

AMERICAN BAR ASSOCIATION

**SECTION OF INTERNATIONAL LAW
SECTION OF CRIMINAL JUSTICE**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges the United States Government to expand
2 and broaden United States interaction with the International Criminal Court, including
3 cooperation with the Court's investigations and proceedings;

4 FURTHER RESOLVED, That the Association calls on the United States Government to
5 participate in all future sessions of the International Criminal Court's governing body, the
6 Assembly of States Parties, and preparations for the Review Conference to be held in 2010.

REPORT

I. Introduction and Summary

This Report supports a resolution to be presented to the August 2008 meeting of the ABA House of Delegates calling on the United States to expand and broaden its relations with the International Criminal Court (ICC or the Court) and to participate in the ICC Review Conference to be held in early 2010.

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 five months before the diplomatic conference which adopted the Court's Rome Statute.² That resolution encouraged constructive US participation in the conference, underlined the need for the Court, and emphasized its importance to the international rule of law. In 2001, the House adopted a resolution recommending that the US accede to the Rome Statute of the ICC.

Although other international criminal tribunals – from the Nuremburg courts to the ad hoc international courts created for the former Yugoslavia, Rwanda and Sierra Leone – benefited from considerable US leadership and support, the ICC has been castigated as a threat to US interests. Those criticisms, however, were made before the ICC established a track record. After six years of operation, the ICC has proven itself to be a responsible judicial institution. The ICC has undertaken four investigations in Africa of particularly horrendous situations and it has acted prudently and without political bias.

A new administration 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 of the Court so far and propose improvements, including, if necessary, through amendments to 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 (ASP), which will precede it.³ 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 reverse its current practice of disengagement from 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 in the Review Conference. The Report maintains that the American

¹ See Resolutions approved by the House of Delegates February 1998 and February 2001.

² Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, UN Doc. A/CONF.183/13, *entered into force* July 1, 2002 [hereinafter Rome Statute].

³ Rome Statute, Arts. 112 (1), 123 (1).

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Servicemembers' Protection Act (ASPA) does not prohibit expanded interaction with the Court because ASPA, through a provision known as the Dodd Amendment, allows actions necessary to bring to justice perpetrators of international crimes and because recent statements and actions by the US Government suggest openness to an expanded relationship with the ICC, notwithstanding ASPA.

II. The US Government Should Cooperate With the ICC

President Clinton signed the Rome Statute on December 31, 2000, but at the same time said that the Rome Statute should not be submitted to the Senate for ratification due to concerns that the Court does not provide sufficient protection from politicized prosecutions.

In May 2002, the Bush administration informed the UN Secretary-General of the US intention not to ratify the Rome Statute, effectively withdrawing the US signature of the Rome Statute. Through a prolonged diplomatic effort, based primarily on the fear that the ICC will target US soldiers, the US Government has sought to persuade other countries not to join the ICC and has imposed economic and military sanctions on otherwise friendly countries that resist entering into written agreements which they view as undermining the ICC. The US, moreover, has not sent a representative to any ICC meeting since 2002, even though it has every right to do so. For six years, the US seats at meetings of the ASP, the ICC's governing body, have been empty.

The legislative basis for this anti-ICC policy is a statute called the American Servicemembers' Protection Act (ASPA). Passed in early 2002, just before the Rome Statute entered into force with the 60th ratification, ASPA prohibits cooperation with the ICC, restricts US participation in UN peacekeeping missions, prohibits transfers of law enforcement information to the ICC, and authorizes the President "to free members of the Armed Forces of the United States" that are detained or imprisoned by the ICC. 22 U.S.C. § 7427.

ASPA also until recently authorized cut-offs of military procurement and military assistance for any country that fails to provide "satisfactory assurances to the United States that the country will not extradite or otherwise transfer [a US citizen] to the International Criminal Court," although such cut-offs could be waived by the President. 22 U.S.C. §§ 740, 7422. A separate piece of anti-ICC legislation, referred to as the Nethercutt amendment to annual foreign operations appropriations bills, provides that Economic Support Funds (ESF) cannot be provided to any ICC member state that refuses to sign a Bilateral Immunity Agreement, and was included in the FY 2005, 2006 and 2008 budget authorizations (although presidential exemptions and waivers for certain allies, including NATO countries, are authorized).

Seeking the "satisfactory assurances" referred to in ASPA, the US embarked on a global diplomatic campaign to press member states to sign non-delivery agreements, referred to variously as Article 98 Agreements or Bilateral Immunity Agreements (BIAs). Signing a BIA was presented 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 citizen targeted by the ICC to the United States rather than to the ICC, and the United States assumed a reciprocal obligation. An objective was to undermine the authority of the ICC and to discourage ratifications of the Rome Statute. Although the United States claimed that BIAs

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.

Neither ASPA nor the Nethercutt amendment, however, is a barrier to the adoption of a new, more constructive relationship with the ICC. ASPA itself has a carve-out that allows a change in policy. It provides that nothing in ASPA “shall prohibit the United States from rendering assistance to international efforts to bring to justice . . . foreign nationals accused of genocide, war crimes or crimes against humanity.” 22 U.S.C. § 7433.

In addition, for the past several years a more pragmatic approach to the ICC has been emerging. This was evidenced most dramatically in the US abstention from the Security Council’s referral to the ICC of the Darfur situation. By allowing the Security Council to refer the Darfur situation to the ICC, the US effectively acknowledged that the ICC has an important role in stopping impunity for the worst international crimes.

ASPA and the BIA campaign, moreover, have been described as counterproductive. For example, in 2006, when Mexico stated that it would not sign a BIA and therefore became subject to a cut-off in ESF funds used to support criminal justice reform and anti-corruption efforts, Rep. Eliot Engel (D-NY) stated during House hearings that “in terms of the Article 98, Secretary Rice has said that, in essence, we’re cutting off our nose to spite our face and I would agree with that statement and I believe that Congress inevitably may have to step in to change the policy if we can’t get it changed any other way.” Rep. Jim Kolbe (R-AZ), the Republican chair of the appropriations subcommittee, also spoke against the Nethercutt amendment when it came to the House floor: “At a time when we are fighting the war on terrorism, reducing this tool of diplomatic influence is not a good idea...If we accept [the Nethercutt amendment], the US will be hamstringing itself, placing a straitjacket on its diplomatic tools [.]”

In addition, on March 9, 2006, General Bantz J. Craddock of the US Army testified before the House Armed Services Committee that

in my judgment, [ASPA] has the unintended consequence of restricting our access to and interaction with many important partner nations. Sanctions enclosed in the ASPA statute prohibit International Military Education and Training (IMET) funds from going to certain countries that are parties to the Rome Statute of the International Criminal Court. Of the 22 nations worldwide affected by these sanctions, 11 of them are in Latin America, hampering the engagement and professional contact that is an essential element of our regional security cooperation strategy. The IMET program provides partner nation students with the opportunity to attend US military training, get a first-hand view of life in the US, and develop long-lasting friendships with US military and other partner nation classmates. Extra-hemispheric actors are filling the void left by restricted US military engagement with partner nations. We now risk losing contact and interoperability with a generation of military classmates in many nations of the region, including several leading countries. [...]

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Due in part to the military's concerns, in October 2006, the IMET restrictions were removed from ASPA. The sanctions available under the statute were further curtailed on January 22, 2008, when President Bush signed into law an amendment to ASPA that eliminated restrictions on Foreign Military Financing (FMF) to nations that refuse to sign BIAs. With these amendments, the aid cut-off provisions have been removed from ASPA, leaving only the ESF cut-offs in the Nethercutt amendment.

Senior US Government officials have also opened the door to greater cooperation with the ICC. On November 1, 2005, the Assistant Secretary of State for African Affairs stated that "if we were asked by the ICC for our help, we would try to make sure this gets pursued fully . . . because we don't want to see impunity for any of these actors." Deputy Secretary of State Zoellick stated on April 13, 2006 that "we will fully cooperate with the [ICC] . . . as related to the genocide in Darfur." State Department Legal Adviser John B. Bellinger III said on June 6, 2007, that "[we] have expressed our willingness to consider assisting the ICC Prosecutor's Darfur work . . . [due to] our desire to find practical ways to work with ICC supporters to advance shared goals of promoting international criminal justice." Legal Advisor Bellinger, in an address on US-ICC relations on April 25, 2008, further stated that "there may be opportunities for constructive cooperation" with the ICC. See www.amicc.org (collecting statements regarding US-ICC cooperation).

A more cooperative approach to the ICC is also consistent with public opinion. Most Americans generally favor the idea of an international body to prosecute war crimes and genocide, even if the US is on equal terms in it with every other nation. WorldPublicOpinion.org found that 60 percent 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.⁴ Even more, 69 percent, reject the idea that the US should be able to claim a special exemption.⁵ 74 percent also favor US participation in the International Criminal Court even after hearing the US objections.⁶

II. The ABA's History of Support for the International Criminal Court

For decades, the ABA supported the idea of a permanent international criminal court.

The ABA was actively involved in the negotiations resulting in the Rome Statute establishing the International Criminal Court from 1995 through 1998. In February 1998, six months before adoption of the Rome Statute in July 1998, the House of Delegates approved a resolution endorsing an independent ICC and encouraging US participation in the Rome diplomatic conference.

⁴ *Americans on International Courts and Their Jurisdiction Over the US*, WorldPublicOpinion.org, May 11, 2006 at p. 8.

⁵ *Id.* at p. 6.

⁶ *Id.* at p. 9.

The ABA sent a delegation, which included then-ABA President Jerry Shestack, to Rome for the six-week 1998 diplomatic conference. Following the Rome conference, the ABA sent representatives to the 1999-2002 Preparatory Commission meetings on establishing the ICC, and drafted a comprehensive proposal for the Court's Rules of Procedure and Evidence. The ABA also became a member of the International Criminal Bar (ICB), an association of bar associations and lawyers created to advance the interests of counsel appearing before the ICC, and has played a leadership role within the ICB.

In February 2001, the House of Delegates approved a resolution calling on the United States to accede to the Rome Statute (accede is the equivalent of ratify). The 2001 resolution recognized the imminence of the entry into force of the Rome Statute, which occurred in July 2002. The 2001 resolution was accompanied by a report which analyzed the text of the Rome Statute and concluded that the Rome Statute was consistent with due process standards and that the objections of the United States to the Court were unwarranted. The current resolution represents the next step in ABA support of the ICC and is most timely, with a new presidential administration taking office in 2009 and with the ICC Review Conference to occur in 2010.

IV. ICC Activities and Operations

The Court is an independent, treaty-based permanent judicial institution with jurisdiction over individuals for genocide, war crimes, and crimes against humanity. Its jurisdiction is complementary to national courts, which means that the ICC can only proceed when a national court is unwilling or unable to hear the case.

Three alleged Congolese warlords - Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui - are in the ICC's custody in The Hague. They are accused of crimes arising from the ongoing civil war and chaos in the Democratic Republic of the Congo. 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.

The ICC's second investigation began in 2004 when the Government of Uganda referred the situation in Northern Uganda, including alleged atrocities by a group called the Lord's Resistance Army, to the Court. In October 2005, the ICC's first arrest warrants were issued, but none of the indictees have been delivered to the Court.

Regarding Darfur, in September, 2004, UN Secretary-General Kofi Annan appointed a Commission of Inquiry on Darfur, which recommended an ICC referral and investigation. In March 2005, the US agreed to abstain from voting on the referral under Chapter VII of the UN Charter, thus allowing it to pass.⁷ Chapter VII resolutions are mandatory and therefore Sudan is bound to carry out the Council's decision that it "shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor..."

ICC investigators gathered and preserved large amounts of critical evidence, and hundreds of witness statements during seventy missions conducted in seventeen countries. They were

⁷ S.C. Res. 1593, U.N. Doc. S/Res/1593(2005). *See also* Press Release SC/8351, March 31, 2005 *available at* <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

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eventually allowed by Sudan to conduct five missions to Sudan and obtained information from a number of government officials. On February 27, 2007, ICC Prosecutor Luis Moreno-Ocampo submitted his investigation to the Pre-Trial Chamber, and eventually obtained arrest warrants for Sudan's Minister of State for Humanitarian Affairs, Ahmad Harun, and Janjaweed militia leader Ali Kushayb.⁸ 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.

The ICC does not have the power to make arrests; that responsibility belongs to states. The failure of governments to execute the arrest warrants issued regarding the Darfur and Uganda situations 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 ICC 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.

The Review Conference to occur in 2010 will appraise the performance of the Court so far and propose improvements, including, if necessary, through amendments of the Rome Statute. It will be the first opportunity for governments to assess the performance of the ICC. The issue of whether the crime of aggression has been sufficiently defined to be included in the Court's jurisdiction is one of the agenda items.

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.⁹ 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 reverse the current practice of limited interaction with the ICC and 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 ICC Review Conference.

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 prior resolutions endorsing the

⁸ Press Release, *ICC Prosecutor Presents Evidence on Darfur Crimes*, International Criminal Court, available at <http://www.icc-cpi.int/press/pressreleases/230.html>.

⁹ Rome Statute, Arts. 112 (1), 123 (1).

Court. The ICC has begun well to realize that potential despite the problems and mistakes of any new and different undertaking.

This resolution calls for new United States relations with the Court of openness, support, and engagement, including positive participation in the ICC Review Conference and in the activities of the Court. This policy will build on the current practice of the United States in dealing with the ICC, as contrasted with the old policy of opposition still formally in place. This new position will provide for American influence on the Court as it enters its final formation, serve the US national interests found in all ICC cases and allow for serious consideration by other countries of the remaining US 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.

Respectfully submitted,

Jeffrey B. Golden, Chair (2007-2008)
Section of International Law

August 2008

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GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Jeffrey B. Golden, Chair
Section of International Law

1. Summary of Recommendation.

The resolution urges the President of the United States to expand interaction with the International Criminal Court (ICC or the Court), including cooperation with the Court's investigations and proceedings. The ICC is a treaty-based court which began functioning in 2002; its purpose is to conduct prosecutions of individuals accused of genocide, crimes against humanity and war crimes.

The resolution further calls on the President of the United States to allow the United States Government to participate in the ICC's governing body, the Assembly of States Parties, including preparations for a Review Conference to be held in 2010.

2. Approval of Submitting Entity.

This Recommendation was approved by the Council of the Section of International Law at its meeting on April 5, 2008 in New York.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This Recommendation has not previously been submitted to the House or Board.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

No existing policies would be affected by approval of this Recommendation.

5. What urgency exists which requires action at this meeting of the House?

The new administration taking office in January 2009 will have to assess whether to continue the policy of disengagement from the ICC. The urgency is that in 2010 the ICC will hold its first Review Conference and the US government, which fully participated in the drafting of the Rome Statute from 1995 through 1998, should be represented. The United States has not sent a representative to any meetings of the International Criminal Court since 2002, even though it is entitled to do so. The ICC has been joined by 106 countries and the Court has behaved in a careful and responsible manner. Although the ABA in 2001 recommended that the US join the ICC, which remains a long-term goal, this recommendation argues for reengagement and cooperation.

6. Status of Legislation.
None known to be pending.
7. Cost to the Association. (Both direct and indirect costs.)
None.
8. Disclosure of Interest. (If applicable.)
None.
9. Referrals.
This recommendation and report will be referred to all ABA entities.
10. Contact Person. (Prior to the meeting.)
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EXECUTIVE SUMMARY

1. Summary of the Recommendation:

The resolution urges the President of the United States to expand interaction with the International Criminal Court (ICC or the Court), including cooperation with the Court's investigations and proceedings. The ICC is a treaty-based court which began functioning in 2002; its purpose is to conduct prosecutions of individuals accused of genocide, crimes against humanity and war crimes.

The resolution further calls on the President of the United States to allow the United States Government to participate in the ICC's governing body, the Assembly of States Parties, including preparations for a Review Conference to be held in 2010.

2. Summary of the Issue that the Resolution Addresses:

For the past six years, the United States Government has pursued a policy of disengagement and hostility toward the ICC. This policy has included a statute, the American Servicemembers' Protection Act (ASPA), that prohibits assistance with the ICC and a global diplomatic campaign threatening cut-offs of military and economic assistance to countries that refuse to sign agreements promising never to deliver any US citizen to the ICC. This policy is not consistent with longstanding US policy supporting international criminal tribunals and the international rule of law. The policy has also been counterproductive because it has resulted in aid cut-offs to otherwise friendly countries.

The ICC has 106 member states, and the Court has behaved in a responsible manner in its six years of operation. The United States further allowed the UN Security Council to refer the Darfur situation to the ICC, which demonstrated that the ICC can be consistent with US national interests. The resolution is designed to highlight that the policy of disengagement from the Court diverge from the tradition US leadership on international justice issues. The resolution also addresses the reality that a new presidential administration will need to formulate its own policy towards the ICC. The American Bar Association views the 2010 Review Conference as an opportunity for the United States to re-engage with the International Criminal Court and to have a "voice at the table" on significant issues impacting the ICC in the future.

3. Please Explain How the Proposed Policy Position will Address the Issue:

The resolution would favor a change in the policy of disengagement from the Court. The United States has not sent a representative to any meetings of the International Criminal Court since 2002, even though it is entitled to do so. Expanding interaction with the International Criminal Court through participation in the Assembly of States Parties and the 2010 Review Conference will permit the United States to present its views concerning the International Criminal Court and will allow for serious consideration by other countries of those remaining US

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concerns about the Court. This will allow the United States to have maximum participation in important issues facing the ICC in the future and will be a step towards re-establishing worldwide credibility of a strong commitment of the United States towards the rule of law.

4. Summary of Minority Views

The proposed resolution could be opposed on the grounds that the ICC may eventually behave in a reckless and politically-motivated way, as its detractors have feared (even if it has not yet done so). Second, the US government has objected to the ICC's potential to exercise jurisdiction of citizens of countries that have not ratified the Rome Statute, and it could be argued that the US should not support the Court until the Rome Statute is amended to prohibit this. Finally, it could be argued that ASPA is a necessary bulwark against the ICC and should remain in force and be strictly followed so as to stop all cooperation with the ICC.