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THE RIGHT WAY TO END THE ICC IMPASSE

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The United States incited international furor this week when it vetoed renewal of the mandate for the United Nations Mission in Bosnia and Herzegovina under consideration by the U.N. Security Council. The United States expressed concern that the new International Criminal Court (ICC) would attempt to prosecute U.S. soldiers who participate in the peacekeeping operation even though the United States has not ratified the ICC treaty.

The U.S. veto should come as no surprise to ICC proponents. America's serious objections to the ICC are well-known, and U.S. representatives gave clear warning that it would consider vetoing U.N. peacekeeping operations once the ICC entered into force. President George W. Bush must fulfill his responsibility as Commander in Chief to protect American soldiers and citizens from the threat of spurious prosecution by a court that has no lawful right to try and punish U.S. nationals. Unless a compromise can be forged that satisfies America's deep concerns, U.S. participation in and support for future U.N. peacekeeping operations is uncertain.

To end the impasse, the United States has proposed that the Security Council determine whether individuals serving in a U.N. peacekeeping operation may be brought before the ICC. This position is fully supported by the U.N. Charter, which vests the Council with responsibility for maintaining global peace and security. No single state may authorize a U.N. mission, and no state or group of states can interfere with its activities. Thus, only the Security Council is in a position to determine whether criminal prosecution of peacekeepers by the ICC

may be appropriate. Otherwise, the ICC would be in a position to interfere with the Council's authority and obligations enshrined in the U.N. Charter, to which ICC nations are party.

This reasonable approach would allow the United States to veto prosecutions it considers without merit, safeguarding Americans' democratic rights while allowing the United States to continue working with the U.N. on missions around the world. If such a compromise is not forged, the Administration should end U.S. participation in peacekeeping missions.

Source of America's Concern. As an unaccountable legal bureaucracy claiming the authority to arrest, prosecute, and punish nationals from any country who are accused of war crimes, genocide, crimes against humanity, and the undefined crime of aggression, the ICC invites political manipulation. The United States must protect its citizens from a court that would not observe such basic rights as trial by a jury of one's peers, protection from double jeopardy, and the right to confront one's accusers.

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Under accepted norms of international law, the ICC should not even be a U.S. concern, since the United States has not ratified the treaty establishing it. Indeed, President Bush has “unsigned” the Rome Statute, notifying the Secretary General of the United Nations that the United States will not ratify it. A bedrock principle of the international system is that treaties and treaty organizations cannot be imposed on states without their consent. The statute violates international law by claiming that the ICC has authority to prosecute and punish the nationals of countries that are not party to it.

President Bill Clinton waited until the last possible day, December 31, 2000, to sign the statute, expressing grave misgivings over that “flawed” treaty. His reasoning was that America needed a voice in the deliberations over the ICC’s structure so that its serious concerns could be properly addressed. But America’s efforts to change the ICC’s structure were rejected by most of the other nations involved in the negotiations. The threat became very real on July 1, 2002, with the Rome Statute entering into force after the required 60 nations—many of them undemocratic and few having a major role in enforcing international peace—had ratified it.

In May 2002, U.S. Ambassador to the United Nations John D. Negroponte explained America’s concerns when the U.S. voted to continue the U.N. Mission of Support for East Timor. On June 20, White House Press Secretary Ari Fleischer echoed those sentiments, stating that “the United States is very concerned about U.S. forces on U.N. peacekeeping missions, and that they may be subject to politically motivated prosecutions by the ICC.” Proponents of the ICC who chose to ignore these warnings professed outrage when the United States followed through on its concerns and acted to protect its citizens on June 30.

The debate is about nothing less than the fundamental question of where ultimate authority lies—with national sovereignty, which holds the only possibility of democratic accountability, or with unaccountable and opaque international bureaucracies that have no direct democratic link to the people over which they claim jurisdiction. Given this question of first principles, President Bush was right to state that the United States would not reauthorize the Bosnia mission. The furor that arose

obscures the main imperative: U.S. military personnel must be protected from the possibility of politically manipulated prosecution if the United States is to participate in U.N. peacekeeping missions.

The Way Forward. In an effort to overcome this impasse, the Administration has proposed a 12-month immunity from ICC prosecution for soldiers on U.N. peacekeeping missions who do not represent countries that are party to the Rome Statute. This period would be used to forge a compromise on using the Security Council to arbitrate over potential cases that involve U.N. peacekeepers. The ICC would be able to investigate and prosecute a case against a peacekeeper only if the Security Council were to vote its approval.

This reasonable solution is consistent with the principles outlined in the Rome Statute. By their nature, U.N. peacekeeping operations are not authorized by a single state and are accountable to the Security Council. Its members should be viewed collectively as the authorizing body alone equipped to determine whether a criminal investigation by another international body is appropriate. Such a process, given an American veto possibility, would provide ample opportunity for the United States to protect Americans while participating in and supporting U.N. peacekeeping. If such a sensible compromise is shunned, the Administration should continue to veto renewals of peacekeeping extensions.

Conclusion. It is not in the interests of the United States or the United Nations to perpetuate this impasse. The United States has proposed a reasonable compromise—placing the U.N. Security Council, as the ultimate authorizing body, in a position to determine whether ICC investigation of U.N. peacekeepers is appropriate. If other nations truly believe the international system can enforce justice through the ICC, they should not object to giving the international institution charged with protecting international peace a say in cases that come before it.

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