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A Shift in the Debate On International Court: Some U.S. Officials Seem to Ease Disfavor

By Nora Boustany

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When then-Undersecretary of State John R. Bolton nullified the U.S. signature on the International Criminal Court treaty one month into President Bush's first term, he declared it the happiest moment in his years of service. Bolton referred to the court as a "product of fuzzy-minded romanticism . . . not just naive, but dangerous."

The bipartisan concern then was that American service members deployed overseas risked exposure to a foreign tribunal. President Bill Clinton signed the Rome Treaty on his last day in office in 2000, while registering strong reservations.

Now, as the court prepares to begin public hearings on its first case, the debate among senior U.S. military officials seems to be shifting away from staunch opposition, and a fresh assessment of the court seems to be underway.

The new attitude has been prompted in part by the court's record since it began operations three years ago; Chief Prosecutor Luis Moreno-Ocampo, an Argentine, has dismissed hundreds of petitions for cases against the United States. The cases were turned down for lack of evidence, lack of jurisdiction, or because of the United States' ability to conduct its own investigations and trials. Out of some 1,500 petitions to the chief prosecutor, almost half accused the United States of war crimes.

In a letter made public last year, Moreno-Ocampo's office said it was throwing out 240 such cases concerning the war in Iraq. Reviews of each claim determined that none fell within the court's jurisdiction, his letter said, because the United States is not a signatory.

A congressional study released in August said the ICC's chief prosecutor demonstrated "a reluctance to launch an investigation against the United States" based on allegations regarding its conduct in Iraq.

To Sen. Patrick J. Leahy (D-Vt.), ranking member of the Appropriations foreign operations subcommittee, the verdict is already in. "The ICC has refuted its critics, who confidently and wrongly predicted that it would be politicized and manipulated by our enemies to prosecute U.S. soldiers," he said recently.

Officially, the United States does not support the court and has no communication with it. "U.S. policy towards the International Criminal Court has not changed," a Defense Department spokesman, who asked not to be identified by name under rules set by the department, said Monday. "While we respect the right of other governments to join and support the ICC, we ask that governments respect the right of the United States not to join the ICC."

But court backers have noted what they consider quiet support for what the court is doing, particularly in the Darfur region of Sudan, in northern Uganda and in Congo.

For example, court advocates considered it a victory that the Bush administration abstained, instead of using its veto, when the U.N. Security Council voted to refer Sudan to the court over alleged atrocities being committed by Khartoum-backed militias in the Darfur region.

Victoria K. Holt, a senior associate at the Henry L. Stimson Center, a research organization devoted to security issues, co-authored a study based on interviews with senior U.S. military officials, policymakers and politicians who attended a January workshop on the court. Holt and others said they were struck by the pragmatism of both active and retired American military officials, and by an evolving attitude toward the court -- a departure from the administration's stated opposition.

David Scheffer, ambassador at large for war crimes issues during the Clinton administration and a participant in the workshop, said most officers did not fear that the court would be used as a "battering ram against the United States." Rather, he said, many were concerned that by not actively supporting the court, the United States might create the impression that it does not follow internationally accepted rules of war.

"It conveys the image that we are simply intimidated by the prospect of international justice and that we have to browbeat other countries to minimize the risk we may have before the court," Scheffer said by telephone from Chicago. Scheffer is now professor of law and director of the Center for International Human Rights at Northwestern University School of Law.

Some court advocates are pushing for more concrete shows of U.S. support. Africa specialist and International Crisis Group senior adviser John Prendergast and activist actor Don Cheadle have been lobbying senators to prod the administration to share satellite images and intelligence with the court as it investigates war crimes in Darfur.

Moreover, in what seemed like an acknowledgment of the court's legitimacy from two longtime Republican critics, Sen. John McCain (Ariz.) and former Kansas senator and onetime presidential hopeful Bob Dole penned an opinion piece published in The Washington Post on Sept. 10 reminding "Khartoum that the International Criminal Court has jurisdiction to prosecute war crimes in Darfur and that Sudanese leaders will be held personally accountable for attacks against civilians."

McCain and Dole wrote that "U.S. and allied intelligence assets, including satellite technology, should be dedicated to record any atrocities that occur in Darfur so that future prosecutions can take place."

One month after the ICC was formally established four years ago, Bush signed the American Servicemembers' Protection Act, which limits U.S. aid and curtails military training to countries that have ratified the Rome treaty that created the court. The

administration negotiated “non-surrender agreements” with 100 countries to ensure that American soldiers are not handed to the ICC, under penalty of losing access to military training. Half of the countries in Latin America are affected by the agreements, although many have received waivers allowing aid to continue.

Many court supporters are arguing that now is the time for the administration to engage with the court, instead of being concerned about potential prosecutions of Americans.

U.S. absence from the court “undermines our argument to the world that we are holding up the standards we preach, and that we are accountable,” said Holt, of the Stimson Center. “At a time the United States is being challenged internationally, support of the court may enhance our standing so it can work more effectively.”