

The International Criminal Court and the U.S.A.: Engaged, But Not Yet Married

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Since the end of World War II, we the people of the world, acting through our nation-state governments, have created or codified numerous international human rights norms. This started with 1945's Charter of the United Nations and 1948's Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. Other multilateral human rights treaties have followed, including the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²

Given the world's nation-state sovereignty basis, we the people of the world have grappled with the very real problem of how to enforce such norms in order to punish violators, to provide redress to victims and survivors, to investigate and promulgate the "truth" about past violations and to deter future violations. The response has been the creation of various mechanisms, none of which is perfect: state reporting to U.N. Charter and treaty bodies for review, comment and recommendations; complaints by states and individuals to such bodies for recommended solutions; international investigations of specific countries or problems; civil litigation against violators in domestic courts and international courts like the Inter-American Court of Human Rights; and truth commissions.³

Another response has been seeking to subject violators to criminal sanctions (imprisonment) in domestic courts under the principle of universal jurisdiction or in international criminal tribunals like the Nuremberg and Tokyo War Crimes Tribunals at the end of World War II and more recently so called *ad hoc* tribunals created by the U.N. Security Council (the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)). Even more recently the International Criminal Court (ICC) has been created.⁴

Although the United States was instrumental in the formation of the previously mentioned post-World War II and *ad hoc* tribunals, the U.S. is not a party to the Rome Statute, the treaty that created the ICC. After a troubled courtship, the two are now engaged in a productive relationship. Some of the issues relating to this relationship will be explored below.

First, however, we will look at basic information about the ICC, the duties and powers of its Office of the Prosecutor, the ICC's initial investigations and cases and its recent Review Conference.

ICC Basics

The ICC commenced operations on July 1, 2002 after 60 states had ratified its Rome Statute. Now 114 states are States Parties for the Court.⁵ The following is a geographical breakdown of those States Parties:

	<u>States Parties?</u>		
	<u>Yes</u>	<u>No</u>	<u>Total</u>
Africa	31	16	47 ⁶
Asia	15	37 ⁷	52
Europe	40	4 ⁸	44
Latin America	25	8	33 ⁹
Middle East	2 ¹⁰	13	15
North America	<u>1</u>	<u>1</u>	<u>2¹¹</u>
TOTAL	114	79	193 ¹²

Under the Rome Statute, the ICC has jurisdiction over the following crimes: genocide, crimes against humanity and war crimes (Arts. 5-8).¹³ The Statute provides detailed definitions of those crimes, which are very important developments in the relatively new area of international criminal law. Once in operation, the Court developed its Rules of Procedure and Evidence and The Elements of Crimes that provide additional due process protections for those accused of crimes by the Court.¹⁴ These also are important contributions to this area of the law and to the ongoing global struggle against impunity for human rights violators.

An important exception to ICC jurisdiction over the above crimes exists under Article 17(1) where:

- (a) "The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;"
- (b) "The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;"
- (c) "The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3" ¹⁵

The above exception to ICC jurisdiction is known, as an ICC term of art, as the principle of “complementarity.” In other words, the ICC is a court of last resort. To further this limited role, the ICC has been engaged in helping certain states to improve their own judicial ability to handle ICC-type cases. This is often referred to as “positive complementarity” within ICC circles.¹⁶

The ICC has 19 judges who are elected by the ICC's Assembly of States Parties for a term of nine years. Eight are from Europe; five, Africa; four, Latin America and Caribbean; and two, Asia. The judges are assigned to the following three divisions of the Court:

- The Pre-Trial Division, which has responsibility for various matters before trial. Six judges with predominantly criminal trial experience are assigned to this division, and they conduct the business in chambers of one or three judges.
- The Trial Division, which has responsibility for conducting the trials. Eight judges with predominantly criminal trial experience are assigned to this division, and they conduct the business in chambers of three judges.
- The Appeals Division, which has responsibility for handling any appeals from the other divisions. Five judges are assigned to this division, and all five judges conduct the appeals in the Appeals Chamber.¹⁷

An inherent problem for the ICC is its lack of an international police or military force to arrest subjects of warrants. But under Articles 59 and 89 of the Statute, a State Party has an obligation "to take steps to arrest" the person and to follow its own appropriate judicial procedure to determine the propriety of delivering the person to the ICC. This obligation obtains for any State Party where the subject may be found, not just the State Party where the alleged crime occurred. In addition, the Court under Article 89(1) may request the arrest of a subject by "any State on the territory of which that person may be found."¹⁸

The governing body for the ICC is its Assembly of States Parties, in which each party has one vote. This is separate and distinct from the United Nations or its General Assembly or Security Council or any other U.N. organ. (Art. 112.)

The ICC's Office of the Prosecutor

The Court's Prosecutor is elected by the Assembly of State Parties for a single nine-year term. (Art. 42(4).)

The Prosecutor has authority to conduct investigations into situations that are referred to the Court by the U.N. Security Council or a State Party under Articles 13(b) and 14 of the Rome Statute or upon his or her own initiative (*proprio motu*) under Article 15(1). The procedures for all such investigations are the same with some notable exceptions.

In all such instances, the Prosecutor under Article 53(1)(a)-(b), 2(a)-(b) may decline to investigate or to press charges if there is a reasonable basis to believe no crime within the Court's jurisdiction has been or is being committed or the conditions for admissibility under Article 17 have not been satisfied. In addition, under Article 53 (1)(c), (2)(c), the Prosecutor may decline to investigate or to press charges if "there are . . . substantial reasons to believe that an investigation [or prosecution] would [is] not serve [not in] the interests of justice." If the last were to happen, the Pre-Trial Chamber under Article 53(3)(b) on its own initiative may review the decision not to proceed, which will stand only if confirmed by the Chamber.

In instances of Security Council or State Party referral, under Article 53 (1) the Prosecutor has to initiate the investigation unless he or she determines "there is no reasonable basis to proceed" under the Statute or the investigation would not be in the "interests of justice." If the Prosecutor declines to proceed on such referrals, the Prosecutor under Article 53(2)(c) must notify the Pre-Trial Chamber and Security Council or State Party of that decision, and the Council or State Party under Article 53 (3)(a) may request the Pre-Trial Chamber of the Court to review the decision and request the Prosecutor to reconsider.

For investigations on the Prosecutor's own initiative, they may proceed if and only if the Pre-Trial Chamber authorizes same under Article 15 after a submission by the Prosecutor (with possible support by victims).

Under Article 61(4) the Prosecutor may amend or withdraw charges on his own, but only before the hearing before the Pre-Trial Chamber to determine under Article 61(7) whether the charges shall be "confirmed," *i.e.*, "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged." If the Prosecutor were to exercise this power, he or she, under Article 61(4), must "notify the Pre-Trial Chamber of the reasons for the withdrawal," which reasons presumably could include the "interests of justice."

After such a hearing and confirmation of the charges by the Pre-Trial Chamber and before trial, however, the Prosecutor, with the permission of the Pre-Trial Chamber, under Article 61(9) may only amend the charges, not withdraw them. After the trial has begun, on the other hand, the Prosecutor, with the permission of the Pre-Trial Chamber, under that same provision, may withdraw the charges, which presumably could be based, in whole or in part, on the interests of justice.

Additional light is shed on the "interests of justice" provisions of Article 53 of the Statute by a Policy Paper issued by the ICC Office of the Prosecutor. This Paper emphasizes that there is a presumption in favor of investigation or prosecution when the eligibility requirements had been satisfied, that the issue of "interest of justice" would be reached only after those requirements had been satisfied and that any exercise of discretion to not investigate or prosecute on this basis would be exceptional. Relevant for such consideration would be the gravity of the crime (the scale, nature, manner and impact), the interests of victims in obtaining justice and protection and the particular circumstances of the accused (age or infirmity and status). The "interests of justice" according to this

Paper should not be interpreted to embrace all issues of peace and security as they are the responsibility of the U.N. Security Council, not the ICC Prosecutor or ICC itself.¹⁹

Finally, the Prosecutor does not have the power to issue any arrest warrants. Under Article 58, they are issued only by the Pre-Trial Chamber after application by the Prosecutor and after the Chamber's verification that the proposed warrant meets all the conditions of the Statute.

Once a case has been initiated, the Prosecutor has the responsibility to gather and present the evidence at the trial of the defendant and to conduct any appeals in the case.²⁰

In summary, the Prosecutor is invested with specific duties regarding investigations and prosecutions under the Rome Statute and is subject to various checks and balances from the Pre-Trial Chamber and others (States Parties and the U.N. Security Council when making referrals). All of these provisions are some of the protections provided to those who are accused by the ICC and should provide comfort to those like some in the U.S. who believe that there are no checks on a hypothetically biased Prosecutor.

The ICC's Initial Investigations and Cases

A. Introduction

All of the ICC's initial investigations and cases come from Africa. But this is not a result of some Western plot against Africa or a *realpolitik* effort to focus investigations on places of limited strategic significance to the major powers.²¹

Three situations arise from submissions to the Court by three of its African States Parties-- Uganda, Democratic Republic of the Congo and the Central African Republic. These ICC investigations have led to the issuance of 10 arrest warrants. One of the subjects from Uganda died of natural causes. Five of the subjects of these warrants remain at large. Three of the Congolese subjects are now on trial at the ICC, and developments in one of these cases (Thomas Lubanga) will be discussed below. The trial of Jean-Pierre Bemba for actions in the Central African Republic started this past November.²²

Another African situation before the Court is that of Kenya. On November 26, 2009, the Prosecutor on his own initiative asked the Pre-Trial Chamber for permission to open an investigation into post-election violence in Kenya in 2007-2008 as possible crimes against humanity. On March 31, 2010, that Chamber approved that application. A year later--March 8, 2011, the Pre-Trial Chamber authorized the issuance of summonses to six individuals.²³

The last two African situations under investigation by the Prosecutor--Darfur (Sudan) and Libya--arise from submissions to the Court by the U.N. Security Council under Article 13(b) of the Rome Statute and Chapter VII of the U.N. Charter.

In the Darfur (Sudan) situation, the Court has issued seven arrest warrants against six persons. One of the subjects (Bahr Idriss Abu Garda) appeared voluntarily at the Court and was in pre-trial

proceedings, but on February 8, 2010, the Pre-Trial Chamber declined to confirm the charges against him, thus ending his case subject to reopening by the Prosecutor if there is additional evidence to support the charges. Two others (both Darfur rebel commanders) voluntarily surrendered themselves to the ICC, and earlier this month (March 2011), the Pre-Trial Chamber confirmed the charges against them and committed them to trial. Three others remain at large, and one of them (Sudanese President Omar Hassan Ahmed Al Bashir) will be discussed below.²⁴

On February 26, 2011, the U.N. Security Council adopted Resolution 1970 regarding the situation in Libya. Among other things, the resolution referred the situation since February 15, 2011 to the Court's Prosecutor, directed the Libyan authorities to cooperate fully with the Court and Prosecutor and invited the Prosecutor to make periodic reports about his actions in this matter to the Council. The resolution also stated that "nationals, current or former officials or personnel from a State outside [Libya], which is not a party to the Rome Statute . . . shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in [Libya] established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State."²⁵

Two days later (February 28th) the Prosecutor stated that he had to decide whether to open an investigation and was collecting information to determine whether the necessary conditions for the Court's jurisdiction were apparently satisfied.²⁶ Another four days passed and the Prosecutor on March 3rd announced that he was opening such an investigation.²⁷ We now wait to see whether that investigation will result in the Prosecutor's application to the Pre-Trial Chamber for issuance of summonses.

It also should be noted that the Office of the Prosecutor has conducted or currently is conducting preliminary examinations or analyses of situations in a number of other countries, including Afghanistan, Chad, Colombia, Cote d'Ivoire, Georgia, Guinea, (Gaza) Palestine, Honduras and Nigeria.. With respect to Afghanistan, which is a State Party to the Rome Statute, the Prosecutor has said that his office was looking into accusations of war crimes and crimes against humanity by the U.S. and its allies and by the Taliban.²⁸

The Prosecutor also has declined to commence certain investigations that had been suggested by outsiders, and under Article 15(6) of the Statute the Prosecutor publicly has stated the reasons for these declinations. Here are two such instances:

- Iraq. The Prosecutor explained why he would not be investigating issues relating to military operations against Iraq by the U.S. and its partners. First, Iraq and the U.S. were not parties to the Rome Statute. Thus, the ICC had no jurisdiction. Second, the crime of aggression was not yet defined and thus not something within the competence of the Court. Third, any allegations of genocide or crimes against humanity were not sufficiently supported by the preliminary evidence. Fourth, allegations of war crimes also were not substantiated.²⁹
- Venezuela. On the same day of the statement regarding Iraq, the Prosecutor released a statement as to why he was not commencing an investigation regarding certain acts in

Venezuela. First, the events occurred prior to Venezuela's ratification of the Rome Statute and thus were not admissible. Second, there was insufficient preliminary information of crimes against humanity. Third, there were no allegations of war crimes or genocide.³⁰

B. Bashir Case

The most controversial of the ICC's current cases is its issuance of two warrants for the arrest of President Bashir. The record suggests that these warrants are entirely appropriate.

The U.N. Security Council resolution of March 31, 2005, referred "the situation in Darfur since 1 July 2002 to the Prosecutor of the [ICC]." The Security Council did so after it had noted an international commission report on "violations of international humanitarian law and human rights law in Darfur" and determined that "the situation in Sudan continues to constitute a threat to international peace and security."³¹ After the Council had adopted the resolution, U.N. Secretary-General Kofi Annan stated:

"The Secretary-General welcomes the adoption today of Security Council resolution 1593 (2005), which refers the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court. He commends the Council for using its authority under the Rome Statute to provide an appropriate mechanism to lift the veil of impunity that has allowed human rights crimes in Darfur to continue unchecked. He congratulates all Members for overcoming their differences to allow the Council to act to ensure that those responsible for atrocities in Darfur are held to account. He also welcomes the Council's encouragement of undertakings that complement the judicial process and promote healing and reconciliation."³²

Significantly, despite the George W. Bush Administration's hostility towards the ICC, the United States abstained on this resolution, rather than exercising its veto right as a permanent member of the Council. Other abstainers on the resolution were China (another permanent member of the Council), Algeria and Brazil.³³

The response of the ICC, and specifically its Prosecutor, to this Security Council referral demonstrates the calm, deliberative processes of the ICC and the checks and balances that exist for the Prosecutor and the Court.

- Approximately **10 weeks** after the Council's adoption of this resolution, the ICC Prosecutor stated that he had "decided to open an investigation into the situation in Darfur, Sudan" after reviewing "the document archive of the International Commission of Inquiry on Darfur . . . [plus] information from a variety of sources . . . [and interviews with] over 50 independent experts." Based upon that review and thorough analysis, the Prosecutor had concluded that the statutory requirements for initiating an investigation were satisfied and that the "investigation will be impartial and independent, focusing on the individuals who bear the greatest criminal responsibility for crimes committed in Darfur."³⁴
- Thereafter the Prosecutor has made semi-annual reports about the status of the investigation and cases to the Security Council.³⁵

- On February 27, 2007, the Prosecutor applied to the ICC Pre-Trial Chamber for the issuance of summons for Ahmad Muhammad Harun ("Ahmad Harun") (Sudan's Minister of Humanitarian Affairs) and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") (a leader of the Militia/Janjaweed) for crimes against humanity and war crimes. It is interesting to note that all of these Sudanese arrest warrants resulted from the Prosecutor's interviewing over 130 witnesses in over 18 countries and reviewing over 100,000 documents without setting foot in Darfur, an example of Prosecutor diligence and competence.³⁶
- On May 2, 2007, the Pre-Trial Chamber granted the two requested summons in the form of arrest warrants (Ahmad Harun and Ali Kushayb) in the Sudan/Darfur situation.³⁷
- On July 14, 2008 (over **three years** after the Security Council's referral), the ICC Prosecutor submitted a 100-page application to the Pre-Trial Chamber of the Court for the issuance of a warrant for the arrest of Mr. Bashir.³⁸ Immediately before this submission and after the Prosecutor's semi-annual report (on June 16, 2008), the U.N. Security Council took the highly unusual step of issuing the Council's Presidential Statement 21 whereby the Council urged Sudan and all other parties to cooperate fully with ICC in order to put an end to impunity for crimes in Darfur.³⁹
- Nearly **eight months** later, on March 4, 2009 (and nearly four years after the Security Council's referral), the Pre-Trial Chamber authorized the issuance of the warrant charging Mr. Bashir with five counts of crimes against humanity and two counts of war crimes. The Chamber, however, 2 to 1, rejected the application for a warrant for genocide on the ground there were not reasonable grounds to believe that the Government of Sudan had acted with the specific intent to destroy certain groups.⁴⁰ The Chamber also issued a request for the arrest of Mr. Bashir to all State Parties and to all members of the Security Council that are not ICC State Parties.⁴¹
- On February 3, 2010, the Court's Appeals Chamber sustained the Prosecutor's appeal from the Pre-Trial Chamber's refusal to issue an arrest warrant against Mr. Bashir for the crime of genocide. The Appeals Chamber determined that the lower panel had applied the wrong (and more exacting) standard of proof for the issuance of an arrest warrant for this crime. The case was remanded to the Pre-Trial Chamber to decide whether to amend the arrest warrant to include genocide.⁴²
- Following this decision by the Appeals Chamber, the Prosecutor applied again for authorization of a genocide warrant, and on July 12, 2010, the Pre-Trial Chamber granted permission for an arrest warrant on the charge of genocide by killing, causing serious bodily or mental harm and deliberately inflicting on each target group conditions of life calculated to bring about their destruction.⁴³

As previously noted, the ICC does not have a law enforcement force that can go out and arrest the individuals who are subjects of arrest warrants. This lack has been most evident with respect to Mr. Bashir, who as the President of Sudan has traveled to other countries that are ICC States Parties without

being arrested. Most recently he has been in Chad and Kenya. In response, the ICC Pre-Trial Chamber on August 27, 2010, gave formal notice to all States Parties and to the U.N. Security Council of these recent trips by Mr. Bashir and the failure of Chad and Kenya to fulfill their obligation to arrest him.⁴⁴ Kenya and Chad subsequently have indicated that they would not permit Bashir to visit their countries again.

As the Security Council resolution on Darfur itself noted, the Council under Article 16 of the Rome Statute has the power to stop any "investigation or prosecution" by the ICC for a period of 12 months after the Council adopts a resolution to that effect under Chapter VII of the U.N. Charter and to renew such a resolution *ad infinitum*. Yet in the over five years after its referral of the Darfur situation to the Court, the Council has not chosen to exercise this power after being kept advised of developments by the Prosecutor's personal biannual reports to the Council.⁴⁵

Moreover, the Security Council has not done so after the issuance of the initial arrest warrant for Mr. Bashir, despite some requests for such action. Significantly, the U.S.A. has opposed such requests for deferral.⁴⁶

- On June 5, 2009, the Prosecutor made his first semi-annual report to the Security Council after the issuance of the Bashir warrant, and immediately thereafter the Council held a closed session to hear from 43 other states, some of whom presumably asked the Council to defer the Bashir prosecution.⁴⁷
- On December 4, 2009, the Prosecutor made another semi-annual report to the Security Council. He stressed the need for the arrest of Mr. Bashir and called for the full support of the Council in that regard. In the Council's discussion of the report, 12 of the 15 members expressed support for the Prosecutor. France stated that the actions of the Security Council and the ICC were complementary, but independent, and that the Council should not interfere with the decisions of the Court and the Prosecutor. Only three members took the contrary view. Libya and Burkina Faso called for suspension of the prosecution by the Council under Article 16 of the Rome Statute, but did not offer a resolution to that effect while Viet Nam called attention to the African Union's urging such a suspension.⁴⁸
- June 11, 2010, was the occasion for the next semi-annual report to the Security Council by the Prosecutor. In addition to reporting on the status of the cases, he mentioned the failure of the Sudanese government to cooperate with the Court, especially its failure to arrest the subjects of its arrest warrants. In this regard, he called the Council's attention to the recent Pre-Trial Chamber's official notice to the Council that Sudan was failing to comply with its obligations under the Council's resolution referring the Sudanese situation to the ICC so that the Council could take whatever action it deemed appropriate. The Prosecutor also said there was continuing commission of crimes in Darfur that were within the Court's jurisdiction. Immediately after this public session to hear the Prosecutor's report, the Security Council went into private session to hear comments about Sudan and the ICC from unnamed U.N. members who were not

on the Council. Presumably some of these representatives raised the issue of whether the Council should vote to defer the ICC's prosecutions of some or all of the Sudanese subjects.⁴⁹

- To like effect was the December 2010 report to the Council by the Prosecutor.⁵⁰ After he submitted his report at a public meeting of the Council, it adjourned to a private meeting.⁵¹

Simultaneously the U.N. Security Council has been devoting attention to the continued conflict in Sudan and efforts by the African Union and others to press for implementation of the 2005 Sudanese Comprehensive Peace Agreement. The ICC's cases also have come up in this context. For example, on December 21, 2009, Thabo Mbeki, the Chairman of the African Union High-Level Panel on Darfur, told the Council that "the three objectives of peace, justice and reconciliation are interconnected and interdependent. We are thus convinced that the positive outcome we all seek with respect to Darfur will have to take the form of an integrated package that achieves the necessary balance among the various objectives of peace, justice and reconciliation." Mbeki continued, "We are convinced that any attempt to emphasize the importance of any of these three objectives at the expense of the others would not bring about the just and stable peace we all desire" The U.N. Secretary-General at the same meeting said something similar, "The High-Level Panel also addressed the difficult issues of justice and reconciliation in the Sudan. Its efforts to develop creative and pragmatic proposals are highly commendable. We must keep sight of the importance of compliance with [Security Council] resolution 1593 . . . , which refers the situation in Darfur to the International Criminal Court."⁵²

As a result of the charges against Bashir, many African states have been critical of the Court, and the Court needs to be concerned about these criticisms. Some of these criticisms undoubtedly are due to a well-founded African fear that other African leaders deservedly could end up in the ICC's dock. Nevertheless, the Court is concerned about these criticisms and has been conducting outreach programs in Africa to provide information about the Court and to allay some of these criticisms.⁵³

The previously discussed allocation of powers between the ICC and the Security Council, of course, reflects the interests of the states that were involved in the negotiation of the U.N. Charter and of the Rome Statute, but given the obviously incomplete or imperfect nature of multilateral international organizations in a world based on nation states, this allocation makes some sense. The Security Council, under Chapter VII of the U.N. Charter, has the responsibility for maintenance of "international peace and security." The ICC does not. Instead, the ICC under Article 1 of the Rome Statute has the responsibility and "the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute." Given the ICC's more limited function and the very Security Council resolution of referral of the Darfur situation, the ICC Prosecutor legitimately should be wary about invoking the "interests of justice" ground for not proceeding with an investigation or prosecution of a case that is within the ambit of that referral.

C. Lubanga Case

The trial of Thomas Lubanga Dyilo from the Democratic Republic of Congo has raised a serious problem for the ICC.

The charges against Mr. Lubanga are war crimes by enlisting and conscripting children under 15 years of age into certain groups and using them to participate in international armed conflict and in armed conflict not of an international character. The trial commenced on January 26, 2009, and the prosecution finished its case in the summer of 2009. The defense started its case in late January 2010, but the trial is not yet over.⁵⁴

Some of the defense witnesses have testified that unnamed "intermediaries" or agents of the Office of the Prosecutor have paid or coached some witnesses to lie. These "intermediaries" are persons who provide assistance to the Office of the Prosecutor, here in the Democratic Republic of the Congo, by identifying leads or witnesses, facilitating contacts between investigators and possible witnesses and providing background information. Intermediaries like the U.N. Mission in Congo and other international groups in the relevant country are very useful and important to the ICC because they have greater resources and knowledge of the country and situation and already have done investigations and reports. However, the use of such intermediaries can produce problems of reliability, credibility, defense confrontation of witnesses and confidentiality.⁵⁵

As a result, on May 12, 2010, the Trial Chamber ordered the prosecution to reveal the identity of one of these "intermediaries" once measures were in place to protect him from retaliation, including being killed. Thereafter efforts were made to work out protection measures, but this was difficult for the Prosecutor to accomplish because the recipients of the required disclosure would include Lubanga's "resource person" in the DRC, who assists in the defense of the case and who is a well known leader of a rebel group.⁵⁶

By July 6th, however, the identity still had not been disclosed, and the Chamber that day orally ordered an immediate disclosure with conditions the Chamber regarded as sufficient protection for the individual. Yet the next day disclosure still had not happened, and the Chamber issued another order for such disclosure. Once again the order was not complied with, and on July 8th the Chamber (a) denied the Prosecutor's "urgent request" for more time to provide the disclosure and (b) stayed all trial proceedings. After noting that the Chamber was currently hearing evidence on the issue of whether "the prosecution has knowingly employed, or made use of, intermediaries who influenced individuals to give false testimony, thereby abusing its powers," the July 8th order stated:

- "The Prosecutor, by his refusal to implement the orders of the Chamber and in [his] filings . . . , has revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings, namely the protection of those who . . . have had dealings with the prosecution."
- The Trial "Chamber, once seized of the case, is the only organ of the Court with the power to order and vary protective measures vis-a-vis individuals at risk on account of work of the ICC."
- Although "Article 68 of the [Rome] Statute gives the Prosecutor positive protective obligations when investigating and prosecuting crimes . . . those responsibilities do not give him license, or discretion, or autonomy to disregard judicial orders because he considers the Chamber's

Decision is inconsistent with his interpretation of his obligations. . . . [T]he prosecution's obligations are subject to the Chamber's overarching responsibility to ensure that the accused receives a fair trial. . . ."

- "No criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations."
- "Whilst these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done, not least because the judges will have lost control of a significant aspect of the trial proceedings. . . ." ⁵⁷

One week later, on July 15th, the Trial Chamber ordered the release of Mr. Lubanga because "an accused cannot be held in preventive custody on a speculative basis, namely that at some stage in the future the proceedings may be resurrected." It also granted the Prosecutor's application to appeal the decision to stay the trial and adjourned any action to impose sanctions on the Prosecutor for misconduct until after the appeal was decided. ⁵⁸

However, on July 23rd the Appeals Chamber in effect stayed the Trial Chamber's order for the release of Mr. Lubanga. The Appeals Chamber concluded that an immediate release of the defendant could render the resumption of the trial impossible if the Chamber sustains the appeal. ⁵⁹ Later the Appeals Chamber reversed the stay of the trial while also criticizing the conduct of the Office of the Prosecutor, and the Prosecutor subsequently complied with the orders regarding disclosure of witnesses. The Lubanga trial is expected to be concluded early this summer.

All of these developments are good news and bad news for the Court's supporters in the U.S. and elsewhere. On the positive side, they demonstrate the existence of checks and balances within the ICC structure and its judicial concern for due process protections for the accuseds. On the negative side, they raised serious questions about the Prosecutor's judgment and about the viability of the Court's first trial. Now, with the first trial subsequently going forward and nearing completion, the threat to the viability of that trial has been extinguished. The questions over the conduct of the first Prosecutor remain as he is nearing the end of his term next year.

ICC's Review Conference

Under Article 123(1) of the Rome Statute, the U.N. Secretary-General was obligated to call a Review Conference for the States Parties to consider any amendments to the Statute and to review the Court's performance. This call was to be made after July 1, 2009 (seven years after the entry into force of the treaty). Such a call was made, and the Conference was held on May 31--June 11, 2010, in Kampala, Uganda. ⁶⁰

At the Conference, the representatives amended Article 8(c) of the Rome Statute to add use of certain weapons as a war crime in non-international armed conflicts while declining to amend Article 124 that allows a new member to opt out for seven years of ICC jurisdiction over war crimes. They renewed their commitment to the Rome Statute and its full implementation, universality and integrity.

They reiterated their determination to end impunity for perpetrators of the most serious crimes of international concern and emphasized that justice was fundamental to sustainable peace. They invited non-members to become members as soon as possible. They reviewed the Court's progress in helping victims and affected communities of international atrocity crimes and assisting national governments to improve their judicial systems so that they can handle such crimes and thereby preempt the ICC's exercise of jurisdiction over them. The Conference also reviewed its progress in strengthening the enforcement of its sentences. It called for increased cooperation with the Court in executing arrest warrants.⁶¹

Most significantly the Conference on June 11th adopted an amendment to its governing instrument (the Rome Statute) to add a definition of the crime of aggression.⁶²

The amendment that was adopted at the Review Conference states that "aggression" means "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." The term "act of aggression" too is defined in the amendment, which also has statements of understandings of the scope of these provisions and changes to the Court's "Elements of Crimes" regarding this particular crime.⁶³

This amendment, however, will not take effect with respect to crimes of aggression that were committed before one year after the ratification or acceptance of the amendment by 30 States Parties. In addition, the Court cannot exercise such jurisdiction unless and until there is an affirmative vote of two-thirds of the Assembly of States Parties to approve the amendment after January 1, 2017. The Assembly will then be able to decide separately on its activation of U.N. Security Council-initiated prosecutions of the crime and for situations referred by States Parties and those initiated by the ICC Prosecutor. ICC States Parties that ratify the amendment have the option of filing a declaration with the ICC that they do not accept aggression jurisdiction. Also, once jurisdiction is activated, non-Security Council situations will need to be approved by the entire Pre-Trial Division of the Court. Another provision will prevent the Court from exercising jurisdiction over nationals of non-States Parties or persons for alleged aggression on their territories. It also included a mandatory review of the provision seven years after coming into effect in order to examine the performance of the Court with respect to the crime and to make any necessary changes to the provision.⁶⁴

The ICC and the U.S.A.

There are several aspects to the U.S. relationship with the ICC that will be examined below: (a) the U.S. engagement with the ICC; (b) U.S. criminal statutes that might invoke complementarity refusals by the ICC to investigate and try U.S. nationals; and (c) U.S. federal courts use of the Rome Statute.

A. U.S. Engagement with ICC

As a backdrop to this summary of the history of U.S. engagement with the Court, it should be noted that there are organized efforts in the U.S. to support the ICC and to promote continued U.S. involvement with the Court and eventually becoming a State Party to the Rome Statute. Prominent in

such efforts is the American Non-Governmental Organizations Coalition for the International Criminal Court or AMICC.⁶⁵

1. President Bill Clinton

During the Clinton Administration, the United States supported the idea of creating an international criminal court and was a major participant at the Rome Conference that produced the Rome Statute. At the conclusion of that Conference in July 1998, the Rome Statute was approved by a vote of 120 to 7. The seven negative votes were cast by the United States, Iraq, Israel, Libya, People's Republic of China, Qatar and Yemen.⁶⁶ These were the reasons advanced for the U.S. negative vote:

- The U.S. wanted an ICC that was controlled by the U.N. Security Council where the U.S. as a permanent member had a veto. Although the U.S. was able to get some provisions in the Statute that gave the Security Council certain rights vis-à-vis the ICC, the Statute allowed the Court to proceed with investigations and prosecutions based upon referrals by member states and upon the prosecutor's own initiative.
- The Statute left open the possible assertion of the Court's jurisdiction over nationals of a non-State Party such as the U.S.⁶⁷

On December 31, 2000 (two and a half years after the Rome Conference and in the last month of his Presidency), however, President Clinton signed the treaty on behalf of the U.S. His formal statement on this action said that he did so "to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes and crimes against humanity" and for the U.S. "to remain engaged in making the ICC an instrument of impartial and effective justice." On the other hand, President Clinton stated that the U.S. was not "abandoning our concerns about serious flaws in the treaty." Foremost was the Court's ability to "claim jurisdiction over personnel of states that have not [ratified the treaty]." Therefore, he said, he "will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." Therefore, in the last month of his Presidency, President Clinton did not submit the Rome Statute to the Senate.⁶⁸

2. President George W. Bush

The Bush Administration likewise declined to submit the Rome Statute to the Senate for ratification, and in May 2002 it notified the U.N. Secretary General, as depositary of the Rome Statute, of the U.S. intent not to ratify the treaty.⁶⁹

The Bush Administration thereafter conducted a major campaign against the ICC. The campaign included a statute that originated with Senator Jesse Helms, then Chairman of the Senate Foreign Relations Committee, and that had what became known as the "Hague invasion clause," authorizing the use of U.S. military force to retrieve any U.S. citizens held by the ICC. The U.S. also sought and obtained so-called bilateral immunity agreements with countries that were States Parties to the Rome Statute whereby they would not turn over any U.S. personnel to the ICC. Other federal legislation called for cancelling any foreign military aid to countries that would not sign such agreements.⁷⁰

However, as noted above, the Bush Administration in March 2005 abstained on the U.N. Security Council vote to refer the Sudan/Darfur situation to the ICC. The Administration also granted waivers from cancellation of foreign military aid.⁷¹

3. President Barack Obama

As a candidate, Senator Barack Obama stated that his administration would cooperate with the Court on Darfur and other cases and consult closely with military and legal advisers before making a decision on whether to join the Court. In the early days of his Administration, this positive attitude towards the ICC was re-emphasized. In January 2009, then U.S. Secretary of State nominee Hillary Clinton **stated** that "we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote US interests by bringing war criminals to justice." In August 2009 as Secretary of State she said it was a "great regret" that the US was not a member of the ICC, but that "we have supported the work of the court and will continue to do so under the Obama Administration."⁷²

Also in January 2009, Susan E. Rice, the new U.S. Ambassador to the United Nations, in her first appearance in the Security Council, said that that 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." Regarding Darfur, Ambassador Rice stated at that time, "It is our view that we support the ICC investigation and the prosecution of war crimes in Sudan, and we see no reason for an Article 16 deferral" by the Council. Following the issuance of an arrest warrant for Omar Al Bashir, President of Sudan, in March 2009, Ambassador Rice reiterated U.S. support for the Court on Darfur and the requirement of Sudan to cooperate with the ICC.⁷³ U.S. support for the ICC's charges against Bashir has continued.⁷⁴

In November 2009 the U.S. for the very first time attended as an observer a meeting of the ICC's governing body, the Assembly of States Parties. The 12-member U.S. delegation listened to the discussion and had extensive meetings with other governments and with NGO's. The leader of the delegation, Stephen Rapp, the new U.S. Ambassador-at-Large for War Crimes, in a speech to the Assembly, commented on the U.S. commitment to ending impunity for brutal crimes and commended the work of international criminal tribunals. He also said that the U.S. was particularly concerned with the forthcoming definition of the crime of "aggression" and that the U.S. supported such an amendment so long as ICC jurisdiction would only attach after "a Security Council determination that aggression has occurred." In that regard, the ICC, he added, "has an interest in not being drawn into a political thicket that could threaten its perceived impartiality."⁷⁵

In late January 2010, Ambassador Rapp publicly stated that no U.S. president was likely to present the Rome Statute to the U.S. Senate for ratification in the "foreseeable future." Rapp cited fears that U.S. officials would be unfairly prosecuted and the U.S.'s strong national court system as reasons it would be difficult to overcome opposition to ratification. He did not mention the virtual political impossibility in this Session of Congress to obtain the two-thirds (67) vote in the Senate that would be necessary for ratification. Rapp also said that the U.S. has a role to play in a three-part system for ending international impunity. First, the US must work to strengthen other national court systems, particularly in the Democratic Republic of Congo. Second, the U.S. must work with countries that exercise universal jurisdiction (like Spain) when there is some relation between the country and the crime. Third, he said, the U.S. should continue to support the work of international criminal tribunals.⁷⁶

In March 2010 the U.S. again attended as an observer the resumed meeting of the Assembly of States Parties. U.S. Ambassador Rapp publicly praised the work being done to prepare for the Review Conference. He offered U.S. assistance for enhancing states' cooperation with the Court and stated the U.S. desire to meet with the ICC to see how the U.S. could support its current investigations. The U.S. experience in foreign assistance judicial capacity-building and rule-of-law programs, he said, could help the ICC in its "positive complementarity" efforts. Similarly the U.S. experience in helping victims and reconciling peace and justice demands could be of assistance. Harold Koh, Legal Advisor, U.S. Department of State, made a public statement expressing U.S. criticisms and skepticism about the then pending proposed amendment on the crime of aggression.⁷⁷

In late May/early June 2010 the U.S. sent a high-level delegation to the ICC's Review Conference that participated as an observer in many of its discussions and debates. This reflected the Obama Administration's policy of engagement with the Court and seeking to affect its future development as an important international institution that is in accord with the long-standing U.S. policy against impunity for perpetrators of genocide, crimes against humanity and war crimes that already are subject to ICC jurisdiction.⁷⁸

At the Conference the U.S. pledged to "renew its commitment to support projects to improve judicial systems around the world. Such improvements would enable national courts to adjudicate national prosecutions of war crimes, crimes against humanity and genocide and thereby make ICC involvement unnecessary. The U.S. also pledged to "reaffirm President Obama's recognition . . . that we must renew our commitments and strengthen our capabilities to protect and assist civilians caught in the [Lord Resistance Army's] wake [in Uganda], to receive those that surrender, and to support efforts to bring the LRA leadership to justice."⁷⁹

Immediately after the Review Conference the U.S. State Department held a press briefing by Ambassador Rapp and Legal Advisor Koh about U.S. participation at the Review Conference. They emphasized the diligent work of the U.S. delegation in resuming engagement with the Court, States Parties, other observer nations and NGOs. This effort, they said, "worked to protect our interest, to improve the outcome, and to bring us renewed international goodwill." All of this reflected U.S. (a) "support for policies of accountability, international criminal justice, and ending impunity," (b) the U.S. "policy of principled engagement with existing international institutions" and (c) ensuring that lawful uses of military force are not criminalized. Even though the U.S. thought the definition of "aggression" was flawed, Koh stated, the U.S. successfully pressed for the addition of safeguards that "ensure total protection for our Armed Forces and other U.S. nationals" with respect to this crime.⁸⁰

Ambassador Rapp at the press briefing added another important argument for U.S. engagement with the ICC. Even though the U.S. was not going to join the ICC at this time, he said, the era of the U.N. establishing ad hoc and short-lived tribunals like the International Criminal Tribunal for Rwanda to address specific problems was over. Only the ICC would be in business for future problems. Therefore, the U.S. needed to be positively engaged with the Court.⁸¹

Even more importantly, U.S. participation at the Review Conference was a major factor in its creation of the previously mentioned additional steps that must be taken before the ICC may exercise jurisdiction over the crime of aggression. Indeed, the U.S. with the world's largest military force deployed around the world was legitimately concerned with the Conference's adoption of an "aggression" amendment. And the resulting amendment means that nationals of the U.S., while it is not a party to the Rome Statute, would not be subject to ICC jurisdiction over this crime, and even if the U.S. were to join the Court by ratifying the Statute, no U.S. national could be charged with such a crime if the U.S. also filed a declaration that it did not accept such jurisdiction.⁸²

The recent and still developing situation in Libya is another instance in which the U.S. has supported the use of the ICC. The previously discussed U.N. Security Council Resolution 1970 that referred the Libyan situation to the ICC Prosecutor was prepared by the U.S. and 10 other Council members.⁸³ During the Council's discussion of the resolution, U.S. Ambassador Susan Rice stated, "For the first time ever, the Security Council has unanimously referred an egregious human rights situation to the [ICC]."⁸⁴

Three days later (March 1st), the U.S. Senate unanimously approved a resolution deploring the situation in Libya and Colonel Gadhafi. This resolution also stated that the Senate "welcomes the unanimous vote of the United Nations Security Council on resolution 1970 referring the situation in Libya to the [ICC]"⁸⁵

What are the overarching themes or policies driving this U.S. engagement by the Obama Administration with the ICC?

They can be gleaned from the above actions, from the May 2010 National Security Strategy, and from public statements by U.S. Ambassador for War Crimes, Stephen Rapp, and by Harold Koh, Legal Advisor to the State Department and former Dean of the Yale Law School. Indeed, Mr. Koh has called these themes or policies an "integrated approach to international criminal justice."⁸⁶

First, the U.S. will **not** be seeking ratification of the Rome Statute in the near future. In January 2010, U.S. Ambassador Rapp publicly stated that no U.S. president was likely to present the Rome Statute to the U.S. Senate for ratification in the "foreseeable future." Rapp cited fears that U.S. officials would be unfairly prosecuted and the U.S.'s strong national court system as reasons it would be difficult to overcome opposition to ratification. He did not mention the virtual political impossibility in this Session of Congress to obtain the two-thirds (67) vote in the Senate that would be necessary for ratification. The U.S. this month (March 2011) also told the U.N. Human Rights Council at the conclusion of its Universal Periodic Review of the U.S. that the U.S. did not accept the recommendations by a number of States that the U.S. ratify the Rome Statute.⁸⁷

Second, the U.S. Administration will not be seeking changes to U.S. statutes that are hostile to the ICC. In January 2010, however, the Justice Department's Office of Legal Counsel opined that U.S. diplomatic or "informational" support for particular ICC investigations or

prosecutions would not violate U.S. law. Other hand-me-downs of past U.S. actions hostile to the ICC are the U.S.' 102 Bilateral Immunity Agreements or "BIA"s, whereby the other countries agreed not to turn over U.S. nationals to the ICC. The last of these was concluded in 2007. There is no indication that the U.S. will seek to rescind these agreements or to negotiate new ones.⁸⁸

Third, the U.S. as a non-member will be participating in meetings of the ICC's Assembly of States Parties and will be meeting with the ICC's Prosecutor and other officials to find ways the U.S. can support current prosecutions (consistent with U.S. laws). Indeed, the National Security Strategy stated that as a matter of moral and strategic imperative the U.S. was "engaging with State Parties to the Rome Statute on issues of concern and [is] supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law." At the ICC's Review Conference, the U.S. emphasized its special commitment for one of the Court's "situations," investigations and prosecutions of those involved in Uganda's Lord Resistance Army, when the U.S. made a formal, written pledge "to renew our commitments and strengthen our capabilities to protect and assist civilians caught in the LRA's wake, to receive those that surrender, and to support efforts to bring the LRA leadership to justice."⁸⁹

The U.S. also will engage in public diplomacy supporting the Court--publicly support the arrest and prosecution of those accused by the ICC's Prosecutor, publicly criticize those who seek to thwart such arrests. In addition, the U.S. has questions about confusion regarding the recent "aggression" amendments to the Rome Statute. In any event, the U.S. has ceased its hostility and harsh rhetoric against the Court.

Fourth, the U.S. will continue to support the final work of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda by providing funding, by supporting their work diplomatically and politically, by providing evidence and concrete support to the prosecutors and defendants. In particular, the U.S. will work in the U.N. Security Council "to create a residual mechanism for the ad hoc tribunals that will safeguard their legacy and ensure against impunity for fugitives still at large."

Fifth, the U.S. will continue to offer support to strengthen other national court systems, particularly in the Democratic Republic of Congo. This should reduce the need for international justice by ensuring justice at home. The U.S. emphasized this in its formal written pledge at the ICC's Review Conference: "The United States renews its commitment to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide."⁹⁰

Sixth, the U.S. must work with countries that exercise universal jurisdiction (like Spain) when there is some relation between the country and the crime.

B. U.S. Ability To Preempt ICC Investigations or Prosecutions of U.S. Nationals

As noted above, the ICC cannot proceed with an investigation or prosecution for ICC crimes if a domestic court has done so or declined to do so absent bad faith. Under its established jurisprudence the ICC looks to whether the individual in question is being investigated or prosecuted in a domestic court for the same conduct that the ICC is investigating. If so, further ICC investigation or prosecution is barred. The name of the crime in the domestic legal system is irrelevant.

It, therefore, is a somewhat theoretical question as to whether the U.S. has criminal statutes that are identical or similar to the crimes covered by the Rome Statute.⁹¹ The U.S. does have a federal statute that makes "genocide" a crime. Its language is substantially the same as, but not identical to, the Rome Statute's definition of the crime. The U.S. statute applies to offences committed in whole or in part in the U.S. or to offenses by alleged offenders who are U.S. nationals or permanent resident aliens or stateless persons habitually residing in the U.S. or to offenses by offenders who were brought into or are found in the U.S. even if the conduct occurred outside the U.S.⁹²

The U.S. also has a criminal statute on "war crimes." But the U.S. definition is significantly narrower than the Rome Statute's. In addition, the U.S. statute is limited to circumstances where the alleged offender or victim is a U.S. national or a member of the U.S. Armed Forces.⁹³

Finally the U.S. does not have a criminal statute that specifically addresses "crimes against humanity" although most of what is covered by the Rome Statute's provision on this subject would violate various provisions of U.S. criminal or military law.⁹⁴ There, however is a pending bill in Congress that would criminalize certain conduct as "crimes against humanity" in terms similar to, but not identical with, the Rome Statute's definition of such crimes. This bill would apply to such offenses committed in whole or in part in the U.S. or when the alleged offender is an U.S. national or resident.⁹⁵ This bill also states that it shall not be construed as support for ratification of, or participation by the [U.S.] . . . in the Rome Statute . . . or to repeal or limit the applicability of the American Servicemembers' Protection Act."⁹⁶

C. U.S. Federal Courts' References to ICC's Rome Statute

Even though the U.S. is not a party to the Rome Statute, U.S. federal courts already have been using that Statute as an authoritative statement of international law on various issues. As of September 18, 2010, the Westlaw legal research service listed 31 reported opinions by U.S. federal courts that mention the "Rome Statute."⁹⁷ Most of these cases are focused on two important subjects: (1) the international law for crimes against humanity; and (2) the international law for liability for aiding and abetting certain violations of international law. The other cases are not as significant.

1. International law for crimes against humanity.

One of the crimes within the ICC's jurisdiction is "crimes against humanity." (Rome Statute, Art. 5 (1) (b). The Rome Statute's Article 7(1) provides that this crime "means any of the following acts when

committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

The Statute's Article 7(2) and (3) then goes on to state definitions of many of these terms.

These provisions of the Rome Statute have been cited by U.S. federal courts as setting forth the substance of the current international law of crimes against humanity. The courts have done so when evaluating whether valid civil claims for money damages have been asserted under two U.S. statutes. One such statute is the Alien Tort Statute (28 U.S.C. § 1350) that provides for U.S. district courts' jurisdiction over a "civil action [lawsuit] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The other is the Torture Victims Protection Act (28 U.S.C. § 1350 footnote) that creates federal court jurisdiction for civil claims for money damages against "an individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . . or extrajudicial killing . . ." ⁹⁸

2. International law for aiding and abetting liability

The ICC only has jurisdiction over natural persons for crimes that are within the ICC's jurisdiction. (Arts. 5, 25(1).) Such persons are criminally responsible, of course, if the person "commits

such a crime, whether as an individual, jointly with another or through another person" or "orders, solicits, or induces the commission of such a crime." (Art. 25 (2), (3) (a), (b).)

In addition, a person is criminally responsible under the Rome Statute if the person "[f]or the purpose of facilitating the commission of such a crime [within the ICC's jurisdiction], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission." (Art. 25 (3) (c).)

The Rome Statute further provides that "a person shall be criminally responsible [for such crimes] only if the material elements are committed with intent and knowledge." (Art. 30 (1).) "Intent," for these purposes, means the person "intends to engage in the conduct" and "means to cause that consequence or is aware that it will occur in the ordinary course of events." (Art. 30 (2).) "Knowledge," for these purposes, means "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." (Art. 30 (3).)

These "aiding and abetting" provisions of the Rome Statute have been cited by U.S. federal courts as setting forth the current international law on this subject. With this legal foundation, the U.S. courts have endorsed the validity of civil claims under the previously mentioned Alien Tort Statute against private parties, including corporations, for aiding and abetting human rights abuses by states. Most of these cases involve claims for significant amounts of compensatory and punitive damages against large multinational corporations as defendants.⁹⁹

The two leading cases on aiding and abetting, both from the Second Circuit, are still pending, and the final word on this issue has not yet been written.¹⁰⁰

Just recently the Second Circuit in dicta in another case, Kiobel v. Royal Dutch Pet. Co., emphasized these prior decisions on aiding and abetting when it stated that its decision in Kiobel did not limit or foreclose ATS suits "against a corporation's employees, managers, officers, directors, or any other person who commits, or **purposefully aids and abets**, violations of international law."¹⁰¹

In Kiobel, however, the court in a 50-page opinion by Judge Cabranes, held (a) that international law was the relevant law for determining whether corporations (or other legal entities) could be held liable under ATS for alleged violations of the law of nations; and (b) that customary international law and hence ATS did not recognize or allow **corporate** direct or accessory civil liability for human rights violations.¹⁰² Important for the latter conclusion was the Rome Statute's limitation of jurisdiction in Article 25(1) to "natural persons." Equally important for the Second Circuit was the Rome Conference's rejection of a French proposal to include corporations and other "juridical" persons in the ICC's jurisdiction because, according to commentators, corporate criminal liability was rejected by many national legal systems and thus such inclusion in the Rome Statute would eliminate the possibility of national systems' preempting ICC jurisdiction under the principle of complementarity.¹⁰³

The Second Circuit in Kiobel also said it was not prevented from so holding by its own precedents. Although at least five prior such precedents had not rejected ATS cases against corporations

on that ground, according to Kiobel, they merely had assumed the viability of such suits for various reasons.¹⁰⁴

One of the judges in the three-judge panel in Kiobel, Judge Leval, submitted an 88-page concurring opinion. He agreed that the complaint in its entirety had to be dismissed because it did not allege that the corporate defendants had **purposefully** aided and abetted the Nigerian government's alleged violations of human rights.¹⁰⁵ But Judge Leval concluded that international law left to domestic law the issue of whether corporations were civilly liable for aiding and abetting violations of international law and that U.S. law allowed for such liability.¹⁰⁶ Judge Leval acknowledged that the ICC's jurisdiction was limited to "natural persons" and that the Rome Conference had rejected the idea of extending the ICC's jurisdiction to corporations and other legal entities.¹⁰⁷ This structure, said Judge Leval, was due to a belief that a corporation could not act with the requisite criminal intent and the inefficacy of criminal punishment for such entities.¹⁰⁸ On the other hand, Judge Leval quoted the Chairman of the Rome Statute's Drafting Committee as saying that despite the diversity of views about corporate criminal liability, "all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages."¹⁰⁹

Recently the Second Circuit panel in Kiobel denied the plaintiffs' petition for rehearing as did the *en banc* court.¹¹⁰ Ultimately the U.S. Supreme Court probably will have to settle the issues of aiding and abetting and of corporate liability under the ATS.

3. Other cases

Some of the other cases, as discussed below, also involve important parts of the Rome Statute.¹¹¹

Command responsibility. The Rome Statute specifically states that a "military commander or person effectively acting as a military commander shall be criminally responsible for [ICC] crimes . . . committed by forces under his or her effective command and control, or effective authority and control . . . as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or were about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution." (Art. 28 (a).) A similar provision is also in the Statute for a "superior," as opposed to a "commander." (Art. 28 (b).)

These portions of the Statute were cited as authoritative statements of international law on the subject in an appellate decision that held that jury instructions on this issue were not clearly erroneous. As a result, the court affirmed a jury verdict for two Salvadoran generals in a case under the Torture Victims Protection Act brought by relatives of the four American church women who had been tortured and murdered in El Salvador. (Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147

(2003).) These statutory provisions were also relied upon in a partial grant of a plaintiff's motion for default judgment. (Doe v. Qi, 349 F. Supp.2d 1258 (N.D. Cal. 2004).)

No double jeopardy. The Rome Statute provides that there shall be no subsequent criminal charges brought against an individual if he or she has been convicted or acquitted for the same conduct or crime by the ICC itself or another court unless the prior court's proceedings were "for the purpose of shielding the person . . . from criminal responsibility" or "were not conducted independently or impartially . . . and were conducted in a manner which . . . was inconsistent with an intent to bring the person . . . to justice." (Art. 20.) This Article was determined to apply only to the ICC, and not to bar a U.S. prosecution because of a prior Colombian prosecution. (United States v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000).)

No immunity. The Rome Statute specifically denies immunity for "all persons without any distinction based on official capacity." (Art. 27 (1).) This was cited as pertinent authority in the partial grant of a plaintiff's motion for default judgment. (Tachiona v. Mugabe, 169 F. Supp.2d 250 (S.D.N.Y. 2001), *aff'd in part & rev'd in part sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), *cert. denied*, 547 U.S. 1143 (2005).)

Other Rome Statute provisions. In in re Agent Orange Product Liability Litigation, 373 F. Supp.2d 7 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009), the court dismissed a complaint over use of the agent orange chemical in the Viet Nam war. In so doing, the court recognized that there was no statute of limitations in the Rome Statute for its crimes, that it barred retroactive application of its provisions and that acting pursuant to a superior's orders was a defense if the person had a legal obligation to obey the orders, the order was not manifestly illegal and the person did not know the order was illegal. (Arts. 22 (2), 29, 33 (1).)

Conclusion

Like all human institutions, especially multilateral international organizations, the ICC is not a perfect body. But it is off to a good start as another important actor in the interactive global struggle against impunity for human rights violators.

The United States is now engaged in various ways to cooperate with and assist the ICC. This effort hopefully will continue and lead to the U.S. eventually joining the ICC. In the meantime, the U.S. Congress should give serious consideration to amending its criminal statutes to coincide with the Rome Statute's definitions and thereby increase the chances of the U.S.'s being able to preempt ICC actions against U.S. nationals. Finally the U.S. courts can continue to look to the Rome Statute for statements of international law on various subjects.

ENDNOTES

¹ Adjunct Professor, University of Minnesota Law School; Provisional Organizer of the Minnesota Alliance for the International Criminal Court.

² David Weissbrodt, Fionnuala Ní Aoláin, Joan Fitzpatrick, and Frank Newman, *International Human Rights: Law, Policy and Process*, ch. 1 (4th ed. 2009) ["Weissbrodt"].

³ *Id.*, chs. 4-6, 9, 11, 12, 14, 15, 16.

⁴ *Id.* at 11, 483-586. The text of the Rome Statute, which will be referenced throughout this article, is available at: http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

⁵ ICC, The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties>.

⁶ Seychelles will become the 31st African state to join the ICC on November 1, 2010. The principal African states that are **not** ICC members are Algeria, Angola, Eritrea, Ethiopia, Libya, Rwanda, Somalia, Sudan and Zimbabwe. (*Compare id. with* U.N., List of Member States of United Nations, <http://www.un.org/en/members/index.shtml>).

⁷ The principal Asian states that are **not** ICC members are China, Democratic Republic of Korea, India, Indonesia, Iran, Malaysia, Myanmar, Pakistan, Philippines, Thailand and Viet Nam. *Id.*

⁸ The principal European states that are **not** ICC members are Belarus, the Russian Federation and Ukraine. *Id.*

⁹ The principal Latin American and Caribbean states that are **not** ICC members are Cuba, El Salvador, Guatemala and Nicaragua. *Id.*

¹⁰ The only Middle Eastern states that **are** ICC members are Cyprus and Jordan. *Id.*

¹¹ Canada is the only North American state that **is** an ICC member. The U.S.A. is the only North American state that is **not** an ICC member. *Id.*

¹² There are 192 members of the U.N., and a non-member of the U.N. (Cook Islands) is an ICC State Party. Thus, the total number of states in the table is 193. *Id.*

¹³ The Rome Statute also grants the ICC jurisdiction over the crime of aggression, but since that crime was not defined in the Statute, the Court could not exercise that jurisdiction. (Art. 5(2).) At the Court's recent Review Conference, such a definition was added. *See infra*.

¹⁴ ICC, Basic Legal Texts, <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools>.

¹⁵ Article 20(3) of the Rome Statute lifts the bar of prior prosecution in a domestic court when it was not in good faith, *i.e.*, when it was done "for the purpose of shielding the person concerned from criminal responsibility for [ICC] crimes" or when it was not "conducted independently or impartially . . . and [WAS] . . . conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

¹⁶ *E.g.*, ICC, Resolution on Complementarity (RC/Res. 1 June 8, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf; AMICC, Report on the Review Conference of the International Criminal Court (June 25, 2010), <http://www2.icc-cpi.int/Menus/ICC/Home>; <http://www.amicc.org>.

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- ¹⁷ Rome Statute, Arts. 34-41; ICC, Chambers, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers>. (One-third of the first set of judges only had a term of three years; another third, six years; and the final third, the full nine year term. (Art. 36(9)(b).)
- ¹⁸ The recent Review Conference adopted a declaration that reemphasized the obligation of States Parties to arrest those subject to ICC arrest warrants. (ICC, Declaration on cooperation (RC/Decl.2 June 8, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf).
- ¹⁹ ICC Office of the Prosecutor, Policy Paper on the Interests of Justice (Sept. 2007), <http://www2.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>.
- ²⁰ ICC, Office of the Prosecutor, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor>.
- ²¹ ICC, Situations and cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases>.
- ²² In the Bemba case, the Trial Chamber on June 24, 2010, dismissed his challenges to admissibility and alleged abuse of process. Bemba then appealed that decision, and thereafter the Trial Chamber postponed the commencement of trial until after the appeal was decided. (ICC, Press Releases: Bemba Case, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Press+Releases>).
- ²³ ICC, Situation in the Republic of Kenya, <http://www2.icc-cpi.int/Menus/ASP/ReviewConference/Rome+Statute+amendment+proposals.htm>
- ²⁴ ICC Press Release, Pre-Trial Chamber I declines to confirm the charges against Bahar Idriss Abu Garda (Feb. 8, 2010), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/pr495?lan=en-GB>.
- ²⁵ U.N. Security Council, 6491st meeting (Feb. 26, 2011); U.N. Security Council, Resolution 1970 (2011) ¶¶ 4-8 (Feb. 26, 2011).
- ²⁶ ICC, Statement by the Office of the Prosecutor on situation in Libya (Feb. 28, 2011).
- ²⁷ ICC, ICC Prosecutor to open an investigation in Libya (March 2, 2011).
- ²⁸ ICC, Office of the Prosecutor, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor>; Lauria, Court Orders Probe of Afghan Attacks, Wall St. J., Sept. 10, 2009; ICC Office of Prosecutor, Letter to Deputy High Commissioner for Human Rights (Jan. 12, 2010) (alleged crimes during the conflict in Gaza in December 2008 and January 2009), <http://www2.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/LettertoUNHC1.pdf>; ICC Office of the Prosecutor, ICC Prosecutor confirms situation in Guinea under examination (Oct. 14, 2009), <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Guinea>.
- ²⁹ Office of ICC Prosecutor, Statement Regarding the Situation in Iraq (09/02/06), http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf. Again, this statement shows a

careful attention to detail and the terms of the Rome Statute, not some backhanded way of currying favor with the U.S.

³⁰ ICC Prosecutor, Statement Regarding the Situation in Venezuela (09/02/06), http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf.

³¹ U.N. Security Council Resolution 1593 (2005), <http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement>.

³² U.N. Secretary-General Press Release, SECRETARY-GENERAL WELCOMES ADOPTION OF SECURITY COUNCIL RESOLUTION REFERRING SITUATION IN DARFUR, SUDAN, TO INTERNATIONAL CRIMINAL COURT PROSECUTOR (3/31/05), <http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm>.

³³ U.N. Security Council, Record of 5158th Meeting (3/31/05), <http://daccessdds.un.org/doc/UNDOC/PRO/N05/292/47/PDF/N0529247.pdf?OpenElement>.

³⁴ Office of ICC Prosecutor, The Prosecutor of the ICC opens investigation in Darfur (06/06/05), <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/darfur%20sudan?lan=en-GB>.

³⁵ AMICC, Work of the Prosecutor, http://www.amicc.org/icc_activities.html#pstatements.

³⁶ ICC Prosecutor, Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR (7/14/08), <http://www2.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>; ICC Prosecutor, Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005) (6/5/09), http://www.amicc.org/docs/OTPSpeech05062009_Eng.pdf.

³⁷ ICC, The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb), http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/darfur_%20sudan?lan=en-GB.

³⁸ ICC, Case: The Prosecutor vs. Omar Hassan Ahmad Al Bashir, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB>.

³⁹ U.N. Security Council, Security Council Urges Sudan's Government To Fully Cooperate with International Criminal Court 'To Put an End to Impunity for the Crimes Committed in Darfur (06/16/08), www.un.org/News/Press/docs/2008/sc9359.doc.htm.

⁴⁰ ICC, Press Release: ICC issues a warrant for the arrest of Omar Al Bashir, President of Sudan (04/03/09), <http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/press%20releases/icc%20issues%20a%20warrant%20of%20arrest%20for%20omar%20al%20bashir>

%20president%20of%20sudan; ICC, [Warrant of Arrest for Omar Hassan Ahmad Al Bashir \(04/03/09\)](http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>. The Prosecutor has appealed this denial. (Reuters, [Sudan: Prosecutor Appeals for Genocide Charges Against President](#), N.Y. Times (8/7/09).

⁴¹ ICC, [REQUEST TO ALL STATES PARTIES TO THE ROME STATUTE FOR THE ARREST AND SURRENDER OF OMAR AL BASHIR \(06/03/09\)](http://www.icc-cpi.int/iccdocs/doc/doc642283.pdf), <http://www.icc-cpi.int/iccdocs/doc/doc642283.pdf>; ICC, [REQUEST TO ALL UNITED NATIONS SECURITY COUNCIL MEMBERS THAT ARE NOT STATES PARTIES TO THE ROME STATUTE FOR THE ARREST AND SURRENDER OF OMAR AL BASHIR \(06/03/09\)](http://www.icc-cpi.int/iccdocs/doc/doc642266.pdf), <http://www.icc-cpi.int/iccdocs/doc/doc642266.pdf>.

⁴² ICC Press Release, [Al Bashir case: The Appeals Chamber directs Pre-Trial Chamber I to decide anew on the genocide charge](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/pr494?lan=en-GB), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/pr494?lan=en-GB>.

⁴³ ICC, [Press Release: Pre-Trial Chamber I issues a second warrant of arrest against Omar Al Bashir for counts of genocide \(July 27, 2010\)](http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr557), <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr557>.

⁴⁴ *E.g.*, Cowell, [Sudan Leader Travels Despite Warrant](#), N.Y. Times, Aug. 27, 2010; [Kenya defends failure to arrest Sudan's president Omar al-Bashir in Nairobi](#), (Aug. 29, 2010), guardian.co.uk; ICC, [Press Release: Pre-Trial Chamber I informs the Security Council and the Assembly of States Parties about Omar Al-Bashir's visits to Kenya and Chad \(Aug. 27, 2010\)](http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pre_trial%20chamber%20i%20informs%20the%20security%20council%20and%20the%20assembly%20of%20states%20parties%20about%20omar%20al%20ba), http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pre_trial%20chamber%20i%20informs%20the%20security%20council%20and%20the%20assembly%20of%20states%20parties%20about%20omar%20al%20ba.

⁴⁵ See AMICC, [ICC Prosecutor Reports to the United Nations](http://www.amicc.org/icc_activities.html#unreports), http://www.amicc.org/icc_activities.html#unreports. These reports include discussions of the Prosecutor's efforts (a) to determine whether Sudan has capable domestic institutions and procedures to handle the crimes in question and (b) to address whether the "interests of justice" call for continuation or termination of the investigations.

⁴⁶ AMICC, [U.S. Administration Update](http://www.amicc.org/usinfo/administration.html), <http://www.amicc.org/usinfo/administration.html>.

⁴⁷ [Ninth Report of the Prosecutor of the ICC to U.N. Security Council Pursuant to UNSCR 1593 \(6/5/09\)](http://www2.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf), <http://www2.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf>; ICC Prosecutor, [Statement to the U.N. Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 \(6/5/09\)](http://www2.icc-cpi.int/NR/rdonlyres/9AE1D7E1-4083-4D19-9FB8-46EADDB42D83/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf), http://www2.icc-cpi.int/NR/rdonlyres/9AE1D7E1-4083-4D19-9FB8-46EADDB42D83/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf; U.N. Security Council, 6135th Meeting (05/06/09); U.N. Security Council, [Official communiqué of the 6136th \(closed\) meeting of the Security Council \(6/5/09\)](#).

⁴⁸ U.N. Security Council Press Release, [Sudan's President 'Will Face Justice'; 'Power Does Not Provide Immunity' \(Dec. 4, 2009\)](http://www.un.org/News/Press/docs/2009/sc9804.doc.htm), <http://www.un.org/News/Press/docs/2009/sc9804.doc.htm>; U.N. Security Council, [Minutes of 6230th Meeting \(Dec. 4, 2009\)](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/633/31/PDF/N0963331.pdf?OpenElement), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/633/31/PDF/N0963331.pdf?OpenElement>.

⁴⁹ ICC, Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), (June 11, 2010), <http://www2.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf>; ICC Prosecutor of the International Criminal Court, [Statement](#)

to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), (June 11, 2010), http://www2.icc-cpi.int/NR/rdonlyres/9AE1D7E1-4083-4D19-9FB8-46EADDB42D83/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf; U.N. Security Council, Minutes of 6336th Meeting (June 11, 2010), <http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N10/401/20/PDF/N1040120.pdf?OpenElement>; U.N. Security Council, Communique of 6337th (closed) Meeting, (June 11, 2010), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/402/81/PDF/N1040281.pdf?OpenElement>; U.N. Security Council, Press Release: Arrest of Indicted Prominent Sudanese Citizens Crucial for Peace in Darfur, Ending Impunity, International Criminal Court Prosecutor Tells Security Council, (June 11, 2010), <http://www.un.org/News/Press/docs/2010/sc9950.doc.htm>.

⁵⁰ ICC Prosecutor, Twelfth Report to Un.N. Security Council (Dec. 9, 2010) , <http://www2.icc-cpi.int/NR/rdonlyres/F66BDD95-C599-4083-B19C-272662872E11/282791/12thUNSCReport1.pdf>; ICC Prosecutor, Statement to the U.N. Security Council (Dec. 9, 2010), <http://www2.icc-cpi.int/NR/rdonlyres/23EA8008-1E3E-494B-A256-8E69F82B27ED/282820/12thspeechtotheUNSC.pdf>.

⁵¹ U.N. Security Council, [Minutes of] 6440th Meeting (Dec. 9, 2010), <http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N10/683/33/PDF/N1068333.pdf?OpenElement>; U.N. Security Council, Communique of 6441st Meeting (Dec. 9, 2010), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/685/28/PDF/N1068528.pdf?OpenElement>. Thirty non-members of the Council attended the closed meeting: 19 from Europe and North and South America plus New Zealand and Australia; 5 from Africa (including Sudan); and six from Islamic countries in the Middle East and Asia.

⁵² E.g., U.N. Security Council, Minutes of 6251th meeting (Dec. 21, 2009), <http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N09/660/48/PDF/N0966048.pdf?OpenElement>; U.N. Security Council, Press Release: Secretary-General, at Security Council Meeting on Sudan, Urges Support for Efforts Aimed at Encouraging Parties To Make Concessions, Embrace Consensus (Dec. 21, 2009), <http://www.un.org/News/Press/docs/2009/sc9829.doc.htm>; U.N. Security Council, Minutes of 6304th Meeting (April 29, 2010), <http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N10/335/45/PDF/N1033545.pdf?OpenElement> ; U.N. Security Council, Press Release: Security Council Extends United Nations Presence in Sudan Until 30 April 2011, Calling on Mission To Take Lead in Preparations for Next Year's Referendums (April 29, 2010), <http://www.un.org/News/Press/docs/2010/sc9916.doc.htm>; U.N. Security Council, Minutes of 6318th Meeting (May 20, 2010), <http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N10/369/35/PDF/N1036935.pdf?OpenElement> ; U.N. Security Council, Press Release: African-Union-United Nations Hybrid Operation in Darfur Focused on Protection Mandate Despite Challenges, Security Council Told (May 20, 2010), <http://www.un.org/News/Press/docs/2010/sc9932.doc.htm>; U.N. Security Council, Press Release: Briefing Security Council on Sudan, United Nations, African Union Officials Tout Unified Strategy, Linking Peace in Darfur to Southern Sudan Referendum (June 14, 2010), <http://www.un.org/News/Press/docs/2010/sc9952.doc.htm>.

⁵³ E.g., ICC, Press Release: Third outreach mission to Kisangani, Democratic Republic of the Congo(07.09.09), <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr449>; Foley, Justice on trial, *Guardian* (10/11/06) (discussion of ICC's outreach and information program in Uganda).

⁵⁴ ICC, Case: Prosecutor v. Thomas Lubanga Dyilo, [http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%](http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%20)

[200106/democratic%20republic%20of%20the%20congo?lan=en-GB](http://www.hrw.org/en/news/2010/07/16/status-international-criminal-court-trial-thomas-lubanga); Human Rights Watch, Recent Developments in the ICC Trial of Thomas Lubanga (July 16, 2010), <http://www.hrw.org/en/news/2010/07/16/status-international-criminal-court-trial-thomas-lubanga>; Baylis, ICC Use of Intermediaries for Investigations (August 31, 2010), <http://intlawgrrls.blogspot.com>; Baylis, Outsourcing Investigations, 14 U.C.L.A. J. Int'l Law & For. Affairs ____ (2009).

⁵⁵ *Id.*

⁵⁶ ICC, Press Release: Trial Chamber I orders stay of proceedings in the trial of Thomas Lubanga Dyilo, <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr555>; ICC Trial Chamber I, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (July 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc906146.pdf>; Human Rights Watch, Recent Developments in the ICC Trial of Thomas Lubanga (July 16, 2010), <http://www.hrw.org/en/news/2010/07/16/status-international-criminal-court-trial-thomas-lubanga>.

⁵⁷ *Id.*

⁵⁸ ICC, Press Release: Trial Chamber I orders the release of Thomas Lubanga Dyilo--implementation of the decision is pending (July 15, 2010), http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/trial%20chamber%20i%20ordered%20the%20release%20of%20thomas%20lubanga%20dyilo%20_%20implementation%20of%20the%20decision%20is%20pend.

⁵⁹ ICC, Press Release: The Appeals Chamber gives suspensive effect to the appeal against the decision on the release of Thomas Lubanga (July 23, 2010), <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/the%20appeals%20chamber%20gives%20suspensive%20effect%20to%20the%20appeal%20against%20the%20decision%20on%20the%20release%20of%20tho>.

⁶⁰ Surprisingly there has been virtually no coverage of the Review Conference by U.S. media.

⁶¹ AMICC, Report on the Review Conference of the International Criminal Court (June 25, 2010), <http://www2.icc-cpi.int/Menu/ICC/Home>; <http://www.amicc.org>; Scheffer, States Parties Approve New Crimes for International Criminal Court, ASIL Insight (June 22, 2010); ICC Review Conference, Kampala Declaration (RC/Decl.1, June 8, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.1-ENG.pdf; ICC Review Conference, Declaration on cooperation (RC/Decl.2, June 8, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf; ICC Review Conference, Resolution on Complementarity (RC/Res.1, June 8, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf; ICC Review Conference, Resolution on impact of the Rome Statute System on victims and affected communities (RC/Res.2 June 8, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf; ICC Review Conference, Resolution on Strengthening the enforcement of sentences (RC/Res.3 June 8, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.3-ENG.pdf; ICC Review Conference, Resolution on Article 124 (RC/Res.4 June 10, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf; ICC Review Conference, Amendments to article 8 of the Rome Statute (RC/Res.5, June 10, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf

⁶² ICC Review Conference, Rome Statute Amendment on the Crime of Aggression (RC/Res.6 June 11, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf; AMICC, Report on the Review Conference

of the International Criminal Court (June 25, 2010), <http://www2.icc-cpi.int/Menus/ICC/Home>;
<http://www.amicc.org>; Oosterveld, [Assessing the ICC conference](#), (June 13, 2010),
<http://intlwgrrls.blogspot.com>; Van Schaack, [Understanding Aggression](#) (June 24, 2010),
<http://intlwgrrls.blogspot.com>; Van Schaack, [Understanding Aggression II](#) (June 26, 2010),
<http://intlwgrrls.blogspot.com>; Van Schaack, [Question on the ICC aggression filter](#) (July 24, 2010),
<http://intlwgrrls.blogspot.com>; Van Schaack, [The Aggression Negotiations](#) (Sept. 2, 2010),
<http://intlwgrrls.blogspot.com>. (As previously mentioned, under Article 5(1) (d) of the Rome Statute, the ICC has had jurisdiction over the "crime of aggression." However, it could not exercise such jurisdiction because the states that were negotiating the Statute could not agree on the definition of that crime. Instead, under Article 5(2), a future definition of that crime was to be developed that is "consistent with the relevant provisions of the [U.N.] Charter," and especially its Chapter VII regarding the Security Council.)

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ AMICC, <http://www.amicc.org>. The author as the Provisional Organizer of the Minnesota Alliance for the ICC has been participating in AMICC activities.

⁶⁶ There also were 21 countries that abstained on the final vote on the Rome Statute. (Wikipedia, [Rome Statute of the International Criminal Court](#), http://en.wikipedia.org/wiki/Rome_Statute_of_the_International_Criminal_Court.)

⁶⁷ Scharf, [Results of the Rome Conference for an International Criminal Court](#), ASIL Insights (Aug. 1998), <http://www.asil.org/insigh23.cfm>; Wedgwood, [Fiddling in Rome: America and the International Criminal Court](#), Foreign Affairs (Nov/Dec. 1998).

⁶⁸ President Clinton, [Statement on Signature of the International Criminal Court Treaty](#) (12/31/00), http://www.amicc.org/docs/Clinton_sign.pdf; Congressional Research Service, [U.S. Policy Regarding the International Criminal Court](#) (29/08/96), <http://fpc.state.gov/documents/organization/73990.pdf>. Under Article II, Section 2 of the U.S. Constitution, the President has the "Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur."

⁶⁹ *Id.*; letter, John R. Bolton (U.S. Under Secretary of State for Arms Control and International Security) to U.N. Secretary-General Kofi Annan (5/6/02), <http://archives.cnn.com/2002/US/05/06/court.letter.text/index.html>.

⁷⁰ *E.g.*, AMICC, [U.S. Administrative Update](#), <http://www.amicc.org/usinfo/administration.html>; AMICC, [U.S. Congressional Update](#), <http://www.amicc.org/usinfo/congressional.html>.

⁷¹ *Id.*

⁷² AMICC, [U.S. Administration Update](#), <http://www.amicc.org/usinfo/administration.html>.

⁷³ *Id.*

⁷⁴ *E.g.*, [Statement by President Obama on the Promulgation of Kenya's New Constitution](#) (Aug. 27, 2010), <http://www.whitehouse.gov/the-press-office/2010/08/27/statement-president-obama-promulgation-kenyas->

new-constitution("I am disappointed that Kenya hosted Sudanese President Omar al-Bashir in defiance of International Criminal Court arrest warrants for war crimes, crimes against humanity, and genocide. The Government of Kenya has committed itself to full cooperation with the ICC, and we consider it important that Kenya honor its commitments to the ICC and to international justice, along with all nations that share those responsibilities"); U.N. Security Council, Press Release: Briefing Security Council on Sudan, United Nations, African Union Officials Tout Unified Strategy, Linking Peace in Darfur to Southern Sudan Referendum (June 14, 2010), (U.S. Ambassador Rice told Security Council that there was a need "to bring to justice all those responsible for crimes in Darfur, calling on Sudan to cooperate with the [ICC] and expressing deep concern at the Court's Pretrial Chamber judges recent decision to refer the issue of Sudan's non-cooperation to the Council").

⁷⁵ AMICC, Report on the Eighth Session of the Assembly of States Parties, The Hague, November 2009 <http://www.amicc.org/docs/ASP8.pdf>; Stephen J. Rapp, Speech to Assembly of States Parties (Nov. 19, 2009), http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf.

⁷⁶ Belczyk, US war crimes ambassador says US unlikely to join ICC in 'forseeable future,' *Jurist* (Jan. 28, 2010), <http://jurist.law.pitt.edu/paperchase/2010/01/us-war-crimes-ambassador-says-us.php>.

⁷⁷ AMICC, Report on the Resumed Eighth Session of the Assembly of States Parties, New York, March 2010 (March 31, 2010), <http://www.amicc.org/docs/ASP8r.pdf>; U.S. Dep't of State, Statement by Stephen J. Rapp . . . at the Session of the Assembly of States Parties of the [ICC], (March 23, 2010), <http://usun.state.gov/briefing/statements/2010/138999.htm>; U.S. Dep't of State, Statement by Harold Honju Koh . . . at the . . . Session of the Assembly of States Parties of the [ICC], (March 23, 2010), <http://usun.state.gov/briefing/statements/2010/139000.htm>.

⁷⁸ AMICC, Report on the Review Conference of the International Criminal Court (June 25, 2010), <http://www2.icc-cpi.int/Menu/ICC/Home>; <http://www.amicc.org>.

⁷⁹ *Id.*

⁸⁰ U.S. Dep't of State, U.S. Engagement with The International Criminal Court and The Outcome of The Recently Concluded Review Conference (June 15, 2010), http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

⁸¹ *Id.* With the existence of the ICC, there is no need to create future ad hoc tribunals. This fact also avoids the administrative problems ad hoc tribunals face when they near the end of their lives and professional and other staff leave to pursue other opportunities with greater future prospects. (See Amann, Prosecutorial Parlance (9/12/10), <http://intlawgrls.blogspot.com> (comments by officials of ICTY and ICTR).)

⁸² *Id.*

⁸³ U.N. Security Council 6491st meeting (Feb. 26, 2011). Other Council members (Bosnia & Herzogiva, Colombia, France, Germany, Libya and the U.K.) specifically commended the reference to the ICC. The other four Council members who did not join in drafting the resolution were Brazil, China, India and the Russian Federation. In the meeting, the Indian representative noted that "only" 114 of the 192 U.N. Members were parties to the Rome Statute and that five of the 15 Council members, including three permanent members (China, Russia and U.S.), were not such parties. He went on to emphasize the importance of Article 6 of the resolution's exempting from ICC jurisdiction nationals of States like India that were not parties to the Rome Statute and its preamble's stating that

the Statute's Article 16 allowed the Council to postpone any investigation or prosecution for 12 months. (*Id.*) The Brazilian representative was serving as President of the Council and, therefore, may not have participated in drafting the resolution, but she noted that Brazil was a "long-standing supporter of the integrity and universality of the Rome Statute" and expressed Brazil's "strong reservation" about Article 6's exemption of nationals of non-States Parties. (*Id.*) This suggests that the inclusion of Article 6 was the price of obtaining "yes" votes for the resolution from India, China and the Russian Federation.

⁸⁴ U.N. Security Council 6491st meeting (Feb. 26, 2011).

⁸⁵ ___ Cong. Record S1068-69 (March 1, 2011) (S. Res. 85).

⁸⁶ Belczyk, US war crimes ambassador says US unlikely to join ICC in 'foreseeable future,' Jurist (Jan. 28, 2010), <http://jurist.law.pitt.edu/paperpurchase/2010/01/us-war-crimes-ambassador-says-us.php>; Koh, The Challenges and Future of International Justice (Oct. 27, 2010), <http://www.state.gov/s/l/releases/remarks/150497.htm>; U.S. White House, National Security Strategy at 48 (May 2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf; Congressional Research Service, International Criminal Court Cases in Africa: Status and Policy Issues (March 7, 2011), <http://fpc.state.gov/documents/organization/158489.pdf>.

⁸⁷ On January 4, 2011, the Human Rights Council's Working Group on the Universal Periodic Review of the U.S. issued its final report on the UPR of the U.S. It set forth all the recommendations of the States without endorsement by the Working Group as a whole. This report again included the specific recommendations for the U.S. to ratify the Rome Statute. (U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review--United States of America ¶¶ 92.1, 92.2, 92.16, 92.25, 92.28, 92.36 (Jan. 8, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>.) On March 8, 2011, the U.S. submitted its response to this final report. Among other things, the U.S. specifically rejected the recommendations that the U.S. ratify the Rome Statute. (U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review--United States of America: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review ¶¶ 29, 30 (March 8, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/28/PDF/G1111628.pdf?OpenElement>.) Nevertheless, the Council adopted the Working Group report in March 2011. (U.N. Human Rights Council, HR Council Media: Human Rights Council concludes sixteenth session (March 25, 2011).)

⁸⁸ AMICC, The Obama's Administration's Evolving Policy Toward the International Criminal Court (March 4, 2011), <http://www.amicc.org/docs/ObamaPolicy.pdf>.

⁸⁹ The U.S. pledge about the LRA was prompted by the enactment of the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009. (Wikisource, [Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009](http://en.wikisource.org/wiki/Lord's_Resistance_Armey_Disarmament_and_Northern_Uganda_Recovery_Act_of_2009), http://en.wikisource.org/wiki/Lord's_Resistance_Armey_Disarmament_and_Northern_Uganda_Recovery_Act_of_2009; U.S. White House, [Statement by the President on the Signing of the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009](http://www.whitehouse.gov/the-press-office/statement-president-signing-lords-resistance-armey-disarmament-and-northern-uganda-r) (May 24, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-signing-lords-resistance-armey-disarmament-and-northern-uganda-r>.)

⁹⁰ ICC, [Review Conference of the Rome Statute: Pledges](http://www2.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-9-ENG-FRA-SPA.pdf) (July 15, 2010), http://www2.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-9-ENG-FRA-SPA.pdf.

⁹¹ Cassel, [Empowering United States Courts To Hear Crimes Within the Jurisdiction of the International Criminal Court](#), 35 *New England L. Rev.* 421 (2001).

⁹² Compare 18 U.S.C. § 1091 with Rome Statute, Art. 6.

⁹³ Compare 18 U.S.C. § 2441 with Rome Statute, Art. 8.

⁹⁴ AMICC, [U.S. Statutory Analogues to Article 5 Crimes](http://www.amicc.org/usinfo/us_law.html#analogues), http://www.amicc.org/usinfo/us_law.html#analogues.

⁹⁵ Compare Rome Statute, Art. 7 with S.1346 (111th Congress, 2d Session), <http://www.govtrack.us/congress/bill.xpd?bill=s111-1346>.

⁹⁶ S.1346, Ch. 25A, § 519 (h) (111th Congress, 2d Session), <http://www.govtrack.us/congress/bill.xpd?bill=s111-1346>. The American Servicemembers' Protection Act in addition to the previously mentioned "Hague invasion clause" provides that subject to U.S. presidential waiver, the U.S. is prohibited from cooperating with the ICC, from transferring classified national security information to the ICC and restricts U.S. participation in certain U.N. peacekeeping operations. AMICC, [Congressional Update—Texts of Legislation](http://www.amicc.org/usinfo/congress_texts.html), http://www.amicc.org/usinfo/congress_texts.html.

⁹⁷ Another September 18, 2010 search of the WESTLAW federal cases for references to "International Criminal Court" turned up 13 additional opinions, but only one was of significance. (*In re XE Services Alien Tort Litigation*, 665 F. Supp.2d 569 (E.D. Va. 2009)(Alien Tort Statute case; grave breaches of Geneva Conventions are punishable by the ICC.) The author, however, has not discovered any U.S. cases citing to decisions by the ICC.

⁹⁸ *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008) (the court also held that the Rome Statute's provision on the necessary intent did not set forth the generally accepted international law on the subject); *Krishanthi v. Rajaratnam*, 2010 WL 3429529 (D.N.J. Aug. 26, 2010); *Wiwa v. Royal Dutch Pet. Co.*, 626 F. Supp.2d 377 (S.D.N.Y. 2009) ; *Almog v. Arab Bank, PLC*, 471 F. Supp.2d 257 (E.D.N.Y. 2007); *Kiobel v. Royal Dutch Pet. Co.*, 456 F. Supp.2d 457 (S.D.N.Y. 2007), *aff'd in part & rev'd in part*, (Nos. 06-4800-cv & 06-4876 2d Cir. Sept. 17, 2010); *Doe v. Saravia*, 348 F. Supp.2d 1112 (E.D. Cal. 2004); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp.2d 1285 (S.D. Fla. 2003), *aff'd in part & vacated in part*, 416 F.3d 1242 (11th Cir. 2005), *cert. denied*, 549 U.S. 1032 (2006), *on remand*, 2007 WL 3054986 (S.D. Fla. 2007), *aff'd*, 578 F.3d 1283 (11th Cir. 2009), *pet for cert. filed* (No. 09-1376 May 10, 2010); *Barrueto v. Larios*, 2003 WL 22697724 (S.D. Fla. 2003); *Mehiinovic v. Vuckovic*, 198 F. Supp.2d 1322

(N.D. Ga. 2002); Wiwa v. Royal Dutch Pet. Co., 2002 WL 319887 (S.D.N.Y. 2002); Estate of Cabello v. Fernandez-Larios, 157 F. Supp.2d 1345 (S.D. Fla. 2001); Iwanowa v. Ford Motor Co., 67 F. Supp.2d 424 (D.N.J. 1999).

⁹⁹ The leading cases are from the Second Circuit: Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009), *pets. for cert. filed* (No. 09-1261 April 15, 2010, and No. 09-1418 May 20, 2010); Khulumani v. Barclay Nat'l Bank Ltd, 504 F.3d 254 (2d Cir. 2007), *after remand sub nom. In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009)(court also decided that the Rome Statute did not set forth generally accepted international law regarding the issue of private person direct liability for apartheid or the issue of civil infliction of mental distress). The same result has been reached by the S.D.N.Y district court in that Circuit: Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp.2d 633 (S.D.N.Y. 2006); Presbyterian Church of Sudan v. Talisman Energy, Inc., 226 F.R.D. 456 (S.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp.2d 331 (S.D.N.Y. 2005). The same result was reached in a Ninth Circuit case, but that opinion was declared non-citable when the court granted a rehearing petition and later granted a joint motion for dismissal of the appeal after a settlement: Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *order for rehearing en banc*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005). In Mehinovic v. Vuckovic, 198 F. Supp.2d 1322 (N.D. Ga. 2002), an individual was held liable for damages under the Alien Tort Statute for aiding and abetting human rights violations by others.

¹⁰⁰ See Krohnke, US FEDERAL COURTS RELY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT IN CIVIL CASES (Nov. 9, 2009), <http://www.amicc.org/docs/Krohnke%20on%20Khulumani.pdf>.

¹⁰¹ Slip Opinion (Nos. 06-4800-cv & 06-4876-cv) at 48-49, Kiobel v. Royal Dutch Pet. Co., ___ F.3d ___ (2d Cir. Sept. 17, 21010); *id.* at 11.

¹⁰² *Id.* at 49.

¹⁰³ *Id.* at 32-33.

¹⁰⁴ *Id.* at 15.

¹⁰⁵ Concurring Opinion (Nos. 06-4800-cv & 06-4876-cv) at 73-88, Kiobel v. Royal Dutch Pet. Co., ___ F.3d ___ (2d Cir. Sept. 17, 2010).

¹⁰⁶ *Id.* at 7-73.

¹⁰⁷ *Id.* at 32-33.

¹⁰⁸ *Id.* at 33-37.

¹⁰⁹ *Id.* at 36-37.

¹¹⁰ On February 4, 2011, in Kiobel, the three-judge Second Circuit panel, by the same 2 to 1 split, denied plaintiffs' petition for rehearing. (Order, Kiobel v. Royal Dutch Pet. Co., 2011 WL 338048 (2d Cir., Feb. 4, 2011) (panel).) The same day the Circuit itself, 6 to 4, denied the petition for rehearing en banc. (Order, Kiobel v. Royal Dutch Pet. Co., 2011 WL 338151 (2d Cir. Feb. 4, 2011) (en banc).) Although there was no discussion of the ICC's Rome Statute in these decisions, they raise other interesting issues about the ATS.

Panel's Decision. Chief Judge Jacobs in a concurring opinion attacked Judge Laval's original concurring opinion on the merits that called for dismissal of the complaint and that vigorously disagreed with the conclusion that corporations were not liable under the ATS under any circumstances. According to Chief Judge Jacobs, subjecting corporations, especially foreign corporations, to such potential liability provokes international rivalry, divisive interests, competition and grievance. As an example he cited statements by former South African President Mbeki that the South African Apartheid Litigation under the ATS constituted "judicial imperialism." In addition, Jacobs argued that exempting corporations from such liability was "of no big consequence" in light of the Second Circuit's 2009 decision that aiding and abetting liability under the ATS would exist only if the defendant acted with "the positive intention of bringing about a violation of the Law of Nations" and that such cases had to be exceedingly rare. Nevertheless, Jacobs continued, plaintiffs' lawyers would find ways to get around this barrier by clever pleadings notwithstanding Twombly and Iqbal.

Judge Cabranes submitted a separate concurring opinion on the panel's denial of the rehearing petition. He said that the majority opinion on the merits was determined by fidelity to law, not some policy agenda.

Senior Judge Laval, also a member of the original panel, dissented from its denial of rehearing. In his dissenting opinion Laval pointed out that the majority's decision on the merits rested on the dubious proposition that the issue of corporate liability was one of subject-matter jurisdiction that could be reached by the court despite its not having been raised or argued by the parties. Laval also argued that the majority's merits decision had been revealed to be motivated by an inappropriate, "intense, multi-faceted policy agenda." He suggested that there already were well established means to address the concerns raised by Jacobs' opinion: forum non conveniens or international comity, U.S. State Department's statements of interest in particular cases that interfered with U.S. foreign policy, judicial power to invalidate unjustifiably inflated jury verdicts.

En Banc Decision. As previously mentioned, the Circuit itself, 6 to 4, denied the petition for rehearing en banc. Senior Judge Laval was not eligible to participate in this en banc decision because of his senior status. Chief Judge Jacobs in a concurring opinion on this denial merely incorporated by reference his concurring opinion on the panel's denial of rehearing.

Circuit Judge Lynch submitted a dissenting opinion that was joined by Judges Pooler, Katzmann and Chin. Lynch said that the case presents a significant issue and generates an internal split of Second Circuit authority on the issue. Moreover, Lynch argued, Judge Laval's "scholarly and eloquent opinion" on the merits suggests that the majority's decision on the merits "is very likely incorrect."

In a separate dissenting opinion on the en banc petition, Circuit Judge Katzmann noted that the Circuit was split 5-5, on the petition. (This suggests that initially the court was split 5-5 and then one of the judges switched from favoring rehearing to the other side.) Katzmann added that his concurring opinion in *Khulumani* did not lead to the inescapable conclusion that corporations could not be liable under the ATS.

¹¹¹ In addition, there are cases that are not important for purposes of U.S. courts' use of the Rome Statute. (Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008)(citation to law review article about the Rome Statute), on remand, 650 F.Supp.2d 1004 (C.D. Cal. 2009)(no exhaustion requirement to sue first in Papua New Guinea on claims for crimes against humanity, genocide, torture and violations of the international law of war); Aveo Belgium Ins. v. American Airlines, Inc. 423 F.3d 73 (2d Cir. 2005) (action to recover for loss of good in international air freight; Rome Statute did not enter into force until certain number of states had ratified the treaty); Shan v. China Constr. Bank Corp., 2010 WL 2595095 (S.D.N.Y. 2010) (Rome Statute's Art. 25 sets forth requirements for direct criminal liability, but plaintiff's civil complaint did not state a plausible theory for direct liability); Israel v. Crime Victims Services Div., 2006 WL 3341199 (N.D. Ill. 2006) (dismissal of *pro se* plaintiff's complaint); Graemon v. Buckley, 2006

WL 1582124 (W.D. Ark. 2006) (dismissal of *pro se* plaintiff's complaint); Schneider v. Kissinger, 310 F. Supp.2d 251 (D.D.C. 2004), *aff'd sub nom. Schneider v. United States*, 412 F.3d 190 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006) (dismissal of complaint that mentioned the Rome Statute.)