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March 18, 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 ("ABILA"), I appreciate the opportunity to confer with you as principal officials regarding the United States' relations with the International Criminal Court ("ICC"). It is a real pleasure to have both of you in your positions to bring openness and expertise about the ICC to those relations. The Committee recognizes the importance of the Administration's setting forth a new policy towards the International Criminal Court. This letter makes recommendations about the U.S.'s relationship with the ICC and the U.S. policy towards the Court.

We are extremely encouraged by U.S. participation as an observer in ICC-related meetings. We hope that this openness can build toward a positive U.S. relationship with the Court, representing a clear shift from previous U.S. policy. We also recognize that the U.S. has ongoing concerns regarding the ICC, and no immediate plans for ratification.

The ABILA ICC Committee's contribution is intended to assist you in the finalization of U.S. policy. Its goal should be creating a sustained relationship between the U.S. and ICC that will build U.S. confidence in the Court and, when the time is right, lead to eventual U.S. ratification of the Rome Statute. However, we do recognize that that day is not at hand.

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Our recommendations as to U.S. policy towards the ICC consist of two overall sets of recommendations, the first designed to take away harmful actions towards the ICC undertaken by the past Administration, and the second designed to encourage positive engagement with the institution. (Details are set forth in the appendixes to this letter.)

I. Eliminating Measures Designed to Harm the ICC:

Reassume the responsibilities of a signatory to the Rome Statute. The U.S. should send a note to the U.N. Secretary-General stating that notwithstanding the U.S.'s note of May 6, 2002, the U.S. is now prepared to resume all of the responsibilities of a signatory to the Rome Statute and support the "object and purpose" of the treaty. The U.S. can send such a note without the need for Congressional approval; thus, such action could be a swift, easy and impressive tactical move. (*See Appendix I.*)

Using ASPA Waivers and Interpreting Other Anti-ICC Legislation as Superseded. Under the past Administration, Congress has enacted various legislation that prohibited U.S. cooperation with the ICC, or required waivers for such cooperation. As explained in greater detail below, the U.S. should interpret Section 705 of the Foreign Operations Authorization Act of 2000 as superseded by the American Service-Members' Protection Act (2002) ("ASPA"). Additionally, the President should invoke ASPA waivers to the extent necessary when required. (*See Appendix II.*)

Allow Countries To Gradually Withdraw from Article 98/ BIA Agreements. Under the past Administration, the U.S. entered into many agreements varyingly referred to as "Article 98 agreements" or Bilateral Immunity Agreements ("BIAs"). The U.S. should quietly allow countries to gradually withdraw from such agreements. To the extent necessary, the U.S. could amend Status of Forces Agreements ("SOFAs") and Status of Mission Agreements ("SOMAs") to adequately safeguard U.S. military and diplomatic officials. (*See Appendix III.*)

II. Take Steps To Facilitate Positive Engagement with the ICC:

In addition to unwinding harmful actions taken by the past Administration towards the ICC, the U.S. needs to forge a new relationship with the institution. The U.S. has in the past played an historic role in furthering prosecutions of the gravest crimes and supporting international criminal tribunals. The ICC is designed to prosecute only the most egregious crimes and has shown itself already to be a responsible institution. The U.S. should therefore continue this extremely important tradition by joining the legion of countries that support the ICC. The steps below are designed to promote open and transparent engagement with the ICC:

Create an office officially in charge of liaising with the ICC, such as the U.S. embassy in The Hague. If an office has already been designated, the Administration should make that publicly known.

Be responsive to reasonable ICC requests for information and/or other assistance.

Make every effort to share information with the ICC, including satellite imagery, which has proven effective in documenting mass crimes, consistent with safeguarding U.S. national security information.

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Help provide information on fugitives from the ICC that would facilitate the arrests of such persons.

Be open to the possibility of referrals to the ICC by the U.N. Security Council pursuant to Article 13(b) of the Rome Statute.

Remain restrained about the invocation of Article 16 of the Rome Statute which permits the Security Council to defer ICC investigations and/or prosecutions under its Chapter VII powers. In particular, the U.S. should remain firm that the Security Council should not defer the ICC warrant outstanding against Sudanese President Omar al Bashir, but permit the Court to carry out the work requested by the Security Council. (*See* Appendix IV.)

Sponsor legislation that would allow the U.S. to prosecute the crimes covered by the Rome Statute to the extent not already covered by domestic legislation. The U.S. currently has federal legislation mandating (in certain circumstances) the prosecution in U.S. federal courts of genocide (18 U.S.C. § 1091, as amended by Genocide Accountability Act of 2007) and war crimes (War Crimes Act of 1996, 18 U.S.C. § 2441). The Administration should support comparable legislation permitting U.S. prosecution of crimes against humanity in order to permit U.S. courts to prosecute such crimes. *See* Crimes Against Humanity, S. 1346, 111th Cong. (2009) (sponsored by Senator Durbin).

Continue to attend ICC-related meetings, as an active, constructive and positively engaged participant. We applaud the U.S. participation in the Assembly of States Parties (“ASP”) meeting in The Hague last November, and note the importance of a U.S. delegation attending the next ASP, scheduled for March 22-25 at the UN, as well as the upcoming review conference in Kampala, Uganda May 31-June 10, 2010. Ideally, the U.S. will have articulated its ICC policy by this Spring, so that it can be actively engaged by the time of the review conference.

In conclusion, the ABILA ICC Committee firmly supports a new policy of the U.S. towards the ICC which would both (1) unwind some of the harmful actions towards that institution put in place by the past Administration, and (2) start to positively engage and support the Court. The ICC has proven itself to be a competent institution, with ample procedural guarantees, and sufficient checks and balances. It furthermore has a difficult yet extremely important responsibility—the prosecution of the gravest crimes known to mankind. The U.S. should sustain its historically significant role in furthering international justice by joining other important nations in supporting the Court.

The committee stands ready to assist you and your staff should you seek any clarification or further material on the topics we have raised.¹

Respectfully submitted,



Jennifer Trahan
Chairperson of the ABILA ICC Committee

¹ Two members of the committee opted not to endorse this letter.

APPENDIX I: REASSUMING THE RESPONSIBILITIES OF A SIGNATORY TO THE ROME STATUTE

As you are aware, on December 31, 2000, then-U.S. War Crimes Ambassador David Scheffer signed the Rome Statute on behalf of the U.S. A signatory is obligated not to do anything that would undermine the “object and purpose” of a treaty.² However, by note dated May 6, 2002, the Bush Administration stated that the U.S. was no longer bound by the obligations of a signatory.³

The U.S. should resume the commitment not to undertake measures that would undermine the “object and purpose” of the Rome Statute.

It is important to note that the 2002 note did not in fact withdraw the U.S.’s signature.⁴ Thus, any new note would be to negate the Bush Administration’s letter, restoring the effect of the original Clinton Administration’s signature. This distinction is significant because the period for becoming a Rome Statute signatory has expired; thus, it is important not to take the position that the Bush Administration’s letter withdrew the U.S.’s signatory status, because the U.S. could not now re-sign the Rome Statute.

A new letter to the UN Secretary-General could reactivate the U.S. signature and its obligations as signatory. As mentioned above, the U.S. could send such a letter without the need for Congressional approval; thus, such action could be a swift, easy and impressive tactical move, signaling willingness to support the “object and purpose” of the institution.

² Vienna Convention on the Law of Treaties, Art. 18. While the U.S. is not a party to the Vienna Convention on the Law of Treaties, it has long recognized the convention as declaratory of customary international law. S. Exec. Doc. L. 92-1 at I (1971) (letter from Secretary of State Rogers to President Nixon).

³ Specifically, the letter states that “the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.” 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 There is no provision in the Vienna Convention for removing signature. Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 Harv. Int’l L.J. 307, 334-35 (2007).

APPENDIX II: USING ASPA WAIVERS AND INTERPRETING OTHER ANTI-ICC LEGISLATION AS SUPERSEDED

Under the past Administration, the U.S. Congress has enacted various pieces of legislation that prohibited U.S. cooperation with the ICC, or required waivers for such cooperation, including Section 705 of the Foreign Operations Authorization Act of 2000, the American Service-Members' Protection Act (2002) ("ASPA"),⁵ and the "Nethercutt Amendment" (2005).⁶

Section 705 is the most worrisome provision, because it states 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."⁷ This Section therefore appears to be a direct impediment to positive engagement.

ASPA is later-in-time than Section 705, and also prohibits any U.S. cooperation with the Court, but much of ASPA (by contrast to Section 705) is waivable, and parts did not apply to major NATO allies. The U.S. should interpret Section 705 as superseded by ASPA. The President should also invoke all additional ASPA waivers to the extent necessary when required.

We also suggest that the administration consider the repeal or amendment of ASPA in part. ASPA (1) limits cooperation with the ICC, including collaboration, extradition, support, funding and sharing of classified information; (2) prohibits U.S. participation in UN peacekeeping (but is subject to waivers); (3) prohibited U.S. military assistance to ICC States Parties (this section was repealed); (4) authorizes the President "to use all means necessary and appropriate" to free U.S. officials, service members, and government employees detained by the ICC, as well as certain members of allied countries; (5) allows the President to cooperate or share intelligence information with the ICC on a case-by-case basis, if it is in the U.S. national security interest.

The so-called "Dodd Amendment" to ASPA, however, is a general exception which permits U.S. cooperation with the Court. It states that "[n]othing 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.*"⁸

Thus, although ASPA (as amended) does not prevent US/ICC cooperation or U.S. military assistance to ICC States Parties, ASPA ideally still should be amended to remove the provision permitting liberation of individuals detained by the ICC. It is repugnant for the U.S. to have standing legislation that permits the U.S. president "to use all means necessary and appropriate to bring about the release" U.S. nationals and others detained or imprisoned by the ICC.

⁵ American Service-Members' Protection Act of 2002, P.L. 107-206, 16 Stat. 899 (2002), 22 U.S.C. §§ 7421 *et seq.*

⁶ Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 § 574, 118 Stat. 2809, 3037-38 (2004). Additionally, the so-called "Hyde Amendment" of 2002 became Public Law 107-117. Section 630 provided that no funds from the Defense Appropriations "may be used to provide support or other assistance to the international Criminal Court or to any criminal investigation or other prosecutorial activity" of the ICC. That language was struck by Section 2014 of ASPA and is no longer law.

Foreign Relations Authorization Act (2003) which became Public Law 107-228 provided that no U.S. dues under the regular budget of the UN could fund the ICC through 2003. That language has expired and has not been renewed.

The so-called "Craig Amendment" of 2002 became Public Law 107-77. Section 630 provided that no funds appropriated by this act could be used "for cooperation with, or assistance or other support to, the International Criminal Court." That language has expired and not been renewed.

The Nethercutt Amendment was also not renewed after fiscal year 2008.

⁷ Public Law 106-114, Foreign Operations Authorization Act of 2000, § 705.

⁸ ASPA, § 2005 (emphasis added).

APPENDIX III: ALLOWING COUNTRIES TO WITHDRAW FROM ARTICLE 98/ BIA AGREEMENTS

Under the past Administration, the U.S. negotiated and entered into many agreements varyingly referred to as “Article 98 agreements”⁹ or as Bilateral Immunity Agreements (“BIAs”). These agreements, which are in some cases reciprocal and in some cases non-reciprocal, basically provide that the country entering the agreement will never surrender American nationals accused of war crimes, genocide, or crimes against humanity to the ICC, even if the individuals at issue committed the crimes in a country that has accepted ICC jurisdiction, and regardless of whether the individual at issue would be prosecuted in the U.S.

Many countries view such agreements with hostility—as a manifestation of arrogance that the U.S. places its citizens (not just military, but all U.S. citizens), above the rule of law. This hostility was only increased because many countries, pursuant to both ASPA and the Nethercutt Amendment, were required to enter into such agreements upon threat of losing U.S. military and economic assistance.¹⁰ At least some countries that are parties to the Rome Statute also view such agreements as inconsistent with their treaty obligations under the Rome Statute.¹¹ Many countries additionally have viewed such agreements as attacks on their sovereign right to dispose of offenders on their territory as they determine.

The U.S. should quietly allow countries to gradually withdraw from such agreements. To the extent necessary, the U.S. could amend SOFAs and SOMAs to adequately safeguard U.S. military and diplomatic officials.

In addition to engendering hostility towards the U.S., in some instances, these agreements have caused countries to obtain foreign military assistance instead from other countries, such as China—undoubtedly an unintended consequence of the past Administration’s insistence on countries either entering into these agreements or losing their military assistance.¹² We also note the possibility that many of the BIAs that have been signed on behalf of foreign countries may not be in effect because the agreements did not—often deliberately—go through necessary domestic legal procedures.¹³

⁹ The name refers to Article 98 of the Rome Statute which deals with the situation where a country may find itself caught in a conflict between its obligation to the ICC to execute its arrest warrants and its obligations under a Status of Forces Agreement (“SOFA”) or Status of Mission Agreement (“SOMA”), or diplomatic and state immunity.

¹⁰ *Citizens for Global Solutions*, Analysis: Unintended Consequences of the U.S. Bilateral Immunity Agreement Policy, http://www.globalsolutions.org/issues/analysis_unintended_consequences_u_s_bilateral_immunity_agreement_policy (*Nethercutt Amendment "disproportionately affected Latin American ICC member countries"*).

¹¹ See Parliamentary Assembly of the Council of Europe, Risks for the Integrity of the Statue of the International Criminal Court, Res. 1300 (Sept. 25, 2002).

¹² Condoleezza Rice, U.S. Secretary of State, Trip Briefing: en route to San Juan, Puerto Rico, (Mar. 10 2006), <http://2001-2009.state.gov/secretary/rm/2006/63001.htm>. See also CICC, “Comments By U.S. Officials On The Negative Impact Of Bilateral Immunity Agreements (Bias) AND The American Servicemembers’ Protection Act (ASPA),” at http://www.coalitionfortheicc.org/documents/CICCFS-CommentsUSOfficials_BIA-ASPA_current.pdf.

¹³ CICC, “Status of U.S. Bilateral Immunity Agreement by region,” at http://www.coalitionfortheicc.org/documents/CICCFS_BIAstatus_current.pdf.

APPENDIX IV: REMAINING RESTRAINED ABOUT INVOKING ARTICLE 16, PARTICULARLY REGARDING AL BASHIR'S WARRANT

Article 16 of the Rome Statute permits the Security Council to defer ICC investigations and/or prosecutions under its Chapter VII powers.¹⁴ To date, the Security Council has done so in one instance—when it exempted U.N. peacekeepers from countries not party to the Rome Statute from ICC jurisdiction for twelve months,¹⁵ and then renewed that deferral for an added twelve months (since expired).¹⁶

A number of countries, including AU member states, argue that the Security Council should defer the ICC warrant outstanding against Sudanese President Omar al Bashir.¹⁷ The Prosecutor has reason to believe that Bashir is implicated in genocide, war crimes and crimes against humanity related to the massive atrocities committed by the Janjaweed and the Government of Sudan in the Darfur region of Sudan.¹⁸

The Security Council should not interfere with the work of the ICC when the ICC Prosecutor is pursuing his mandate under the Rome Statute, as he is in this instance. It was the Security Council that referred the situation in Darfur, Sudan to the Prosecutor.¹⁹ Therefore, this would be a particularly inappropriate instance to utilize deferral in that the Security Council would in effect be partly undermining its own referral. It should be recognized that particularly where the ICC investigates or prosecutes high-ranking individuals, there likely will be politically motivated efforts to obtain Article 16 deferrals. The U.S. should show extreme reticence to grant such deferrals.

We also note that it is possible that such a request for deferral would not amount to a proper use of Chapter VII, by not satisfying the threshold criteria of Article 39 of the U.N. Charter, which requires “a threat to the peace, breach of the peace or act of aggression.”²⁰ Of course, situations created by the person at issue—such as when Sudanese President Bashir expelled humanitarian workers from Darfur²¹—should on no accounts be rewarded by the use of a Security Council deferral. The U.S. should continue to remain firm against the use of deferral regarding the al Bashir warrant, and remain wary of other attempts to utilize Article 16 deferrals.

¹⁴ Rome Statute, Art.16.

¹⁵ S.C. Res. 1422 (2002). The resolution specifically covered “current or former officials or personnel from a contributing State not a Party to the Rome Statute” regarding “acts or omissions relating to a United Nations established or authorized operation . . .”

¹⁶ S.C. Res. 1487 (2003).

¹⁷ 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.”).

¹⁸ ICC, ICC Prosecutor Presents Case Against Sudanese President, Hasan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur, [http](http://www.iccnatj.org/press/2008/07/14/08071401.htm) (July 14, 2008). The Pre-Trial Chamber has issued a warrant against him for war crimes and crimes against humanity. *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009). The Appeals Chamber recently reversed the Pre-Trial Chamber’s decision not to include genocide in the warrant, and remanded that issue for further consideration. *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09-OA, Judgment on the Appeal of Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (Mar. 4, 2009).

¹⁹ S.C. Res. 1593 (2005).

²⁰ See U.N. Charter, Art. 39. See also “Human Rights Watch, Article 16, Questions and Answers” (Aug. 15, 2008), at <http://www.hrw.org/en/news/2008/08/15/q-article-16>.

²¹ Jonathan Adams, *Sudan’s President Bashir Defies Warrant, Expels Aid Groups*, THE CHRISTIAN SCIENCE MONITOR (Mar. 5, 2009).