

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

**NEW YORK
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**Statement to National Security Transition Team Regarding
U.S. Engagement with the International Criminal Court**

The Association of the Bar of the City of New York

December 2008

The Association of the Bar of the City of New York¹ writes to offer suggestions on American policy toward the International Criminal Court ("ICC" or the "Court"). The Association has been a long-time supporter of the ICC; in 2001, the Association recommended that the US government ratify the Court's Rome Statute of the International Criminal Court.

Consistent with the President-elect's message of change, the time has come for the United States to engage constructively with the International Criminal Court. For the past eight years, the United States has pursued an aggressive policy of hostility toward to ICC. Under this policy, the United States not only refused to provide any support to the Court and its investigations, but has cut off economic and military assistance to numerous countries as a punishment for supporting the ICC. Although President Clinton signed the Rome Statute at the end of his presidency, the Bush administration in May 2002 took the unprecedented step of withdrawing the US signature on the Rome Statute and embarking on a worldwide diplomatic campaign designed to intimidate other countries from joining or supporting the ICC.

The ICC is the most important institution in the international criminal justice system. Created in 1998, when the Rome Statute on the ICC was adopted following years of negotiations and a global diplomatic conference, the ICC began operations in 2002 as a permanent court prosecuting the worst crimes under international law: genocide, crimes against humanity and war crimes. These are the same crimes that are being prosecuted by other international tribunals that have received significant and consistent US support and resources, such as the special tribunals for the former Yugoslavia, Rwanda and Sierra Leone. The ICC – which has been joined by 108 countries – is currently pursuing four cases arising from atrocities committed in Uganda, the Democratic Republic of the Congo, Central African Republic and Sudan. The first trial, of a Congolese rebel leader named Thomas Lubanga Dyilo, will begin early next year.

American policy toward the ICC has been a failure and an embarrassment. It has alienated many countries, including our closest allies, while damaging American credibility and commitment to the rule of law. The isolation of the US due to its failed ICC policy has also undermined other foreign policy goals, such as fighting terrorism. For example, when the US cut off aid to Latin

¹ The Association, founded in 1870, has over 23,000 members. While most practice in the New York area, the Association's membership includes lawyers from around the nation and in 50 foreign countries. The Association reports on legislative and regulatory issues on a local, state and national level.

American allies because they supported for the ICC, those countries sought such aid from China and other countries.

With regard to Darfur, it is significant that the US did not prevent the UN Security Council referral of the Darfur genocide case to the ICC. We have been awkwardly caught, however, between our stated goal of seeing the perpetrators of that genocide prosecuted and the policy of opposition to the Court. As a result, last month the US correctly argued against calls for the Security Council to delay the ICC case against Sudan's president Omar al-Bashir (as Article 16 of the Rome Statute permits) on the grounds that the perpetrators of the genocide should face justice; at the same time, the US follows policies that undermine the effectiveness of the ICC in accomplishing this goal.

In addition, the concerns that the ICC would act irresponsibly and pursue frivolous cases have proven unfounded. Under its prosecutor, Luis Moreno-Ocampo, the ICC has narrowly applied its jurisdiction to pursue only the worst violations of international law in cases where a national court is unable or unwilling to prosecute.

Polls have consistently shown a majority of Americans believe the US should join the ICC to try individuals for genocide, war crimes and crimes against humanity when their own country won't try them. We recognize, however, that ratification of the Rome Statute is unlikely in the short-term. As a result, the Association recommends several measures that can be taken immediately and would go far in reducing our isolation with regard to the International Criminal Court.

First, the United States should signal the change in ICC policy by retracting the May 2002 letter that withdrew the US government's signature on the Rome Statute. At the same time, the US should declare its intention to again assume the obligations of a signatory.

Second, the US should respond positively to requests from the ICC for assistance. The State Department has disclosed the request of the ICC prosecutor for information regarding the Darfur investigation, and we understand that an informal channel for such assistance has been established. The US should extend this channel to evidence and intelligence relating to all investigations and cases. The ICC's prosecution of the horrendous crimes in Darfur and elsewhere should be supported with all appropriate measures, and the US should continue to oppose suggestions that the Security Council invoke Article 16 of the Rome Statute to delay the al-Bashir case for a year or longer.

Third, the US should take steps to repeal the so-called American Service Members Protection Act (ASPA), the legislative basis for the US government's rigid anti-ICC policy. ASPA prohibits US assistance to the ICC and, among other things, authorizes the United States to invade the Hague to free any American being held by the ICC. Although there are provisions in ASPA for waivers and a carve-out that permits cooperation with the ICC on a case-by-case basis (the "Dodd Amendment"), ASPA remains on the books and is an impediment to change to ICC policy. ASPA has already been partially repealed: the prohibition of US military assistance to ICC members was removed in January 2008, and it appears probable that some of the economic sanctions will not be reauthorized.

Finally, the United States should participate in all future meetings of the ICC's governing body, the Assembly of States Parties (ASP), and in the first Review Conference to be held in 2010.

The US is entitled to attend ASP meetings as a nonvoting observer, and many countries that have not yet ratified the Rome Statute, such as Israel, China and Russia, send delegations. For eight years, the US chairs at ASP meetings have been empty, although from 1996 through 2001, the United States sent delegations to all meetings in order to express its views. Indeed, much of the Rome Statute was drafted by US lawyers during years of negotiations.

These measures are consistent with the traditional American policies favoring international justice mechanisms. They will also serve to further the goals of ending impunity for the worst international crimes and enabling a system of accountability for these crimes. The ICC, which exercises limited jurisdiction and is subject to built-in safeguards, has shown itself to be a responsible and measured international institution. It deserves our support.

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Thank you for the opportunity to express our views on this important matter. If you would like any further information from the Association, please feel free to contact Mark R. Shulman, Chair of the Association's Committee on International Human Rights, at mshulman@law.pace.edu or 914-422-4338.

Thank you very much for your attention and concern.