Backgrounder

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The Bush Administration's Policy on the International Criminal Court Is Correct

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The United States and many advocates for the International Criminal Court (ICC) have long been at odds over the court's statute, accountability, and jurisdiction. Although these differences have not been resolved, two recent actions have refocused international and domestic attention on America's policy toward the ICC. The first was enactment of the Nethercutt amendment, which extended prohibitions on assistance to ICC parties beyond those already in place under the American Servicemembers' Protection Act (ASPA). The second is the debate over whether or not the U.N. Security Council should refer the genocide in Sudan to the ICC for investigation.

As with earlier disagreements over U.S. policy toward the ICC, advocates of the court seek to portray the U.S. position as shortsighted and at odds with human rights. Nothing could be further from the truth.

Both the Clinton Administration and the Bush Administration concluded that the ICC is a seriously flawed institution that the U.S. should not join. Regrettably, the Rome Statute establishing the ICC broke with long-standing international legal precedent by asserting ICC jurisdiction over nationals and military personnel from states that are not party to the treaty. This forced the U.S. to take unusual steps to protect its people from the ICC.

Unless the ICC's flaws are addressed, the U.S. should not join the court and should oppose initiatives that could give credence to the court's claims of

Talking Points

- The ICC lacks safeguards against political manipulation, possesses sweeping authority without any accountability to the Security Council, and violates national sovereignty.
- By claiming jurisdiction over civilians and military personnel of countries that are not party to the court, the ICC is violating the norms and precedents of international law. This has required the U.S. to take unusual steps to protect its citizens and military personnel, including opposing efforts to legitimize the ICC through Security Council resolutions and protecting U.S. persons through non-surrender Article 98 agreements.
- Until the ICC's flaws are addressed, the U.S. should not join the court and should oppose initiatives that could give credence to the court's claims of jurisdiction over U.S. persons.

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Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to

jurisdiction over American nationals and military. Specifically, the Administration should:

- **Continue to use the ASPA and the Nethercutt amendment as tools to secure Article 98 agreements.** The ASPA and Nethercutt amendment have contributed to America's success in negotiating Article 98 agreements by which countries agree not to turn over American persons to the ICC.
- **Oppose Security Council resolutions endorsing the International Criminal Court or referring cases to the ICC.** The U.S. fully supports ad hoc tribunals to address allegations of war crimes, human rights abuses, and genocide. ICC advocates need to decide whether their allegiance to the court is more important than the need to see that justice is done.

As long as the U.S. determines that it is not in America's interest to join the ICC, the President must take steps to protect Americans from the court.

Background

America has long been a champion of human rights. It was a key supporter of the ad hoc war crimes tribunals in Rwanda and the former Yugoslavia, which were approved by the Security Council. It was an eager participant in the effort to create the International Criminal Court. Once negotiations began on the final version of the Rome Statute, however, America's concerns were ignored and the final document was approved despite U.S. opposition.[1]

Since the approval of the Rome Statute, U.S. policy toward the ICC has been clear and consistent: The U.S. opposes the ICC because it is an international legal body that lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states.

The U.S. policy toward the ICC was initiated by the Clinton Administration—a fact that is conveniently ignored by ICC advocates. According to former Ambassador-at-Large for War Crimes Issues David J. Scheffer, the 1998 negotiations on the Rome Statute "produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the court and risks deterring responsible international action to promote peace and security."[2] Although acknowledging the treaty's "significant flaws" and recommending to his successor against submitting the treaty to the Senate for advice and consent, President Bill Clinton signed the ICC treaty in December 2000 to give the U.S. an opportunity to address American concerns.

After several ineffective attempts to change the objectionable parts of the ICC treaty, the Bush Administration ended the farce of the U.S. being a signatory to a treaty that it would never ratify by sending a letter to the U.N. Secretary-General declaring that "the United States has no legal obligations arising from its signature" of the Rome Statute—in essence, "unsigning" the Rome Statute.[3]

In normal circumstances, this would have ended the matter; but the ICC, in direct contravention of the norms and precedents of international law, claims jurisdiction to prosecute and imprison persons from countries that are not party to the Rome Statute and, more shockingly, jurisdiction over those who have specifically rejected the court's jurisdiction. This unprecedented break with international legal norms has required the

1. In the final stages of the U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, from June 15 to July 17, 1998, the U.S. proposed changes in the Rome Statute in an effort to address its concerns and increase the likelihood that the U.S. could become a party to the ICC. These changes were rejected by a vote of 113 to 17, with 25 abstentions. The final text of the Rome Statute was adopted by a vote of 120 to 7, with 21 abstentions. The U.S. voted against. See press release, "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court," United Nations, L/ROM/22, July 17, 1998, at *www.un.org/icc/pressrel/lrom22.htm* (March 2, 2005).
2. *Ibid.* David J. Scheffer, "America's Stake in Peace, Security, and Justice," U.S. Department of State, August 31, 1998, at *www.state.gov/www/policy_remarks/1998/980831_scheffer_icc.html* (February 28, 2005).

U.S. to take unusual steps to protect its citizens and military personnel by:

- Blocking overzealous advocates of the ICC from using the Security Council to legitimize the ICC's illegitimate claims of jurisdiction and
- Protecting U.S. citizens and military personnel through a network of Article 98 agreements (non-surrender agreements named after the section of the ICC treaty that permits such arrangements) with as many countries as possible. Countries that sign such agreements with the United States promise, in effect, not to surrender U.S. nationals or military personnel to the ICC without the consent of the U.S. government.

Even though the Bush Administration policy is benign, focused solely on shielding the U.S. from the ICC and not designed to undermine the court, it has been met with hostility by supporters of the court.

Article 98 Agreements

Criticism of U.S. policy toward the ICC has specifically targeted the ASPA and the Nethercutt amendment.[4] These laws, respectively, prohibit disbursement of U.S. military assistance and economic support funds to countries that are party to the Rome Statute unless they are specifically exempted in the legislation, have entered into an Article 98 agreement with the U.S., or have received a waiver from the President.

Critics object to the non-surrender agreements and to using U.S. foreign assistance as a means for convincing countries to sign the agreements. These criticisms mischaracterize U.S. policy:

- **Article 98 agreements are limited in scope.** Critics see Article 98 agreements as a direct threat to the ICC or as "bilateral immunity agreements." This is a great exaggeration. The agreements are nothing more than an obligation by the country not to turn U.S. persons over to the ICC without permission from the U.S. government. They do not absolve the U.S. of its obligation to investigate and prosecute alleged crimes or constrain the other nation's ability to investigate and prosecute crimes committed by an American person within its jurisdiction. Finally, the agreements do not constrain the ability of an international tribunal established by the Security Council to investigate or prosecute crimes committed by American persons. The Article 98 agreements simply prevent U.S. persons from being turned over to an international legal body that does not have jurisdiction recognized by the U.S.

  The limited nature of Article 98 agreements is entirely consistent with international law, which supports the principle that a state cannot be bound by a treaty to which it is not a party. The agreements are also consistent with customary international law because the issue of ICC jurisdiction is very much in dispute. Moreover, they are consistent with the Rome Statute itself, which permits such agreements in Article 98 of the treaty.[5]

3. The text of the letter, signed by Under Secretary John Bolton, stated: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, 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. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." Press statement, "International Criminal Court: Letter to UN Secretary General Kofi Annan," U.S. Department of State, May 6, 2002, at *www.state.gov/r/pa/prs/ps/2002/9968.htm* (March 2, 2005).
4. Among other things, this legislation prohibits disbursement of selected U.S. assistance to an ICC party unless the country is specifically exempted in the legislation, is waived by the President, or has entered into a bilateral agreement not to surrender U.S. persons to the ICC. The Senate approved an amendment to add the ASPA to the Supplemental Defense Appropriations Act of 2002 by a vote of 75 to 19. The House approved the ASPA in H.R. 4775 by a vote of 280 to 138. The American Servicemembers' Protection Act became law when President George W. Bush signed the Supplemental Defense Appropriations Act of 2002 (Public Law 107–206) on August 2, 2002. The House approved the Nethercutt amendment by a vote of 241 to 166 on July 15, 2004. The Senate approved the Nethercutt amendment as Section 574 of the FY 2005 Foreign Operations, Export Financing, and Related Programs Appropriations Bill (H.R. 4818). The President signed it into law (Public Law 108–447) on December 8, 2004.

- **The use of foreign aid to advance U.S. objectives is common.** Countries are not entitled to U.S. assistance. The U.S. can assign any conditions to its assistance that it deems appropriate and often does so, as demonstrated by the many laws and congressional earmarks governing disbursement of foreign assistance. The U.S. distributes most assistance, particularly military assistance and economic support funds, to support U.S. policy priorities.

  Congress and the Administration have determined through the ASPA and the Nethercutt amendment that protecting U.S. persons from the illegitimate claims of ICC jurisdiction is an American priority. Congress has also determined that this concern generally supersedes other foreign aid priorities, but has provided a waiver to the President for any exceptions.

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Military Assistance and Economic Support Funds Potentially Affected the ASPA or the Nethercutt Amendment

Country	Economic Support Funds Budgeted for 2005 (in $millions)	Military Assistance* Budgeted for 2005 (in $millions)
Benin		0.25
Bolivia	8	3.8
Brazil		0.05
Burkina Faso		0.05
Cambodia	17	0.05
Croatia		0.05
Cyprus	13.5	
Ecuador	13	2.3
Lesotho		0.05
Mali		0.175
Malta		0.125
Namibia		0.1
Niger		0.1
Paraguay	3	0.25
Peru	8	1.3
Samoa		0.05
South Africa	1	0.05
Sudan	20	
Tanzania		0.1
Trinidad and Tobago		0.05
Uruguay		0.65
Venezuela	0.5	0.05
Total	**84**	**9.60**

*Foreign Military Financing (FMF) and International Military Education and Training (IMET).

Source: U.S. Department of State, Congressional Budget Justification: Foreign Operations, FY 2005, February 10, 2004, pp. 579-603, at *www.state.gov/documents/organization/28982.pdf* (February 28, 2005).

Constraints on foreign assistance have been useful in persuading countries to sign Article 98 agreements. The constraints provide a reason (i.e., maintaining eligibility for U.S. assistance) for countries to sign the Article 98 agreements in the face of aggressive financial and other pressure from the European Union, the United Nations, and ICC advocacy groups.

However, the critics of the U.S. policy are exaggerating the legislation's impact. As shown by Table 1, the legislation will potentially affect only 22 countries and less than $100 million in 2005.[6] In truth, the ASPA and Nethercutt restrictions are far less intrusive than other constraints on U.S. foreign assistance. For instance, they do not force a country either to adopt strict labor or environmental standards or to restructure fiscal priorities. They do not even demand that a country not become a party to the ICC. They simply ask the country to respect the sovereign decision of the U.S. not to be a party.

U.N. Security Council

Critics are similarly mischaracterizing the U.S. objection to U.N. Security Council resolutions referencing the ICC, such as a recommendation that the ICC investigate accusations of genocide, war crimes, and crimes against humanity in Darfur,

5. Article 98 (2) states: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." Rome Statue of the International Criminal Court, Article 98, U.N. Doc. A/CONF.183/9, at *www.un.org/law/icc/statute/romefra.htm* (March 2, 2005).
6. Jordan, which is scheduled to receive $209 million in military assistance and $250 million in Economic Support Funds assistance in 2005, is not included in the table for two reasons. First, as a major non-NATO ally, it is exempt from ASPA prohibitions. Second, Jordan recently signed an Article 98 agreement with the U.S. and received a six month waiver on February 10, 2005, for the funds that would be affected by the Nethercutt amendment.

Sudan.[7] The U.S. has been leading the effort to stop atrocities around the world, particularly in Darfur. Specifically:

- While serving as Secretary of State, Colin Powell declared that violations of human rights, war crimes, and genocide were occurring.[8]
- The U.S. led the effort to pass a Security Council resolution condemning the atrocities and has pressed for economic sanctions on Sudan because of the government's support for militia groups committing atrocities in Darfur.
- The U.S. has been a key supporter of the African Union peacekeepers authorized by the Security Council to monitor the situation.
- The U.S. is a major donor of humanitarian aid to people in the region, providing over $567 million in aid since 2003.[9]
- The U.S. has consistently insisted that those responsible for the atrocities in Darfur must be held to account by an ad hoc tribunal.

The U.S. has been frustrated in its effort. The Security Council has not imposed sanctions because China, France, and Russia—afraid that their commercial interests would suffer—have threatened to veto resolutions imposing sanctions. The U.N. Human Rights Commission has minimized criticism of Sudan because that nation sits on the commission.

The U.S. has not drawn the ire of human rights and ICC advocacy groups because it opposes an investigation into the atrocities in Darfur. What angers the ICC advocates is that the U.S. opposes using the ICC to investigate the atrocities in Darfur. The fact is that ICC advocates have focused attention away from the true failure—the inability to pass a Security Council resolution imposing sanctions if Sudan fails to constrain the militia groups—onto U.S. opposition to a Security Council resolution requesting that the ICC investigate atrocities in Darfur.

Worse, the ICC advocates are dismissive of valid reasons for establishing an ad hoc tribunal. From the U.S. perspective, using the ICC would undermine ongoing efforts to build regional capacity among Africans to handle conflicts and hold accountable those who commit atrocities. As noted by international lawyers Lee Casey and David Rivkin:

> [B]oth of the ICC's current investigations involve African countries, the Democratic Republic of Congo and Uganda, respectively. Adding Darfur to this list begins to look a very great deal like European justice for African defendants.[10]

Subsequent announcements that the ICC intends to look at cases in the Central African Republic and the Ivory Coast bolster that argument.

Moreover, the ICC lacks an enforcement mechanism and would face many challenges in arresting and incarcerating perpetrators, since Khartoum would be unlikely to assist the court. A regional solution based on an African Union and U.N. hybrid court approved by the Security Council—perhaps using the existing infrastructure of the International Criminal Tribunal for Rwanda in Arusha, Tanzania—could count on support from the existing African Union forces to support the arrest and incarceration of the perpetrators and serve as the core of a permanent African Union court of justice, which is a goal of that body.[11]

The bottom line is that, while it is opposed to a Security Council resolution supporting an ICC investigation in Darfur, the U.S. has proposed a credible—even superior—alternative.[12] The fact that ICC advocates are angered by the U.S. proposal

7. The ICC cannot assert jurisdiction without such a recommendation because Sudan is not a party to the ICC and the alleged perpetrators and victims are Sudanese.
8. Secretary of State Colin L. Powell, "The Crisis in Darfur," testimony before the Committee on Foreign Relations, U.S. Senate, September 9, 2004, at *www.state.gov/secretary/former/powell/remarks/36042.htm* (March 2, 2005).
9. U.S. Agency for International Development, "Darfur Humanitarian Emergency," at *www.usaid.gov/locations/sub-saharan_africa/sudan/darfur.html* (March 2, 2005).
10. David B. Rivkin, Jr., and Lee A. Casey, "Darfur's Last Hope," *The Washington Times*, February 4, 2005, p. A19.

reveals that they are more interested in affirming the authority of the ICC through the Security Council than they are in seeing justice done.

What the United States Should Do

The U.S. has decided that the flaws in the Rome Statute are serious enough to prohibit U.S. participation in the International Criminal Court. Unless these flaws are addressed, the U.S. should not join the court and should oppose initiatives that could give credence to the court's claims of jurisdiction over American nationals and military personnel. Specifically, the Bush Administration should:

- **Continue to use the ASPA and the Nethercutt amendment as tools to secure Article 98 agreements.** Despite the best efforts of pro-ICC countries and groups, America has concluded Article 98 agreements with 99 governments—more than the number of countries that have ratified or acceded to the Rome Statute. Significantly, over two-thirds of these agreements are with ICC parties and signatories. The ASPA and the Nethercutt amendment have contributed to this progress, and U.S. negotiators should use them to convince other countries to sign Article 98 agreements with the U.S.
- **Oppose Security Council resolutions endorsing the International Criminal Court or referring cases—including the Darfur atrocities in Sudan—to the ICC.** The United States has been a leader in trying to force the Sudanese government to stop supporting the militia groups that are committing atrocities in Darfur. The Security Council's failure to impose sanctions on the Sudanese government despite the best efforts of the U.S. government is a tragedy that sadly reveals the failures of the U.N. in dealing with human rights abuses. The fact that commercial interests in China, France, and Russia trump efforts to stop genocide is shameful.

  ICC advocates, however, have ignored these true failures and instead have focused attention on U.S. opposition to the ICC. In truth, the U.S. fully supports establishing a tribunal to address allegations of war crimes, human rights abuses, and genocide. America has proposed a solution that will address the situation without compromising America's policy toward the ICC. The ICC advocates need to decide whether their allegiance to the court is more important than the need to see that justice is done in Darfur.

Conclusion

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 like the ICC, but in its actions. The United States has led the fight to free millions in Afghanistan and Iraq. It is a party to many human rights treaties and, unlike many other nations, abides by those treaty commitments.

The U.S. has led the charge to hold violators of human rights to account, including fighting hard for imposing Security Council sanctions on the Sudanese government until it stops supporting the militia groups that are committing genocide in Darfur and helps to restore order to the region. The U.S. polices its military and punishes them when they commit crimes. In every practical way, the U.S. honors the beliefs and purposes underlying the ICC.

But America's strong record on human rights is irrelevant to advocates of the ICC. Supporters of the court appear more interested in whether or not a country is a party to the Rome Statute than in whether or not the country actually lives up to the principles of the ICC treaty.

For instance, over 150 allegations of sexual abuse have been made against the civilian and military personnel deployed on the U.N. peacekeeping mis-

11. Based on comments by Ambassador Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues. See Brookings Institution, "Darfur, War Crimes, the International Criminal Court, and the Quest for Justice," *Brookings Briefing*, transcript, February 25, 2005, at *www.brookings.org/dybdocroot/comm/events/20050225.pdf* (March 2, 2005).
12. For a more detailed discussion, see Brett D. Schaefer "Why the U.S. Is Right to Support an Ad Hoc Tribunal for Darfur," Heritage Foundation *WebMemo* No. 665, February 15, 2005, at *www.heritage.org/Research/InternationalOrganizations/wm665.cfm*.

sion in the Democratic Republic of the Congo—including persons from a number of ICC parties—but few prosecutions or investigations are ongoing. ICC supporters' time would be better spent in pressing these countries to hold their nationals and military to account or urging ICC signatories Iran, Sudan, Zimbabwe, and Russia to address human rights concerns in their countries—violations that range from substandard to horrifying.

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