

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL CRIMINAL COURT COMMITTEE**
www.ila-americanbranch.org
(FOUNDED 1873)

*Officers and Members
of the Executive Committee
of the ABILA*

**Chair, Executive
Committee**
John E. Noyes

President
Ruth Wedgwood

Vice-Presidents
Valerie Epps
Gary N. Horlick
Philip M. Moremen
Leila N. Sadat
David Stewart

**Honorary
Vice-Presidents**
Charles N. Brower
Edward Gordon
P. Nicholas Kourides
Luke T.C. Lee
Cynthia C. Lichtenstein
John F. Murphy
James A.R. Nafziger
Ved P. Nanda
Cecil J. Olmstead
Alfred P. Rubin
Charles D. Siegal
Robert B. von Mehren

Honorary Secretary
Houston Putnam Lowry

Honorary Treasurer
Anne Siegal

Executive Committee
William Aceves
Catherine M. Amirfar
Kelly D. Askin
David J. Bederman
Andrea Bjorklund
Ronald A. Brand
John Carey
Christina M. Cerna
Paul Dubinsky
Malvina Halberstam
Scott Horton
Karen A. Hudes
Larry Johnson
Aníbal Sabater
Michael P. Scharf
Louise E. Teitz
Nancy Thevenin
Susan Tiefenbrun
George K. Walker
Peter Yu

Co-Directors of Studies
Valerie Epps
Philip M. Moremen

Webmaster
Mark Cuevas

Program Director
Rachel Smith

Jennifer Trahan
Chair, American Branch, International Law Association, ICC Committee
Assistant Professor of Global Affairs, NYU
15 Barclay Street
New York, NY 10007
jennifer.trahan@att.net

December 6, 2010

War Crimes Ambassador Stephen J. Rapp
Legal Adviser Harold Koh
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Re: Recommendations for future U.S. policy towards the ICC

Dear War Crimes Ambassador Rapp and Legal Adviser Koh:

As chairperson of the Committee on the International Criminal Court of the American Branch of the International Law Association, I appreciate the opportunity to again express to you views regarding United States relations with the International Criminal Court. The Committee commends the Administration's positive and constructive engagement with the ICC thus far. This letter suggests additional steps that could be taken to advance and continue that course. However, we are mindful of the Administration's existing legal and political concerns and recognize that ratifying the Rome Statute is not currently realistic at this time.

This Committee's contribution is intended to assist you in finalizing a U.S. approach that will support a sustained and strengthening relationship between the U.S. and ICC. This relationship will build U.S. confidence in the Court and, when it is politically feasible, make it possible for the U.S. to ratify the Rome Statute. Our recommendations are three-fold. The Administration should: (1) formally recommit to U.S. signatory obligations under the Rome Statute by sending a note to the Secretary General indicating that the U.S. is ready to reassume its obligations as a signatory to the treaty; (2) continue to refuse to defer the ICC's outstanding arrest warrants for Sudanese President Omar al Bashir and continue to support the ICC's investigation in Darfur; and (3) resume its policy review regarding the ICC and set forth a comprehensive policy statement outlining the U.S. position.

First, as the Committee recommended in its March 12th letter, the U.S. should send a note to the United Nations Secretary-General indicating that the U.S. is ready to reassume its signatory obligations with respect to the Rome Statute. Although Fmr. Ambassador John Bolton's May 2002 letter¹ only deactivated the U.S. signature by declaring the Bush Administration's intent not to be bound by its obligations as a signatory,² it did alienate the U.S. from the international community and caused considerable tensions.³ Formally declaring U.S. intent to resume its signatory obligations would help restore U.S. credibility in its "principled engagement" with the Court and remove any remaining doubt within the international community regarding past and future U.S. actions about the ICC. Sending a note does not require Congressional approval and would eliminate ambiguity about U.S. intentions not to undermine the Rome Statute. The note would also advance two other important purposes: (a) it formally confirms to the U.N. Secretary-General that the U.S. is ready to reassume its signatory obligations, which is consistent with increasing engagement by the U.S. and Administration officials' statements regarding the U.S. approach to the ICC; and (b) it is an act, made in good faith by the U.S., signaling its commitment to the treaty's object and purpose and shows the international community that U.S. actions are in line with its statements.

Second, as a permanent member of the Security Council, the U.S. should continue to refuse to defer the ICC's outstanding arrest warrants for Sudanese President Omar al Bashir. The Rome Statute, under Article 16, permits the Security Council to defer ICC investigations and/or prosecutions pursuant to its Chapter VII powers.⁴ Since the ICC issued its arrest warrants for President al Bashir for genocide, war crimes and crimes against humanity, several States, including African Union ("AU") member states, have urged the Security Council to defer the ICC warrants.⁵ These States argue that executing the warrants will, among other things, frustrate and derail the peace process in Sudan by deterring President al Bashir's participation.⁶ However, deferring the warrants for this reason could have far-reaching effects. Generally, the ICC prosecutes such individuals not only to bring justice and restore the rule of law, but also to deter others from engaging in behavior contrary to international humanitarian law. If the Security Council were to defer President al Bashir's warrants, ostensibly to ensure that he participates in the peace process, future defendants could evade or significantly delay arrest by merely participating in a peace process. They may do this in bad faith and regardless of the outcome, after committing genocide, war crimes and crimes against humanity, and may be emboldened to continue committing atrocities if they believe they will not face justice. Such a result would be inconsistent with the intent and purpose of the Rome Statute as well as the interests of justice. Consequently, the U.S. should remain steadfast in supporting the ICC investigation in Darfur and refusing to defer the ICC warrants, particularly because it was the Security Council that referred the Darfur situation to the ICC.⁷

¹ Letter from John R. Bolton, U.S. Under-Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002).

² Press Briefing with Steven J. Rapp, Ambassador-at-Large for War Crimes, <http://geneva.usmission.gov/2010/01/22/stephen-rapp/>

³ Indeed, Fmr. Ambassador Bolton's previous statements expressing his hope that without U.S. participation and support the ICC would "wither and collapse" likely contributed to this tension. John Bolton, Undersecretary for Arms Control and International Security and head of the administration's ICC team, remarks made to the Senate Foreign Relations Committee, July 23, 1998.

⁴ Rome Statute, Art.16.

⁵ International Bar Association, *Arrest Warrant Against President al-Bashir Targets Impunity, Not Africa says IBA*, at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=45B89B37-9C25-48B5-A45E-8DE59D652D64> ("The African Union has criticised the Court's decision and may renew its call for the UN Security Council to defer the proceedings under Article 16 of the Rome Statute.").

⁶ *Id.*; African Union Press Release No. 119/2010 On the decision of the pre-trial chamber of the ICC informing the UN Security Council and the Assembly of the State Parties to the Rome Statute about the presence of President Omar Hassan al Bashir of the Sudan in the territories of the Republic of Chad and the Republic of Kenya, 29 August 2010, Addis Ababa.

⁷ The President recently stressed the importance of ensuring justice is done: "Q: Is peace not at risk if he were to present himself to the ICC? THE PRESIDENT: Well, I think that peace is at risk if there's no transparency and accountability of the actions that are taking place, whether it's in Sudan or anywhere else in the world." Interview with US President Barack Obama, South African Broadcasting Corporation, at <http://www.whitehouse.gov/the-press-office/interview-president-south-african-broadcasting-corporation>; see also H.R. 241, March 12, 2009 ("call[ing] upon the international community to persist in its efforts to bring President al-Bashir to justice and to pressure the Sudanese regime to cease its campaign of violence."); American

Third, the Administration should resume its policy review regarding the ICC and issue a comprehensive policy statement outlining the U.S. position. Although various Administration officials have made public statements supporting principled engagement with the ICC, these statements, even examined cumulatively, do not clearly define a complete U.S. policy. A clear and comprehensive policy statement would reinforce the Administration's support for the ICC, provide a basis for further consultations among ICC stakeholders in the U.S. Government, and ensure that the U.S. is able to respond to any situation that arises in relation to the ICC, in line with U.S. policy goals. We believe that such a comprehensive policy statement, together with a note to the U.N. Secretary-General and continued U.S. support for the ICC investigations in Darfur, are important elements in constructive and principled engagement with the Court by the United States.

We remain encouraged by the Administration's open and positive attitude towards engagement with the ICC. Continued engagement could be very helpful to the ICC by providing technical assistance, protecting witnesses who testify before the tribunal,⁸ and apprehending fugitives currently at large. Engagement will also allow the U.S. to contribute to the ICC's work, thus protecting its interests, without actually becoming a State Party, as it did at the recent Review Conference. Moreover, successful and positive cooperation and dialogue within the ICC may assuage U.S. concerns about becoming an ICC State Party.

In conclusion, the ABILA ICC Committee is very encouraged by the steps taken in the last year by this Administration as concerns the ICC, including U.S. participation in the Eighth Session of the Assembly of States Parties, the Resumed Session of the Eighth Session, and this past summer's Review Conference in Kampala, Uganda; its commitment to assist States' in building their legal capacity to prosecute atrocity crimes on a national level; assisting the ICC in investigating and prosecuting the Lord's Resistance Army leaders in Uganda;⁹ the Administration's intent to meet with the Prosecutor and ICC officials regarding possible U.S. assistance,¹⁰ and the numerous supportive statements made by yourselves and other Administration officials. We strongly encourage continued principled and constructive engagement with the ICC. The U.S. has always been a leader in bringing those who commit the worst atrocities to justice and

Servicemembers' Protection Act of 2002, Section 2015 ("Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."); Ben Chang, Spokesman for National Security Adviser James L. Jones ("We support the ICC in its pursuit of those who've perpetrated war crimes. We see no reason to support deferral [of the indictment of President Al-Bashir] at this time."), at <http://washingtontimes.com/news/2009/feb/05/obama-backs-indictment-of-sudan-leader/>; Susan E. Rice, U.S. Permanent Representative to the UN ("It is our view that we support the ICC investigation and the prosecution of war crimes in Sudan, and we see no reason for an Article 16 deferral."), at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/08/AR2009020802191.html>; Johnnie Carson, US Assistant Secretary of State for African Affairs Press Conference in Accra, Ghana ("We think that President Bashir should present himself to the court to face charges. [...] If their own court won't do it and the international court is available, he should present himself to it."), at http://www.rferl.org/content/US_Urges_Sudans_Bashir_To_Face_ICC_Charges/1947621.html.

⁸ U.S. to Help Protect Kenyan Violence Witnesses, Voice of America News, Alan Boswell, February 11, 2010, Nairobi, Kenya, <http://www.voanews.com/english/news/africa/east/US-to-Help-Protect-Kenyan-Violence-Witnesses-84133462.html>

⁹ "The Obama Administration's Evolving Policy Towards the International Criminal Court," Douglas Dunbar, November 15, 2010, www.amicc.org, citing <http://amicc.org/docs/Uganda%20arrest%20warrants.pdf>

¹⁰ *Id.*, citing <http://usun.state.gov/briefing/statements/2010/138999.htm>; The Challenges and Future of International Justice, Harold H. Koh, Legal Advisor, U.S. Department of State, Panel Discussion at NYU Center for Global Affairs, New York, NY, October 27, 2010, <http://www.state.gov/s/l/releases/remarks/150497.htm>.

we support this Administration's commitment. The committee stands ready to assist you and your staff should you seek any clarification or further detail on these matters.¹¹

Respectfully submitted,

Jennifer Trahan

Jennifer Trahan
Chairperson of the ABILA ICC Committee

Charles D. Siegal

Charles D. Siegal
Honorary Vice President, ABILA

¹¹ This letter does not represent the views of the American Branch of the International Law Association, which does not take positions on issues. One member of the ABILA ICC Committee did not join this letter.