Koh and Rapp's Remarks on U.S. Engagement in the International Criminal Court and the Outcome of the ICC Assembly of States Parties Conference, June 2010

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MR. DUGUID: Good afternoon, ladies and gentlemen. Welcome to the State Department. We have a special briefing to lead off our daily press briefing today. Recently, there was an International Criminal Court conference in Kampala, Uganda. Our delegation was led by our Legal Advisor Dr. Harold Koh and Ambassador-at-Large for War Crimes Issues Stephen Rapp. We have them both here today to take your questions and tell you a little bit about the achievements of the U.S. delegation at the conference.

We’ll start with Professor Koh.

MR. KOH: Thanks, Gordon. We just returned from a two-week review conference of the International Criminal Court’s Assembly of States Parties in Kampala, Uganda, which we attended as an observer nation.

Ambassador Rapp and I headed an interagency delegation that included representatives from State, Justice, Defense, the Uniformed Services, and the National Security Council. Our delegation worked extremely hard to resume engagement with the court, the states parties, observer nations, and many private organizations involved in international criminal justice. And we engaged in countless hours of conversation in plenary private meetings, et cetera.

The conference completed three main tasks. It endorsed and supported the court’s core work with respect to the traditional crimes of genocide, war crimes, and crimes against humanity, and highlighted issues of state cooperation, peace and justice, stocktaking, and participation of victims, about which Ambassador Rapp will say more. It also adopted two new crimes, prohibition and non-international armed conflict of certain weapons, the so-called Belgian amendment, and a crime of aggression whose elements will be reconsidered and affirmatively considered after seven more years.

We think that with respect to the two new crimes, the outcome protected our vital interests. The court cannot exercise jurisdiction over the crime of aggression without a further decision to take place sometime after January 1st, 2017. The prosecutor cannot charge nationals of non-state parties, including U.S. nationals, with a crime of aggression. No U.S. national can be prosecuted for aggression so long as the U.S. remains a non-state party. And if we were to become a state party, we’d still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.

Under the terms of the resolution adopted, any crime of aggression couldn’t become operational unless it were affirmatively adopted after another review by consensus or a two-thirds decision of all states parties no earlier than January 1, 2017. It could not be exercised except for acts committed one year after 30 states parties accepted the amendment. And two ways of referring to the crime would be created – one channel that would go through an exclusive Security Council trigger, and a second channel which would go through a prior Security Council review subject to four conditions.

If the Security Council did not make a determination that aggression had occurred, the prosecutor would have to offer a reasonable basis for investigating the crime under a definition that’s been clarified by understandings we suggested. The prosecution would have to get a majority vote of six judges of the court’s pretrial division. The Security Council would still, at that point, have the authority to stop the prosecution with a red light Chapter 7 resolution disapproving the resolution. And as I said, the channel would not apply to nationals of non-state parties or any non-consenting state party who opted out.

This issue has occupied the states parties and, in some sense, diverted the court from its core human rights mission. Many states and Kampala expressed an impulse to finalize the crime. Now, a non-final approach has been tentatively reached which takes the issue off the table for the next seven years with a notional solution that can be reexamined in 2017.

The United States considered the definition of aggression flawed, but a number of important safeguards were adopted. Understandings were adopted to make the definition more precise, to ensure that the crime will be applied only to the most egregious circumstances. And while we think the final resolution took insufficient account of the Security Council’s assigned role to define aggression, the states parties rejected solutions that provided for jurisdiction without a Security Council or consent-based screen. We hope that crime will be improved in the future and will continue to engage toward that end.

The big picture going forward, I think we should keep in mind, is that as the country of Nuremberg prosecutor Justice Jackson, we are the only country that has successfully prosecuted the crime of aggression at Nuremberg and Tokyo. Of course, we do not commit aggression and the chances are extremely remote that a prosecution on this crime will, at some point in the distant future, affect us negatively.

So to paraphrase Churchill, this is not the end, it was not the beginning of the end, but it did feel like the end of the beginning of the U.S’s 12-year relationship with this court. After 12 years, I think we have reset the default on the U.S. relationship with the court from hostility to positive engagement. In this case, principled engagement worked to protect our interest, to improve the outcome, and to bring us renewed international goodwill. As one delegate put it to me, the U.S. was once again seen, with respect to the ICC, as part of the solution and not the problem. The outcome in Kampala demonstrates again principled engagement can protect and advance our interests, it can help the states parties to find better solutions, and make for a better court, better protection of our interests, and a better relationship going forward between the U.S. and the ICC.

And let me turn it over to Ambassador Rapp.

AMBASSADOR RAPP: Well, thank you very much, Harold. I think one of the main aspects of this conference in which I think our principled engagement was so positive was working with the court in the stocktaking exercises, which looked at issues like complementarity, which is this idea that you should have justice at the national level in preference to justice at the international level. And that means strengthening national systems so that they can prosecute war crimes and genocide and crimes against humanity, the need for greater cooperation with this court, greater recognition of the rights and the concerns of victims and affected communities, and making sure that we proceed with the process of justice in a way that benefits the search for peace.

The sessions that went on the first week, we participated in very actively. We, ourselves, together with the Norwegian Government and the Government of the Democratic Republic of Congo, had a separate session on accountability in the DRC, which is, I think you all know, is a prime concern of Secretary Clinton with the enormous levels of atrocity that are ongoing there, the thousands of rapes that are committed every month. International justice alone, a few cases tried at The Hague, doesn’t, even if there is full cooperation – an arrest of each of the suspects, and there’s still one at large – doesn’t have the kind of effect that you need to have on the ground if you’re going to protect people from those crimes.

So we focused, in those sessions, on ways in which we as a donor state, and a very generous one, together with the EU and other partners, can strengthen justice on the ground. And that was a message that had a very receptive audience in Africa, where there is a strong desire to see these cases prosecuted in the national system, but with help in terms of capacity and independence to ensure that justice is done. This whole conference, I think, gave us an opportunity to engage with the ICC and work toward making this institution more effective.

The United States, as everyone knows, has been a leader in international justice, beginning with Nuremberg, that Harold mentioned, and in Tokyo, but particularly beginning, again, in 1993 with the establishment of the Yugoslavia Court, the following year with the establishment of the International Criminal Tribunal for Rwanda where I worked, and thereafter with the Special Court for Sierra Leone and other international institutions where we were a large contributor to those courts, in which Americans played leadership roles, and in which, beyond even our formal role, we provided assistance to those courts and information sharing and witness protection and diplomatic support, and support and efforts to arrest suspects. And even while we don’t become a member of the ICC, the opportunity to do some of those same kinds of things presents itself with the ICC, where that court is pursuing the same kind of cases that we prosecuted through these international institutions in Rwanda and Sierra Leone.

We’ve had a concern in the past that the prosecutor of the ICC could make – could undertake politically motivated prosecutions, could perhaps come after Americans who were engaged in protecting people from atrocity instead of emphasizing those that were committing the crimes. Thus far, this court has been appropriately focused. The cases that it has taken up in Northern Uganda involving Joseph Kony and the crimes of the Lord’s Resistance Army in the DRC, the various militia groups that have engaged in campaigns of mass atrocity in Darfur, Sudan, and in the Central African Republic were cases that cried out for justice and accountability and for the protection of the victims.

And if it weren’t for the ICC, the UN would have been having to go in and establish a special court for those kinds of situations. So as we recognized in March when we participated in the Assembly of States Parties in New York, it’s in our interest to support those prosecutions – not at this time as a member of the ICC, but in kind with assistance as long as it’s consistent with our law. And at the same time that we support those prosecutions, also work on the whole of the international justice system, the key part of which is that that is below the level of the international system, the massive amount of work that needs to be done at the national level. That message of our commitment and our support for appropriate prosecutions at this court, I think, resonated very well when we came to this issue of aggression, where those of us that have worked in international justice know how challenging it is to prosecute, to arrest, to obtain cooperation. Even when you’re going after the cases that involve mass atrocity, people accuse you of being politically motivated.

But what’s happened, as we’ve seen in the last 15 years, is that when a leader has been charged by one of these courts, and there’s strong evidence of his involvement in mass atrocity against innocent civilians, eventually it becomes possible to dislodge that leader, as we saw with Milosevic and as we saw with Charles Taylor, and bring that person to justice. If the court, on the other hand, were to get into the political area and to deal with crimes not against individual civilians, as in war crimes or crimes against humanity or genocide, but crimes against states and the crime of aggression, it would find it even more difficult to obtain cooperation, and it would quickly find itself by haven taken one side or another, even accepted a case or rejected a case involving a border conflict, really stymied from the point of view of getting the kind of cooperation that it needs to deal with atrocity crimes.

And that was an argument that resonated very strongly, and 50 human rights organizations across the world agreed with us on that point and put out a letter to the foreign ministers of the ICC countries, saying it wasn’t a good idea for this court to go there. What happened is, as Harold said, in the end is that we had a deferral, at least, of the ability of this court to move into the aggression area until 2017. Even then, it’ll take a vote comparable to the vote we would have had in Kampala; a vote by an overwhelming majority or a consensus in favor of going forward. This gives the court seven more years to get it right in terms of going after atrocity crime.

As I think everyone knows, the Yugoslavia and Rwanda tribunals, even though they’ve not moved as quickly as some would have liked, and these cases have sometimes been difficult, the results show that almost 200 people have been prosecuted, including chiefs of state and heads of government and immediate leaders like those I prosecuted in Rwanda and others. Thus far, the ICC has only begun two trials and hasn’t concluded them. And this court has a ways to go before it’s as effective as the ad hoc tribunals were. This next seven years gives them an opportunity, I think, to be effective, and to the extent consistent with our law, at least in the situations that have been open so far, we’re prepared to do what we can to assist those prosecutions to ensure that these crimes that shock the universal conscience result in accountability for those that bear the greatest responsibility.

So with that opening, I guess we can go to questions.

MR. DUGUID: Yes. Please, as you ask your question, direct it to either Professor Koh or Ambassador Rapp, Matt, and then – okay.

QUESTION: Yeah. Well, actually, this is for both of you. I guess I’m not exactly sure what you guys spent two weeks doing except for thwarting the idea – basically making sure that something that they wanted to do didn’t happen and has been pushed down the road till 2017, and even then, it’s going to take – there are so many conditions attached to this that it probably – it sounds as though it’s almost impossible for – it will be almost impossible for the court to take up the crime of aggression. I’m wondering, what were you worried about? If you hadn’t gone and engaged, did you think that they would have actually agreed on this and to start prosecuting this crime immediately?

And then second of all, you talked about how you’ve reset the default from hostility to engagement, but in fact, the Bush Administration was – cooperated in several notable instances, cases that – the LRA and in Darfur. So how exactly is this Administration different than the last one?

MR. KOH: Matt, we didn’t thwart anything. We worked with the other countries who were there to reach a consensus outcome, which was reached. The first week was entirely about the core mission of the court – genocide, war crimes, and crimes against humanity. We made presentations there; we participated in discussions about a set of issues going to ensuring successful prosecutions.

The International Criminal Court has not completed a case. And that’s an important fact. The aggression issue is a second agenda. One prosecutor there said to me the challenge is how do you land on Mars when you haven’t proved you can land on the moon? So the first week was all about strengthening the core agenda of the court. The second week was about trying to decide what kind of consensus outcome there could be with regard to the crime of aggression. And there were many different views on the table. I think everybody realized that more time was needed. And the consensus outcome, which was achieved on the last day was what I described, adopting a non-final outcome to be reconsidered. But seven years from now, the court may be quite advanced in other respects as a stronger institution with the development of U.S. engagement.

Now, you say that this was the strategy or policy of a previous administration. The fact of the matter is that in the early days, there was hostility to the court getting sufficient membership. There are now 111 states parties. It’s not going to go away. The only approach that we think ensures our interests and ensure that the court accomplishes its core mission is a strategy of engagement. And so we think that after 12 years of back and forth on different approaches, that will be the default, and we think it’s one that serves our interests and makes for a stronger court.

AMBASSADOR RAPP: I should note that, I mean, a number of resolutions were passed – high-level ministerial statement on cooperation and on mechanisms for increasing coordination between donors when it comes to strengthening the national justice systems. And so there were, I think, constructive steps taken by the court. And the cooperation indeed was also requested, as we suggested, of non-party states like ourselves. Because when I was in the Sierra Leone court, we sought assistance of states that weren’t obliged to assist us, and they did. And so it’s important that that occur.

On this whole question of engagement and what we accomplished, what we saw when this Administration took over in 2009 and – was that there had been this process of studying the crime of aggression for the last six or seven years – a working group that actually met in Princeton, New Jersey – and that came up with recommendations about how to proceed. And it reached a consensus outcome on defining the crime of aggression. Everyone seemed to think the definition was very good. We thought it very vague, a definition that would allow a court to be involved in any so-called manifest violation, without really defining what that was that could have gotten the court into border disputes, could have involved in it prosecuting people, or going in to protect civilians – as we did in Kosovo – from atrocities, from war crimes and crimes against humanity.

And because we weren’t present, some things ended up in that process that I think probably wouldn’t have been there if we’d been involved. We had to play catch-up with that. And as Harold said, we were successful in adding several understandings to that definition. Those understandings wouldn’t have been there were it not for our participation that ensured that this court would not deal with but any of the most serious cases, that there would have to be not just character, gravity, or scale, but a combination of several of those factors, and that this wouldn’t lead to national prosecutions of leaders for aggression by – alleged aggression by other states.

So I think it was successful because we raised issues, raised questions, not in a negative sort of way, but just simply said, “What about this, what about this, what about this?” And through our engagement, I think we accomplished quite a lot. We also raised this issue about the court needing, really, to become a bicycle. As Harold used the example, at the moment, it’s just starting out and it’s a bit wobbly; let’s not overload it with this thing. And so the result was basically a deferral of this issue for seven years. But significantly, provisions have gone into the statute that can’t be changed in 2017 by this process, which will protect the nationals of non-party states like ourselves, or states that opt out. So – and I don’t think that would have occurred were it not for us sort of raising the issues in this conference.

But in all of the engagement that we had, we found states from each continent that considered our concerns very carefully, and worked to accommodate those concerns. And indeed, in the process of discussion, other concerns were raised by individual parties. And I think as a result, the process was much better and the result was much better, not just for the United States, but for this court itself.

MR. DUGUID: Thank you. Charlie and then Elise.

QUESTION: For Professor Koh, I’m intrigued by your use of the word “reset,” because, not surprisingly, at least to me, it has a – more of a political tinge on the diplomatic – in the diplomatic dictionary in this Administration. And obviously, I don’t think you used the word just out of the – out of thin air. And maybe I’m missing something. Is there a legal part to it as well? Or was, in fact, the main purpose of going to the conference, attending the way you did, to make things right or get on the other side with the ICC in a political sense?

MR. KOH: Well, Charlie, there are really three policies at work. One is our support for policies of accountability, international criminal justice, and ending impunity, which lead to our supporting international criminal tribunals ad hoc, of the kind – Rwanda, Yugoslavia, Sierra Leone, Cambodia, et cetera.

A second policy is a policy of principled engagement with existing international institutions, whether it be the Human Rights Council, the Copenhagen process, the nuclear security process. And then the third point, which was illustrated by President Obama’s Nobel lecture, is that in the 21st century, sometimes there are uses of force in which nations must engage that are lawful. And the question is how to make sure that they are not criminalized if they are lawful.

Now, I think one fundamental point is that the crime of aggression is different from the other three crimes in a couple of respects. As Steve pointed out, there have been hundreds of prosecutions for genocide, war crimes, and crimes against humanity. There have only been two prosecutions for wars of aggression, namely Nuremberg and Tokyo. Both of those happened before there was a UN system. There’s been no successful prosecution for an act of aggression alone. And the question is, since we’re making international criminal law for the real world, before you lock in the crime forever, you want to make sure that as a legal matter you’ve got it right.

And a lot of our focus on this was clarifying, as lawyers do, what terms mean, to make sure that it deters to the appropriate extent but doesn’t over or under-deter; to talk exactly about what the jurisdictional filters and trigger mechanisms were going to be; and I think most important, to reaffirm the principle that when you have an organic change in an institution like this, it should be done on a consensus basis.

The other three crimes were adopted by consensus approaches at Rome. And we thought it was very important that if you’re going to add to the criminal array available to this court, it should also be done by unanimity of view by the interested parties.

MR. DUGUID: Thank you. Elise.

QUESTION: Yes. For either one of you, maybe both – hi.

AMBASSADOR RAPP: How are you doing?

QUESTION: Nice to see you.

I’m just wondering what the end game is here with this Administration and the court. Are you trying to shape the court in a way that, ultimately, you can perhaps consider becoming a signatory to the court? Or are you just concerned necessarily about other crimes that you see and the way that they should be prosecuted to make sure that international justice is upheld?

Because I just – I do – it is kind of curious that an administration would become so engaged in shaping the kind of format of a court that it’s not a signatory to. And what gives us the moral authority to do that if we’re not becoming a signatory to the court? And in addition, are you conditioning any kind of future U.S. assistance with the court on some of the objectives that you proposed at the conference?

MR. KOH: Well, first of all, the other countries all wanted us to engage. Their recognition, as a historical matter, as international institutions and courts with which the United States is not involved tend not to be as effective. Secondly, they noticed that all of the ad hoc tribunals – the Yugoslav and Rwanda tribunal, the Cambodia tribunal – have been more successful by virtue of deep U.S. engagement.

Third, the other strategies that have been used, either isolation from the court or hostility from the court, appear to be non-starters. You have now a court that exists, it’s functioning, it’s hearing cases, and needs help. And it needs people who are both going to criticize things that it does that are less well thought through and to try to suggest directions in which it can go.

I don’t think we’re talking so much about an end game as we are talking about a process, the default --

QUESTION: A process by which eventually you hope that you can join?

MR. KOH: I think our basic conviction is a strategy of engagement is good for the court and good for U.S. interests. We might as well start that process and make a serious effort at it, which is what we did. And as I said, the reaction was favorable. On the last day, they said, “We’re delighted to see a situation in which the U.S. is part of the solution for the court and not part of the problem.”

AMBASSADOR RAPP: I mean, it’s clear that joining the court is not on the table, as far as a U.S. decision at this time. But as you know, the United States takes a very long time to adopt international conventions and treaties, and sometimes doesn’t. I mean, it took us 40 years to ratify the Genocide Convention.

I think what we’re looking at here is how this court develops. We want to see it develop responsibly, to focus on crimes that involve truly massive intentional attacks on civilians, both in terms of the decisions made by its prosecutor on where to open investigations and also by its chambers, its trial chambers that have to decide whether, sometimes, to authorize those investigations or to issue arrest warrants.

And I think over time, there’s a possibility that we may gain confidence in this institution and that would enable us to move forward. And who knows what the future may hold? But at this time, we recognize that this institution is the international court where justice will be delivered if it can’t be delivered at the national or the regional level, that the United Nations is not going to step up and establish a Rwanda or Yugoslavia court and spend a hundred million or more a year on a court, as they have with those, when 111 countries are dues-paying members to this one.

And so this is where accountability is to be delivered. It’s also recognized, as we’ve seen with Darfur, that the UN Security Council, of which we’re a permanent member, has the ability to send cases to it involving not just the 111 countries but all 192. And so it’s a tool in the international toolbox, so to speak, for achieving accountability instead of establishing a separate, one-off institution.

So, if for nothing else, because of that role, but also because we’re so committed to achieving accountability for these cases and fulfilling the promise that we’ve made to victims when we went and convicted Jean Kambanda, the prime minister of Rwanda, for genocide, or brought Milosevic to trial or Charles Taylor to trial, there’s been an expectation created that when people of whatever level commit mass atrocities against the innocent, there’s going to be accountability. And we think that’s appropriate. We want it done. We want it done fairly. We want it done effectively. And the ICC wants us to assist and to the extent it’s consistent with our law and we do have some laws that we have to be careful about observing that are a little different in this area than they are with other courts. We want to go forward on this, and that’s something that we’ll be doing in the next several years and perhaps that will build an engagement and a confidence that will allow us to go further.

MR. DUGUID: Thank you. I believe we have time for one more question. Farah, please.

QUESTION: I was hoping you could tell us a little bit more about the discussions surrounding Sudan and the effectiveness – I mean, a lot of people watched with dismay and don’t feel like the court has been positive – has gotten positive outcomes for people there. And I was hoping you could tell us a little bit more about the discussions there.

And my second question is about – you’ve talked a lot about strengthening national justice systems, and there’s an awful lot of people who say, okay, the ICTR is the last time we’re ever going to have the international community coming in and imposing a – sort of creating a justice system for a country, and more like they believe that we’re going to see more like Sierra Leone and Cambodia, which is just assisting a national – I mean, do you feel that that’s the future, or do you think that, in fact, there will be – the future really is in these international efforts?

AMBASSADOR RAPP: Well, first of all, on the Sudan issue – and Kampala -- it was a good thing that this conference was in Africa and 30 countries in Africa – more than – I think there are about 55 countries in Africa – but a substantial majority are members of the ICC. Uganda itself sent the first case to the ICC, the Kony case, by referral. And there were discussions, particularly in this Peace and Justice Forum, about the interplay of peace and justice, and the Sudan issue was there. But I think the bottom line of the conference is that everyone recognized that when there are cases before the court, states need to cooperate. And I think it strengthened the commitment of the African parties to assist in the cases in Africa and assisted the other countries in their resolve to ensure that arrests are made. So I think it actually was helpful to this challenging aspect of getting cooperation in Sudan.

In regard to the future of international justice, the possibility of ad hoc mixed courts at the national level – I mean, the Sierra Leone is an example of that, though more international than national – but where national judges sit with international judges, where there’s international assistance to those courts, I think that remains very much an open possibility in the future. The ICC is never going to be able to prosecute more than three or four cases in each situation, and that – and there may be situations where it’s better to have a court close to the people, as we had in Sierra Leone or you have in Cambodia, with international help and assistance to provide the capacity and the independence, rather than send those cases thousands of miles away to The Hague.

And that’s consistent with complementarity, consistent with the idea that it’s better to do it at the national level. So I think our American interest will be to look for alternatives close to the ground, as we did in Kenya for instance, where we very strongly supported the Waki Commission report and the initiative of former Secretary General Annan that urged there to be a national independent court to deal with the post-election violence and to provide, perhaps, an international prosecutor in that or other international personnel to ensure the independence to give assurance to the victims that they wouldn't – that they’d be properly treated because of some of the ethnic aspects of that conflict.

That’s the best approach. Sadly, it didn’t happen there. Because it didn’t happen, it’s gone to the ICC. But I think we’ll always be working to try to do it there. And that was part of the message of the sessions on complementarity. There needs to be a continuum from the national level to the international, with the international level only handling a relative handful of cases and hopefully providing an incentive for countries to do it themselves so that it happens at the local level with their own people with assistance rather than thousands of miles administered by people that are unfamiliar with their culture and country.

MR. DUGUID: Thank you, Ambassador Rapp. Thank you, Professor Koh. Thank you for joining us, ladies and gentlemen. We’ll begin with the daily press briefing shortly. That’s all the time we have.