REPORT
on
U.S. Relations with the International Criminal Court

1. Introduction and Summary

This report is in support of a resolution to be presented to the 2008 meeting of the House of Delegates. The resolution calls on the United States to expand and intensify its relations with the International Criminal Court (ICC), to participate in the Court’s Review Conference to be held in early 2010 and to accede to the Rome Statute.

The ABA has a long history of supporting the establishment and operation of the ICC.1 The two previous ABA resolutions addressed potential or actual milestones in the history of relations between the United States and the Court. The February 1998 resolution was passed four months before the diplomatic conference which adopted the Court’s Rome Statute. Confronting the widespread expectation that the conference would fail, the resolution encouraged constructive U.S. participation in the conference, underlined the need for the Court and emphasized its importance to the International Rule of Law.

The February 2001 resolution consisted of one sentence calling on the United States to accede to the Rome Statute. It recognized the imminence of the entry into force of the Rome Statute, which in fact occurred in July 2002, and the opposition of the United States to the Statute and the Court. This opposition had been strong and continuous since the United States voted against the Statute at the diplomatic conference. The resolution was accompanied by a remarkably accomplished and skillful report which presented a detailed legal analysis of the text of the Rome Statute followed by a point-by-point refutation of the objections of the United States to the Court.

The present report and resolution similarly respond to another compelling phase in the relationship between the United States and the ICC. Although the United States continues to formally maintain its official policy of disengagement from and resistance to the Court, it has begun to rapidly diverge from it in practice. There is a formal and publicly acknowledged arrangement for interaction between the U.S. and the institution in the Darfur situation. The U.S. now acknowledges that it cannot “delegitimize” the ICC, and that the ICC is perhaps the only chance to bring the Darfur war criminals to justice.2 Administration officials increasingly have made statements not only recognizing the Court’s role in Darfur, but also acknowledging its importance at the center of the emerging global system of enforcing accountability for atrocities.

This divergence coincides with the advent of a new administration which must decide, as part of creating its own policy on the Court, whether and how to participate in the 2010 Review Conference of the Rome Statute. This conference will appraise the performance

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of the Court so far and propose improvements, including, if necessary, through amendments of the Rome Statute. The United States signed the Final Act of the Rome Conference and is therefore entitled to participate as an observer in the Review Conference and in the preparatory meetings of the Court’s governing body, the Assembly of States Parties, which will precede it. Observers will have all of the privileges of States Parties to the Rome Statute except voting. Accordingly, the Conference and the preceding meetings will offer the United States an important opportunity to raise with other countries, and seek reassurance or action about, its continuing concerns with the Court.

This report recommends an ABA resolution that encourages the United States to build on reasons for the current practice of limited interaction with the ICC to create a policy of openness toward, support for and cooperation with the Court. To that end, it calls on the new administration to participate constructively and with an open mind in the Review Conference.

II. Background

The ABA and the U.S. were actively involved in the negotiations resulting in the “Rome Statute” establishing the International Criminal Court. Both made substantial contributions to the substantive, procedural and institutional aspects of the Rome Statute. For the ABA, this included both broad elements such as due process and very technical questions such as appeals and discovery. In its reports, resolutions and publications, the Association made clear that it regarded the achievement of the ICC as an inspiring and historic step forward for the establishment of the international rule of law.

Following the Rome conference, the ABA participated vigorously in the further negotiations to establish the ICC. It has been a leader in creating and directing the International Criminal Bar (ICB) as an association of counsel for defendants and for victims at the ICC. Through the ICB and directly, the Association has encouraged and assisted American lawyers to enroll themselves as counsel to the Court. President Clinton signed the statute at the very end of his administration, but in the accompanying statement told Americans and his successor that the Statute was not fit in its present form to be submitted to the Senate for advice and consent to ratification. Chief U.S. concerns were and are the claim that the Court does not provide sufficient protection from politicized prosecutions and the actuality that the Court in certain circumstances can try the citizens of countries not party to the Rome Statute.

The ICC officially came into existence on July 1, 2002 after achieving the necessary ratification of the Rome Statute by 60 nations. In anticipation of this, the Bush administration in May 2002 made a formal policy statement of disengagement from the Court and suspended the U.S. signature of the Rome Statute.

3 Articles 112 (1) and 123 (1) of the Rome Statute.
4 See generally http://www.icc-cpi.int.
5 In Multilateral Treaties Deposited with the Secretary-General of the United Nations, the following information appears in note 7 to the Rome Statute of the International Criminal Court:
However, the U.S. went well beyond disengagement with a campaign to press member states to sign non-delivery agreements (variously, “Article 98 Agreements” or “Bilateral Immunity Agreements” - “BIAs”), as a condition of receiving some forms of American economic or military assistance. These agreements required the other party to deliver upon request any American to the United States rather than to the ICC. The primary purpose was to keep Americans, especially military personnel, out of the jurisdiction of the ICC. However, the statements of American officials negotiating them often made clear that a major additional objective was to undermine the authority of the ICC and to discourage ratifications of the Rome Statute. Although the United States claimed that these agreements satisfy Article 98 of the Rome Statute, most countries, such as those in the European Union which have all refused to sign them, insist that Article 98 recognizes only agreements limited to persons sent on official civilian or military business.

As of early 2008, U.S. efforts to obtain these agreements may be winding down. Their main proponents have left government. Strenuous resistance to these agreements, especially by countries important to the United States such as Mexico and Japan, has impressed the administration. Countries report that the campaign seems to be diminishing. The American military, disturbed at damage to its relations with rejectionist nations by bans on military assistance to them, has had the legislation requiring those sanctions repealed. Similar restrictions on economic support funds remain, but their application usually has been avoided by presidential waivers.

Meanwhile, U.S. public opinion has remained in strong support of U.S. participation in the ICC. Most Americans generally favor the idea of an international body to prosecute war crimes and genocide, even if the U.S. is on equal terms in it with every other nation. WorldPublicOpinion.org found that a majority (60%) of Americans favor giving an international body, such as a court, the power to judge individuals charged with extreme violations of human rights, if a national government is not performing this function. Even more (69%) reject the idea that the U.S. should be able to claim a special exemption. They also found that a large majority (74%) favor U.S. participation in the International Criminal Court even after hearing the U.S. objections. These results show that ABA support for the ICC based on the Association’s commitment to the rule of law has been and is in keeping with the feelings of most Americans, and that a new open

*In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following:*

"This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty."

7 *Id.* at p. 6.
8 *Id.* at p. 9.
policy on the ICC by the incoming administration will enjoy public acceptance and encouragement.

II. Current ICC Activities

At the time that U.S. official opposition to the ICC crystallized, the Court was a powerful concept, laid out in a treaty, but not yet an actuality. The ICC has now been in operation for five years. In this time, it has made progress and established itself in ways which the Bush administration has had to acknowledge.

A. The Congo

This progress has now achieved the arrest and trial of Congolese warlords Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui. After the former Zaire (now the Democratic Republic of the Congo, or “DRC”) descended into civil war and chaos in 1997, competing warlords vied for superiority by exploiting long simmering ethnic rivalries. In 2002, Lubanga, leading a military faction known as the FLPC, emerged as the dominant warlord in the Northeastern province of Ituri by seizing control of the capital of Bunia.9

Lubanga has secured counsel, been arraigned and has had a hearing to confirm the charges against him (similar to an indictment proceeding). The ICC has scheduled his trial for June, 2008.

In July 2007, the ICC Prosecutor obtained a sealed arrest warrant against Germain Katanga who was in custody in Kinshasa also under allegations of the use and brutalization of child soldiers. In October 2007, following a request of the government of the DRC, the indictment was unsealed and he was transferred to detention at the Court. He has been arraigned and is now preparing for his confirmation of charges hearing in May. Mathieu Ngudjolo Chui, alleged former leader of the National Integrationist Front (FNI) who served as a Colonel in the National Army of the Government of the DRC from October 2006 until his arrest and transfer to the Court in February 2008, will also face confirmation of charges at that time on nine counts of war crimes and crimes against humanity.

B. Uganda

The conflict in Northern Uganda is currently the longest running civil war on the African continent.10 Under the cult-like leadership of Joseph Kony, the Lord’s Resistance Army (LRA) has kidnapped as many as 25,000 children, according to UN estimates, and forced

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them to serve as soldiers, porters, and sex slaves.\textsuperscript{11} Using an army which at times consisted of up to 80\% abducted and brain washed children,\textsuperscript{12} Kony is alleged to have killed tens of thousands of villagers, displaced 2 million more\textsuperscript{13} (nearly 50\% of the population of Northern Uganda), and staged attacks on aid workers and other noncombatants.

By 2004, the Government of Uganda under President Museveni was frustrated by the apparent failure of military, diplomatic and mediation efforts.\textsuperscript{14} Uganda, an ICC State Party, referred the situation to the Court.

After investigating for more than a year, the ICC publicly announced in October 2005 its first arrest warrants for Kony and four of his top lieutenants.\textsuperscript{15} In July, 2006, Kony agreed to peace talks with Uganda at Juba, Sudan. These talks have continued since without a final conclusion. Many observers assert that fear of the ICC brought Kony to the negotiating table and keeps him there, but also deters him from agreeing to make a final peace settlement.\textsuperscript{16}

\section{C. \textbf{Darfur}}

In September, 2004, UN Secretary-General Kofi Annan appointed a Commission of Inquiry on Darfur, which recommended an ICC referral and investigation.\textsuperscript{17} In March 2005 after a long hesitation, the U.S. agreed to abstain from voting on the referral resolution, thus allowing it to pass.\textsuperscript{18} The resolution declares that the resolution is a Security Council action under Chapter VII of the United Nations Charter. Actions required of countries under Chapter VII resolutions are mandatory. Sudan is therefore bound to carry out the Council’s decision expressed in the referral resolution that it “shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor…”

Shortly thereafter, the ICC publicly announced it would open a formal war crimes investigation into the genocide in Darfur. Over the next two years, ICC investigators gathered and preserved large amounts of critical evidence, and hundreds of witness statements during seventy missions conducted in seventeen countries. They were

\begin{itemize}
\item \textsuperscript{11} Frank Nyakairu & Agencies, \textit{ICC opposes Museveni peace offer to Kony}, The Monitor (Kampala), May 19, 2006.
\item \textsuperscript{12} MIPT Terrorism Knowledge Base, Lord’s Resistance Army, ¶1, available at http://www.tkb.org/Group.jsp?groupId=3513.
\item \textsuperscript{14} \textit{Id}.
\end{itemize}
eventually allowed by Sudan to conduct five missions to Sudan and obtained information from a number of government officials.19

On February 27, 2007, ICC Prosecutor Luis Moreno-Ocampo submitted his investigation to the Pre-Trial Chamber, requesting and later receiving arrest warrants for Sudan’s Minister of State for Humanitarian Affairs, Ahmad Harun, and Janjaweed militia leader Ali Kushayb.20 However, despite frequent demands from the Court and by individual countries as well as international organizations, Sudan has refused to deliver either of these persons to the Court. Instead, in apparent defiance, Sudan has promoted Ahmad Harun to a higher position in its government which includes supervision of humanitarian relief work in Darfur.

IV. ICC Performance

The approach of the Court’s first two trials constitutes an historic and crucial moment for its development, future credibility and effectiveness. The first use of any system, no matter how carefully planned, always reveals and should resolve fundamental problems and issues. Thus, the Lubanga case in particular continues to be the source of a stream of motions, appeals and decisions which are setting fundamental precedents. This judicial activity is evoking, in support or response, decisions and actions by ICC officials which are also shaping or extending these precedents. Their subjects include among others the appointment and rights of defense counsel, attorney-client privileges, legal aid, the participation of victims, support for defense investigations, issues suitable for appeal in the pre-trial phase, and discovery. Many of these bear directly on due process for defendants, especially the question of equality of arms between the prosecution and the defense.

The referral, to the surprise of many, of the first cases by states parties avoided the complications and difficulties that would have been likely had the Prosecutor acted on his own initiative. The Office of the Prosecutor (OTP) has, however, a system for receiving, vetting, investigating and responding to requests for such action. It has received some requests for prosecution of American citizens. After examination, careful and detailed responses from the Office have refused these because of lack of jurisdiction.

Non-enforcement of its arrest warrants seriously threatens the effectiveness and credibility of the Court. The President of the Court and the Prosecutor are campaigning vigorously against this threat. It was the main theme of the President’s annual report to the UN General Assembly on November 1, 2007 the Prosecutor’s report on Darfur to the Security Council on December 5, 2007 and in the Assembly of States Parties debate at the end of 2007. The United States joined many other countries in calling for enforcement in its statements in the General Assembly and the Security Council meetings.

19 FACT SHEET The Situation in Darfur, Sudan, International Criminal Court, Office of the Prosecutor.
V. Conclusion

The Association participated early in the negotiations to create the International Criminal Court because it recognized the Court’s potential to be a new and enormous advance toward the international rule of law. It confirmed that recognition in its two resolutions endorsing the Court. The ICC has begun well to realize that potential despite the problems and mistakes of any new and different undertaking.

The resolution this report recommends calls for new United States relations with the Court of openness, support and engagement, including positive participation in the Review Conference and in the activities of the Court, and leading to American accession to the Rome Statute. This policy will build on the current practice of the United States in dealing with the ICC, as contrasted with the old policy of indifference still formally in place. This new position will provide for American influence on the Court as it enters its final formation, serve the U.S. national interests found in all ICC cases and allow for serious consideration by other countries of the remaining U.S. concerns about the Court. It will be a long start toward re-establishing the worldwide credibility of a strong American commitment to the international rule of law.

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