

## **NES is one of Founding Members of The American Coalition for an International Criminal Court**

Dear AMICC members, observers, supporters and alliance leaders,

We are pleased to send to you the excellent report of the American Society of International Law (ASIL) report of its Task Force on US Policy Toward the International Criminal Court. The Task Force, co-chaired by Judge Patricia M. Wald and former Department of State Legal Adviser William H. Taft IV, reached consensus and recommends specific steps to further positive US engagement with the Court. The recommendations of the Task Force include many of the policy actions AMICC and its members have been advocating, including formally reversing US hostility toward the ICC; examining areas where the US can cooperate with the Court; and US participation as an observer in the meetings of the Assembly of States Parties and the 2010 Review Conference. Full disclosure requires us to note that we are listed as experts consulted by the Task Force. The report is available on our website and at [www.asil.org/icc-task-force.cfm](http://www.asil.org/icc-task-force.cfm).

There are several points in the report we would like to highlight. First, the report recommends “a stated policy of the U.S. Government’s intention, notwithstanding its letter of May 6, 2002 to the U.N. Secretary General, to support the object and purpose of the Rome Statute of the Court” (p. 17). It does not, however, call for the reactivation of the US signature to the Rome Statute which many of AMICC’s members are pushing for. The Task Force’s report rightly points out that the Bolton note relieved the US of its obligations as a Rome Statute signatory but did not “unsign” the Statute or otherwise eliminate the US signature (p. 29). When we asked the Task Force members about this at the presentation of the report at the ASIL Annual Meeting last week, William Taft explained the Task Force’s position that the US could reassume the obligations of a signatory by making a policy statement and that this does not require a formal note to the Secretary-General. We were pleased to learn that under Task Force’s recommendation the US would reassume signatory obligations, though we are concerned that it would not provide adequate notice of this renewed obligation to others through the Secretary-General as the depository of the Rome Statute or send a sufficiently clear signal that the US as it reengages will not undermine the object and purpose of the treaty.

Second, also regarding the status of the US signature of the Rome Statute, the report correctly states that “As a Signatory, the United States could assume its observer status within the Assembly of States Parties“ (p. xi). This is provided in Article 121 of the Rome Statute which also states that the right to participate as an observer can be based on signature of the Final Act in Rome. This applies without reference to signature of the Rome Statute itself. The effect of the US deactivating its signature and on its power to convey observer status is unclear.

Third, in several places in the report, the Task Force recommends that “The President should initiate an inter-agency policy review to reexamine whether, in light of the Court’s further performance and the outcome of the 2010 Review Conference, to recommend that the United States become a party to the Rome Statute with any appropriate provisos, understandings, and declarations similar to those adopted by other States Parties” (p. 23). Since ratification is still considered a long-term goal, this issue will not arise soon. However, it should be noted that any declarations that are interpreted by the ICC judges in the course of judicial proceedings to be reservations, and thus prohibited by the Rome Statute, will not be recognized. Accordingly, when the time for ratification comes, its supporters should not give Congress the impression that declarations or reservations would be effective in limiting the reach of the Court. Uruguay has already withdrawn a declaration following the objections of several countries that it was in fact a reservation (For more information, [view this link](#) under “Objections” and End Note 11).

Fourth, regarding complementarity, the Task Force recommends that “Congress should consider amendments to U.S. law to permit full domestic U.S. prosecution of crimes within the jurisdiction of the Court so as to ensure the primacy of U.S. jurisdiction over the Court’s jurisdiction under the complementarity regime” (p. 40). This is a desirable and laudable goal and one which many of AMICC’s members likely support. We would note, however, that Article 17 of the Rome Statute and the Court’s early jurisprudence in the Lubanga case suggest that the ICC would recognize national proceedings that encompass that same persons and conduct. Thus, the ICC would not require a defendant to be charged with genocide by killing in a national case dealing with mass murder provided that the case dealt with the person charged by the ICC and the same alleged conduct of killing. Some

ICC advocates are concerned that the failure to implement legislation on the ICC crimes could be used as an excuse to delay US ratification of the Rome Statute.

The ASIL Annual Meeting also convened a plenary meeting on “The United States and International Law During the Obama Administration: Executive and Legislative Perspectives” featuring the State Department’s Director of Policy Planning Anne-Marie Slaughter and Acting Legal Adviser Joan Donoghue as well as a former US Senator and a current congressional staffer. President Obama’s nominee for legal adviser, Harold Koh, was also present. In Ms. Donoghue’s presentation, she stated that the US had not yet decided on questions such as the status of the US signature of the Rome Statute and whether the US would engage on the Review Conference. During the question and answer period, we followed up on her statement by asking whether the ongoing inter-agency policy review on the ICC would deal with the status of the signature and the US participation in the Review Conference and we made the points that (1) a drawn-out review process will mean that the US will miss a meaningful opportunity to participate in the Review Conference preparations and (2) that the reactivation of the US signature would enhance US credibility as it reengages with the ICC. The acting legal adviser responded by noting that the ASIL Task Force had issued a very good report and that its major points included the issues that would be examined in the inter-agency policy review.

We hope that the Task Force’s report is useful to you in your advocacy. Please let us know if you have any questions about the issues we raised or any other points in the report.

Best regards,

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