

Embracing the ICC? US moves back toward international law

Obama administration set to reverse bush isolationism

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“The [administration of US President Barack Obama] is reportedly close to announcing a change in US policy toward the International Criminal Court (ICC), including affirming President Clinton’s 2000 signature on the Rome Statute and increasing US cooperation with the court,” Brett D. Schaefer and Steven Groves from the conservative Heritage Foundation said last week.

This would be the most important legal policy change so far by the new president, far more important than the closing of Guantanamo.

Such a step would be welcome. Contrary to the received notion that all Republicans oppose the ICC, a little-noted signal has come from the most respected jurist in the Republican camp: Sandra Day O’Connor, the first woman justice on the US Supreme Court, joined an American Society of International Law taskforce which recommended in March active collaboration with the ICC.

The most powerful person on the ICC, for the moment, is the prosecutor. Luis Moreno-Ocampo has held the position since 2003. While controversial in some circles, his pursuit of several files worldwide shows a dynamism lacking in other, ad hoc international courts, such as the Special Tribunal for Lebanon (STL), which former UN investigator Serge Brammertz all but destroyed in two years of sterile work, while assassinations were continuing in Lebanon.

Not surprisingly, one has heard little from the International Criminal Tribunal for the former Yugoslavia, where he is currently posted.

Under a barrage of Lebanese criticism, his successor Daniel Bellemare broke his silence last week if only by calling for suggestions. I have many, which I will send to him, but I join meanwhile the request made by my colleague and close observer of the STL, Michael Young: Zuhair Siddiq, the “false witness” whose testimony has led to the wrongful incarceration of at least four people, must be arrested immediately and tried for obstructing the course of justice.

True, prosecutors can be excessive, and Kenneth Starr’s vendetta against US President Bill Clinton over the Lewinsky affair is a case in point. The tribunal, however, is a whole, and the case of the wrong or vindictive prosecutor will

eventually collapse when the trial proceeds. It is therefore important to arrange for people indicted by the Prosecutor to have their day in court as quickly as possible.

Back to the ICC. I met Ocampo at a conference at Yale law school convened by Paul Kahn in March 2004, where the dean Harold Koh (who is now the legal adviser of the State Department), made a memorable impromptu presentation.

The elephant in the room was the new administration of President George W Bush, which was opposed to the ICC, and Ocampo was nodding patiently at the disjunctive US policy. The tide has now turned, and it is now clear that US opposition to international criminal law was more damaging to the administration than any other policy it took, including the wars of Afghanistan and Iraq.

Bush ‘unsigned’ the ICC Treaty, breaking with signal advances in international criminal law started under Clinton, whose last act on December 31, 2000 was to sign it for the US.

From a country at the forefront of international criminal law in the 1990s, leading to the appointment for the first time in history of an ambassador-at-large for war crimes in the State Department, the Bush administration moved away from the ICC into lawlessness.

This meant forfeiting the immense potential of international justice against such crimes against humanity as the September 11 attacks. Instead the US government was left with the legal dead-end of the “war on terror,” equating sheer might with right. The Bush argument, and the one made in the Heritage Foundation article, is that the ICC could indict American military personnel for atrocities committed abroad. This is true, but only if the US did not prosecute them, under the principle of complementarity well established in the Rome Treaty. In fact, trying soldiers and their commanders for war crimes and crimes against humanity has long been a central staple of the rule of law in the US.

Even under Bush, those accused of atrocities in Abu Ghraib have been tried, and a few jailed. The more accountability for war crimes and crimes against humanity for Americans who commit them, the more the US standing as a rule of law country increases in the world.

In fact, toward the end of the Bush administration, US officials could see the value of the ICC, and increased their cooperation with the court following the pressure from victims of Darfur and their supporters worldwide. The US government led the Security Council in referring Darfur to the ICC.

Sudan’s president is under indictment, and his range of travel has now been severely limited – we did not see him in New York at the General Assembly – and this is the next best thing to his arrest.

Rather than enduring Moammar Ghaddafi’s demeaning soliloquy, the UN’s reputation would have been better served in arresting him as advocated by the supporters of Imam Musa al-Sadr in New York last week.

This also may be a job for the ICC, as would the ever rising call for the ongoing atrocities in Sri Lanka, especially in the brutal internment of hundreds of thousands of Tamil civilians, to get on the radar of international justice. It is also important to put both Benjamin Netanyahu and Mahmoud Ahmadinejad on notice.

With its sudden return to the frontline, including with the advocacy by the Goldstone UN commission of a possible referral by the Security Council of the Gaza atrocities to the ICC prosecutor, the files are becoming overwhelming for one person. This will necessitate the appointment of more prosecutors, and more chambers capable of quickly reviewing their indictments. This, however, is an administrative detail. With the rise of the specter of war in the Middle East and elsewhere, only justice can provide the needed deterrent to the certain tide of coming atrocities.

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