

ADOPTED**AMERICAN BAR ASSOCIATION****CENTER FOR HUMAN RIGHTS****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges all national governments to
- 2 observe, respect, and protect the independence of the International Criminal Court;
- 3
- 4 FURTHER RESOLVED, That the American Bar Association condemns threats by
- 5 governments to the International Criminal Court and its officers and personnel in the
- 6 performance of their duties.

REPORT

“There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.”

--Benjamin B. Ferencz, Former Nuremberg War Crimes Prosecutor

Since 1978, the American Bar Association has supported the establishment of a permanent international criminal tribunal to ensure accountability for mass atrocities.¹ Pursuant to that longstanding commitment, a delegation led by the ABA President participated in the 1998 Rome Conference that resulted in such a tribunal, the International Criminal Court (the “ICC” or the “Court”). Since the ICC’s formal creation under the Rome Statute of 1998 (which is also a multi-lateral treaty among 123 nations, including many U.S. allies), and the latter’s entry into force, in 2002,² the ABA has supported worldwide ratification of (or accession to) the treaty, including by the United States (which remains a non-party).

Subsequent ABA policies variously have urged greater U.S. engagement and cooperation with the ICC (even in the absence of ratification or accession).³ And, in 2012, with seed funding from The Planethood Foundation, founded by former Nuremberg War Prosecutor Benjamin B. Ferencz, the ABA Center for Human Rights established an “ICC Project” (now a joint project with the Criminal Justice Section under a broader “Atrocity Crimes Initiative”) to effectuate this strong body of ABA policy supporting the ICC in service of ABA Goal IV: Advance the Rule of Law, and its objective of “hold[ing] governments accountable under law.”

Given the ICC’s unique status as the only permanent judicial institution with a mandate to investigate and prosecute individuals for genocide, crimes against humanity, war crimes, and aggression, its initial growth and success as a new court since 2002 understandably have been uneven. While there have been numerous important successes,⁴ there have also been challenges: severely limited funding has led to

¹ Resolution 102C, *adopted* Aug. 1978. For a compendium of ABA policies on the ICC, see “ABA Policy on the ICC” (hereafter “ABA compendium”), *available at* <https://www.aba-icc.org/the-aba-icc-project/aba-policy-on-the-icc/>. Policies have, for example, urged the United States to support referrals of Sudan and Myanmar (177A (Midyear Meeting 2005) and 120 (Annual Meeting 2019) respectively), encouraged greater US cooperation with the Court’s investigations and participation in the Assembly of States Parties (108A (Annual meeting 2008)), and urged Congress to pass domestic crimes against humanity legislation (300 (Annual Meeting 2013)).

² The Rome Statute was adopted in 1998 by 120 states (the United States was one of seven states that voted in opposition despite playing an extensive role in negotiating the treaty). As of May 2020, there are 123 States Parties to the Rome Statute. The vast majority of ratifications happened within the first five years of the treaty’s existence, allow the Court to become operational in 2002 and reflecting an intense global desire to ensure accountability and prevent impunity for atrocity crimes.] Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL Insights 3:10 (Aug. 11, 1998); *States Parties: Chronological List*, Int’l Criminal Ct. Assemb. of States Parties, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20%20chronological%20list.aspx.

³ ABA compendium, *supra* n.1.

⁴ See Jane Stromseth, *Is the ICC Making a Difference?*, JUST SECURITY (Dec. 6, 2017), <https://www.justsecurity.org/47717/icc-making-difference/> (arguing the ICC has built a track record of

administrative inefficiencies and delays in completing trials and announcing verdicts, and inconsistent cooperation from States has limited the execution of arrest warrants and apprehension of suspects, for example. This year the ICC, in anticipation of its 20th anniversary in 2022, has undertaken a thorough institutional review, inviting all stakeholders, including civil society entities in the United States, to weigh in regarding how the Court can be improved across a broad range of topics. The ABA is participating in that review through the ICC Project and, in April 2020, submitted formal Comments to the Group of Independent Experts, which has been tasked with conducting and making recommendations for a large portion of the review.

The federal government, meanwhile, despite having been a leading force in the ICC's creation and playing an important role in the 1998 drafting of the Rome Statute/Treaty and subsequent legal framework, to date has resisted ratification due largely to concern about a potential for politically motivated prosecutions of U.S. personnel. While noting such concerns, President Clinton signed the Rome Statute on the last day it was open for signature, he chose not to send the treaty to the Senate for ratification at the time.⁵ The Bush administration initially disavowed Clinton's signature but later came to cooperate effectively (albeit indirectly) with the Court in response to the genocide in Darfur, and softened its policies towards the Court over time.⁶ The Obama administration cooperated with the Court, including by facilitating the transfer of two suspects to the ICC, supporting Security Council referral of the situation in Libya to the Court (the United States supported a referral of the situation in Syria as well but it was ultimately vetoed), participating in the ICC Assembly of States Parties as an observer, and expanding the U.S. War Crimes Rewards Program to allow rewards regarding ICC fugitives (among others).⁷ In no case, however, did the Clinton, Bush, or Obama administrations challenge the ICC's independence as an international judicial body by seeking to impede the Court's operations, or threaten Court personnel, or impair the ICC's ability to carry out its global mission *per se*.⁸

justice for atrocity crimes, catalyzed domestic accountability processes, empowered civil society advocacy, and strengthened prospects for deterrence and prevention); James A. Goldston, *Argument: Don't Give Up on the ICC*, FOREIGN POLICY (Aug. 8, 2019), <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/>; HUMAN RIGHTS WATCH, PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE LESSONS FROM COLOMBIA, GEORGIA, GUINEA, AND THE UNITED KINGDOM (2018); Rosemary Gray, *Gender-Based Crimes: A Monumental Day for the ICC*, INTLAWGRRLS (July 8, 2019), <https://ilg2.org/2019/07/08/gender-based-crimes-a-monumental-day-for-the-icc/>.

⁵ See, e.g., "Excerpt: Position on International Criminal Court Clarified," Press Briefing by Richard Boucher, U.S. Dep't of State Spokesman (Jan. 2, 2001), https://b14399d4-3c15-4ce4-8e6c-3f7884fb2110.filesusr.com/ugd/e13974_97394e86d5634f55806d7f3905ccfe85.pdf.

⁶ See e.g., Amb. Clint Williamson, *A New War With the International Criminal Court*, THE HILL (Sept. 18, 2018), <https://thehill.com/opinion/criminal-justice/406722-a-new-war-with-the-international-criminal-court> (describing actions taken later in the Bush administration to reverse earlier policies and pursue a working relationship with the Court).

⁷ *Obama Administration*, AM. COALITION FOR THE INT'L CRIMINAL CT., <https://www.amicc.org/obama-administration>.

⁸ The American Servicemembers Protection Act, enacted during the Bush administration, contemplates various actions and penalties against other countries that cooperate with the ICC where U.S. personnel are involved. None, however, addresses the Court's functioning as an independent judicial institution. American Servicemembers' Protection Act, 22 U.S.C. §§ 7421–7433 (2002). For more on the American Servicemembers' Protection Act, including changes to its restrictions over time, see Julian Bava and Kiel

The Trump administration, by contrast, has been hostile to the ICC, and has sought through official policy to hamstring the Court's independence. On September 11, 2018, then-National Security Advisor John Bolton threatened immigration, financial, and criminal sanctions against the ICC were it to proceed with an investigation of alleged war crimes by American armed forces and the CIA in Afghanistan,⁹ declaring further that ICC judges and prosecutors would henceforth be barred from entering the US, and that their funds in the US would be targeted. "We will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans," Bolton said.¹⁰ The following spring, the administration made good on Bolton's threat by revoking the travel visa of ICC Prosecutor Fatou Bensouda.¹¹

In response to this action, ABA President Bob Carlson issued this statement:

The American Bar Association is concerned over the policy announced last month by the United States government to restrict visas for certain officials of the International Criminal Court, a policy implemented last week by revoking the ICC Prosecutor's visa.

In the United States, the independence and impartiality of our justice system is foundational to our democracy and commitment to the rule of law. Although the United States is not a member of the ICC, barring the travel of legal professionals because of their work on behalf of this international tribunal sends the wrong message about the United States' commitment to those same principles in the pursuit of international justice and accountability.

The ABA urges the State Department to immediately reverse this policy decision and to refrain from taking actions against legal professionals based solely on their work on behalf of the ICC.¹²

On March 5, 2020, the ICC Appeals Chamber reversed a lower chamber decision and authorized a formal investigation of alleged war crimes in Afghanistan, potentially to

Ireland, *The American Servicemembers' Protection Act: Pathways to and Constraints on U.S. Cooperation with the International Criminal Court*, 12 EYES ON THE ICC 1 (2016), https://www-cdn.law.stanford.edu/wp-content/uploads/2016/07/Bava_Ireland_Article_FINAL.pdf.

⁹ "John Bolton threatens ICC with US sanctions," BBC, Sept. 11, 2018, available at <https://www.bbc.com/news/world-us-canada-45474864>. The Afghanistan investigation also encompasses alleged crimes committed by Afghan National Security Forces and the Taliban and affiliated groups. For more information, see *Afghanistan*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/afghanistan>.

¹⁰ "John Bolton threatens ICC with US sanctions," BBC, Sept. 11, 2018, available at <https://www.bbc.com/news/world-us-canada-45474864>.

¹¹ "US revokes visa of International Criminal Court prosecutor," BBC, Apr. 5, 2019, available at <https://www.bbc.com/news/world-us-canada-47822839>.

¹² "Statement of ABA President Bob Carlson Re: Restricting International Criminal Court officials' visas," April 9, 2019, available at <https://www.americanbar.org/news/abanews/aba-news-archives/2019/04/statement-of-aba-president-bob-carlson-re--restricting-internati/>.

encompass actions by American personnel.¹³ Secretary of State Mike Pompeo, on March 17, 2020, responded to the decision with a direct attack upon the ICC itself, while extending it to named staff persons of the Court. In his media remarks announcing these measures, Mr. Pompeo stated:

Turning to the ICC, a so-called court which is revealing itself to be a nakedly political body:

As I said the last time I stood before you, we oppose any effort by the ICC to exercise jurisdiction over U.S. personnel. We will not tolerate its inappropriate and unjust attempts to investigate or prosecute Americans. When our personnel are accused of a crime, they face justice in our country.

It has recently come to my attention that the chef de cabinet to the prosecutor, Sam Shoamanesh, and the head of jurisdiction, complementarity, and cooperation division, Phakiso Mochochoko, are helping drive ICC prosecutor Fatou Bensouda's effort to use this court to investigate Americans. I'm examining this information now and considering what the United States' next steps ought to be with respect to these individuals and all those who are putting Americans at risk.

We want to identify those responsible for this partisan investigation and their family members who may want to travel to the United States or engage in activity that's inconsistent with making sure we protect Americans.

This court, the ICC, is an embarrassment. It's exposing and – we are exposing and confronting its abuses, and this is a true example of American leadership to ensure that multilateral institutions actually perform the missions for which they were designed.¹⁴

Setting aside the fact that, when U.S. personnel accused of a crime “face justice in our country,” the ICC has no jurisdiction over the U.S. and therefore poses no “threat” to U.S. personnel,¹⁵ Sec. Pompeo's statement nonetheless arguably represents an attack on international and national judicial independence writ large, thus setting a negative

¹³ 'Unanimous' ICC gives go-ahead to probe Afghanistan alleged war crimes," UN News, Mar. 5, 2020, available at <https://news.un.org/en/story/2020/03/1058741> (emphasis added); *Afghanistan: ICC Appeals Chamber Authorises the Opening of an Investigation*, INT'L CRIMINAL CT. (Mar. 5, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>

¹⁴ "Secretary Michael R. Pompeo's Remarks to the Press," U.S. Department of State transcript, Mar. 17, 2020 (emphasis added), available at <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press-6/>.

¹⁵ Under the Rome Statute's principle of “complementarity,” the ICC has jurisdiction to investigate and prosecute atrocity crimes only where the accused is otherwise subject to the Court's jurisdiction and the national government of the accused is unable or unwilling to investigate and prosecute the allegations itself. See Rome Statute of the International Criminal Court arts. 1, 17, July 17, 1998, 2187 U.N.T.S. 90.

example for the rest of the world.¹⁶ In a time when democracy is in retreat globally,¹⁷ such an attack against the ICC and its professional staff by the United States — historically the leading exemplar of democracy and a just rule of law, of which an independent judiciary is an indispensable part — gives fodder to those who cite such attacks as a legitimate basis to undermine judicial independence in their countries. Instead, America’s core values of liberty, justice, and the rule of law are better served by adhering to the procedures set forth in the Rome Statute, which delineate clearly the ICC’s actual jurisdiction and firmly provide ample safeguards against any concern about politically motivated prosecutions.¹⁸

In response to these recurrent assaults on the ICC, the ABA reaffirms its support of the independence of the ICC, consistent with the ABA’s commitment to judicial independence, both domestically and internationally, and condemns attacks by governments on the ICC, its officers, and personnel.

Respectfully submitted,

Hon. James A. Wynn, Jr.
Chair, Center for Human Rights

August 2020

¹⁶ Matt Apuzzo & Marlise Simons, *U.S. Attack on I.C.C. Is Seen as Bolstering World’s Despots*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html>.

¹⁷ With regard to Poland, for example, the ABA has been resolute in condemning recent and recurring legislative attacks upon judicial independence, issuing statements by Presidents Perry Martinez, Carlson, Bass, and Klein, and undertaking presidential visits to Poland to support resistance to such laws by the Warsaw Bar and other advocates. See, e.g., “Poland: Erosion of Judicial Independence Continues,” ABA Center for Human Rights, available at https://www.americanbar.org/groups/human_rights/reports/poland-erosion-of-judicial-independence-continues/.

¹⁸ See ABA Policy 105C (Annual Meeting 2001) for the ABA’s original analysis of the Rome Statute’s protections (and recommendation that the United States therefore accede to the Rome Statute). See also, Monroe Leigh, *Comparison: The U.S. Constitution vs. The International Criminal Court’s Rome Statute*, AM. COALITION FOR THE INT’L CRIMINAL CT., https://b14399d4-3c15-4ce4-8e6c-3f7884fb2110.filesusr.com/ugd/e13974_1ac1df43c05c435e904ce556bb351eb8.pdf.

GENERAL INFORMATION FORM

Submitting Entity: Center for Human Rights (CHR)

Submitted By: Hon. James A. Wynn, Jr., Chair

1. Summary of Resolution(s).

The resolution reaffirms the Association's commitment to the independence of the International Criminal Court ("ICC"), urges all national governments to observe, respect, and protect the independence of the ICC, and condemns governmental attacks on the ICC and its personnel.

2. Approval by Submitting Entity.

The resolution was approved by the CHR Board on May 4, 2020.

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

No.

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

As explained in the report, the ABA has numerous policies supporting the ICC since 1978. This resolution is distinct from yet consistent with and advances those prior policies (which are available here: <https://www.aba-icc.org/the-aba-icc-project/aba-policy-on-the-icc/>). Relevant policies include:

- 01M103C
- 01A105C
- 05M177A
- 06A120B
- 08A108A
- 19A120

The ABA also has policies reaffirming its commitment to protect and defend the independence of judicial and legal professionals, the latest of which is 106A (Annual Meeting 2018).

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If adopted as policy, the resolution will enhance ABA advocacy of the ICC's judicial independence and of the ability of its officers and personnel to perform their professional duties without undue interference.

8. Cost to the Association. (Both direct and indirect costs)

If adopted, the resolution will incur no additional costs to the Association.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals. The Resolution with Report has been referred to the:

Section of Civil Rights and Social Justice
 Section of International Law
 Criminal Justice Section
 Judicial Division
 Center for Public Interest Law

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Hon. James A. Wynn, Jr., CHR Chair
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240/476-1870 (CHR Director)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution reaffirms the Association's commitment to the independence of the International Criminal Court ("ICC"), and urges all national governments to observe, respect, and protect the independence of the ICC, and condemns governmental attacks on the ICC and its personnel.

2. Summary of the Issue that the Resolution Addresses

As illustrated in the report, the U.S. Secretary of State recently imposed visa restrictions against ICC officials and threatened financial and criminal sanctions against them and members of the Court's professional staff, which threatens the ICC's independence as a duly established international tribunal.

3. Please Explain How the Proposed Policy Position Will Address the Issue

While taking no position on the merits of any case, the resolution will reaffirm the Association's commitment to the ICC's independence by urging all governments to observe, respect, and protect the ICC's independence and refrain from attacks on its officers and personnel.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None received thus far.