

**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL CRIMINAL COURT COMMITTEE**

July 24, 2013

Stephen J. Rapp, Ambassador-at-Large,
Office of Global Criminal Justice
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

William K. Lietzau, Deputy Assistant Secretary of Defense
(Detainee Policy)
2900 Defense Pentagon, 4C882
Washington, D.C. 20301-2900

Re: U.S. Policy Toward the International Criminal Court

Dear Ambassador Rapp and Deputy Assistant Secretary of Defense Lietzau:

As chairperson of the Committee on the International Criminal Court of the American Branch of the International Law Association (“ABILA”),¹ I appreciate this opportunity to write to you as the principal officials dealing with the United States’ relationship with the International Criminal Court (“ICC”). The Committee recognizes the value of the Administration’s case-by-case support for the ICC.

We are encouraged by the participation of the United States as an observer in ICC meetings during the first term of the Obama Administration, the U.S.’s position of principled engagement with the Court, and its willingness to support individual investigations and prosecutions on a case-by-case basis. We hope the U.S. will continue to expand its relationship with the Court, which is an important shift from the policies of the previous administration. However, we also recognize that the U.S. has ongoing concerns regarding the ICC, and no immediate plans for ratification.

This ABILA ICC Committee’s statement is intended to assist you over the next three years in further developing U.S. policy vis-à-vis the ICC. We encourage you to continue to pursue the goal of creating a sustained relationship between the U.S. and ICC that will further build U.S. confidence in the Court, and, when the time is right, lead to eventual U.S. ratification of the Rome Statute.

¹ The ABILA ICC Committee consists of approximately 125 professional members and student associates. This letter does not represent the views of the American Branch of the International Law Association, which does not take positions on issues.

(1) The Administration should create a firm policy of support for the ICC

As previously mentioned, this Committee welcomes improvements made in the relationship between the U.S. and the ICC during the first term of the Obama Administration. The Administration has taken a number of positive steps including its decision to participate as an observer in ICC meetings, its willingness to support individual investigations and prosecutions carried out by the Court on a case-by-case basis, and its willingness to publicly state that the U.S. “respects the rights of every country to join the ICC.”² That said, the current Administration has fallen short of creating a comprehensive policy on the ICC.

To further the U.S.’s principled engagement with the Court during President Obama’s second term, the Administration should set forth a clear and unwavering position of support for the ICC. As set forth below, there are a number of concrete steps the Administration should take to affirm its continuous support of the Court and remove any ambiguity regarding its position. Additionally, rather than collaborating only on a case-by-case basis, the Administration should provide a clear and comprehensive policy statement as to its position regarding the Court.

Such a 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 situations that arise in relation to the ICC, in line with U.S. policy goals. We believe that a comprehensive policy statement, together with the measures set forth below, are important elements in constructive and principled engagement with the Court, and would enhance U.S. credibility in its commitment to multilateral engagement and support for international justice.

(2) The U.S. should formally recommit to its Rome Statute signatory obligations

As this Committee has previously recommended, the U.S. should send a note to the United Nations Secretary-General indicating that the U.S. upholds its signatory obligations with respect to the Rome Statute. Such action seems particularly appropriate given that then-State Department Legal Advisor Harold H. Koh has verbally articulated this position in official administration speeches.

The U.S. purported to deactivate its signatory status by means of then-Under Secretary of State John Bolton’s May 2002 note to the U.N. Secretary-General,³ whereby he declared that the U.S. “has no legal obligations arising from its signature.”⁴ The Administration

² “Where Can Victims of Atrocities find Justice?,” Remarks by Steven J. Rapp, Ambassador-at-Large for War Crimes, May 10, 2011, Makati, Philippines, at http://www.state.gov/j/gcj/us_releases/remarks/2011/165257.htm.

³ 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).

⁴ Press Briefing with Steven J. Rapp, Ambassador-at-Large for War Crimes, <http://geneva.usmission.gov/2010/01/22/stephen-rapp/>.

should reverse this action by sending a counter-note to the U.N. Secretary General affirming that it will indeed abide by its signatory obligations.

As a signatory to the Rome Statute, the U.S. is only committed to support the “object and purpose” of the treaty. Reaffirming U.S. commitment would reinforce the Administration’s current position of supporting the Court on a case-by-case basis. Formal action would also be in line with former State Department Legal Advisor Harold H. Koh’s public statements, iterated on three separate occasions, that the U.S. respects the “object and purpose” of the Rome Statute.⁵ These statements, however, are insufficient to revoke the Bolton note without more, as there is still a footnote by the U.S.’s name in the U.N.’s listing of Rome Statute States Parties and signatories quoting the contents of the Bolton note.⁶

Formally revoking the May 2002 letter would unequivocally establish the U.S. position on its signatory obligations and solidify its position on the ICC, restoring the credibility of its commitment to the Court and clarifying its position among states. Sending a note does not require Congressional approval and would eliminate ambiguity about the U.S.’s status. Additionally, the note would reaffirm the Administration’s position, which has now been informally acknowledged on a number of instances by various officials, that it is committed to cooperation with the Court.

(3) The U.S. should work towards repeal of current law banning U.S. funding of the ICC, and eventual repeal of the American Servicemembers’ Protection Act

The Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act expressly prohibits the use of funds to the ICC, stating that “[n]one of the funds authorized to be appropriated by this or any other Act may be obligated for use by, or for support of, the International Criminal Court unless the United States has become a party to the Court pursuant to a treaty made under Article II, section 2, clause 2 of the Constitution of the United States on or after the date of enactment of this Act.”⁷ Furthermore, the so-called American Servicemembers’ Protection Act of 2002 (“ASPA”),⁸ includes a number of objectionable provisions, including one that provides authority to use military force to free U.S. members of the armed forces from the ICC—which would presumably include use of force at the Court itself, in The Hague,

⁵ Koh stated this at N.Y.U.’s Center for Global Affairs on October 27, 2010, the Grotius Center of Leiden University on November 16, 2012, and the New York City Bar Association on November 26, 2012.

⁶ See U.N. Treaty Collection at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#11

⁷ Foreign Relations Authorization Act (H.R. 3427), Public Law No. 106-113, §§ 705-706, November 29, 1999.

⁸ American Servicemembers' Protection Act of 2002 (H.R. 4775), Public Law No. 107-206 (as amended October 17, 2006 and January 28, 2008).

Netherlands.⁹ In line with the Administration's current position on the ICC, the Administration should work towards Congressional repeal of ASPA and omission of the funding prohibition from the Foreign Relations Authorization Act so as to allow for additional U.S. support for the Court.

In recent remarks during a U.N. Security Council Debate on Peace and Justice, Ambassador Rice stated, on October 17, 2012, that the U.S. is "actively engaged with the ICC Prosecutor and Registrar to consider how we can support specific prosecutions already underway, and [the United States] responded positively to informal requests for assistance."¹⁰ Accordingly, the Administration has offered what they refer to as "in-kind support" to the ICC on a case-by-case basis. That said, without the repeal of the current laws prohibiting funding to the ICC, the U.S. will continue to be impeded in support that the Administration may want to provide to the Court. While in-kind support is an important mechanism, the U.S. could further, and more effectively, support the Court by offering monetary assistance, yet still do so on a case-by-case basis.

(4) The U.S. should support the referral by the U.N. Security Council of the situation in Syria to the ICC

The death toll in Syria is now estimated to exceed 100,000,¹¹ and there are credible reports that over 100 civilians continue to be killed each day.¹² The Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, published on February 5, 2013, as well as the High Commissioner for Human Rights, have both characterized the acts that are occurring as "war crimes" and "crimes against humanity."¹³

⁹ Specifically, ASPA permits the U.S. to "to use all means necessary and appropriate to bring about the release of any" American detained by the ICC. ASPA, § 208(a). Other provisions of ASPA (although subject to waiver) include:

- Restrictions on U.S. participation in U.N. peacekeeping operations without an exemption from ICC jurisdiction covering them,
- Prohibition on direct or indirect transfer of classified national security information, including law enforcement information, to the International Criminal Court, even if no American is accused of a crime.

AMICC website, "Anti-ICC Legislation Generally," at <http://www.amicc.org/usicc/legislation>. ASPA also prohibited cooperation with the ICC, but the subsequent "Dodd Amendment," however, states: "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.*" Amendment No. 3787 to Amendment No. 3597, at <http://www.amicc.org/docs/Dodd2nddeg.pdf> (emphasis added). Thus, the U.S. is not prevented from cooperating as to ICC trials (since all ICC trials are necessarily of persons accused of genocide, war crimes or crimes against humanity).

¹⁰ U.N. Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court, remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the Nations, October 17, 2012, New York, NY.

¹¹ Reuters, Dominic Evans and Oliver Holmes, *Syria Death Toll Tops 100,000, Rebels Lose Border Town*, (June 26, 2013). The U.N. has estimated over 92,000 fatalities as of the end of April. N.Y. Times, David Jolly, *Death Toll in Syrian Civil War Near 93,000, U.N. Says* (June 13, 2013).

¹² "Syria Unrest: 'Humanitarian' Vote Pressed at UN," BBC News, February 29, 2012.

¹³ U.N. General Assembly, Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, ¶¶ 1, 42-162, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013) (detailing reported instances of war crimes and crimes against humanity committed during the Syrian crisis); *see*

Prompt action by the Security Council is needed to stop the appalling atrocities being committed. Because Syria is not a party to the Rome Statute, the ICC lacks jurisdiction absent a referral by the Security Council. The U.S. should support a U.N. Security Council referral of the situation to the International Criminal Court's Prosecutor for investigation and prosecution in order to seek justice for Syrian victims.

Referring the Syrian situation to the ICC is not tantamount to aligning the U.S. with any party to the conflict. Such a referral operates in a neutral way, only requiring the Prosecutor to investigate whether atrocities occurred in Syria. Nor would a referral increase the possibility of escalating the conflict. It would simply ensure that justice for victims of such atrocities is achieved by prosecuting those responsible for perpetrating those crimes.

The Security Council has previously referred two situations to the International Criminal Court: (1) the situation in Darfur (U.N.S.C. Resolution 1593) and (2) the situation in Libya (U.N.S.C. Resolution 1970). At the time of the Libya referral, far fewer fatalities were known to have occurred than have been documented in Syria. Thus, the referral is urgently needed both for the protection of the Syrian people and the Security Council's and Court's credibility. Consistently referring situations such as the one in Syria to the ICC may also deter those committing atrocities from continuing to commit such crimes, thereby saving lives.

It is far too soon to predict whether the Syrian justice system will eventually have the will and capacity to prosecute the crimes now being committed in a timely and effective manner. Regardless, should Syria demonstrate the will and capacity to effectively prosecute atrocities, the complementarity provision of the Rome Statute¹⁴ would preserve Syria's ability to prosecute its nationals.

(5) The U.S. should not include language opposing allocation of U.N. funds in Security Council referral resolutions

Given the budget constraints that the ICC has been facing, with an ever-expanding number of investigations and cases, and demands for even more investigations and prosecutions, it is a matter of serious concern to ICC officials and State Parties that the two U.N. Security Council referral resolutions to date contain language that states that none of the expenses incurred in connection with the referral shall be borne by the U.N.¹⁵ Neither does the Rome Statute require that funding accompany referrals, nor could the Rome Statute mandate that the Security Council or General Assembly allocate funding,

also Nick Cumming-Bruce, *U.N. Rights Officials Urge Syria War Crimes Charges*, N.Y. TIMES, Feb. 18, 2013, A10, at http://www.nytimes.com/2013/02/19/world/middleeast/un-rights-panel-says-violence-in-syria-is-mounting.html?_r=0 (Navi Pillay, the U.N. High Commissioner for Human Rights, and the U.N. Human Rights Council state that war crimes and crimes against humanity have been committed in Syria and renew requests that the Syrian crisis should be referred by the Security Council to the International Criminal Court).

¹⁴ See Rome Statute, art. 17.

¹⁵ S.C. res. 1593, para. 7; S.C. res. 1970, para. 8.

since both those entities derive their powers from the U.N. Charter. Yet, pragmatically, if the Security Council made a number of consecutive referrals without funding accompanying them, then the Court could be in the impossible position of having insufficient funding to investigate and/or prosecute the referred matters. This potential predicament has led some to suggest that the Prosecutor should decline to initiate an investigation on a referred matter for which she does not have sufficient funding, by invoking Rome Statute article 53.1(c) that it would “not serve the interests of justice” to proceed, if unable to do so properly, due to lack of sufficient funding.¹⁶ The judges too might refuse to authorize the commencement of an investigation in the case of an unfunded Security Council referral.¹⁷ As a practical matter, Security Council member states should, in order to ensure successful referrals, consider excluding such language, leaving it to the General Assembly to consider the matter of funding. Note also that a serious legal issue exists as to whether the Security Council actually has the power to refuse to allocate funds to accompany the referral, when budget decisions, under the U.N. Charter, are made by the General Assembly.¹⁸

We understand that the U.S. has particular concerns about U.N. funds being utilized to pay for ICC investigations and prosecutions. U.S. dues comprised 22% of the U.N. budget for 2013,¹⁹ and, as noted above, the U.S. has a current legislative ban on funding the ICC. Thus, the argument is sometimes made that the U.S. may not permit U.N. funds to go to the ICC as doing so would violate U.S. law. Yet, another reading of U.S. law is that it only prohibits direct U.S. funding to the ICC, such that there would be no impediment to using U.N. dues to fund the ICC. Acknowledging that the U.S. government, including members of Congress and the Department of Defense, may not agree with this reading, and that domestic politics may make it difficult for the U.S. to accept such a reading, we urge you nonetheless to consider this interpretation of U.S. law. Alternatively, as noted above, the Administration should work towards Congressional repeal of the legislation that prevents U.S. funding of the ICC. If the U.S. supports a Security Council referral to the ICC (as it did in the situation of Libya), then it, along with other Security Council member states, has a vested interest in ensuring that the Court has sufficient funds to carry out the Security Council’s directive.

¹⁶ See Rome Statute, art. 53.1(c) (“In deciding whether to initiate an investigation, the Prosecutor shall consider whether . . . [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”). Kevin Jon Heller, *Opinio Juris*, “A Few Thoughts on a Syria Referral,” at <http://opiniojuris.org/2013/01/14/a-few-thoughts-on-a-syria-referral/> (arguing same).

¹⁷ See Rome Statute, art. 13 (“The Court *may* exercise its jurisdiction . . .”). Compare Rome Statute, art. 15 (4) (“If the Pre-Trial Chamber . . . considers that there is a reasonable basis to proceed with an investigation . . . it shall authorize the commencement of the investigation . . .”).

¹⁸ U.N. Charter, art. 17.1.

¹⁹ U.N. Secretariat, *Assessment of Member States’ Contributions to the United Nations Regular Budget for the Year 2013 and of New Member States’ Advances to the Working Capital Fund for the Biennium 2010-2011 and Contributions to the United Nations Regular Budget for 2011 and 2012*, at p. 6, U.N. DOC. ST/ADM/SER.B/866 (Dec. 24, 2012), http://www.un.org/ga/search/view_doc.asp?symbol=ST/ADM/SER.B/866.

(6) The U.S. should consider whether it always needs to include a clause exempting the nationals of non-States Parties from referred situations

The text of the two referrals made to date also contains clauses exempting the nationals of non-ICC States Parties from jurisdiction that would otherwise follow from referral of the situation.²⁰ While a complete discussion of the merits of whether the U.S. should insist on such language is beyond the scope of this letter, we note that it generates considerable hostility internationally for the U.S. to insist on such jurisdictional exclusions. It is also worth considering that Rome Statute article 13(b) only permits the Security Council to refer a “situation” to the ICC.²¹ Just as the Security Council would not be permitted to refer only the rebels in a situation country or only government forces in a situation country, it is entirely unclear whether it can exempt nationals of non-ICC States Parties. Put another way, while Security Council power is extremely broad under the U.N. Charter,²² the ICC’s Prosecutor and Judges take their directives from the Rome Statute, including the text of article 13(b) and article 27 (no immunity based on official capacity). Thus, there is at least some question as to whether the current jurisdictional carve-outs, vis-à-vis the nationals of non-ICC States Parties, are legally effective.²³

(7) The U.S. should allow secondment of U.S. personnel to the Court

Currently the U.S. does not second U.S. personnel to the ICC. Secondment would permit the U.S. both to support the Court and permit U.S. nationals to play a greater role in the Court’s actual work. The ICC could also benefit from the extensive expertise of U.S. nationals who have worked at other international and/or hybrid tribunals such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. The U.S. has already taken a positive step in a similar direction by deploying 100 Special Operations Forces as military advisors to Uganda in order to assist regional forces to disarm and neutralize the LRA and to apprehend fugitive LRA members.²⁴ This additional step would allow the

²⁰ S.C. Res. 1970, para. 6; S.C. Res. 1593, para. 6.

²¹ See Rome Statute, art. 13(b).

²² See, e.g., U.N. Charter, arts. 40-42.

²³ As noted above, one provision of ASPA restricts U.S. participation in U.N. peacekeeping operations absent an exemption from ICC jurisdiction covering them. See ASPA, § 105(a). Specifically, it states: the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

ASPA, § 105(a). This provision, on its face, applies to peacekeeping and peace enforcement operations and not to referral resolutions and does not seem to mandate the type of non-State Party jurisdictional carve-outs found in Security Council resolutions 1593 and 1970. As argued above, we also suggest eventual repeal of ASPA.

²⁴ “U.S. sends special operation forces to Uganda,” Digital Journal, Oct. 15, 2011, at <http://digitaljournal.com/article/312830>. See also *The Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009*, 111th Cong., 2nd sess. Cong. S.1067. Washington, D.C.

U.S. to take a different role in the Court’s operations, through its nationals, and foster a greater understanding of the Court among U.S. citizens and other government officials.

(8) The U.S. should contribute to the Trust Fund for Victims

The U.S. should also lend its support by contributing monetarily to the Trust Fund for Victims (“TFV”). The TVF was created to implement reparations ordered by the ICC and to provide “physical and psychosocial rehabilitation or material support to victims of crimes within the jurisdiction of the ICC.”²⁵ Twenty-four countries have contributed to the TFV to date.²⁶ Contributions are voluntary and can be made by any state, individual, or organization. Donations to the TFV do not fund ICC operations, but are separate. Thus, U.S. funding of the TFV would not constitute funding of the ICC. Monetary reparations are a small but important part of helping victims and families of victims of war crimes, crimes against humanity, and genocide to rebuild their lives and communities. The U.S. could play a significant role in this process by lending its financial support.

* * *

In conclusion, the ABILA ICC Committee is very encouraged by the steps taken by this Administration regarding the ICC, including U.S. participation at the Eleventh Session of the Assembly of States Parties to the ICC; its commitment to assist states in building their capacity to prosecute atrocity crimes at the national level; assistance being provided to Ugandan forces to apprehend members of the Lord’s Resistance Army; and numerous supportive statements made by you 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 we support this Administration’s commitment.

Thank you for your consideration.

Sincerely,



Jennifer Trahan,
Chair, American Branch of the International Law
Association, ICC Committee

²⁵ Website of the Trust Fund for Victims, at <http://www.trustfundforvictims.org/>.

²⁶ Website of the Trust Fund for Victims, Financial Info., at <http://www.trustfundforvictims.org/financial-info>.