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 TAGS: PGOV, PREL, UNSC
 SUBJECT: PEACE AND ACCOUNTABILITY: A WAY FORWARD

Classified By: AMBASSADOR JOHN C. DANFORTH for reasons 1.5 b and d

1. (C) SUMMARY: Differences about the International Criminal Court (ICC) have been serious obstacle for U.S.-European Union (EU) relations for over three years. This issue has hampered efforts to advance US priorities in peacekeeping operations. A major confrontation over this issue is likely to occur in connection with Sudan/Darfur when the UN Commission of Inquiry for Sudan reports in January 2005 and recommends referral to Sudanese human rights violators to the ICC. USUN proposes (1) a diplomatic effort to achieve a general agreement to disagree on the ICC with our EU partners (and other ICC supporters) for future U.N. resolutions, and (2) a set of specific proposals for dealing with the issue in connection with Sudan. END SUMMARY

BACKGROUND

2. (C) U.S. opposition to the ICC reflects the ICC's vulnerability to politicization, lack of accountability, and creation of multiple jeopardy. Much of Europe and parts of the rest of the world, including Canada and some Latin American countries, disagree. If we could reach agreement with the EU about an approach to the ICC, at least in the UN, other governments would be unable to continue the fight.

3. (C) EU countries have asserted their relentless determination to defend the ICC against what they see as a U.S. assault (EU Statement, Dec. 2, 1004, Item 146: International Criminal Court, Report of the Sixth Committee), and the United States has been adamant that it will not agree in any way to support or give legitimacy to the ICC. In

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addition, Congress has decided that U.S. funds must be withheld from any recipient of U.S. aid that refuses to agree not to surrender any U.S. national to the ICC. The terms of these non-surrender agreements have added fuel to the U.S.-EU debate over the ICC.

4. (C) The nature of the debate at the UN often fails to advance the US goal of demonstrating the inherent flaws of the ICC in its current form. The EU has successfully insisted on language in UN resolutions that treats the ICC as an integral part of the international landscape. We have encountered this EU position in connection with UN General Assembly resolutions on, among other things, the Rights of the Child, Enforced or Involuntary Disappearances, Trafficking in Women and Girls, Extra-judicia, Summary or Arbitrary Executions, and Human Rights in the Democratic Republic of the Congo. U.S. proposals for alternative language have been defeated by wide margins. In some cases, the inclusion of ICC language in resolutions has forced the United States to call for a vote and vote &no8 or abstain even when we agree with the substance of the resolution.

5. (C) In the past year in the Security Council, renewal of Resolution 1487 (2003) (the binding &request8 to the ICC not to conduct an investigation or prosecution of a national of a non-Party to the Rome Statute engaged in a UN-authorized or)established operation (the first such request was in Resolution 1422 (2002)) failed, principally because it came up at the same time as the Abu Ghraib abuses came to light. In addition, the Security Council engaged in lengthy and difficult debate concerning the ICC in order to obtain agreement on resolutions renewing the peacekeeping operations in the DRC (MONUC) and Burundi. In a nutshell, the U.S. view, stated in 2003, was that UN resolutions should respect &the strongly held views of those who support the ICC and the equally strongly held views of those who do not8 has not prevailed.

TRAIN WRECK COMING IN JANUARY 2005

6. (C) There will be continuing attempts to confront the United States over the ICC in 2005 in the General Assembly and the Security Council. More urgently, however, the U.S. faces the likelihood of a serious conflict with the EU over Sudan. This is of particular concern since the United States is the acknowledged leader in demanding accountability for Sudanese human rights violators. Resolution 1564 (2004) called on the Secretary-General to establish an international

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Commission of Inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.8 The Commission is expected to report in mid to late January. Whether or not it determines that acts of genocide have occurred, it likely will determine that there have been horrific violations of law and specify individuals and/or entities to be held judicially accountable.

7. (C) We anticipate that Commission may recommend that the Security Council refer the situation in Darfur to the ICC. In view of our role in trying to put a stop to the human catastrophe in Darfur and our use of the term genocide8 to describe what has occurred there, we may be placed in an awkward and ultimately politically untenable position by such a recommendation. While some members of the EU will support a referral to put the US in an awkward position, other EU members might be amenable to a strategy that would avoid such a conflict. On a positive note, we have received recent signals that Council members recognize the difficulty this issue poses for us and may be willing to consider other accountability mechanisms in the case of Sudan.

PROPOSAL FOR GENERIC RESOLUTION

8. (C) We first seek to lower the profile of the ICC issue at the UN and reduce the proliferation of favorable references to the ICC in UN resolutions and reports. We recommend the U.S. propose to the EU the following agreement to disagree8 resolution that could apply to all future situations. (A stand alone resolution may not be necessary to effectuate this agreement, but we provide a text below so that the possible elements of a such an agreement may be discussed. If the EU were amenable to such an n agreement, an appropriate form, such as a Security Council procedural note8, could be found. End comment)

BEGIN TEXT OF POSSIBLE RESOLUTION:

Recalling its responsibility for the maintenance of international peace and security;

Concerned that violations of international law, particularly international humanitarian law, may create situations that threaten international peace and security;

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Reaffirming that those who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law,

Noting, in this regard, that a credible system of justice and accountability is required and that such crimes have been prosecuted effectively in international and national courts,

Noting also that State Parties to the Rome Statute have chosen to accept the ICC,s jurisdiction in accordance with the Statute and in particular the principle of complementarity, (SC Res 1422)

Noting further that States not Party to the Rome Statute will continue to fulfill their responsibilities in their national jurisdictions in relation to international crimes, (SC Res 1422)

Recognizing that these prosecutions end impunity and contribute to the restoration and maintenance of peace,

1. Notes that states will fulfill their responsibilities to prosecute such crimes in a manner consistent with their obligations under the Charter of the United Nations and other relevant international agreements;

2. Decides, while recognizing these differences in approach to implementation of its resolutions, to agree to use the following language when calling for prosecution of violations of international law: &Calls upon states to bring to justice those responsible for the commission of the crimes referred to herein;8

END TEXT

PROPOSALS SPECIFIC TO DARFUR

9. (C) In respect to the situation in Sudan particularly, we would envisage that the upcoming resolution would use the above language, allowing for quick adoption. Then, when it comes time to establish judicial accountability, we conceive of five possibilities:

(a) Arrange, if possible, for the African Union (AU) either to assign criminal jurisdiction for Darfur to its existing

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Court of Justice or to create a new institution to have jurisdiction over alleged international law crimes committed in African Union Member States.

(b) Propose that the jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) be expanded to cover

Darfur.

(c) Propose that the Security Council create a special tribunal, like the ICTR, with jurisdiction over Darfur.

(d) Propose that the Security Council delegate responsibility for holding perpetrators judicially accountable for crimes in Darfur to Member States, working among themselves to find the most appropriate modality.

(e) Acquiesce in a Security Council referral of the situation in Darfur to the ICC while insisting on the kind of safeguards we sought and could not obtain during negotiation of the Rome Statute of the ICC. An example of such a text is:

BEGIN OF POSSIBLE DARFUR REFERRAL TEXT:

The Security Council,

PP1 Reaffirming its central role under the Charter of the United Nations with respect to the maintenance of international peace and security,

PP2 Taking note that the Statute of the International Criminal Court provides for referrals by the Security Council of situations to the Prosecutor of the International Criminal Court,

PP3 Recognising that not all Member States are parties to the Statute of the International Criminal Court and accept the jurisdiction of that Court over their nationals without their consent or a binding decision of this Council while at the same time that they share the view that perpetrators of the most heinous offenses under international humanitarian law should be held accountable, and

PP4 Acknowledging that such non-parties to the Statute of the International Criminal Court do not support the International Criminal Court and will not vote in the affirmative in this Council to refer a situation to that Court without substantial additional safeguards, including reporting to the Council and voluntary funding only,

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PP5 Taking note of international obligations arising from agreements referred to in Article 98 of the Statute of the International Criminal Court,

PP6 Noting with grave concern the report of the Commission of Inquiry, dated , (to come)

PP7 Determining that the situation in Darfur and Sudan constitutes a threat to international peace and security,

PP8 Acting under Chapter VII of the Charter of the United Nations,

OP1 Decides to request the International Criminal Court, in accordance with Article 13 (b) of its Statute, to undertake the investigation and, if appropriate, prosecution of alleged crimes described in the report of the Commission of Inquiry, the actions of XXX, YYY, ZZZZ and events in AAA, BBB, CCC on or about , 2003 and , 2004);

OP2 Calls for voluntary contributions to defray the costs of this referral and any ensuing investigation and prosecution;

OP3 Requests the Secretary General immediately to transmit this resolution to the Prosecutor of the International Criminal Court in accordance with Article 17(1) of the Relationship Agreement between the United Nations and the International Criminal Court (A/58/874);

OP4 Invites the Prosecutor of the International Criminal Court to address the Council on (date) and every six months thereafter for the duration of the investigations and prosecutions referred to in this resolution;

OP5 Decides to remain seized of the matter.

END TEXT
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