

## Expert seeks local support for the International Criminal Court

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By Michelle Lore

An attorney turned expert on the International Criminal Court recently returned to his birth state of Minnesota to garner the legal community's support for the court.

Duluth-born John L. Washburn currently serves as convenor of the American Nongovernmental Organizations Coalition for the International Criminal Court (AMICC), a program of the United Nations Association of the United States of America. (See sidebar for Washburn biography.)

The ICC was established in July 1998 by the Rome Statute, which sets out the court's jurisdiction, functions and structure. The statute entered into force on July 1, 2002, and the court has recently begun its operations. The court itself is seated in The Hague in the Netherlands and consists of 18 judges (11 men and seven women) separated into three chambers — pre-trial, trial and appellate. The court also includes a chief prosecutor, as well as several deputy and assistant prosecutors.

Under the Rome Statute, the ICC has jurisdiction over crimes against humanity, war crimes and genocide, collectively a subset of international criminal law now referred to as atrocity law. According to Washburn, the crimes in question have to meet tight criteria — they must be “massive, widespread and a shock to the conscience of humanity ... [and] in most cases, they have to be the consequence of a plan or a policy.” Convicted defendants are subject to imprisonment and seizure of assets and will be held in a prison outside of The Hague. Capital punishment is not a sentencing option.

During his two-day visit to Minnesota, Washburn spoke at length about the court at all four of the state's law schools, was the featured speaker at a seminar at the law firm of Robins Kaplan Miller & Ciresi, and appeared on Almanac. Washburn also took time out from his busy schedule to talk with Minnesota Lawyer associate editor Michelle Lore.

### ***What is the American Nongovernmental Organizations Coalition for the International Criminal Court (AMICC)?***

It's a coalition of 30-plus nationwide organizations of all kinds — religious, human rights, lawyers, whatever — that are committed to the International Criminal Court and want to see the United States participate in it immediately and ratify its statute as soon as possible. ... We provide lots of information to organizational members to use in their nationwide programs. ... The other dimension is that we organize in various places around the country alliances with local organizations to promote the court in their areas.

### ***What is the status of support and/or opposition for the court on an international scale?***

One hundred thirty-nine countries have signed the Rome Statute. Of these, 94 have ratified it. ... [It has] very widespread support.

### ***What is the United States' current position on the ICC?***

The U.S. position, as defined by what it does, is that it is opposed to the court and would like to prevent any further ratification of its statute and, in particular, is taking very strong steps to avoid the court having jurisdiction over Americans. It has a campaign going around the world to get countries to sign agreements, one-on-one agreements

between the U.S. and another country, [that] require the other country to return from its territory or jurisdiction any American in whom the ICC takes an interest. This campaign is backed up by legislation that denies military assistance to countries that refuse to sign these agreements — the American Servicemembers' Protection Act. ... [The act] also gives the president waiver power so that he doesn't have to do that in situations where he feels the national interest is at stake. Moreover, a large number of countries are exempted from this cut-off threat. ... The joker in this unfortunately is that it applies not just to service people, but it applies to any American in the territory or under the jurisdiction of the other country. So although a lot of countries, probably in excess of 70 now, have succumbed to U.S. pressure on this, most of them are very angry about it and feel that they have been forced by the United States to seriously derogate their sovereignty.

### ***Why is the United States opposed to the court? What are its specific objections?***

The American people say, by 60 percent or better, in poll after poll over the last 10 years, that they think the U.S. should participate and join the court and should ratify its statute right away. This is, however, the kind of passive support that needs to be turned into the kind of focused, aroused public opinion that will drive the American political system. That's what my efforts are about; that's what the coalition is about.

However, turning to the Bush administration, there are two things going on. One is that there is a world view, an ideology if you like, that the Bush administration brought in with it having to do with its concept of U.S. sovereignty, having to do with the place of America in the world, America's superpower responsibilities — which no other country has — the need for the United States to be unfettered in its exercise of its power, particularly in carrying out these responsibilities. In part of this ideology is a very strong suspicion and doubt about international organizations in general, which are often perceived as being deliberately perverted in order to control and tie down the United States, or as instruments of anti-Americanism. And that's what they feel about the court.

Two things particularly upset the U.S. about the court. One of them is that the court has the capacity to try Americans even though the U.S. has not ratified the Rome Statute. ... The other area that upsets them is that the court has the capacity to decide whether or not a country's judicial system is adequate to permit the court to [grant a] request [that the ICC] defer its action on somebody and allow [that country] to take this person and investigate and prosecute them itself. The idea that we could conceivably have foreign judges assessing the adequacy of the American judicial system is seen as very unfortunate.

Beyond that, we have longstanding military concerns that go back to the Clinton administration, which are professional in nature and have to do with concerns about whether civilian judges will understand the exigencies and uncertainties of combat, and the great reluctance to see American soldiers subjected to foreign legal systems — those kinds of concerns.

### ***How has the Bush administration's position on the ICC changed from the Clinton administration?***

The Clinton position was that the administration look with favor in general on the court, but not go against the U.S. military's concerns. This resulted in a kind of duality that confused other countries. But at the end of the day, the Clinton administration made a decision that the U.S. should sign the Rome Statute so that it could work from within the system to seek answers to its concerns and seek ways to safeguard American military people. The Bush administration, because it had its ideological position, in addition to the military one that it inherited from the Clinton era, decided that it was not going to have anything to do with the court and would try to render it ineffective as far as it could. ... [The United States] signed under the Clinton administration, but when the Bush administration realized in May of 2002 that the necessary signatures [to put the court into effect] had come in, it announced that it would have nothing to do with the court and that it was nullifying the signature.

### ***Would the organizers and participants of the terrorist attacks of Sept. 11 fall under the International Criminal Court's jurisdiction?***

Yes, they would. The creators of the court decided that they were not going to waste time trying to define terrorism, that instead they would make sure that they had established as crimes within the court's jurisdiction the worst crimes that terrorists are known to commit.

### ***How is the International Criminal Court similar to the court system used in the United States and how is it different?***

It's similar in that it's trials will be conducted in much the same way, except that there will not be jury trials. Otherwise, the full extent of protections to defendants, which we have in our Bill of Rights, are in the Rome Statute and will be applied in trials. Basically, the rules of evidence will be the same as we have. ... The courtroom will look like an American courtroom.

***What is the reason for not having a jury?***

The creators of the court, after a lot of debate, decided that it would not be possible to meet the standards for putting a jury together. How, for example, would you find a jury of peers for somebody like Milosevic or Idi Amin? The kind of crimes, the kind of person and the multi-national setting would make it very difficult to have a jury. ... Also, since the crimes in question generate very powerful emotions, understandably, a defendant would probably be better off with a judge who is a career professional than he would be with a civilian jury.

***Why the decision against using the death penalty?***

There was initially a debate — rather like the debate we're having in the U.S. about the death penalty — but then it was recognized as a practical matter, so many countries outlaw the death penalty in their laws or their constitutions or both, that the court would simply not have adequate worldwide support if it had the death penalty. So that really ended the discussion.

***I understand that the court has recently begun its work. What are the cases that are currently being investigated or prosecuted now?***

The two known areas that have been formally taken up by the court are from the Congo and Uganda. In Uganda, this has to do with the civil war that has been going on in the country for 18 years. The government opponents in this civil war are an outfit ... called the Lord's Resistance Army. They have wreaked havoc on the upper half of the country — hundreds of thousands of people killed, millions displaced, the economy is shot. They have a number of especially atrocious practices, mass murders, destruction of whole villages, burning villages down with people inside them. ... The process is underway to determine [who will be on trial]. There is a prime suspect who has been identified in the media as a man who is the leader of the Lord's Resistance Army, a man named Joseph Kony ... who has developed these atrocious practices and induced his followers to pursue them. ...

In the Congo situation, we have a number of warlords, people involved with foreign armies that invaded the Congo and [have] been responsible for hundreds of thousands of deaths over the last four or five years — and great local suffering of people. The center of the situation is that this area is loaded with very valuable natural resources of all kinds ... diamonds, gold, all of that. Local warlords and others have been massacring and exterminating tribes and other groups of people who stand in the way of their exploiting these natural resources.

***Discuss the rights of victims in the International Criminal Court.***

It represents a point at which the victim's movement in the United States desires to reach and probably will reach in the next five or 10 years. Essentially the idea is that victims should have a recognized standing in the court proceedings, that under certain circumstances, at the permission of the judge, they should have the right to be represented and to be heard, either personally or through their counsel.

***What has been the general reaction of the Minnesota law students you've spoken to about the International Criminal Court over the last two days?***

The students are intrigued, they're interested, they listen very intently. The reception has been tremendous. The proof of all of this is how many people, as a result of my appearances here, are willing to ... commit themselves to [establishing a local alliance] in the area. In several of the audiences there have been persons who either were opposed to the court or had very grave reservations about it and because they were from law schools they expressed their criticism of the court, or opposition to it in ways that were useful to me. I really welcome the opportunity to talk with people who are thoughtful and well-educated and sympathetic to the basic purposes of the court, but have real fundamental concerns about whether it's the appropriate way to do this, and about American relations with [the court].

***Why do you feel that it's important that the United States accept and participate in the International Criminal Court?***

First, I feel very strongly that a court like this is needed. I think it is clear from current history that too many of these monsters who commit these crimes are getting away with it. ...

Also, in the course of my Foreign Service career, I was exposed to people who had been victimized in atrocities like this. I also was exposed to a few people who carried out these atrocities. That left me with a strong feeling of not only the horror of these atrocities, the natural personal disgust that you feel, but also what these atrocities do to the societies in which they occur. They tear a society apart. They make people feel that their fellow human beings are animals. They create a sense of profound instability. They destroy social bonds. ... They need to be addressed. I think it's in the interests of the United States to participate in attacking these atrocities through an instrument like this.

The other thing is simply, as an American and a lawyer, I believe that the court is a very powerful expression of American values. The U.S. contributed a great deal to some of the best aspects of this court. I believe that Americans have a feeling about the rule of law and about the court that is well-expressed and well-represented in this court.

***Is there anything else you want to add?***

This is a court that should particularly attract the attention and support of lawyers. The [American Bar Association] and the National Association of Criminal Defense Lawyers are committed to the court and have formally declared, by resolution of their highest governing bodies, that they are committed to U.S. ratification at the earliest possible moment and to U.S. cooperation with the court. I think that the creation of this court is an achievement of the legal profession. The overwhelming majority of the people who were involved in the negotiations for this court were and are lawyers. The kind of parliamentary and legislative diplomacy that took place is characteristically lawyers' work. And the drafting of the [Rome] statute was particularly lawyers' work. So I commend this court to lawyers; I commend it as an achievement of our profession and as a long, long step forward in the international rule of law.