



# NATIONAL SECURITY LAW REPORT

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## **Enforcing ICC Arrest Warrants**

**By Keith A. Petty**

*(Captain, U.S. Army Judge Advocate General's Corps, Prosecutor, Office of Military Commissions.)*

On March 4, 2009 the International Criminal Court (ICC) issued an arrest warrant for Sudanese President Omar Bashir. Executing Bashir's arrest warrant will be a major step toward punishment and prevention of the Darfur atrocities, which have claimed over 300,000 lives. Enforcement in international criminal law, however, is notoriously difficult. The question becomes whether the international community is willing to use armed force to apprehend Bashir if other measures fail.

Initially, even though enforcement is difficult, armed force is not the only effective mechanism to apprehend heads of State suspected of crimes within the jurisdiction of the Court. Nonetheless, the use of force in these circumstances will not run afoul of the general prohibition of the use of force or the principles of the ICC. As such, the ICC has the potential to become an effective U.S. national security tool, rather than being used as a political weapon, as critics charge.

I am delighted to engage in this discussion with Professor Tung Yin and thankful to Professor Greg McNeal and the American Bar Association for providing this forum. It is my hope that this discussion, and others like it, will contribute to policies that serve the complementary goals of punishment and prevention.

### **Enforcement Mechanisms and So-called "Toothless Warrants"**

Sudan's unwillingness to cooperate with Bashir's arrest warrant is consistent with historical difficulties in bringing high profile war criminals, particularly heads of State, to justice. Bashir's defiance was preceded by Serbia's Slobodan Milosevic, who was indicted by the International Criminal Tribunal for the Former Yugoslavia in May 1999 and was not arrested by Serb police until April 1, 2001. Similarly, Liberia's Charles Taylor remained in exile in Nigeria, avoiding apprehension for three years after the Special Court for Sierra Leone issued an indictment and arrest warrant on June 4, 2003.

Even though the ICC does not have the authority to order the forcible removal of a sitting head of State, its enforcement provisions are not "toothless." The Court relies on the cooperation of member States in order to enforce arrest warrants and other Court orders. Article 86 of the Rome Statute obligates States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." Moreover, it is the responsibility of the custodial State, in this instance the Republic of Sudan, to comply with requests for arrest and surrender under Article 89. The Prosecutor of the ICC, Luis Moreno-Ocampo, framed the issue when he stated, "We have no police and no army, but we have legitimacy." It is noteworthy that the accused that have been successfully surrendered to the Court were arrested by the custodial States, proving that the cooperation regime works.

States can act unilaterally or in cooperation with intergovernmental organizations. For example, after the ICC issued arrest warrants for Sudanese officials Ahmad Harun and Ali Kushayb, an Interpol red notice was disseminated worldwide. Additionally, the African Union force (AMIS) in Sudan is an organization that could enter into an agreement to enforce ICC arrest warrants pursuant to Article 87 of the Rome Statute.

The United Nations could also provide invaluable assistance to the ICC. In fact, Security Council Reso-

lution (S.C. Res.) 1593 provides that “the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor... [and] urges all States and concerned regional and other international organizations to cooperate fully.”

Sudan’s unwillingness to cooperate with the Court is a clear breach of its legal obligations. As a result, the Security Council could rely on non-military Chapter VII powers, including the use of economic sanctions under Article 41 of the Charter. Unfortunately, such measures will in all likelihood fail in light of Bashir’s flagrant disregard of the Court’s order by attending the Arab League Summit in Qatar in March 2009. This is surpassed in audaciousness only by the League’s joint statement rejecting the ICC’s arrest warrant. The Security Council might be advised to supplement Resolution 1593 with a requirement that all member States cooperate with the ICC on the Darfur situation, rather than merely “urging” them to do so.

Multinational forces have also played a role in executing arrest warrants for international criminal tribunals. NATO’s IFOR/SFOR missions proved instrumental to the arrest of suspects indicted by the ICTY. These actions are reinforced by several key decisions of the ICTY, ruling that international organizations must comply with binding orders of the Tribunal.

Similarly, S.C. Res. 1638 expanded the U.N. Mission in Liberia (UNMIL) to “apprehend and detain former president Charles Taylor... for prosecution before the Special Court for Sierra Leone.” Charles Taylor was later arrested by Nigerian officials when he tried to flee the country in March 2006, U.N. peacekeepers subsequently transferred him to Freetown.

The ICC might request that U.N. peacekeepers in the region apprehend Bashir. Utilizing its Article 42 authority, the Security Council could expand the mandate of the United Nations Mission to Sudan (UNMIS) to include enforcement of arrest warrants. UNMIS previously had its mandate extended by S.C. Res. 1706 from operations in southern Sudan to include Darfur. The hybrid U.N.-African Union force authorized by S.C. Res. 1769 could similarly be authorized to execute outstanding ICC arrest warrants. There is no legal obstacle to doing so, only the lack of political will.

### **Using Force as a Last Resort to Prevent Atrocity Crimes**

Authorizing the use of force is certainly a measure of last resort. Enforcing the arrest of President Bashir through force can be justified on the grounds of maintaining international peace and security and States’ obligations under the responsibility to protect. There is no conflict between fulfilling these duties and the ICC’s mandate to punish perpetrators of atrocity crimes and also to prevent such crimes.

Assuming other measures fail, the use of force could be authorized under Article 42 of the U.N. Charter if the Security Council determines that the continued refusal of Sudan to execute Bashir’s arrest warrant is a threat to international peace and security. Even in the case of a non-State Party, such as the Sudan, the Security Council may compel a custodial State to turn over a suspect upon the request of the ICC.

States could justify using force to arrest Bashir as part of a responsibility to protect, even without U.N. authorization. The general prohibition against coercive force must be weighed against the international community’s responsibility to protect victims of genocide, crimes against humanity and war crimes. Enforcing the warrant of arrest under this theory must be linked to the necessity of ending the humanitarian catastrophe that has befallen Darfur.

Ultimately, the ICC has little control over the enforcement mechanism. It is up to the will of the international

community, particularly the Assembly of States Parties, to enforce arrest warrants and cooperate to come up with resolutions short of armed attack to arrest heads of State accused of atrocity crimes.

### **The ICC is a U.S. National Security Priority**

In light of the ICC's limited ability to order cooperation, critics maintain that the Court will be used as a political weapon. This argument is tenuous at best. So far there is no indication that the Court will pursue objectives beyond justice. The fear of "frivolous and politicized" ICC investigations and prosecutions was expressed by the United States at the Rome Conference in 1998. This view overlooks the check on the Prosecutor prior to initiating investigations *proprio motu*. Specifically, the Pre-Trial Chamber must authorize investigations initiated by the Prosecutor under Article 15. Moreover, the rule of complementarity gives States the priority to investigate and prosecute alleged crimes either committed by one of its nationals or committed by it on the territory of a member State. All that is required is an "amendment to U.S. law to permit full domestic U.S. prosecution of crimes within the jurisdiction of the Court" as recommended by the American Society of International Law Task Force report on the ICC of March 2009.

The United States, and other non-State Parties, can avoid fears of a "renegade" Office of the Prosecutor by signing and ratifying the Rome Statute. State Parties have the opportunity to participate in certain aspects of the Court's decisions and direction, including which cases will go forward. Furthermore, the ICC and its enforcement mechanisms would relieve certain burdens from the United States. Sudan is a perfect example.

The United States was either unwilling or unable to take action in Sudan despite the ongoing genocide, possibly because of its focus on two resource-intensive wars. It was the international community that belatedly came together to face this issue. The ICC – with the support of the Assembly of States Parties, the U.N. and its peacekeeping forces, African forces, and numerous Non-Governmental Organizations – will be an invaluable ally in U.S. efforts to combat crimes of international concern, including those allegedly committed by President Bashir in Darfur. The benefits of utilizing the enforcement mechanisms available to the ICC are obvious. The U.S. will not have to foot the bill alone or waste diplomatic capital by taking action unilaterally.

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### **TUNG YIN RESPONDS**

In his thoughtful opening essay, Captain Petty makes a strong normative case for the International Criminal Court. In fact, I do not disagree that the ICC could relieve the United States of the burden of acting as the world's police officer. At the same time, however, there are important qualifications in Captain Petty's essay that ultimately highlight the reasons to question the ICC's current relevance. Put another way, it is one thing to make a case that the ICC *should* have jurisdiction over certain international defendants, such as Omar Bashir; it is an altogether different thing to make the case that the ICC *will* be able to execute that jurisdiction.

As Captain Petty recognizes, President Bashir – and Sudan – has openly defied the ICC arrest warrant, and there is little reason to believe that Sudan will comply with its international obligations so long as he remains in power. As I note in my essay (Page 5) this defiance is sadly consistent with the history of international criminal tribunals.

What about bringing in other States? Captain Petty suggests that the United Nations Security Council should require, rather than merely urge, all member States to cooperate with the ICC. Seeing as how

the ICC treaty itself requires that signatories “cooperate fully with the Court,” however, it is hard to see what an additional U.N.S.C. resolution could realistically accomplish.

Captain Petty does concede that alternative measures, such as authorizing United Nations/African Union peacekeepers to enforce the arrest warrant or employing coercive force (including military force), depend on “the will of the international community . . .” and are thus out of the ICC’s hands. I do not dispute that the United Nations Security Council *could* authorize the use of military force to apprehend President Bashir; I question whether it *would* do so, particularly given the existence of China’s and Russia’s veto power. As to whether States could justify employing military force to enforce the arrest warrant even in the absence of U.N. Security Council authorization, I again do not doubt that there could be a legal justification under international law for doing so (though the consensus seems to be that the U.S. led military intervention in Kosovo violated international law despite the atrocities being committed there). But given the extremely negative response to the U.S.-led invasion of Iraq in 2003, notwithstanding Saddam Hussein’s rampant violations of international law, I find it difficult to believe that States would employ their own military in Sudan absent U.N. Security Council authorization.

In conclusion, if States, including but not limited to the United States, took seriously Captain Petty’s arguments and demonstrated the political will that they currently lack, then the ICC would not be toothless.

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## **Enforcing ICC Arrest Warrants**

### **By Tung Yin**

*(Professor of Law and Claire Ferguson Carlson Faculty Fellow at The University of Iowa College of Law. Beginning in the Fall of 2009, he will be Professor of Law at Lewis & Clark Law School. His research since 2002 has focused primarily on domestic legal and constitutional issues arising out of the armed conflict against al Qaeda.)*

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On March 4, 2009, the Prosecutor for the International Criminal Court (ICC) issued an arrest warrant for Sudanese President Omar Hassan Ahmad al-Bashir for war crimes and crimes against humanity. Considering the ICC’s charge to prosecute “the most serious crimes of concern to the international community,” one might have expected al-Bashir to have been concerned, at the least about the severity of the indictment and the potential consequences of conviction. Publicly, however, al-Bashir dismissed the arrest warrant as worthless, and not surprisingly, the Sudanese government has refused either to execute the warrant or to turn al-Bashir over to the ICC. One could use this situation to caricature the ICC as a toothless, clawless lion, roaring impotently into the wind, while its prey laughs from a position of safety. Would there be any validity to such a caricature?

After many decades of debate, the ICC came into existence in 2002 to provide a permanent, as opposed to ad hoc, forum for the prosecution of grave violations of international law. It is intended to step in when nations with primary criminal jurisdiction refuse to prosecute those violations. The problem that the al-Bashir arrest warrant demonstrates, however, is that when the alleged perpetrator is a head of state, not only is the nation going to decline to prosecute, it is also not going to turn that head of state over to the ICC for prosecution.

Of course, it is not impossible to gain custody over international defendants to bring them to trial. Between the end of World War II and mid-2003, there were five international military tribunals convened to prosecute crimes against peace, war crimes, and crimes against humanity: Nuremberg, Tokyo, Former Yugoslavia, Rwanda, and the hybrid Special Court in Sierra Leone. Although the circumstances of the international tribunals vary, it is instructive to consider how they obtained physical custody over their

defendants.

The Nuremberg and Tokyo trials were convened to prosecute German and Japanese leaders for war crimes committed during World War II, including the initiation of a war of aggression. The Allied prosecutors, led by Supreme Court Justice Robert Jackson, had custody over the defendants because Germany and Japan had surrendered unconditionally and they had been conquered and occupied by the Allies.

The International Criminal Tribunal for the Former Yugoslavia indicted 75 defendants for war crimes committed during the Serb-Croat conflict in the early to mid-1990s, but almost a quarter of those indicted remain at large. The highest profile defendant, former President Slobodan Milosevic, was brought to trial only after one of the Yugoslavian republics (Serbia) extradited Milosevic in defiance of court order suspending extradition and contrary to the will of another republic (Montenegro), probably as the result of intense economic pressure by Western nations. More to the point, Milosevic was arrested only after he had lost his campaign for re-election in 2000, which in part was due to the military defeat of his Serbian army by NATO forces during the Kosovo conflict.

The International Criminal Tribunal for Rwanda indicted over 70 defendants for a three month genocidal rampage in 1994 in which the Hutu majority methodically massacred as many as half a million members of the Tutsi minority (as well as Hutu sympathizers). Key defendants such as former Prime Minister Jean Kambanda and former chief of staff of the army Augustin Bizimungu were captured after Tutsi-led troops eventually drove the Hutus out of Rwanda. Kambanda fled to Kenya and was caught in 1997. Bizimungu fled to the Congo, attempted to take back Rwanda, and failing, escaped to Angola, where he was finally arrested in August 2002.

Finally, the Special Court for Sierra Leone obtained custody over its defendants, accused of war crimes committed during that country's 1999 civil war, because the warring parties reached the so-called Lome Peace Accord in 1999, which included a controversial amnesty provision granting "absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement." See Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone, July 7, 1999, at art. IX. Due in part to dissatisfaction with the amnesty provision, the United Nations considered creating an international tribunal to prosecute war crimes, and ultimately the U.N. and Sierra Leone agreed to create a Special Court. With respect to amnesty, the U.N. took the position that "amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law." Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, U.N. Doc. S/2000/915, at par. 22 (2000).

Examining the circumstances behind these five international tribunals, we find two instances where the defendants were political leaders of nations that had surrendered unconditionally (Japanese and German leaders), one where the defendant lost power in a fractured republic (Milosevic), one where an internal revolution ousted the defendants from power and forced them to flee to foreign nations, where they were apprehended (Bizimungu and Kambanda), and one where the defendants may have thought that they had amnesty (the Rebel United Front members). I do not mean to imply that these are the *only* circumstances in which an international tribunal could acquire custody over a defendant, but the fact remains that there is yet to be an international trial of a political leader for war crimes where that leader remains in power.

If it takes military force to overthrow a head of state who is one of the worst violators of international law and to bring that person to justice, is it worth it? The generally negative international reaction to the 2003 U.S.

led invasion of Iraq suggests that the answer may well be “no,” even though that invasion ultimately resulted in the apprehension, prosecution (in an Iraqi court), and conviction of Saddam Hussein.

To be sure, the bulk of Saddam’s violations of international law occurred well before 2003, but it is a lengthy list: aggressive wars against Iran in 1980 and Kuwait in 1990 in violation of United Nations Charter Article 2(4); use of chemical weapons and phosphorus shells; attacks targeting cities; and mass executions. A declassified Pentagon report revealed that U.S. forces found more than twenty torture chambers in Kuwait City where victims were beaten, electrocuted, or dumped into acid vats.

So why did Saddam escape prosecution following the 1991 Gulf War? One reason was that the cost of capturing Saddam to stand trial back in 1991 would have been too high for the international community to bear despite the grievous losses inflicted by the U.S.-led coalition. After Iraq invaded Kuwait in 1990, a U.S.-led coalition attacked Iraq in 1991 and ejected the Iraqi military from Kuwait. United Nations Security Council Resolution 687, which effected a cease-fire in the 1991 Gulf War, imposed further sanctions on Iraq, including reparations “for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.” Resolution 687 also required Iraq to disarm and refrain from developing or possessing weapons of mass destruction, as well as ballistic missiles with ranges greater than 150 miles (which could be used offensively).

It seems unlikely that Saddam would have agreed to the cease-fire if one condition had been that he stood trial for crimes against peace, war crimes, and crimes against humanity. Therefore, in order to prosecute Saddam, the Coalition would have had to continue the war, invade Iraq, slaughter more Iraqi soldiers (and civilians, no doubt) in order to capture Saddam. From a utilitarian perspective, it seems hard to justify the additional casualties that would have resulted from such an invasion simply to bring Saddam to trial for invading Kuwait

This is not to say that there is anything unreasonable about deciding it was not worth it to pursue Saddam back in 1991, especially in light of the terms of the cease-fire. However, this argument could always be made in the instance of a sitting political leader who is accused of committing war crimes: it just is not worth a war to get the person, even if these are the very people that the ICC should be prosecuting.

I close this essay with an excerpt from President Teddy Roosevelt’s Corollary to the Monroe Doctrine: “Generally peace tells for righteousness; but if there is conflict between the two, then our fealty is due first to the cause of righteousness. Unrighteous wars are common, and unrighteous peace is rare; but both should be shunned.” With the al-Bashirs of the world, the international community may have to choose between peace or justice; and if it chooses justice, the ICC may be little more than a toothless, clawless lion.

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### **KEITH PETTY RESPONDS**

Professor Yin’s essay relies on two basic premises. First, he argues that the negative reaction to the U.S.-led invasion of Iraq is evidence that it may not be “worth it” to use force to remove leaders accused of atrocity crimes. Second, he offers readers the false choice of peace or justice in dealing with war criminals.

The comparison between Saddam Hussein and Omar al-Bashir is misleading. Clearly, Saddam Hussein committed crimes while reigning over pre-invasion Iraq, and, like Bashir, he was a brutal dictator. However, as Professor Yin indicates, Hussein committed his crimes well before the 2003 invasion. In

contrast, the crimes that Bashir is charged with continue today. As I explain in my essay, the legal justification to use force to execute Bashir's arrest warrant is strengthened by the need to bring an end to the ongoing humanitarian crisis in Darfur. There was no similar legal justification prior to the invasion of Iraq. Rather, the operation was based on preemptive self-defense as well as enforcing a series of Security Council resolutions, none of which authorized the use of force.

Moreover, Saddam Hussein did not have a warrant for his arrest by an international criminal tribunal at the time of his forcible removal from power. The negative international reaction to the invasion of Iraq was due to a perceived lack of legitimacy. The indictment and arrest warrant for President Bashir lend moral and legal authority to any actions taken to secure his arrest. Therefore, if the use of force is required to remove a head of state accused of genocide, crimes against humanity, or war crimes, one should ask whether the proposed military action is legitimate, not "is it worth it?"

Besides highlighting the difficulties in enforcing ICC arrest warrants, Professor Yin suggests that we may need to sacrifice justice in the pursuit of peace, or alternatively that justice will be unattainable due to weak ICC enforcement mechanisms. It is true that peace has been achieved on several occasions through amnesty or exile agreements for violating regime elites. This peace, however, comes at a high price. Leading commentators agree that justice must be provided if any peace is to last. Additionally, failure to prosecute leaders committing grave abuses sends a signal to others that they can commit the most heinous crimes with impunity. Echoing an infamous remark made by Adolf Hitler, President Bashir must be thinking, "Who after all will remember Darfur?"

That the ICC would be unable to obtain justice, as Professor Yin suggests, is a failure not of the enforcement regime, but of imagination. As I propose in my essay, the use of armed force to arrest Bashir is the last of several options to enforce the ICC warrant. Other enforcement mechanisms available to the ICC include State cooperation, support from inter-governmental organizations such as Interpol, non-military Chapter VII powers available to the Security Council, and the use of multi-national forces in a law enforcement capacity. With these possibilities in mind, the question becomes "How can we achieve it?"

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## **National Security and the International Criminal Court**

**By Jason Dominguez-Meyer**

*(Assistant Professor of Law at Thurgood Marshall School of Law, formerly served at the ICTY. ABA sections on International Law and Criminal Justice as well as the House of Delegates have passed a resolution urging the U.S. to expand interaction with the ICC.)*

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Joining the ICC carries great potential costs and benefits to U.S. security and is thus an important act, worthy of great scrutiny. The national security benefits take the form of disincentives for aggressors who would commit crimes covered by the ICC, training grounds for nations to learn to cooperate in stopping those crimes, and contributions to international law. The costs could include politically motivated prosecutions and U.S. defensive military action reduction.

National security benefits range from the ICC's deterrence of genocide, crimes against humanity, war crimes, and (possibly one day) aggression (hereinafter "ICC crimes"). To be sure, prosecution is less effective than preventative military deterrence, especially where the aggressor is insulated or does not care about political costs. However, prosecution costs less, kills fewer, and is to be used with, rather than in lieu of, military action. Measuring the deterrent effect is hard (uncommitted crimes are hardly countable) but Mile Mrksic, sentenced to a 20 year prison term by the International Criminal Tribunal for

the former Yugoslavia (ICTY), Haradin Bala (13 years), Stanislav Galic (life imprisonment) and some one hundred convicted war criminals will not soon be menacing the former Yugoslavia. Ad hoc international courts have also investigated and prosecuted crimes in Rwanda, Sierra Leone, East Timor, Cambodia and Lebanon, making real the political cost of committing serious humanitarian crime and putting despots on notice.

On those occasions, teams of military specialists, legal experts, judges, and diplomats from dozens of countries have worked together successfully. When nations cooperate to prosecute ICC crimes, as far from the U.S. as central Africa and East Timor, national security benefits because networks are formed, knowledge, skills and technologies increase, and U.S. resources are amplified. International courts are training grounds for cooperation. National security and humanitarian law experts learn how to achieve goals with shared limited resources. Modern threats to security in the U.S. are no longer iconic overseas battalions and tanks. Reliance on allies for intelligence and direct action is necessary. The U.S. cannot finance and staff a world police force, even if that role was once desirable. It needs the cooperation of many nations to ferret out enemies, prevent terrorism or fight necessary wars.

Mutual cooperation is contingent upon proper U.S. standing in the international community. Under the reciprocity principle of international relations, the U.S. must give to others in order to receive in return and achieve mutual cooperation. Dominance may bring order, but it also induces oppression and resentment. Giving, in the international relations context, includes acting with good faith in entering into treaties and implementing them fully in a timely fashion. The U.S. took part in the third United Nations Conference on the Law of the Sea from 1973 to 1982 and in later negotiations from 1990 to 1994, when the Convention on the Law of the Sea (UNCLOS) came into force. The U.S. has signed but not ratified UNCLOS. Other treaties have been signed and ratified, but some or all of their provisions are viewed as non-self executing and thus unenforceable. *E.g.*, Vienna Convention on Consular Relations, see *Medellin v Texas*, 128 S. Ct. 1346 (2008); *also*, International Covenant on Civil and Political Right, *see*, Jordan Paust, *International Law as Law of the United States* 361-376 (2003). If the U.S. fails to be a fair reciprocating treaty partner, a downward spiral may result as each side punishes the other, tit-for-tat.

The way to ensure that international courts appropriately work out important legal concepts such as self-defense is to staff them. These courts constantly issue judgments. The U.S. voice is not amply represented at the ICC if it is not a member state. American jurists Theodor Meron, Gabrielle Kirk McDonald, Patricia Wald, Stephen Schwebel and others have had great influence on the development of law and policy at the ICTY and the ICJ, as have U.S. parties and their lawyers. The common law prosecutors at the ICTY greatly impacted ICTY law and procedures. International court employees develop relationships with each other and, drawn

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from the ranks of government lawyers, diplomats, and military experts, they shape the law and procedures at the courts and will help shape policy and opinion upon return to their numerous home countries.

The Rome Statute of the ICC has been ratified by 108 countries. There is a precedent for the U.S. participating in an international court of this scale and importance: the U.S. helped establish and joined the International Court of Justice (ICJ) sixty-four years ago. After twenty-five years of operation, the U.S. Senate passed five resolutions advising President Nixon to increase use of the ICJ. 69 Am.J. Int'l L. 246 (1975). These resolutions, passed thirty-five years ago (May 20, 1974) support the notion that international adjudication was not simply a 1945 trend. In 1975, the Senate called for the U.S. to resort to the ICJ to settle territorial disputes and disputes arising out of international agreements. It asked Nixon to take measures to expand the range of international bodies able to request advisory opinions, maximize the use of UN Charter Chapter VI, and to study ways to grant individuals, corporations, and nongovernmental organizations greater access to the ICJ and other international courts on questions of international law. These resolutions were passed nearly unanimously. Although some decisions have worked out poorly for the U.S. (in national security, *see, Nicar. v. U.S.*, Merits, 1986 ICJ REP. 14 (Judgment of June 27)), the U.S. has found ways diplomatically and pragmatically to conduct its foreign policy.

Turning to potential costs, some have voiced concern that the ICC could be used for illegitimate prosecutions. The ICC, a court of last resort, cannot prosecute subjects whom the U.S. has already prosecuted, under the principle of complementarity, which allows the U.S. to claim jurisdiction over its subjects unless the U.S. is unwilling or unable to prosecute. The contours of these two elements have not been traced; no states have formally challenged admissibility at the ICC. Complementarity is another key concept that the U.S. should help develop. Even assuming the ICC applies "unwilling" and "unable" narrowly, complementarity alone would not block prosecution of an act that the U.S. declines to investigate. Law can always be misinterpreted; scrutinizing procedural integrity and members' intentions at the ICC will reduce misinterpretation and enhance success.

ICC Article 98 agreements are an external safeguard against misuse of the ICC. They will protect the bulk of U.S. military forces serving overseas from unwanted ICC prosecution. Article 98 allows bilateral agreements, such as status of forces agreements, that prohibit ICC signatories from surrendering U.S. nationals to the ICC. The extent of the protection (to non-military/government personnel, for example) and other questions of scope and applicability have not been litigated, but to the extent the U.S. has negotiated such agreements in a timely fashion, military and government officials are covered. Over one hundred such agreements have been signed.

It is impossible to predict or guarantee that the ICC would not one day take action contrary to the interests of the U.S., even with heavy ICC participation by NATO members or other apt allies. The wrong person in the wrong place could cause disarray. The question then becomes, does being a member state make it more dif-

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difficult to remedy? If the ICC acts counter to U.S. interests, the U.S. has many diplomatic and practical options at its disposal, including withdrawal and non-cooperation. The best strategy to curtail right or wrong ICC prosecution is scrupulous avoidance of ICC crimes. Strict adherence to the rule of law also helps democracy building. Given the profusion of court rulings against the Bush administration related to Guantanamo Bay, staying lawful is easier said than done. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), & *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

The executive branch has struggled to balance constitutional rights and national security. Preparing for membership in the ICC or to show the world we can police ourselves as well as we police it, the U.S. should set up a body to investigate U.S. subjects accused of ICC crimes. Done properly, this would prevent not only ICC prosecutions, but third country prosecutions. Spain opened an investigation against former administration officials David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes and John Yoo. Spain advised the U.S. that they would suspend it if at any point the U.S. was to start its own investigation. Spain has thirteen cases against eight countries for ICC crimes. Belgium aggressively exercised universal jurisdiction (until pressure from the U.S. in 2003) and cases against Americans officials were filed in Germany, but later dismissed. If a grand jury, military or civilian commission, or like body had investigated and found insufficient evidence against the above-name officials, neither the ICC nor Spain could exercise jurisdiction against them. A legislative fix that adds a body to perform this perfunctory investigation would defeat the unwilling and unable test of ICC jurisdiction. One international organization applying humanitarian law predictably and uniformly is an improvement upon the current fractured landscape, where sovereign states over whom we have no influence apply it.

Were treaty and political safeguards to fail to prevent politically-motivated prosecutions at the ICC, the U.S. could cut back military actions (humanitarian intervention or collective defense) to avoid putting its armed forces at risk. However, inaction could result in a failed state, civilian casualties, genocide, or a myriad of violent outcomes that have been witnessed recently absent interventions. U.S. action against the Taliban and al Qaeda in Pakistan and Afghanistan, both places with egregious human rights and failing statehood troubles, has been criticized. These crises call for mutual cooperation. This cooperation could be made easier, according to the reciprocity principle, by the U.S. joining the ICC.

The Obama administration is currently conducting an interagency policy review on the ICC. Until the administration completes the review, it should participate in the ICC to increase national security through mutual cooperation and law making. As a signatory to the Final Act of the Rome Conference, the U.S. is entitled to participate as a non-voting observer at the meetings of the Assembly of State Parties, the governing body of the ICC. The annual meeting takes place November 18-26, 2009 in the Hague, Netherlands. The U.S. should participate in this meeting (as do non-parties China and Russia) as well as prepare for the Review Conference in 2010, which includes an important discussion on the crime of aggression.

There are benefits and drawbacks to joining the ICC. Depending on one's international relations beliefs, the benefits of joining the ICC may or may not outweigh the costs. Either way, discussion of these issues is of paramount importance to U.S. national security.

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## The Standing Committee Remembers Judge Robinson O. Everett

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The Standing Committee mourns the loss of Robinson O. Everett, Counselor to the Standing Committee on Law and National Security, Duke University Professor of Law and Senior Judge of the United States Court of Appeals for the Armed Forces. Judge Everett passed away during his sleep on June 12, 2009. He was 81.

He was one of the country's most prominent and respected authorities on military justice. He served on the U.S. Court of Appeals for the Armed Forces for 10 years as chief judge. His work as counsel to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary in the 1960s helped lead to legislation that modernized the U.S. military court system.



In 2000, Judge Everett received The Standing Committee's Morris I. Leibman

Award in Law and National Security for his numerous contributions and achievements, his citation read:

For over four decades, Judge Robinson Everett's impact on law and national security affairs has been unparalleled. A longtime professor of law at Duke University, he pioneered courses in military and national security law, providing models for dozens of courses now widely taught at the nation's law schools. Together, his authoritative textbooks and ground breaking work in crafting the Military Justice Act of 1968 have created an invaluable legal foundation to support and ensure military justice for the armed forces. For ten years, as Chief Judge, later senior judge, U.S. Court of Military Appeals, Judge Robinson's judicial opinions have expanded this base to create a body of law widely credited for restoring the essential respect and cooperation between the Court and the uniformed services. Building on achievements, in 1993 Judge Everett founded the highly regarded Center on Law, Ethics and National Security at Duke University. Deservedly, whether as law professor, judge, author or congressional consultant, Robinson Everett's many contributions have received a continuous round of richly deserved accolades. Yet in all this, Judge Everett remains humble and unassuming, someone whose only comment would be that he "tried to do his best" --for students, for colleagues, for profession, and for country, but most of all, for his family -- a loving wife and three sons. It is an honor for the Standing Committee that Judge Everett has agreed to accept the Morris I. Leibman Award in Law and National Security in acknowledgment of his life's work.

Robinson Everett was born on March 18, 1928. He graduated from high school in 1943, attended Phillips Exeter Academy for one year, and in June 1944 enrolled at the University of North Carolina. Later, he transferred to Harvard University, where he was a Wendell Scholar and received his AB magna cum laude in 1947, at the age of 19. In 1950, Judge Everett graduated magna cum laude from Harvard Law School, where he had served two years on the Harvard Law Review. He began teaching at Duke Law School shortly after graduating from law school; at 22 years old, he was the youngest person ever to teach at Duke Law. He became a full-time member of the faculty in 1957 and gained tenure in 1967. In 1959, he completed a master's of law degree at Duke.

In 1951, Judge Everett joined the U.S. Air Force. He served on active duty for two years during the Korean War in the Judge Advocate General's Department. Upon his release from active duty, he became a commissioner of the U.S. Court of Military Appeals. He was a member of the Air Force Reserve from the day he enlisted as a private in 1951 until April 1978, when he retired as a colonel.

In 1956 he published a textbook, *Military Justice in the Armed Forces of the United States*, and throughout his career he wrote numerous articles on military law, criminal procedure, evidence, and other legal topics. From 1961 to 1964 he served part-time as counsel to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, and from 1964 to 1966 he was a consultant for that subcommittee. During this period he participated actively in extensive studies and hearings that led to the enactment of the Military Justice Act of 1968, which created the position of military judge and formalized the military court system. In February 1980, President Jimmy Carter nominated Judge Everett to the U.S. Court of Military Appeals. He served as Chief Judge from 1980 to 1990, when he assumed senior status.

Judge Everett founded the Duke University Law School's Center on Law, Ethics, and National Security to support and encourage teaching and scholarly research on national security law topics and to host conferences and seminars in the national security field. His legal scholarship addresses issues relating to military justice, criminal procedure and redistricting, among other topics.

With myriad accomplishments to choose from, Judge Everett consistently stated that his proudest moment was persuading his wife, Lynn McGregor Everett, to marry him in 1966. He is survived by Lynn and their three sons, Rob Jr., Greg, and Luke.

### **Don't miss out – Newsletter to go Electronic!**

*Are you also receiving The National Security Law Report electronically? This Fall we will switch to only electronic copies.*

*Have you missed invitations to exciting breakfast programs and other events?*

*Are you missing out on national security career opportunities and publications?*

**If you have not yet sent us your email address, the answers to the above questions may be yes.**

**Visit <http://www.abanet.org/natsecurity> and update your information today!**

**UPCOMING EVENTS*****During the ABA Annual Meeting:***

Friday, July 31, 2009

3:45 p.m. to 5:15 p.m.

Hyatt Regency Chicago

151 East Wacker Drive, Chicago, IL

(Columbus Hall CD, Gold Level, East Tower)

***President Obama's Detainee Policies:  
Views from Inside and Out***

Moderator: Professor Harvey Rishikof

Saturday, August 1, 2009

8:30 a.m. to 10:00 a.m.

Hyatt Regency Chicago

(Water Tower, Bronze Level, West Tower)

***National Security Threats in Cyberspace***

Moderator: Stewart A. Baker

Saturday, August 1, 2009

10:45 a.m. to 12:15 p.m.

Chicago Marriott,

540 North Michigan Avenue, Chicago, IL

(Purdue/Wisconsin Room, 6th floor)

***Careers in National Security Law***

Moderator: Andrew Borene

More information can be found at [www.abanet.org/natsecurity](http://www.abanet.org/natsecurity)***This Fall***

Thursday, September 10, 2009

University Club, Washington D.C.

Registration: [www.abanet.org/natsecurity](http://www.abanet.org/natsecurity)***Breakfast Program featuring:******Jeh Johnson******General Counsel******U.S. Department of Defense***

November 12 and 13, 2009

Renaissance Hotel

999 Ninth Street, NW, Washington, DC

(Opening reception, Wed., November 11th)

Registration and hotel information:

[www.abanet.org/natsecurity](http://www.abanet.org/natsecurity)***19th Annual Review of the Field of  
National Security Law***

**American Bar Association Standing Committee on Law and National Security  
2009 National Security Law Student Writing Competition  
“Advancing Liberty in the 21<sup>st</sup> Century”**

**Topic:** 2009 marks the bicentennial of the birth of Abraham Lincoln, regarded by many as our nation’s greatest and most eloquent president. Lincoln, who devoted much of his adult life to the practice of law, was the quintessential American lawyer-president. Lincoln’s “Legacy of Liberty” lives on today. But few remember that during the early days of the civil war it was Lincoln who suspended citizen’s habeas corpus rights and had begun limited military arrests in an effort to keep Maryland from seceding from the union. The resulting clash between the administration, civilian courts and military leaders during that time stirred great public debate and established case law regarding war time executive powers that remained in effect for over 140 years. This year’s topic: *Advancing Liberty in the 21<sup>st</sup> Century While Preserving National Security*, seeks to encourage scholarly debate regarding current issues related to detaining and prosecuting terrorists; the impact of the nation’s immigration policy on National Security; the status of international treaties and their impact on National Security; as well as the many issues related to the area of surveillance and intelligence gathering. **Students are encouraged to consider the full range of topics related to “Liberty.” All papers should include an analysis of the selected topic/issue and suggestions for reform.**

**Eligibility:** The competition is open to all students attending an ABA accredited law school between Nov 1, 2008 and August 15, 2009. Only original and previously unpublished papers are eligible. Papers prepared for law school credit are eligible provided they are original work. Jointly authored papers are not eligible. Entrants can have a faculty member or practicing lawyer review and critique their work, but the submission must be the student’s own work product. The name of the reviewing professor or lawyer must be noted on the entry cover page. Committee members, staff, and selection committee members shall not participate in the contest. Only one essay may be submitted per entrant.

**Format:** Essays **may not** exceed 4,000 words including title and citations. Essays over 4,000 words will be rejected. The text of the essay must be double-spaced, with twelve-point Times New Roman font and one-inch margins. Entries should reflect the style of ABA Standing Committee on Law and National Security’s *National Security Law Report* articles rather than law review style. Entrants are encouraged to review past copies of the Report available at [www.abanet.org/natsecurity](http://www.abanet.org/natsecurity) prior to drafting their submissions. Citations must be embedded in text **not footnotes or endnotes**. Citations must conform with the Court Documents and Legal Memoranda style (Bluepages) of *The Bluebook: Uniform System of Citation*.

**Entry Procedure:** Submissions must be postmarked no later than **August 15, 2009** and mailed to: American Bar Association, Standing Committee on Law and National Security, 740 15th Street NW, Washington, DC 20005; or sent via email to [hmcMahon@staff.abanet.org](mailto:hmcMahon@staff.abanet.org). Each submission must include a **separate cover page** with the entrant’s name, law school, year of study, mailing and email address, and phone number. Following the cover page, the contestant must include an executive summary, no more than 200 words, single spaced, providing a brief overview of their paper. The contestant’s name and other identifying markings, such as school name, **may not** appear on any copy of the submitted essay or the executive summary. Winner will be notified by **September 25, 2009**. By submitting an entry in this contest, the entrant grants the ABA and the ABA Standing Committee on Law and National Security permission to edit and publish the entry in the Committee’s *National Security Law Report*. Please direct any questions about the contest to the Committee Staff Director at [hmcMahon@staff.abanet.org](mailto:hmcMahon@staff.abanet.org).

**Judging:** The winning entry will contain a clearly written original analysis of a national security law issue that is substantively accurate and persuasive, supported by citations. The entries will be judged anonymously by members of the ABA Standing Committee on Law and National Security and the Advisory Committee.

**Prize:** The winner will receive a cash prize and free registration to the November 2009 Annual Review of the Field of National Security Law Conference. Registration for the conference will include reimbursement for travel, housing, and per diem up to **\$500**. Additionally, an edited version of the winning article will be published in the *National Security Law Report*. Winner must be present at the Annual Review Conference, which will be held in Washington, DC, likely the second week in November, to receive the award.

## In Case You Missed It ...

*Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of The University of Texas School of Law maintains a listserv for professionals and academics working in this area. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at [rchesney@law.utexas.edu](mailto:rchesney@law.utexas.edu).*

**“In Case You Missed It...,”** featuring selected posts from Professor Chesney’s listserv, is a recurring feature of The National Security Law Report.

### **Ashcroft v. Iqbal (S.Ct. May 18, 2009)**

The Supreme Court yesterday held that a Bivens complaint (asserting civil causes of action against several government officials in connection with post-9/11 immigration enforcement measures) failed to satisfy the pleading standard set forth in Twombly. En route to that holding, the court noted that Bivens liability in this context cannot be vicarious, but must instead be premised on the individual defendant’s personal unconstitutional conduct. The case will be remanded to the Second Circuit for a determination as to whether the plaintiffs should be given leave to replead.

### **Mattan v. Obama (D.D.C. May 21, 2009)**

Judge Lamberth has followed Judge Bates in construing the scope of the government’s detention power pursuant to the AUMF. Here is the key passage from the brief opinion:

“The Court reaches the same conclusion, and for the same reasons, as did Judge Bates of this Court in *Hamlily v. Obama*, Civ. A. No. 05-763, 2009 WL 1393113 (D.D.C. May 19, 2009). The Court hereby adopts that opinion. The Court concludes that respondents’ claimed authority to detain individuals who are “part of” Taliban, al Qaeda, or associated enemy forces comports with the AUMF’s broad authorization of executive force and the laws of war. However, two elements of the proposed framework fall outside the bounds of both the AUMF and the established laws of war: the claimed authority to detain those who “substantially supported” enemy forces and the claimed authority to detain those who have “directly supported hostilities” in aid of enemy forces. As Judge Bates explained, respondents can point to no authority sustaining detention authority based only upon “support” of enemy forces.

Accordingly, the Court will adopt respondents’ proposed definition except for the two “support”-related elements described above. However, the Court will still consider support of Taliban, al Qaeda, or associated enemy forces in determining whether a detainee should be considered “part of” those forces. Such consideration of “support” factors is consistent with Judge Bates’ opinion and, as Judge Bates noted, is not inconsistent with Judge Walton’s opinion, *Gherebi v. Obama*, Civ. A. No. 04-1164, 2009 WL 1068955 (D.D.C. Apr. 22, 2009), as applied. [FN3]

FN3. In his detailed and thorough opinion, Judge Walton accepted respondents’ definition--including the “support” elements--but criticized the murky meaning of “support” in this context: Replacing a standard that authorizes the detention of individuals who “support” an enemy organization with a standard that permits the detention of individuals who “substantially support” that enemy doubtless strikes the casual reader as a distinction of purely metaphysical difference, particularly when the government declines to provide any definition as to what the qualifier “substantial” means. Indeed, the Court shares the petitioners’ distaste for the government’s reliance on the term “support” at all, laden as it is with references to domestic criminal law rather than the laws of war that actually restrict the President’s discretion in this area. *Gherebi*, 2009 WL 1068955 at \*23. Judge Walton made clear that he was adopting the government’s framework only “provided that the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.” *Id.* at \*24.