



Executive Memorandum

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OVERTURNING CLINTON'S MIDNIGHT ACTION ON THE INTERNATIONAL CRIMINAL COURT

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President Bill Clinton unexpectedly authorized a U.S. representative to sign the 1998 Rome Statute establishing an International Criminal Court (ICC) on December 31, 2000—the last day countries could become parties to the treaty without ratifying it. This caught Congress and America by surprise; the Administration had refused to sign the treaty for 18 months because, in the President's words, it had "significant flaws" that threaten the rights of Americans and legitimate activities of the U.S. military. Now the White House is claiming its midnight action will ensure that U.S. negotiators have a voice in the ICC's actions and procedures and reaffirm America's opposition to genocide, war crimes, and crimes against humanity.

Such justifications are disingenuous. The United States has demonstrated its opposition to such offenses, for example, by making substantial commitments to military and humanitarian interventions. Moreover, repeated attempts to secure changes that address its concerns have been rejected. By signing the treaty without those changes, the President has undermined these principled efforts.

The Bush Administration should move immediately to counter President Clinton's ill-considered action, first by notifying the Secretary-General of the United Nations (the depositor of the treaty) that the United States will not be bound by the current statute, which threatens national sovereignty and is

unlikely to be ratified by the U.S. Senate. In the meantime, the Administration should work with Congress to ensure that Americans are protected from the court's actions and to prohibit U.S. diplomatic or financial support for the court until its concerns have been addressed. If these conditions are not met by the conclusion of the ICC Preparatory Commission's meetings in March, the Administration should discourage other countries from ratifying the treaty.

What's Wrong with the Treaty. The Rome Statute has been ratified by only 27 of the 60 countries needed for it to take effect. If it enters into force, it will create a Netherlands-based international legal bureaucracy with the authority to arrest, prosecute, and punish nationals from any country accused of such "international" offenses as war crimes and crimes against humanity. As the statute is now written, Americans who appear before the court would be denied such basic constitutional rights as trial by a jury of one's peers, protection from double jeopardy, and the right to confront one's accusers. Finally, the ICC could prosecute and punish even the nationals of countries

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that do not sign and ratify the treaty—an astonishing break with the accepted norms of international law.

Supporters argue that the ICC will deter genocide and other atrocities, but this flies in the face of reality. Many repressive governments have signed the Rome Statute but continue to commit atrocities against civilians. The Sudanese government, for example, is embroiled in a civil war against Christians and others from the nation's southern region, and Zimbabwean President Robert Mugabe has encouraged his supporters to murder political opponents and seize their property. Clearly, such regimes do not fear an ICC. They are more likely to see it as a useful vehicle for spurious accusations against the United States and its allies.

What Signing the Treaty Signifies. President Clinton acted inappropriately by authorizing the signing of the ICC treaty in the last days of his Administration. Although the statute will not be binding under U.S. law until it receives the Senate's consent and is ratified, the Administration's signature carries symbolic weight. It implies that the United States supports the ICC and intends to become a full participant. This weakens its position that the treaty is seriously flawed, bolsters the credibility of an ICC, and increases the probability that other nations will ratify the statute. Indeed, few international organizations can prosper without full U.S. participation.

What the Bush Administration Should Do. Upon taking office, President Bush should send written notification to the U.N. Secretary-General that the United States does not intend to be bound by the treaty. This will help avert international objections to future efforts to protect U.S. interests and U.S. citizens from the effects of an ICC based on a flawed treaty.

The Administration should also pursue, with Congress, measures that safeguard the constitutional rights of Americans, such as provisions of the American Servicemembers' Protection Act of 2000 (H.R. 4654/S. 2726) that authorize actions to free U.S. military personnel and officials held by the court and to prohibit U.S. funds from supporting the ICC until U.S. concerns are adequately

addressed. In the meantime, the Administration should participate in the ongoing negotiations on the treaty to seek remedies for its flaws. At a minimum, the treaty should be changed to protect U.S. soldiers and officials from arrest for actions that support legal military operations and ensure that the basic rights embodied in the U.S. Constitution are used in ICC cases involving the United States or its citizens.

If the statute's flaws are not satisfactorily addressed at the February 26–March 9 ICC Preparatory Commission meetings, the Administration should exert the full political and diplomatic influence of the United States to discourage other nations—particularly friends and allies—from ratifying the treaty. Finally, Washington should pursue all additional measures that will protect Americans, the U.S. military, and U.S. sovereignty should the court become a reality.

Conclusion. Proponents of the ICC suggest that if it continues to oppose the court, the United States will lose credibility and moral standing as the world's foremost democracy, and instead will appear to be an isolationist nation that wishes to remain above the law. President Bush should ignore such groundless claims and make clear that the United States will not sign any treaty that weakens its sovereignty or violates the core principles on which its constitutional system is founded.

The true measure of America's commitment to peace and justice and its opposition to genocide and war crimes lies not in its participation in international bureaucracies, but in its actions. America has an unmatched record of policing its military and countering the actions of despots. The Bush Administration should remind the participants in the ICC Preparatory Commission of this fact and not accept the terms of a seriously flawed treaty signed by its predecessor at the 11th hour.

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