karadzic and his commanding General Mladic, who died last month as a convicted genocidaire thanks to the hard work of the Yugoslavia tribunal, which enjoyed the strong support of the United States, as well as Liberian President Taylor.

As these processes succeeded, our allies argued that the world should not establish a new tribunal every time horrific atrocities occurred and pushed for the establishment of a permanent international court. These efforts resulted in a treaty which gained 124 state parties. The Court's jurisdiction has been exercised where crimes were committed on the territory of state parties and in countries where the UN Security Council had granted jurisdiction, acting under Chapter 7 of the UN Charter.

The George W. Bush administration was concerned about the potentially broad reach of the ICC and supported the American Servicemen's Protection Act (ASPA), which passed Congress in 2002. However, after Secretary Powell's determination that genocide was being committed in Sudan's Darfur province, the US government abstained from the Security Council's referral of that situation to the ICC, and by the end of the Bush administration, the US was the strongest supporter of the ICC's arrest warrants in Sudan.

During the Obama Administration we used the authority of ASPA's Dodd Amendment, which permitted US assistance to the ICC in cases involving alleged atrocities committed by noncitizens of the US, to support all of the ICC's then active investigations and prosecutions. Most prominently, when two warlords, Bosco Ntaganda in 2013, and Dominic Ongwen in 2015, surrendered to US officers in Africa, we assisted in transferring them to The Hague. Both were later convicted and received the longest sentences in the history of the ICC, strongly advancing our commitment to accountability for atrocities committed by armed groups in the DR Congo and by the LRA in Uganda and neighboring countries.

If the US were to be successful in dismantling the ICC, the question arises where accountability will be achieved for the forced deportation by the Myanmar military of 800,000 Rohingya into Bangladesh, or the continuing crimes against humanity of the Taliban in Afghanistan. Where else would there be justice for genocide in Darfur, where the ICC has continuing jurisdiction, as we see the RSF's own videos and photos of them shooting hundreds of innocent men, women and children and pushing their bodies into ditches, in scenes reminiscent of the *Einsatzgruppen's* murder of Jews in World War II?

Second, when it comes to avoiding investigations or prosecutions of our personnel or that of allies who are not ICC state parties, the argument that the ICC has no jurisdiction is neither legally nor strategically sound. This argument would have precluded the indictment

of Charles Taylor for crimes committed in Sierra Leone because Liberia was not a party to the treaty that created the Special Court. For war crimes committed in Ukraine, which recognized ICC jurisdiction in 2014, the ICC has issued arrest warrants against Vladimir Putin and five other Russian officials. The US strongly supported these warrants, as evidenced by the bipartisan votes for legislation providing US assistance to the ICC in the Ukraine situation.

This basis for ICC jurisdiction is in line with the fundamental concept of territorial jurisdiction, which is integral to state sovereignty. If you murder someone in London, the British will decide where to try you. It does not interfere with US sovereignty, because the ICC has no jurisdiction over American citizens acting in the US. It is only when we act on the territory of a state party that the ICC can possibly reach us.

US officials recognized that the ICC had this jurisdiction early on, and that is why the Bush administration negotiated non-surrender agreements, which are permitted by Article 98 of the ICC Statute and remain in effect. As for the crime of aggression, which the ICC gained power to prosecute only in 2017, there is a special provision, resulting from our active engagement, excluding the citizens of nonparties from ICC jurisdiction over aggression. Of course, this protects Putin from prosecution for aggression in Ukraine, and US citizens from any possible ICC prosecution for alleged aggression in Venezuela.

Our “do not prosecute non-party nationals” position is best used as a policy argument to the ICC Prosecutor to defer action against nonparties from countries with independent judicial systems and a history of holding their own atrocity crime perpetrators to account. This is similar to the legal principle of complementarity, under which the ICC can only exercise jurisdiction when a state does not have the capacity or will to genuinely investigate. This is the “magic bullet” for US protection given our strong system of military justice. During my tenure Ambassador-at-Large, we were able to provide the ICC with evidence of genuine investigations of our alleged torture in Afghanistan and assisted our Israeli allies in communicating that alleged war crimes during the 2014 Gaza operation were being similarly investigated. As I noted earlier, ICC officials took their statute’s pledge to honor states’ domestic investigations seriously and no investigations against US nationals were opened.

In 2022, thanks to the continuing engagement of my successor, the ICC Prosecutor “deprioritized” the investigation of US and allied personnel in Afghanistan. The issuance of arrest warrants for two Israeli officials was for alleged conduct in the much larger conflict beginning in 2023, during which the IDF website provided much less information about investigations, and we provided much less sustained encouragement for the Israelis to pursue necessary domestic accountability than during previous smaller Gaza operations.

However, I would note that Israel has a respectable legal argument that the ICC does not have jurisdiction in Gaza because the UN General Assembly's "non-member state" resolution of 2012 did not settle key and legally relevant aspects of Palestinian statehood. They have raised that issue in judicial filings, and it is still pending in the Court.

In recent pronouncements, the Trump administration has asserted that the ICC represents a current threat to US personnel. It does not. We are no longer in Afghanistan, and Iran is not a state party. Attack on boats in international waters are not considered to be on state's territory unless they are on ships carrying national flags, not clandestine speed boats, and even if one or more were so flagged it may not meet the ICC's gravity test, as we saw when the ICC Prosecutor decided not to investigate actions on the Comoros' flagged *Mavi Marmara* during Israel's operation against a Gaza flotilla in May 2010. Finally, as noted earlier, the US intervention in Venezuela cannot be reached by the ICC as a crime of aggression, and the Maduro arrest operation was so targeted that it could not reasonably meet legal or gravity thresholds for other possible crimes.

Third, and finally, sanctioning the judges and other officials of an international criminal court under our International Emergency Economic Powers Act is the wrong approach. There is no emergency for the reasons I have stated. Sanctions should be used against those who acts like terrorists or mass killers, not judges who joined the Court after distinguished careers in the judicial systems of our most trusted allies and who are in good faith applying a treaty ratified by a majority of the world's nations. Judicial independence is fundamental to the rule of law, and in annual human rights reports we justifiably criticize countries where the judges are subject to political control or influence. Even our own American Servicemembers Protection Act, which Europeans sometime call the "Invade The Hague Act," prohibits the use of economic benefits to influence the decisions of court officials. As we have seen, the sanctions result in judges losing access to credit cards, which effectively tells them to do our bidding or there will be personal economic consequences.

This is also a tactic that will not work. We must ask ourselves, if we were judges, would we bend our decisions because of a threat from an interested party? If we did, it would destroy our reputations and end our careers.

Of course, we would like to see international courts decide the cases in a way that aligns with our understanding of appropriate outcomes. But as Justice Robert Jackson said in a great speech in April 1945 before his appointment as Nuremberg Prosecutor, "We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage."

We now live in a much more multipolar power, where we are consistently reminded of the ineffectiveness and counterproductivity of unilateral action. The answer is to work in concert with our allies in international bodies and to use our best legal advocacy and most effective diplomacy to further our values and protect our interests.