

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

June 1, 2017

Secretary of State Rex W. Tillerson  
Acting Legal Adviser Richard C. Visek  
U.S. Department of State  
2201 C Street, N.W.  
Washington, D.C. 20520

*re: U.S. Policy toward the International Criminal Court and the  
importance of the Office of Global Criminal Justice*

Dear Secretary of State Tillerson & Acting Legal Adviser Visek:

As chairperson of the Committee on the International Criminal Court of the American Branch of the International Law Association (“ABILA”),<sup>1</sup> I write to you regarding (1) the significant role of the United States in championing the prosecution of atrocity crimes; (2) the benefits of the United States continuing its engagement with the International Criminal Court (“ICC”); and (3) the importance of the Office of Global Criminal Justice and the continued need for that office. The committee would also like to express strong support for the recently articulated position of the U.S. Embassy in Khartoum, that the United States “oppose[s] invitations, facilitation, or support for travel by any person subject to outstanding International Criminal Court (ICC) arrest warrants, including President Bashir.”<sup>2</sup>

This letter is primarily intended to assist you in developing U.S. policy vis-à-vis the ICC. It provides an overview of the role the United States has played in the development of international criminal justice and highlights some of the lessons that can be learned from the U.S.-ICC relationship thus far. We encourage you to continue to foster a relationship between the United States and the ICC that advances the shared interests of both, insofar as these overlap. We also encourage you to appoint an Ambassador-at-Large for Global Criminal Justice to help navigate this ongoing and important relationship as well as continue other helpful work advancing the prosecution of atrocity crimes (for ICC purposes, genocide, war crimes and crimes against humanity).

We are encouraged by the position of principled engagement with the Court that the United States has employed over the course of the last dozen years, beginning in the

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<sup>1</sup> The ABILA ICC Committee consists of approximately 42 members. This letter does not represent the views of the American Branch of the International Law Association, which does not take positions on issues.

<sup>2</sup> U.S. Embassy in Khartoum, 17 May 2017.

second term of President George W. Bush, and including ongoing U.S. support for individual investigations and prosecutions on a case-by-case basis where consistent with U.S. national interests. We hope the United States will continue this policy of strategic engagement with the Court, when it is in the best interests of the United States. At the same time, we recognize that the U.S. has ongoing concerns regarding the ICC and no immediate plans for ratification.

### **(1) The Leading Role of the United States in International Criminal Justice**

The United States has played a leading role in the development of international criminal justice since it first spearheaded efforts to ensure accountability for atrocities committed during World War II. At that time, then-Associate Supreme Court Justice Robert Jackson took a leave of absence from his duties at the Court to lead the prosecution of Nazi war criminals before the International Military Tribunal at Nuremberg, an institution that he helped create. Meanwhile, U.S. General Douglas MacArthur issued the special proclamation that established the International Military Tribunal for The Far East (Tokyo Tribunal), where the U.S. led the prosecution and was represented on the Tribunal's judicial panel.

The United States has similarly been at the forefront of the current resurgence of international criminal law, for example, leading the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively), as well as the Special Court for Sierra Leone (SCSL). By playing key roles in the functioning of these institutions, the United States has strengthened their work and the development of international criminal law. At the ICTY, for instance, the United States has had a consistent judicial presence throughout the course of the Tribunal's run, with U.S. appointees serving as President of the Tribunal for much of the Tribunal's operations. U.S. presence at the SCSL has likewise been strong. Since its inception, three of the four SCSL Prosecutors hailed from the United States, and it is one of those American Prosecutors who is currently tasked with finishing the work of the court in its residual mechanism. Former U.S. Ambassador-at-Large for War Crimes David J. Scheffer is currently tasked with assisting the Extraordinary Chambers in the Courts of Cambodia, a tribunal prosecuting remaining high-level members of the Khmer Rouge; that tribunal is also currently led by a U.S. national as its international prosecutor.

Notably, this engagement has directly benefited U.S. policy-making and, in particular, has enhanced the leadership of the Office of Global Criminal Justice. For example, Pierre-Richard Prosper and Clint Williamson—the two Ambassadors-at-Large for War Crimes Issues appointed by former President Bush—brought to the position their experience as war crimes prosecutors at the ICTR and ICTY, respectively. Ambassador Stephen J. Rapp, who served both at the ICTR and as Prosecutor of the SCSL, also advanced such important work.

Consistent with this longstanding engagement, the United States was also at the forefront of the creation of the ICC. The United States played a prominent role in the drafting of the Statute for the ICC, with the bipartisan backing of Congress.<sup>3</sup> While the United States voted against the final draft of the Statute, it continued to hold a prominent position in the later work done to establish the ICC<sup>4</sup> by helping to develop key documents designed to direct the work of the Court.

**(2) The Interests of the United States and the ICC are Often Aligned; thus, the U.S. Should Continue to Engage with the Court on a Case-by-Case Basis Where Consistent with U.S. National Interests**

Both the United States and the ICC are committed to the broader notion that perpetrators of atrocity crimes ought to be held accountable, and their interest in ending impunity for specific crimes often overlaps:

- This includes, for example, a shared commitment to investigating and prosecuting the atrocities committed in Darfur, which former Secretary of State Colin Powell famously concluded amounted to genocide. Because Sudan is not a party to the ICC, the Court can only exercise jurisdiction over conduct committed on its territory if authorized by the United Nations Security Council (UNSC). A resolution to that effect was successfully passed during the second Bush Administration, a measure described by a Bush Administration official as having “an important sort of diplomatic dimension...sending a signal about accountability.”<sup>5</sup>
- The ICC has also indicted key members of the Lord’s Resistance Army, prosecutions that the United States also supports through the Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009 (“LRA Act”), passed with unanimous consent in the Senate. Indeed, until recently the United States had Special Operations Forces working with members of the Ugandan military to track the head of the LRA, Joseph Kony, wanted by the ICC for mass atrocity crimes including the use of child soldiers and hacking off the limbs of victims.

A shared priority of the United States and the ICC is for cases to be prosecuted domestically, unless nations lack the will or capacity for domestic prosecutions. The Court is designed to complement domestic proceedings, with any state able to block the ICC from exercising jurisdiction by addressing the crimes themselves through credible investigations and, if appropriate, prosecutions.<sup>6</sup> Thus, for example, the U.S. stands in a

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<sup>3</sup> 103 H.R.J. Res. 89, 105th Cong. (1997).

<sup>4</sup> As a signatory to the Final Act in Rome, the U.S. earned the right to be a part of the Court’s Preparatory Commission. Ellen Grigorian, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns*, Congressional Research Service Report, Report RL 30020, at 23 (updated Jan. 6, 1999).

<sup>5</sup> Press Briefing on Sudan, Robert Zoellick, Deputy Sec’y of State (May 27, 2005).

<sup>6</sup> Article 17, Rome Statute.

position to legally preempt the ICC's ability to investigate or prosecute any U.S. nationals for conduct in Afghanistan, by conducting such investigations or prosecutions itself. This would be equally true for crimes allegedly committed on the territory of, or by the nationals of, U.S. allies, or for any other country.

The ICC has also focused its targets on areas of critical concern to the United States, including the ICC's first prosecution of an Al Qaeda operative, Ahmad Al Faqi Al Mahdi, a member of Ansar Dine/Al Qaeda in the Islamic Maghreb. The ICC also has jurisdiction to prosecute ex-members of the Gadhafi regime, after a referral resolution by the U.N. Security Council that the United States supported. The ICC's Prosecutor also has the ability to prosecute ISIS members in Libya, as well as any ISIS members in Syria or Iraq who hail from an ICC State Party. The Prosecutor has already been exploring the feasibility of such prosecutions.

These efforts demonstrate that, on a case-by-case basis, it can benefit the United States to work with the Court. Indeed, this fact has been recognized by U.S. presidential administrations since 2005, and was affirmed in Congressional legislation from 2013 that, with bipartisan support and by unanimous vote in both Houses, expanded the U.S. Rewards for Justice Program to back the apprehension of individuals wanted by the ICC.<sup>7</sup>

This expansion of the Rewards Program has enabled the United States to incentivize arrests that advance U.S. interests, including ICC warrants for members of two different rebel factions that were designated by the United States as terrorist groups in the wake of 9/11.<sup>8</sup> In fact, one of the accused added to the U.S. wanted list was expressly targeted by Executive Order 13413 for crimes committed abroad that then-President George W. Bush deemed "an unusual and extraordinary threat to the foreign policy of the United States."<sup>9</sup> Significantly, two of the four ICC accused added to the U.S. Rewards Program are now in ICC custody and awaiting trial for war crimes and crimes against humanity.

Importantly, by continuing to assist the Court on cases and issues that are important to American national interests, the United States will draw additional benefits, including the enhanced goodwill of key allies, many of whom are ICC members. Moreover, because U.S. law limits support for the Court to "in-kind" assistance, working with the ICC, as warranted, involves no direct costs to the United States.<sup>10</sup> The United States also has extensive power to shape the ICC's docket by the referral and deferral power of the U.N. Security Council; thus, the U.S. can vote for referrals (or block them via its veto power), as well as vote to defer ICC investigations and prosecutions.

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<sup>7</sup> Department of State Rewards Program Update and Technical Corrections Act

<sup>8</sup> ICC accused Joseph Kony and Dominic Ongwen are both members of the Lord's Resistance Army (LRA), while Sylvestre Mudacumura, commands a rebel group that absorbed the Army for the Liberation of Rwanda (ALIR). Both the LRA and ALIR are U.S.-designated terrorist groups. Statement on the Designation of 39 Organizations on the USA PATRIOT Act's Terrorist Exclusion List (Dec. 6, 2001).

<sup>9</sup> Executive Order 13413 (Oct. 27, 2006).

<sup>10</sup> Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Foreign Relations Authorization Act (H.R. 3427), Public Law No. 106-113, §§ 705-706, November 29, 1999.

In addition, continued engagement with the Court would align with domestic public opinion, which continues to support U.S. leadership in world affairs and the institutions that govern them.<sup>11</sup> In fact, U.S. engagement with the ICC has enjoyed majority support with the American public for years,<sup>12</sup> and that support has continued to grow over time.<sup>13</sup> This is consistent with widespread U.S. interest in combatting impunity and furthering international justice, non-partisan issues for which support extends across demographics, including political affiliation.<sup>14</sup>

Additionally, experience has shown that efforts to control the Court through bilateral relations are counterproductive. For example, the Bush Administration initially put pressure on countries to enter into bilateral immunity agreements a/k/a “article 98” agreements or lose U.S. funding assistance. The consequence was a continuing wave of strong criticism from countries that are close allies of the United States including almost all European countries—both individually and through resolutions and declarations by the EU—and by the great majority of Latin American countries. The reaction in many nations to military aid bans was so severe that American military relations with them were seriously damaged and the Defense Department asked Congress to lift the bans, which it did. Former Secretary of State Condoleezza Rice described the early Bush Administration policy, which pushed countries to obtaining foreign aid instead from China, as “shooting ourselves in the foot.”<sup>15</sup> Such mistakes should not be repeated.

### **(3) Appointing an Ambassador-at-Large for Global Criminal Justice**

Since 1997—just prior to the adoption of the ICC Statute—the United States has had an Ambassador-at-Large for Global Criminal Justice (formerly known as the Ambassador-at-Large for War Crimes Issues) who has led the Office of Global Criminal Justice at the State Department. As this brief overview suggests, previous Ambassadors have done invaluable work and this position ought to be promptly filled and meaningfully supported (and funding for the Office certainly should not be cut). A point person with the title of Ambassador and with established knowledge in the field of international criminal justice would provide an invaluable resource on the ICC and other international accountability efforts as this Administration moves forward. Such a figure could help to identify cases and situations of shared interest to the United States and the ICC, as well as work on other important initiatives to support the prosecution of atrocity crimes where consistent with U.S. national interests.

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<sup>11</sup> DINA SMELTZ ET AL., CHI. COUNCIL ON GLOB. AFFAIRS, AMERICA IN THE AGE OF UNCERTAINTY 26-27 (2016).

<sup>12</sup> SMELTZ, CHI. COUNCIL ON GLOB. AFFAIRS, FOREIGN POLICY IN THE NEW MILLENNIUM 23 (2012) (70% support in 2012); CHI. COUNCIL ON GLOB. AFFAIRS, CONSTRAINED INTERNATIONALISM: ADAPTING TO NEW REALITIES 16 (2010) (70% support in 2010); CHI. COUNCIL ON GLOB. AFFAIRS, ANXIOUS AMERICANS SEEK A NEW DIRECTION IN UNITED STATES FOREIGN POLICY 13 (2008) (68% support in 2008).

<sup>13</sup> SMELTZ ET AL., at 31.

<sup>14</sup> *Id.* at 31-32 (72% support in 2016).

<sup>15</sup> Steven R. Weisman, U.S. Rethinks Its Cutoff of Military Aid to Latin American Nations, N.Y. Times, March 12, 2006, at <http://www.nytimes.com/2006/03/12/politics/us-rethinks-its-cutoff-of-military-aid-to-latin-american-nations.html>.

Moreover, history suggests that the experience gained in this role engenders additional benefits beyond an individual's designated term. Former Ambassadors-at-Large have gone on to play key roles outside of the United States, including serving as the UN Secretary-General's Special Expert on the Extraordinary Chambers of the Courts of Cambodia and as the European Union's Lead Prosecutor responsible for investigating war crimes in Kosovo. In other words, filling this position will not only directly assist the United States in the short term, but could contribute to future additional U.S. leadership roles in the field of international criminal justice.

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For 70 years, the United States has been a global leader in the field of international criminal law, which it helped to create to ensure accountability infused with American values of fairness and the rule of law. The U.S. should not abdicate this leadership, and should instead continue to play a pivotal role in ending impunity, protecting the vulnerable, and creating a more just world. We hope that you will seriously consider the recommendations suggested in this letter as vital steps in this process.

I would be happy to meet with you or individuals within your offices regarding these issues.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Trahan".

Jennifer Trahan,  
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Association, International Criminal Court Committee  
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