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Minnesota State Bar Association Human Rights Committee

RESOLVED: The Human Rights Committee recommends that the Minnesota State Bar Association (MSBA) urges the United State Government to take steps towards ratification of the Rome Statute by expanding and broadening United States interaction with the International Criminal Court, including cooperation with the Court's investigations and proceedings. The Human Rights Committee further recommends that the MSBA call on the United States Government to participate in all future sessions of the International Criminal Court's governing body, the Assembly of States Parties.

Report

I. Introduction

Although the primary focus of the MSBA is on law-related activities in Minnesota, the Human Rights Committee believes the bar association has a role to play beyond the state's borders as well. In December 2007, for example, the MSBA passed a resolution condemning actions taken against judges and lawyers in Pakistan and affirming support for the international rule of law. The resolution was similar to those put forth by the ABA and other bar associations across the country. In another example, in 2008 the MSBA passed a resolution calling for the divestiture of funds from companies complicit with the regime responsible for the Darfur genocide. It is important that the MSBA continue to weigh in on such international concerns, affirming that the preservation of fundamental human rights worldwide is top priority of Minnesota's legal community. For this reason, the Human Rights Committee asks the MSBA Assembly to adopt a resolution urging the United States of America to participate to the full extent of its rights in the Review Conference.

II. The International Criminal Court

Established on July 1, 2002 by the ratification of the Rome Statute, the International Criminal Court (ICC) is a permanent tribunal for the prosecution of individuals accused of the most serious crimes of international concern. Seated at The Hague in the Netherlands, the ICC is not a part of the United Nations system and is funded primarily by its State Parties, encompassing 110 members. To date, 28 signatories to the Rome Statute, including the United States, have yet to ratify the Rome Statute.

Jurisdiction

Grounded in the principle of complementarity, the ICC is a court of last resort, investigating and prosecuting crimes only when national courts have failed to do so. Under Article 17 of the Rome Statute, the ICC cannot review cases that are being investigated or prosecuted by a state unless the state is unwilling or unable to genuinely carry out the investigation or prosecution. The ICC has no jurisdiction over persons who have already been tried, persons who have not committed crimes of sufficient gravity to justify ICC action and persons who the relevant state has decided not to prosecute. The ICC can only interfere with a state's decision to prosecute and legal proceedings therein when such proceedings were undertaken for the purpose of shielding the individual from the ICC's jurisdiction or when such proceedings were not conducted independently or impartially in accordance with international norms of due process and justice.

The Court's jurisdiction currently encompasses three categories of crimes: genocide, crimes against humanity and war crimes. Each of these crimes is set forth in Article 5 of the Rome Statute and defined in Articles 6, 7 and 8, respectively. Article 5 also includes crimes of aggression as a crime within the jurisdiction of the Court. At this time, the Court cannot exercise its jurisdiction over crimes of aggression as the State Parties have not agreed on and adopted a definition of the crime and have not set out conditions under which it can be prosecuted.

The ICC's jurisdiction is further limited territorially and temporally by the Rome Statute. Though a number of states had argued to allow the ICC to exercise universal territorial jurisdiction, a compromise was reached in the face of opposition to the proposal. Under the terms of this compromise, the ICC can only exercise jurisdiction where the person accused of committing a crime is a national of a state party, where the alleged crime was committed on the territory of a state party¹ or where the situation was referred to the court by the UN Security Council. Further, the ICC can only prosecute crimes arising after the Statute's ratification in 2002. With regard to states ratifying the statute after 2002, the ICC only has jurisdiction from the date of that state's ratification unless the state otherwise authorizes the ICC's actions.

Composition of the Court

The Court is composed of eighteen judges in three levels, the Pre-Trial Division, the Trial Division and the Appeals Division. Judges in each Division sit in Chambers, and assignments are made in a way that balances the expertise of the judges with regard to criminal law and procedure and international law. The current Judges on the ICC are: Sang-Hyun Song (Republic of Korea), Fatoumata Dembele Diarra (Mali), Hans-Peter Kaul (Germany), Elizabeth Odio Benito (Costa Rica), Akua Kuenyehia (Ghana), Erkki Kourula (Finland), Anita Ušacka (Latvia), Sir Adrian Fulford (United Kingdom), Sylvia Steiner (Brazil), Ekaterina Trendafilova (Bulgaria), Daniel David Ntanda Nsereko (Uganda), Bruno Cotte (France), Joyce Aluoch (Kenya), Sanji Mmasenono Monogeng (Botswana), Christine van den Wyngaert (Belgium), Cuno Tarfusser (Italy) and René Blattman (Bolivia).²

¹ Under Article 12 of the Rome Statute, jurisdiction extends to crimes committed on vessels for which the state of registry is a State Party.

² "Structure of the Court," International Criminal Court, official website, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/>, (last visited January 16, 2010).

Procedure and Due Process

The procedural requirements of investigations and prosecutorial proceedings of the International Criminal Court are governed by the Rome Statute and its Rules of Procedure and Evidence as adopted by the Assembly of States Parties in 2002. Article 66 and 67 set forth the rights of the accused. As in the United States, defendants in front of the ICC are presumed to be innocent until proven guilty beyond a reasonable doubt by the Prosecutor. Under Article 67, defendants have a right to trial without undue delay, a right to be present at trial, a right to an attorney, a right to confront witnesses, present evidence and raise defenses and a right to remain silent. Though trials in front of the International Criminal Court differ from US criminal trials, namely in that there is no right to a jury trial, David Scheffer, the first United States Ambassador-at-Large for War Crimes Issues and lead diplomat for the United States negotiating team on the Rome Statute, stated that “[the United States negotiating team was] very confident at the end of Rome that those due process rights, in fact, are protected, and that this treaty does meet a constitutional test.”³

To further ensure the representation and protection of defendant’s rights during an investigation and trial, the Office of Public Counsel for the Defense (OPCD) was created pursuant to ICC regulations.⁴ The OPCD provides support and assistance to the defendants and their counsel, either providing legal advice or appearing for them for specific issues. The OPCD can also act as ad hoc Counsel if appointed by the Court or as duty Counsel if selected by the defendant.

Current Cases at the ICC

Currently the ICC has active investigations in four countries. Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic, each a state party to the ICC, have referred situations occurring on their territories to the Court. In addition, the UN Security Council referred the situation in Darfur, Sudan – a non-State Party.⁵

In Uganda, five warrants of arrest were issued against the five top members of the Lords Resistance Army (LRA) in 2005. One of the indictees was confirmed dead; the four remaining indictees, including the LRA leader, Joseph Kony, are still at large.⁶

With regard to the DRC, three cases are being heard in the ICC; two cases are at the pre-trial stage, while the proceedings against Thomas Lubanga Dyilo are at the trial stage. The

³ *Burden of Proof: Millennium 2000: Would an International Criminal Court Help or Hinder Pursuit of Global Justice?* (CNN television broadcast Jan. 2, 2000) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0001/02/bp.00.html>).

⁴ International Criminal Court, Defence, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/> (last visited Aug. 6, 2009).

⁵ “Situations and Cases,” International Criminal Court, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>, (last visited January 15, 2010)

⁶ *Id.*,

accused Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui are currently in the custody of the ICC. The suspect Bosco Ntaganda remains at large.⁷

In the [situation in Darfur, Sudan](#), three cases involving four indictees are being heard before Pre-Trial Chamber of the Court. The indictees are Ahmad Harun, an official of the Sudanese Government charged with planning the genocide, Ali Kushayb, an alleged leader of the Janjaweed militia, and Omar Al Bashir, President of Sudan, charged with war crimes and crimes against humanity. These three suspects remain at large. The fourth suspect, Bahr Idriss Abu Garda, charged with war crimes, made a voluntary appearance before the Pre-Trial Chamber in May 2009. He is not in custody.

With regard to the Central African Republic, the case against Jean-Pierre Bemba is in the trial stage of the proceedings before the Pre-Trial Chamber. Bemba, Alleged President and Commander-in-chief of the Movement for the Liberation of Congo, is charged with war crimes and crimes against humanity.

III. The International Criminal Court and the United States: Concerns and Considerations

The United States has yet to ratify the Rome Statute. President Clinton signed the Rome Statute on December 31, 2000, but did not submit the treaty to the Senate for ratification due to concerns that the treaty did not provide sufficient protection from politicized investigations and prosecutions. In May, 2002, the Bush administration “unsigned” the treaty, renouncing any US obligations as a signatory to the Rome Statute. Opponents of the ICC have voiced a number of objections to the treaty, some of which were presented by Ambassador Scheffer in his testimony before the Senate Foreign Relations Committee in 1998.

In his testimony before the Senate Foreign Relations Committee, Ambassador Scheffer outlined three main concerns.⁸ First, Ambassador Scheffer expressed concern that US military and civilian personnel active in peacekeeping and humanitarian missions could be exposed to the Court’s jurisdiction even if the United States did not ratify the Rome Statute. Second, Ambassador Scheffer viewed the powers of ICC prosecutors as being overly broad, as they could, on their own authority, initiate investigations and prosecutions without referral of a situation to a court by a State Party or by the UN Security Council. Finally, Scheffer opposed a resolution in the Rome Statute to define and include the crimes of terrorism and drug-trafficking within the jurisdiction of the Court, citing concerns that the inclusion would undermine national and international efforts to combat these crimes.

In a report submitted to Congress on US policy regarding the ICC, the State Department listed three additional objections.⁹ First, the State Department noted the lack of a right to a jury trial, generally objecting to what it saw as a lack of due process guarantees. The report also

⁷ Id.

⁸ *Developments at Rome Treaty Conference* L Hearing Before the Senate Foreign Relations Committee , 105th Cong. (1998) (testimony of Ambassador David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court) (available at http://www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html).

⁹ CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court* (available at <http://fpc.state.gov/documents/organization/13389.pdf>).

expressed concerns over the possibility of politicized prosecutions resulting from characterizations of US foreign policy decisions as “criminal” by unfriendly countries. Finally the report outlined objections to the scope of the ICC’s jurisdiction, claiming that the authority to define and punish crimes of aggression was solely the prerogative of the UN Security Council under the UN Charter.

Opponents of the Rome Statute have also made the argument that US participation in the International Criminal Court is incompatible with the US Constitution. Insofar as the Rome Statute allows for the prosecution of American citizens for crimes committed on American soil, opponents claim that the Rome Statute is in conflict with the Constitution which places such trials under the exclusive jurisdiction of US courts.

US Opposition to the International Criminal Court

During the Bush Administration, the United States Government took several measures to shield US citizens from ICC prosecution. This protection was primarily enacted through two pieces of legislation, the American Service Members Protection Act (ASPA) and the Nethercutt Amendment to the Foreign Operations, Export Financing and Related Programs Appropriation Act.

The ASPA sought to limit the ICC’s jurisdiction by prohibiting the United States from providing military aid to countries that had ratified the Rome Statute. The ASPA also included a provision, dubbed the “Hague Invasion Act,” which permitted the President to authorize military force to free any US military personnel held by the ICC and prohibited US cooperation.

The Nethercutt Amendment sought to limit the ICC’s jurisdiction by suspending Economic Support Fund assistance to ICC State Parties who had not signed a Bilateral Immunity Agreements with the US. However, the Nethercutt Amendment was not renewed by Congress in 2009.¹⁰

While in operation, the ASPA and Nethercutt provisions were viewed by US military leaders as well as legal commentators as counterproductive. Cuts in military funding due to ASPA provisions led to strong statements on the part of US military leaders, such as US Army General Bantz K. Craddock, Command of the US Southern Command, and Chairman of the Joint Chiefs of Staff Richard Myers, that ASPA has hurt the government’s ability to fight terrorism and created the risk of losing contact and interoperability with nations in Latin America.¹¹

President Bush invoked waivers of the military funding restrictions under the ASPA with regard to at least 21 countries.¹² In January 2008, President Bush signed into law [amendments to the American Servicemembers' Protection Act \(ASPA\)](#) to eliminate restrictions on Foreign Military Financing (FMF) to nations unwilling to enter into BIAs.

¹⁰ Posting of Annie Lowrey to Foreign Policy Blog, <http://blog.foreignpolicy.com/posts/2009/03/12/nethercut> (March 12, 2009, 18:39 EST).

¹¹ The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Congressional Update & ASPA, <http://www.amicc.org/usinfo/congressional.html> (last visited Aug. 6, 2009).

¹² *Id.* (last visited January 15, 2010).

Towards a Cooperative Approach

Public opinion favors a cooperative approach to the ICC. In a 2005 poll conducted by the Chicago Council on Foreign Relations and the Program on International Policy Attitudes at the University of Maryland, 60% of 1,182 Americans polled favored US participation in the ICC over the use of a temporary tribunal.¹³ According to a 2008 poll by the Chicago Council on Global Affairs, 68% of Americans believed that the United States should participate in the ICC.¹⁴

The Bush administration slowly moved from firmly opposing the ICC in the international community to a stance of “pragmatic exploitation;” exemplified by the Administration’s decision to abstain during the March 2005 decision by the UN Security Council to refer the situation in Darfur to the ICC Prosecutor for investigation. This position of pragmatism was part of the public stance of eight presidential candidates during the 2008 primaries, representing an emerging consensus in Washington.¹⁵

In his statements made as a US Senator, President Barack Obama urged a cooperative approach to the ICC. In a press release made on April 23, 2008, he stated, “The US also needs to work with the International Criminal Court to ramp up the pace of indictments of those responsible for war crimes and crimes against humanity [in Sudan], while Khartoum must feel increased pressure to hand over those individuals already indicted by the Court.”¹⁶ As a Presidential candidate, Obama responded to a candidate questionnaire, writing, “My administration would continue to cooperate with ongoing ICC investigations in Sudan.”¹⁷ During her candidacy for President, now Secretary of State Hillary Clinton said, “Consistent with my overall policy of reintroducing the United States to the world, I will as President evaluate the record of [the ICC], and reassess how we can best engage with this institution and hold the worst abusers of human rights to account.”¹⁸

Since the first days of his administration President Obama has made it clear that there has been a shift in U.S. Government policy regarding the ICC. On January 29, 2009 Susan E Rice, US Ambassador to the United Nations, raised the issue of the ICC in her first appearance before the Security Council stating: the ICC “looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur.”¹⁹ Following the arrest warrant issued for Sudanese President Bashir Ambassador Rice reiterated US support for the ICC saying “The United States supports the International Criminal Court’s (ICC) actions to hold accountable those responsible for the

¹³ AMICC, Public Opinion Polls, http://www.amicc.org/usinfo/opinion_polls.html (last visited Aug. 6, 2009).

¹⁴ *Id.*

¹⁵ Alvarez, Jose E. “The Evolving U.S. –ICC Relationship” ASIL Newsletter. January/March 2008. Volume 24, Issue 1. <http://www.asil.org/newsletter/president/pres080320.html>

¹⁶ AMICC, Administration Advocacy, http://www.amicc.org/usinfo/administration_advocacy.html (last visited Aug. 6, 2009).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Statement by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, on the Respect for International Humanitarian Law. January 29, 2009 <http://usun.state.gov/briefing/statements/2009/january/127018.htm>

heinous crimes in Darfur. We remain determined in our pursuit of both peace and justice in Sudan.”²⁰ http://en.wikipedia.org/wiki/United_States_and_the_International_Criminal_Court_-_cite_note-54

In an October 2, 2009 briefing at the State Department, U.S. Ambassador-at-Large for War Crimes, Stephan Rapp, stated; “our policy with the ICC, that’s under review...We are beginning... to take, I think, an approach of greater cooperation with the ICC.”²¹ Ambassador Rapp attended the Assembly of State Parties Meeting in November of 2009 at which he made a speech supporting the ICC and stating that “the commitment of the Obama administration to the rule of law and accountability is firm”²² This Speech represented the first time the United States had participated in ICC meetings since 2001.

The first Review Conference of the ICC Statute is scheduled to take place from May 31 to June 11, 2010 in Kampala, Uganda, to review and consider amendments to the Rome Statute. The US Government has announced its intentions to participate in the conference as an observer. Ambassador Rapp confirmed the US Government’s decision to “return to engagement with the ICC,” but indicated that the Obama Administration does not intend to join the court in the foreseeable future.²³

IV. Conclusion

The Human Rights Committee respectfully requests that the MSBA grant its motion in order to support the United States Government’s decision to participate in the 2010 Review Conference and to urge the Government to take further steps towards positive engagement with the Court and, ultimately, ratification of the Rome Statute.

²⁰ Statement by Ambassador Susan E Rice, U.S. Permanent Representative to the United Nations, on the ICC’s Arrest Warrant for Sudanese President Bashir. March 4, 2009 <http://usun.state.gov/briefing/statements/2009/march/126539.htm>

²¹ Special Briefing by Ambassador-at-Large for Global Women’s Issues Melanne Verveer and Ambassador-at-Large for War Crimes Issues Stephan Rapp. October 2, 2009 <http://www.state.gov/s/gwi/rls/rem/2009/130211.htm>

²² Rapp, Stephen J. “Speech to Assembly of State Parties” November 19, 2009 http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf

²³ Colum Lynch, “US to attend conference held by War Crimes Court,” Washington Post, Nov. 17, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/16/AR2009111603662.html?referrer=emailarticle>, (last visited January 16, 2010).