Executive Summary
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The U.S. Should Not Join the International Criminal Court

Brett D. Schaefer and Steven Groves

The idea of establishing an international court to prosecute serious international crimes—war crimes, crimes against humanity, and genocide—has long held a special place in the hearts of human rights activists and those hoping to hold perpetrators of terrible crimes to account. In 1998, that idea became reality when the Rome Statute of the International Criminal Court was adopted at a diplomatic conference convened by the U.N. General Assembly. Formally established in 2002, the International Criminal Court (ICC) was created to prosecute war crimes, crimes against humanity, genocide, and the as yet undefined crime of aggression. Regrettably, a number of concerns remain about how ratification of the Rome Statute would affect U.S. sovereignty and what consequences ICC action could have on politically precarious situations around the world.

Past U.S. Administrations concluded that the Rome Statute created a seriously flawed institution that lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances. These concerns led President Bill Clinton to urge President George W. Bush not to submit the treaty to the Senate. After extensive efforts to change the statute to address key U.S. concerns failed, President Bush felt it necessary to "un-sign" the Rome Statute by formally notifying the U.N. Secretary-General that the U.S. did not intend to ratify the treaty and was no longer bound under international law to avoid actions that would run counter to the intent and purpose of the treaty. Subsequently, the U.S. took a number of steps to protect its military personnel, officials, and nationals from ICC claims of jurisdiction.

Limited cooperation with the ICC was pursued by the Bush Administration, notably in the case of Darfur. However, the Obama Administration has recently expressed a willingness to expand its cooperation with the ICC. Secretary of State Hillary Clinton stated that it was "a great regret but it is a fact that we are not yet a signatory [to the Rome Statute]. But we have supported the court and continue to do so."

What the U.S. Should Do. Increasing U.S. ties to the ICC before fully addressing its serious flaws would be premature. To protect U.S. military personnel and other U.S. persons and to encourage other member states to support reforms to the Rome Statute that would address U.S. concerns, the Obama Administration should:

- **Not re-sign the Rome Statute.** The Obama Administration is under pressure to "re-sign" the Rome Statute, reversing the Bush Administra-

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tion's decision. With "aggression," a key crime within the ICC's jurisdiction, still undefined and with long-standing U.S. objections still not addressed, this would be tantamount to signing a blank check. The Obama Administration should use the possibility of U.S. membership as an incentive to encourage the state parties to remedy the key flaws in the Rome Statute.

- **Maintain existing Article 98 agreements.** The U.S. is militarily engaged in Iraq and Afghanistan, has troops stationed and in transit around the globe, and in all likelihood will be involved in global anti-terror activities for many years. Now is not the time to weaken the legal protections enjoyed by U.S. military personnel and officials deployed in foreign nations. Even if the U.S. joins the ICC at some future date, the U.S. should not terminate the Article 98 agreements because they are consistent with the Rome Statute and would serve as a useful protection if the court overreaches.
- **Establish clear objectives for changes to the Rome Statute for the 2010 review conference that would help to reduce current and potential problems posed by the ICC.** In 2010, the Assembly of States Parties is scheduled to hold the first review conference to consider amendments to the Rome Statute. Defining the crime of aggression is a key issue on the agenda. The U.S. should either seek an explicit, narrow definition to prevent politicization of this crime or, even better, seek to excise the crime from the Rome Statute entirely, on the grounds that it infringes on the Security Council's authority. Moreover, the conference should reverse the statute's violation of customary international law by explicitly limiting the ICC's jurisdiction only to nationals of those states that have ratified or acceded to the Rome Statute and to nationals of non-party states only when the U.N. Security Council has explicitly referred a situation to the ICC.
- **Approach Security Council recommendations to the ICC on their merits and oppose those deemed detrimental to U.S. interests.** The U.S. abstentions on Security Council resolutions on Darfur indicate only that it is not U.S. policy to block all mentions of the ICC. However, accepting the reality of the ICC does not mean that the U.S. should acquiesce on substantive issues when they may directly or indirectly affect U.S. interests, U.S. troops, U.S. officials, or other nationals. The U.S. should abstain if a resolution would advance issues critical to U.S. interests and would not directly or indirectly undermine the U.S. policy of opposing ICC claims of jurisdiction over U.S. military personnel and its nationals. The U.S. should insist that all resolutions include language protecting military and officials from non-ICC states participating in U.N. peacekeeping operations.

Conclusion. While the International Criminal Court represents an admirable desire to hold criminals accountable for their terrible crimes, the court is gravely flawed. Its broad autonomy and jurisdiction invite politically motivated indictments. Its inflexibility can impede political resolution of problems, and its insulation from political considerations can complicate diplomatic efforts. Efforts to use the court to apply pressure to inherently political issues and supersede the foreign policy prerogatives of sovereign nations undermine the court's credibility and threaten its future as a useful tool for holding accountable the perpetrators of genocide, war crimes, and crimes against humanity.

President Clinton considered the ICC's flaws serious enough to recommend against U.S. ratification of the Rome Statute, and President Bush concurred. These issues remain unresolved and continue to pose serious challenges to U.S. sovereignty and its national interests. Unless the serious flaws are addressed fully, President Obama should similarly hold the ICC at arm's length. To protect its own interests and to advance the notion of a properly instituted international criminal court, the U.S. should continue to insist that it is not bound by the Rome Statute and does not recognize the ICC's authority over U.S. persons and should exercise great care when deciding to support the court's actions.

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The idea of establishing an international court to prosecute serious international crimes—war crimes, crimes against humanity, and genocide—has long held a special place in the hearts of human rights activists and those hoping to hold perpetrators of terrible crimes to account. In 1998, that idea became reality when the Rome Statute of the International Criminal Court was adopted at a diplomatic conference convened by the U.N. General Assembly. The International Criminal Court (ICC) was formally established in 2002 after 60 countries ratified the statute. The ICC was created to prosecute war crimes, crimes against humanity, genocide, and the as yet undefined crime of aggression. Regrettably, although the court's supporters have a noble purpose, there are a number of reasons to be cautious and concerned about how ratification of the Rome Statute would affect U.S. sovereignty and how ICC action could affect politically precarious situations around the world.

Among other concerns, past U.S. Administrations concluded that the Rome Statute created a seriously flawed institution that lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances. These concerns led President Bill Clinton to urge President George W. Bush not to submit the treaty to the Senate for advice and consent necessary for ratification.[1] After extensive efforts to change the statute to address

Talking Points

- While the International Criminal Court represents an admirable desire to hold war criminals accountable for their terrible crimes, the court is flawed notionally and operationally.
- The Rome Statute violates international law as traditionally understood by empowering the ICC to prosecute and punish the nationals of countries that are not party to it.
- The court's broad autonomy and jurisdiction invite politically motivated indictments. Its inflexibility can impede political resolution of problems, and its insulation from political considerations can complicate diplomatic efforts.
- The Obama Administration should not "resign" the Rome Statute or take any other steps that would weaken Bush Administration efforts to protect U.S. nationals, military personnel, and officials from illegitimate claims of ICC jurisdiction.
- Unless the ICC's serious flaws are addressed fully, President Obama should continue to insist that the U.S. is not bound by the Rome Statute and exercise great care when deciding to support the court's actions.

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Until these and other concerns are fully addressed, the Obama Administration should resist pressure to "re-sign" the Rome Statute, eschew cooperation with the ICC except when U.S. interests are affected, and maintain the existing policy of protecting U.S. military personnel, officials, and nationals from the court's illegitimate claims of jurisdiction. Nor should the Obama Administration seek ratification of the Rome Statute prior to the 2010 review, and then only if the Rome Statute and the ICC and its procedures are amended to address all of the serious concerns that led past U.S. Administrations to oppose ratification of the Rome Statute.

Background

The United States has long championed human rights and supported the ideal that those who commit serious human rights violations should be held accountable. Indeed, it was the United States that insisted—over Soviet objections—that promoting basic human rights and fundamental freedoms be included among the purposes of the United Nations.[2] Eleanor Roosevelt served as chairman of the U.N. Human Rights Commission when it drafted the Universal Declaration of Human Rights, which has served as the U.N.'s bedrock human rights document since 1948. The United States also played a lead role in championing major international efforts in international humanitarian law, such as the Geneva Conventions.

The U.S. has supported the creation of international courts to prosecute gross human rights abuses. It pioneered the Nuremburg and Tokyo tribunals to prosecute atrocities committed during World War II. Since then, the U.S. was a key supporter of establishing the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), which were both approved by the Security Council.

Continuing its long support for these efforts, the U.S. initially was an eager participant in the effort to create an International Criminal Court in the 1990s. However, once negotiations began on the final version of the Rome Statute, America's support waned because many of its concerns were ignored or opposed outright in the five-week United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, in June 1998. According to David J. Scheffer, chief U.S. negotiator at the 1998 Rome conference:

> In Rome, we indicated our willingness to be flexible…. Unfortunately, a small group of countries, meeting behind closed doors in the final days of the Rome conference, 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.[3]

In the end, despite persistent efforts to amend the Rome Statute to alleviate U.S. concerns, the conference rejected most of the changes proposed by the U.S., and the final document was approved over U.S. opposition.[4]

Since the approval of the Rome Statute in 1998, U.S. policy toward the ICC has been clear and consistent: The U.S. has refused to join the ICC because it lacks prudent safeguards against political manip-

1. Bill Clinton, "Statement on the Rome Treaty on the International Criminal Court," December 31, 2000, at *http://findarticles.com/p/articles/mi_m2889/is_1_37/ai_71360100* (July 31, 2009).
2. For instance, see Evan Luard, *The Years of Western Domination, 1945–1955*, Vol. 1 of *A History of the United Nations* (New York, St. Martin's Press, 1982), pp. 31–32.
3. David J. Scheffer, "America's Stake in Peace, Security, and Justice," U.S. Department of State, August 31, 1998, at *http://www.state.gov/www/policy_remarks/1998/980831_scheffer_icc.html* (July 30, 2009).

ulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances.

The United States is not alone in its concerns about the ICC. As of August 6, 2009, only 110 of the 192 U.N. member states had ratified the Rome Statute.[5] In fact, China, India, and Russia are among the other major powers that have refused to ratify the Rome Statute out of concern that it unduly infringes on their foreign and security policy decisions—issues rightly reserved to sovereign governments and over which the ICC should not claim authority.

The ICC's Record

The International Criminal Court has a clear legal lineage extending back to the Nuremburg and Tokyo trials and ad hoc tribunals, such as the ICTY and the ICTR, which were established by the U.N. Security Council in 1993 and 1994, respectively. However, the ICC is much broader and more independent than these limited precedents. Its authority is not limited to disputes between governments as is the case with the International Court of Justice (ICJ) or to a particular jurisdiction as is the case with national judiciaries. Nor is its authority limited to particular crimes committed in a certain place or period of time as was the case with the post–World War II trials and the Yugoslavian and Rwandan tribunals.

Instead, the ICC claims jurisdiction over individuals committing genocide, crimes against humanity, war crimes, and the undefined crime of aggression. This jurisdiction extends from the entry into force of the Rome Statute in July 2002 and applies to all citizens of states that have ratified the Rome Statute. However, it also extends to individuals from countries that are not party to the Rome Statute if the alleged crimes occur on the territory of an ICC party state, the non-party government invites ICC jurisdiction, or the U.N. Security Council refers the case to the ICC.

International lawyers Lee Casey and David Rivkin point out that the ICC is a radical departure from previous international courts:

> The ICC represents a fundamental break with the past. It has jurisdiction over individuals, including elected or appointed government officials, and its judgments may be directly enforced against them, regardless of their own national constitutions or court systems. Unlike the ICJ, the ICC has the very real potential to shape the policies of its member states in the substantive areas where it operates. These include the core issues of when states can lawfully resort to armed force, how that force may be applied, and whether particular actions constitute the very serious international offenses of war crimes, crimes against humanity, or genocide.[6]

Moreover, although it is generally considered to be within the U.N. family, the ICC is not explicitly a U.N. body. It is an independent treaty body overseen by the states that have ratified the Rome Statute.

The ICC is divided into five main components: the Assembly of States Parties, the presidency, the

4. In the final stages of the U.N. Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 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 and a last ditch effort by the U.S. to allow ICC jurisdiction over non-party states "only if the State had accepted that jurisdiction" was defeated 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, July 17, 1998, at *http://www.un.org/icc/pressrel/lrom22.htm* (July 30, 2009).
5. International Criminal Court, "The States Parties to the Rome Statute," at *http://www2.icc-cpi.int/Menus/ASP/states+parties* (August 6, 2009).
6. Lee A Casey and David B. Rivkin, Jr., "Making Law: The United Nations' Role in Formulating and Enforcing International Law," in Brett D. Schaefer, ed., *ConUNdrum: The Limits of the United Nations and the Search for Alternatives* (New York: Rowman and Littlefield, 2009), p. 47.

judges, the prosecutor's office, and the registrar.[7] The assembly elects the court's judges and the prosecutor, determines the court's budget, and broadly oversees ICC operations. The presidency, composed of three judges elected by their peers, administers the daily operations of the court, except the independent Office of the Prosecutor. The 18 judges are divided into the Pre-Trial Division, the Trial Division, and the Appeals Division and handle the various judicial responsibilities of the ICC. The Office of the Prosecutor is charged with receiving referrals and information on alleged crimes, considering them, and conducting investigations and prosecutions. The registry handles the non-judicial administration of court matters.

The court's structure establishes few, if any, practical external checks on the ICC's authority. Among the judges' responsibilities are determining whether the prosecutor may proceed with a case and whether a member state has been "unwilling or unable genuinely to carry out the investigation or prosecution,"[8] which would trigger the ICC's jurisdiction under the principle of "complementarity," which is designed to limit the court's power and avoid political abuse of its authority. Thus, the various arms of the ICC are themselves the only real check on its authority. This absence of external checks raises serious concerns:

> The ability both to interpret the law and effectively to force member states to adopt its view gives the ICC unprecedented power. For the first time, a permanent international institution is entitled to determine the legal obligations of states and their individual citizens and to criminally punish those individual citizens—even if its understanding of the law radically differs from the relevant state's position. Moreover, the ICC's judges are not otherwise subject to the supervision or control of the states parties, except in matters of personal corruption. Thus, when the ICC determines what international law requires in any of its areas of competence, this is arguably the final word.[9]

The Assembly of States Parties first met in August 2002 to establish a budget and approve various documents and instruments negotiated by states parties between 1998 and 2002 that detailed the court's rules, procedures, and operations. In early 2003, the judges were elected and sworn in, and Luis Moreno-Ocampo was selected as the prosecutor in April 2003.[10] The proposed 2010 ICC budget, which must be approved by the Assembly of States Parties, would provide for a staff of 781 and a budget of €102.98 million (about $145 million).[11]

Even though the Rome Statute entered into force in July 2002, there is little concrete basis for judging the ICC's performance. Shortly after its formal establishment, the ICC began receiving its first referrals. Currently, the ICC has opened four cases, involving situations in the Democratic Republic of Congo (DRC), Uganda, the Central African Republic, and Darfur, Sudan.

The Democratic Republic of Congo. President Joseph Kabila of the Democratic Republic of Congo referred "crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute" to the ICC in an April 2004 letter to the prosecutor.[12] In June 2004, the prosecutor announced his decision to open the ICC's first investigation into "grave crimes allegedly committed on the territory of

7. For more information, see International Criminal Court, "Structure of the Court," at *http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court* (July 30, 2009).
8. Rome Statute of the International Criminal Court, July 17, 1998, Art. 17, at *http://www.un.org/children/conflict/keydocuments/english/romestatuteofthe7.html* (July 30, 2009).
9. Casey and Rivkin, "Making Law," p. 48.
10. International Criminal Court, "Chronology of the International Criminal Court," at *http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm* (July 30, 2009).
11. International Criminal Court, Assembly of States Parties, "Proposed Programme Budget for 2010 of the International Criminal Court," advance version, July 17, 2009, at *http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-10.Proposed%20Programme%20Budget%20for%202010.ADVANCE.17Jul1630.pdf* (July 30, 2009).

the Democratic Republic of Congo" after concluding that "an investigation…will be in the interest of justice and of the victims."[13]

The ICC issued four arrest warrants. Bosco Ntaganda remains free. Germain Katanga and Mathieu Ngudjolo Chui are in ICC custody, and their cases are in pre-trial. Thomas Lubanga Dyilo is under trial by the ICC for the war crime of "[e]nlisting and conscripting of children under the age of 15 years…and using them to participate actively in hostilities in the context of an international armed conflict."[14] His trial has experienced numerous problems, including a halt in June 2008 by the ICC after the prosecutor refused to disclose documents with "potential exculpatory effect" to the defense.[15] The court granted Lubanga's application for release in July, but it was delayed to permit a series of appeals by the prosecution. The trial proceeded after the prosecutor agreed to make the information available to the defense,[16] but again experienced several missteps.[17] The prosecution rested its case on July 14, 2009.[18]

Uganda. In December 2003, President of Uganda Yoweri Museveni referred to the prosecutor crimes against humanity allegedly committed by the Lord's Resistance Army (LRA) rebel group against the population of northern Uganda.[19] The prosecutor announced his determination that there was a "reasonable basis to open an investigation into the situation" in July 2004.[20] Arrest warrants have been issued against five members of the Lord's Resistance Army, including LRA leader Joseph Kony.[21] No arrests have been made, and all suspects remain at large except for one who is dead. The LRA has refused to engage in peace talks or ceasefire negotiations until the ICC arrest warrant for Kony is withdrawn.[22]

The Central African Republic. In a July 2005 letter, the government of the Central African Republic referred to the ICC all crimes within the jurisdiction of the court committed anywhere on the territory of the Central African Republic since July 2002.[23] In May 2007, the prosecutor decided to open an investigation into "grave crimes…. Civilians

12. Press release, "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo," International Criminal Court, April 19, 2004.
13. Press release, "The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation," June 23, 2004.
14. International Criminal Court, "The Prosecutor v. Thomas Lubanga Dyilo," at *http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo* (July 30, 2009).
15. Press release, "Trial Chamber Imposes a Stay on the Proceedings of the Case Against Thomas Lubanga Dyilo," International Criminal Court, June 16, 2008.
16. Coalition for the International Criminal Court, "Lubanga Case," at *http://www.iccnow.org/?mod=drctimelinelubanga* (July 30, 2009).
17. Robert Marquand, "Global Court Starts with a Fumble. Warlord Grins," *The Christian Science Monitor*, January 30, 2009, at *http://www.csmonitor.com/2009/0130/p01s01-wogn.html* (July 30, 2009).
18. Francis Obinor, "ICC Prosecutor Concludes Case on Congolese Ex-Warlord," *The Guardian* (Lagos, Nigeria), July 16, 2009, at *http://www.ngrguardiannews.com/africa/article02/indexn2_html?pdate=160709&ptitle=ICC%20prosecutor%20concludes%20case%20on%20Congolese%20ex-warlord* (July 30, 2009).
19. Over the past 20 years of its conflict with the Ugandan government, the LRA has been accused of massive atrocities, including displacing and killing thousands of Ugandans and kidnapping juveniles to use as child soldiers. The conflict has spread beyond Uganda to include southern Sudan, eastern Democratic Republic of Congo, and eastern parts of the Central African Republic. See press release, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC," International Criminal Court, January 29, 2004.
20. Press release, "Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda," International Criminal Court, July 29, 2004.
21. After Raska Lukwiya's death was confirmed, the warrant for his arrest was cancelled, and legal proceedings were terminated. See International Criminal Court, "The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen," at *http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda* (July 30, 2009).
22. BBC News, "UN 'Open to Uganda Rebel Talks,'" July 16, 2009, at *http://news.bbc.co.uk/2/hi/africa/8153762.stm* (July 30, 2009).

were killed and raped; and homes and stores were looted. The alleged crimes occurred in the context of an armed conflict between the government and rebel forces."[24] In 2008, the ICC issued a warrant for the arrest of Jean-Pierre Bemba, leader of the DRC rebel group Movement for the Liberation of Congo (since transformed into a DRC political party), for war crimes and crimes against humanity committed in the Central African Republic in 2002–2003.[25] Bemba was arrested by Belgian authorities in May 2008 and transferred to ICC custody.

Darfur, Sudan. The Security Council referred the situation in Darfur since July 2002 to the ICC in March 2005.[26] The prosecutor announced his decision to proceed with an investigation in June 2006.[27] The ICC has issued four arrest warrants involving the situation in Darfur. Bahr Idriss Abu Garda appeared voluntarily and is not in custody based on his cooperation with the investigation. The three other suspects remain at large, including President of Sudan Omar Hassan Ahmad al-Bashir. The decision to issue an arrest warrant against a sitting head of state was very controversial and led the African Union (AU) to request that the ICC withdraw the warrant out of concern that it could impede the Darfur peace process—concern echoed by aid workers who have since faced increased harassment in Darfur—and undermine the 2005 peace agreement that ended the decades of civil war between Khartoum and southern Sudanese rebels.[28] The AU also decided to refuse to cooperate with the ICC,[29] and several African leaders have argued that the African states party to the ICC should withdraw from the Rome Statute.[30]

Other Investigations. In addition to these four cases, the Office of the Prosecutor is "currently conducting preliminary analysis of situations in a number of countries including Chad, Kenya, Afghanistan, Georgia, Colombia and Palestine."[31] Interest in using the ICC to investigate situations has increased rapidly. By February 2006, the prosecutor had received 1,732 communications alleging crimes.[32] As of July 2009, the prosecutor has "received over 8137 communications…from more than 130 countries."[33] Thus, the prosecutor received nearly four times as many communications

23. Press release, "Prosecutor Receives Referral Concerning Central African Republic," International Criminal Court, January 7, 2005.
24. Press release, "Prosecutor Opens Investigation in the Central African Republic," International Criminal Court, May 22, 2007, at *http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic* (July 30, 2009).
25. International Criminal Court, "Situation in the Central African Republic: Jean-Pierre Bemba Gombo," June 11, 2008, at *http://www.icc-cpi.int/NR/rdonlyres/CD878D2C-6C6E-44E9-B1D7-F49FCC70E462/277752/ICCFSCARJPB200806ENG.pdf* (July 31, 2009).
26. Press release, "Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, to International Criminal Court Prosecutor," Executive Office of the U.N. Secretary-General, at *http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm* (July 31, 2009).
27. Press release, "The Prosecutor of the ICC Opens Investigation in Darfur," International Criminal Court, June 6, 2005.
28. Reuters, "Two Female Foreign Aid Workers Kidnapped in Darfur," France 24, July 3, 2009, at *http://www.france24.com/en/20090703-two-female-foreign-aid-workers-kidnapped-darfur-sudan* (July 31, 2009), and Jon Ward and Betsy Pisik, "Obama Backs Indictment of Sudan leader," *The Washington Times*, February 5, 2009, at *http://www.washingtontimes.com/news/2009/feb/05/obama-backs-indictment-of-sudan-leader* (July 31, 2009).
29. BBC News, "African Union in Rift with Court," July 3, 2009, at *http://news.bbc.co.uk/2/hi/africa/8133925.stm* (July 31, 2009).
30. Colum Lynch, "International Court Under Unusual Fire," *The Washington Post*, June 30, 2009, at *http://www.washingtonpost.com/wp-dyn/content/article/2009/06/29/AR2009062904322_pf.html* (July 31, 2009).
31. International Criminal Court, "Office of the Prosecutor," at *http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor* (July 31, 2009).
32. International Criminal Court, Office of the Prosecutor, "Update on Communications Received by the Office of the Prosecutor of the ICC," at *http://www.iccnow.org/documents/OTP_Update_on_Communications_10_February_2006.pdf* (August 12, 2009).

in the past three and a half years (February 2006 to July 2009) as in its first three and a half years (July 2002 to February 2006).

As an institution, the ICC has performed little, if any, better than the ad hoc tribunals that it was created to replace. Like the Rwandan and Yugoslavian tribunals, the ICC is slow to act. The ICC prosecutor took six months to open an investigation in Uganda, two months with the DRC, over a year with Darfur, and nearly two years with the Central African Republic. It has yet to conclude a full trial cycle more than seven years after being created. Moreover, like the ad hoc tribunals, the ICC can investigate and prosecute crimes only after the fact. The alleged deterrent effect of a standing international criminal court has not ended atrocities in the DRC, Uganda, the Central African Republic, or Darfur, where cases are ongoing. Nor has it deterred atrocities by Burma against its own people, crimes committed during Russia's 2008 invasion of Georgia (an ICC party), ICC party Venezuela's support of leftist guerillas in Colombia, or any of a number of other situations around the world where war crimes or crimes against humanity may be occurring.

Another problem is that the ICC lacks a mechanism to enforce its rulings and is, therefore, entirely dependent on governments to arrest and transfer perpetrators to the court. However, such arrests can have significant diplomatic consequences, which can greatly inhibit the efficacy of the court in pursuing its warrants and prosecuting outstanding cases. The most prominent example is Sudanese President Bashir's willingness to travel to other countries on official visits—thus far only to non-ICC states—despite the ICC arrest warrant. This flaw was also present with the ICTY and the ICTR, although they could at least rely on a Security Council resolution mandating international cooperation in enforcing their arrest warrants. In contrast, the Nuremburg and Tokyo tribunals were established where the authority of the judicial proceedings could rely on Allied occupation forces to search out, arrest, and detain the accused.

The Myth of Bush Administration Intransigence

The U.S. refusal to ratify the Rome Statute has been mischaracterized by ICC proponents as solely a Bush Administration policy. In fact, the Clinton Administration initiated the U.S. policy of distancing itself from the ICC. According to David J. Scheffer, Ambassador-at-Large for War Crimes Issues under the Clinton Administration:

> Foreign officials and representatives of nongovernmental organizations tried to assure us in Rome that procedural safeguards built into the treaty—many sought successfully by the United States—meant that there would be no plausible risk to U.S. soldiers. We could not share in such an optimistic view of the infallibility of an untried institution….
>
> We hope that other governments will recognize the benefits of potential American participation in the Rome treaty and correct its flawed provisions. The United States can make the critical difference in the ability and willingness of reluctant governments to cooperate with the court, but not if the court places at risk those who shoulder the responsibility for international peace and security.[34]

President Clinton himself acknowledged the treaty's "significant flaws" and recommended that President Bush not submit the treaty to the Senate for advice and consent. When President Clinton authorized the U.S. delegation to sign the Rome Statute on December 31, 2000, it was not to pave the way for U.S. ratification, but solely to give the U.S. an opportunity to address American concerns about the ICC:[35]

> In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that

33. American Society of International Law, Independent Task Force, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement*, March 2009, p. 18, at *http://www.asil.org/files/ASIL-08-DiscPaper2.pdf* (July 31, 2009), and International Criminal Court, Office of the Prosecutor, "Communications, Referrals and Preliminary Analysis," at *http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref* (July 31, 2009).

34. Scheffer, "America's Stake in Peace, Security, and Justice."

> when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not.
>
> Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the court's jurisdiction.
>
> But more must be done. Court jurisdiction over U.S. personnel should come only with U.S. ratification of the treaty. The United States should have the chance to observe and assess the functioning of the court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.[36]

After adoption of the Rome Statute in 1998, both the Clinton and Bush Administrations sought to rectify the parts of the statute that precluded U.S. participation. Specifically, the U.S. actively participated in the post-Rome preparatory commissions, hoping to address its concerns. As former U.S. Under Secretary for Political Affairs Marc Grossman noted:

> After the United States voted against the treaty in Rome, the U.S. remained committed and engaged—working for two years to help shape the court and to seek the necessary safeguards to prevent a politicization of the process. U.S. officials negotiated to address many of the concerns we saw in hopes of salvaging the treaty. The U.S. brought international law experts to the preparatory commissions and took a leadership role in drafting the elements of crimes and the procedures for the operation of the court.
>
> While we were able to make some improvements during our active participation in the UN Preparatory Commission meetings in New York, we were ultimately unable [to] obtain the remedies necessary to overcome our fundamental concerns.… President Clinton…hoped the U.S. signature would provide us influence in the future and assist our effort to fix this treaty. Unfortunately, this did not prove to be the case. On April 11, 2002, the ICC was ratified by enough countries to bring it into force on July 1 of this year. Now we find ourselves at the end of the process. Today, the treaty contains the same significant flaws President Clinton highlighted.[37]

The consequences of failing to change the objectionable provisions of the Rome Statute became acute when the 60th country ratified the treaty, causing the statute to enter into force in July 2002. Faced with the prospect of a functioning International Criminal Court that could assert jurisdiction over U.S. soldiers and officials in certain circumstances, the Bush Administration and Congress took steps to protect Americans from the court's jurisdiction, which the U.S. did not recognize. For instance, Congress passed the American Service-Members' Protection Act of 2002 (ASPA), which restricts U.S. interaction with the ICC and its state parties by:

- Prohibiting cooperation with the ICC by any official U.S. entity, including providing support

35. Brett D. Schaefer, "Overturning Clinton's Midnight Action on the International Criminal Court," Heritage Foundation *Executive Memorandum* No. 708, January 9, 2001, at *http://www.heritage.org/Research/InternationalOrganizations/EM708.cfm*.
36. Clinton, "Statement on the Rome Treaty on the International Criminal Court."
37. Marc Grossman, "American Foreign Policy and the International Criminal Court," remarks to the Center for Strategic and International Studies, Washington, D.C., May 6, 2002, at *http://www.iccnow.org/documents/USUnsigningGrossman6May02.pdf* (July 31, 2009).

or funds to the ICC, extraditing or transferring U.S. citizens or permanent resident aliens to the ICC, or permitting ICC investigations on U.S. territory.

- Prohibiting participation by U.S. military or officials in U.N. peacekeeping operations unless they are shielded from the ICC's jurisdiction.
- Prohibiting the sharing of classified national security information or other law enforcement information with the ICC.
- Constraining military assistance to ICC member states, except NATO countries and major non-NATO allies and Taiwan, unless they entered into an agreement with the U.S. not to surrender U.S. persons to the ICC without U.S. permission.
- Authorizing the President to use "all means necessary and appropriate" to free U.S. military personnel or officials detained by the ICC.[38]

Congress also approved the Nethercutt Amendment to the foreign operations appropriations bill for fiscal year 2005,[39] which prohibited disbursement of selected U.S. assistance to an ICC party unless the country has entered into a bilateral agreement not to surrender U.S. persons to the ICC (commonly known as an Article 98 agreement) or is specifically exempted in the legislation. Both ASPA and the Nethercutt Amendment contained waiver provisions allowing the President to ignore these restrictions with notification to Congress. In recent years, Congress has repealed or loosened restrictions on providing assistance to ICC state parties that have not entered into Article 98 agreements with the U.S. However, other ASPA restrictions remain in effect.[40]

The Bush Administration signed these legislative measures and undertook several specific efforts to fulfill the mandates of the legislation and to protect U.S. military personnel and officials from potential ICC prosecution.

Possible Legal Obligations from Signing the Rome Statute. Under Article 18 of the Vienna Convention on the Law of Treaties,[41] the Bush Administration determined that its efforts to protect U.S. persons from the ICC could be construed as "acts which would defeat the object and purpose of a treaty."[42] To resolve this potential conflict, the U.S. sent a letter to U.N. Secretary-General Kofi Annan, the depositor for the Rome Statute, stating that it did not intend to become a party to the Rome Statute and declaring that "the United States has no legal obligations arising from its signature" of the Rome Statute. This act has been described as "unsigning" the Rome Statute.[43] As John Bellinger,

38. 22 U.S. Code § 7421.
39. Public Law 108–447, div. D, tit. I, § 574.
40. For a more detailed discussion, see Alexis Arieff, Rhoda Margesson, and Marjorie Ann Browne, "International Criminal Court Cases in Africa: Status and Policy Issues," Congressional Research Service *Report for Congress,* May 18, 2009, pp. 6–7, at *http://www.fas.org/sgp/crs/row/RL34665.pdf* (July 31, 2009); American Society of International Law, *U.S. Policy Toward the International Criminal Court*, pp. 5–17; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109–364, § 1222; Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Public Law 109–102, § 574(b); and National Defense Authorization Act for Fiscal Year 2008, Public Law 110–181, § 1212.
41. The U.S. has signed, but not ratified this treaty. However, the U.S. observes it in part because it arguably constitutes "customary international law on the law of treaties." U.S. Department of State, "Frequently Asked Questions: Vienna Convention on the Law of Treaties," at *http://www.state.gov/s/l/treaty/faqs/70139.htm* (July 31, 2009).
42. Vienna Convention on the Law of Treaties, May 23, 1969, at *http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf* (July 31, 2009).
43. The text of the letter, signed by U.S. Undersecretary of State for Arms Control 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." John R. Bolton, letter to U.N. Secretary General Kofi Annan regarding the Rome Statute of the International Criminal Court, May 6, 2002, at *http://www.asil.org/ilib0506.cfm#r3* (July 31, 2009).

former Legal Advisor to Secretary of State Condoleezza Rice, made clear in a 2008 speech, "the central motivation was to resolve any confusion whether, as a matter of treaty law, the United States had residual legal obligations arising from its signature of the Rome Statute."[44]

While critics may disagree with the decision, the Bush Administration's action complied with international law.[45] In fact, the critics' mischaracterization of the un-signing as proof of the Administration's intransigence and defiance of international law exposes their political leanings in favor of U.S. ratification more than it supports their contention that the Bush Administration was trying to "kill the ICC." [46] The very act of un-signing demonstrated U.S. concern about observing its obligations under international law.

Article 98 Agreements. Because the ICC could claim jurisdiction over non-parties to the Rome Statute—an assertion unprecedented in international legal jurisdiction—the Bush Administration sought legal protections to preclude nations from surrendering, extraditing, or transferring U.S. persons to the ICC or third countries for that purpose without U.S. consent. Under an Article 98 agreement, a country agrees not to turn U.S. persons over to the ICC without U.S. consent.

Contrary to the claims of the more strident critics, who label the Article 98 agreements as "bilateral immunity agreements"[47] or "impunity agreements,"[48] the agreements neither absolve the U.S. of its obligation to investigate and prosecute alleged crimes, constrain the other nation's ability to investigate and prosecute crimes committed by an American person within its jurisdiction, nor constrain an international tribunal established by the Security Council from investigating or prosecuting crimes committed by U.S. persons. The agreements simply prevent other countries from turning U.S. persons over to an international court that does not have jurisdiction recognized by the United States.

The limited nature of the 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 contemplates such agreements in Article 98:

> 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.[49]

44. John Bellinger III, "U.S. Perspectives on International Criminal Justice," remarks at the Fletcher School of Law and Diplomacy, Medford, Mass., November 14, 2008, at *http://2001-2009.state.gov/s/l/rls/111859.htm* (July 31, 2009).
45. As Curtis A. Bradley notes: "While the policy merits of the Bush Administration's announcement are of course open to debate, the announcement appears to be consistent with international law. There is nothing in international law that obligates a signatory to a treaty to become a party to the treaty, and the Rome Statute itself (in Article 125) states that it is 'subject to ratification, acceptance or approval by signatory States.' In addition, Article 18 of the Vienna Convention on the Law of Treaties provides that, upon signing a treaty, a nation is 'obliged to refrain from acts which would defeat the object and purpose' of the treaty 'until it shall have made its intention clear not to become a party to the treaty.' The Vienna Convention thus contemplates that nations may announce an intent not to ratify a treaty after signing it." Curtis A. Bradley, "U.S. Announces Intent Not to Ratify International Criminal Court Treaty," *ASIL Insights*, May 2002, at *http://www.asil.org/insigh87.cfm* (July 31, 2009).
46. Bellinger, "U.S. Perspectives on International Criminal Justice."
47. Coalition for the International Criminal Court, "USA and the ICC," at *http://www.iccnow.org/?mod=usaicc* (July 31, 2009).
48. For instance, see Amnesty International, "International Criminal Court: Concerns at the Seventh Session of the Assembly of States Parties," October 2008, p. 19, at *http://www.amnesty.org/en/library/asset/IOR40/022/2008/en/ba3e6842-a44a-11dd-b0b6-8f879f4ae071/ior400222008en.pdf* (July 31, 2009).
49. Rome Statute of the International Criminal Court, Art. 98, Sect. 2, p. 69.

Although the U.S. is not currently seeking to negotiate additional Article 98 agreements, there are no known plans to terminate existing agreements. Reportedly, 104 countries have signed Article 98 agreements with the U.S., of which 97 agreements remain in effect.[50]

Language to Protect U.S. Persons. In 2002, the U.S. sought a Security Council resolution to indefinitely exempt from ICC jurisdiction U.S. troops and officials participating in U.N. peacekeeping operations. The effort failed in the face of arguments that the Security Council lacked the authority to rewrite the terms of the Rome Statute, but the Security Council did adopt Resolution 1422, which deferred ICC prosecution of U.N. peacekeeping personnel for one year under Article 16 of the Rome Statute.[51] The deferral was renewed once and expired in June 2004.[52] The U.S. also successfully included language in Resolution 1497 on the U.N. Mission to Liberia granting exclusive jurisdiction over "current or former officials or personnel from a contributing State" to the contributing state if it is not a party to the Rome Statute.[53]

U.S. Cooperation with the ICC

Many of the flaws in the Rome Statute identified by the Clinton and Bush Administrations remain unaddressed. Although the U.S. has reserved the option of cooperating with the ICC in certain circumstances, it has repeatedly stated that fundamental changes to the Rome Statute are needed before the U.S. could ratify the treaty. The U.S. has taken legislative and diplomatic steps to protect U.S. citizens, officials, and military personnel from the ICC's jurisdiction, which the U.S. considers illegitimate. These steps in no way violate international law. On the contrary, they bolster international law by complying with international legal norms and rules as they have been traditionally understood.

Moreover, these actions do not preclude the U.S. from supporting an ICC investigation when it is deemed important to U.S. interests. The most pertinent example is the Bush Administration's decision not to block U.N. Security Council Resolution 1593, which referred the situation in Darfur to the ICC. The U.S. abstention acknowledged that the existence of the court and many states' support for the ICC would not be changed by the U.S. vetoing every Security Council resolution that references the ICC. It demonstrated a pragmatic approach of weighing the costs and benefits of U.S. policy toward the ICC against other interests and echoed President Bush's use of his waiver authority under ASPA and the Nethercutt Amendment when those restrictions undermined other U.S. interests. However, it did not change the U.S. effort to protect its nationals from the ICC's illegitimate jurisdictional claims. Indeed, the U.S. abstention was secured only after language protecting U.S. persons from the ICC was included in the resolution:

> [N]ationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.[54]

Interestingly, when the ICC prosecutor issued an arrest warrant for President Bashir of Sudan,

50. Nicholas Kralev, "U.S. Warms to Global Court," *The Washington Times*, April 30, 2009, at *http://www.washingtontimes.com/news/2009/apr/30/us-warms-to-global-panel* (July 31, 2009).
51. Press release, "Security Council Requests International Criminal Court Not to Bring Cases Against Peacekeeping Personnel from States Not Party to Statute," U.N. Security Council, December 7, 2002, at *http://www.un.org/News/Press/docs/2002/sc7450.doc.htm* (July 31, 2009).
52. Press release, "Security Council Requests One-Year Extension of UN Peacekeeper Immunity from International Criminal Court," U.N. Security Council, December 6, 2003, at *http://www.un.org/News/Press/docs/2003/sc7789.doc.htm* (July 31, 2009).
53. U.N. Security Council, "Resolution 1497 (2003)," S/RES/1497, August 1, 2003.
54. U.N. Security Council, "Resolution 1593 (2005)," S/RES/1593, March 31, 2005.

staunch supporters of the ICC sought to defer ICC pursuit of the situation in Darfur. These supporters reportedly included permanent Security Council members France and the United Kingdom, which had strongly criticized U.S. efforts to protect its military and officials from the ICC. As Bellinger noted,

> [I]n recent months, we have opposed efforts by some countries to invoke Article 16 of the ICC Statute to defer the investigation and prosecution of Sudanese President Al Bashir. The irony of the United States' support for the court in opposing an Article 16 deferral is often noted by the press; what I hope will get equal attention is the still-greater irony that some strong supporters of the court seem so willing to consider interfering with the Court's prosecution of an individual responsible for genocide.[55]

The basis for these role reversals was a concern of African countries and some Security Council members that prosecution of Bashir would further destabilize the situation in Darfur. The U.S. determined that the pursuit of justice in Darfur, even through the flawed ICC, was too important to defer. Regardless of the merits of both arguments, the dispute underscores long-standing concerns about the ICC's involvement in situations that are overwhelmingly political and foreign policy concerns.

Until the U.S. formally joins the ICC, legislative and policy measures to protect U.S. military personnel, officials, and nationals from the ICC are entirely prudent and warranted. Indeed, recent instances of national courts and prosecutors asserting extraterritorial jurisdiction, such as those by judicial authorities in Spain and the Netherlands,[56] underscore the need for the U.S. to protect itself and its citizens and soldiers from claims of jurisdiction under international law by the ICC and other foreign judicial authorities.

Persistent Barriers to U.S. Ratification

ICC supporters have called for the Obama Administration to re-sign the Rome Statute, reverse protective measures secured during the Bush Administration (Article 98 agreements), and fully embrace the ICC. Indeed, the Obama Administration may be considering some or all of those actions.[57] However, the ICC's flaws advise caution and concern, particularly in how the ICC could affect national sovereignty and politically precarious situations around the globe.

When it decided to un-sign the Rome Statute, the Bush Administration voiced five concerns regarding the Rome Statute.[58] These critical concerns have not been addressed.

The ICC's Unchecked Power. The U.S. system of government is based on the principle that power must be checked by other power or it will be abused and misused. With this in mind, the Founding Fathers divided the national government into three branches, giving each the means to influence and restrain excesses of the other branches. For

55. Bellinger, "U.S. Perspectives on International Criminal Justice."

56. For instance, under a since-amended universal jurisdiction law in Belgium, activists launched criminal prosecutions against General Tommy Franks in 2003 over the use of cluster bombs in Iraq. Former U.S. Secretary of State Colin Powell, President George H. W. Bush, and Israeli Prime Minister Ariel Sharon were also targeted with lawsuits under the Belgian law. It became such a diplomatic headache that U.S. Secretary of Defense Donald Rumsfeld threatened to pull NATO headquarters out of Brussels unless the law was changed. See Ambrose Evans-Pritchard, "US Threatens to Pull Nato HQ out of Belgium," Telegraph.co.uk, June 13, 2003, at *http://www.telegraph.co.uk/news/worldnews/europe/belgium/1432913/US-threatens-to-pull-Nato-HQ-out-of-Belgium.html* (July 31, 2009). Spanish Judge Baltasar Garzón has made a name for himself pursuing cases under Spain's universal jurisdiction laws, including seeking the extradition of Chilean dictator Augusto Pinochet through an international arrest warrant issued during Pinochet's 1997 visit to the United Kingdom and the recent effort to open an investigation into the U.S. incarceration and interrogation of detainees at Guantánamo Bay. See CBS News, "Thatcher: Release Pinochet," October 19, 1998, at *http://www.cbsnews.com/stories/1998/10/19/world/main20458.shtml* (July 31, 2009), and Thomas Catan, "Spanish Judge Probes U.S. Torture Allegations," *The Wall Street Journal*, April 30, 2009, at *http://online.wsj.com/article/SB124101758039968837.html* (July 31, 2009).

57. Kralev, "U.S. Warms to Global Court."

58. Grossman, "American Foreign Policy and the International Criminal Court."

instance, Congress confirms and can impeach federal judges and has the sole authority to authorize spending, the President nominates judges and can veto legislation, and the courts can nullify laws passed by Congress and overturn presidential actions if it judges them unconstitutional.

The ICC lacks robust checks on its authority, despite strong efforts by U.S. delegates to insert them during the treaty negotiations. The court is an independent treaty body. In theory, the states that have ratified the Rome Statute and accepted the court's authority control the ICC. In practice, the role of the Assembly of State Parties is limited. The judges themselves settle any dispute over the court's "judicial functions." The prosecutor can initiate an investigation on his own authority, and the ICC judges determine whether the investigation may proceed. The U.N. Security Council can delay an investigation for a year—a delay that can be renewed—but it cannot stop an investigation. As Grossman noted:

> Under the UN Charter, the UN Security Council has primary responsibility for maintaining international peace and security. But the Rome Treaty removes this existing system of checks and balances, and places enormous unchecked power in the hands of the ICC prosecutor and judges. The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself.[59]

The Challenges to the Security Council's Authority. The Rome Statute empowers the ICC to investigate, prosecute, and punish individuals for the as yet undefined crime of "aggression." This directly challenges the authority and prerogatives of the U.N. Security Council, which the U.N. Charter gives "primary responsibility for the maintenance of international peace and security" and which is the only U.N. institution empowered to determine when a nation has committed an act of aggression. Yet, the Rome Statute "empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime" free of any oversight from the Security Council.[60]

A Threat to National Sovereignty. A bedrock principle of the international system is that treaties and the judgments and decisions of treaty organizations cannot be imposed on states without their consent. In certain circumstances, the ICC claims the authority to detain and try U.S. military personnel, U.S. officials, and other U.S. nationals even though the U.S. has not ratified the Rome Statute and has declared that it does not consider itself bound by its signature on the treaty. As Grossman noted, "While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a U.N. Security Council mandate."[61]

As such, the Rome Statute violates international law as it has been traditionally understood by empowering the ICC to prosecute and punish the nationals of countries that are not party to it. In fact, Article 34 of the Vienna Convention on the Law of Treaties unequivocally states: "A treaty does not create either obligations or rights for a third State without its consent."[62]

Protestations by ICC proponents that the court would seek such prosecutions only if a country is unwilling or unable to prosecute those accused of crimes within the court's jurisdiction—the principle of complementarity—are insufficient to alleviate sovereignty concerns. As Casey and Rivkin note:

> [C]omplementarity applies only if the state in question handles the particular case at issue in a manner consistent with the ICC's understanding of the applicable legal norms. If the court concludes that a state has been unwilling or unable to prosecute one of its citizens or government officials because it does not

59. *Ibid.*

60. *Ibid.*

61. *Ibid.*

62. Vienna Convention on the Law of Treaties.

> consider the questioned conduct unlawful, based on its own interpretation of the relevant international legal requirements, the court can proceed with an investigation.[63]

For example, the Obama Administration recently declared that no employee of the Central Intelligence Agency (CIA) who engaged in the use of "enhanced interrogation techniques" on detainees would be criminally prosecuted.[64] That decision was presumably the result of an analysis of U.S. law, legal advice provided to the CIA by Justice Department lawyers, and the particular actions of the interrogators. Yet if the U.S. were a party to the Rome Statute, the Administration's announced decision not to prosecute would fulfill a prerequisite for possible prosecution by the ICC under the principle of complementarity. That is, because the U.S. has no plans to prosecute its operatives for acts that many in the international community consider torture, the ICC prosecutor would be empowered (and possibly compelled) to pursue charges against the interrogators.

Erosion of Fundamental Elements of the U.N. Charter. The ICC's jurisdiction over war crimes, crimes against humanity, genocide, and aggression directly involves the court in fundamental issues traditionally reserved to sovereign states, such as when a state can lawfully use armed force to defend itself, its citizens, or its interests; how and to what extent armed force may be applied; and the point at which particular actions constitute serious crimes. Blurring the lines of authority and responsibility in these decisions has serious consequences. As Grossman notes, "with the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests."[65] The ability to project power must be protected, not only for America's own national security interests, but also for those individuals threatened by genocide and despotism who can only be protected through the use of force.

Complications to Military Cooperation Between the U.S. and Its Allies. The treaty creates an obligation to hand over U.S. nationals to the court, regardless of U.S. objections, absent a competing obligation such as that created through an Article 98 agreement. The United States has a unique role and responsibility in preserving international peace and security. At any given time, U.S. forces are located in approximately 100 nations around the world, standing ready to defend the interests of the U.S. and its allies, engaging in peacekeeping and humanitarian operations, conducting military exercises, or protecting U.S. interests through military intervention. The worldwide extension of U.S. armed forces is internationally unique. The U.S. must ensure that its soldiers and government officials are not exposed to politically motivated investigations and prosecutions.

Ongoing Causes for Concern

Supporters of U.S. ratification of the Rome Statute often dismiss these concerns as unjustified, disproved by the ICC's conduct during its first seven years in operation, or as insufficient to overcome the need for an international court to hold perpetrators of serious crimes to account.[66] Considering the other options that exist or could be created to fill the ICC's role of holding perpetrators of war crimes, crimes against humanity, genocide, and aggression to account, the benefits from joining such a flawed institution do not justify the risks.

Furthermore, based on the ICC's record and the trend in international legal norms, they are being disingenuous in dismissing concerns about overpoliticization of the ICC, its impact on diplomatic initiatives and sovereign decisions on the use of force, its expansive claim of jurisdiction over the citizens of non-states parties, and incompatibility with U.S.

63. Casey and Rivkin, "Making Law," p. 48.
64. Siobhan Gorman and Evan Perez, "CIA Memos Released; Immunity for Harsh Tactics," *The Wall Street Journal*, April 17, 2009, at *http://online.wsj.com/article/SB123990682923525977.html* (August 3, 2009).
65. Grossman, "American Foreign Policy and the International Criminal Court."
66. For example, see American Society of International Law, "U.S. Policy Toward the International Criminal Court."

legal norms and traditions. A number of specific risks are obvious.

Politicization of the Court. Unscrupulous individuals and groups and nations seeking to influence foreign policy and security decisions of other nations have and will continue to seek to misuse the ICC for politically motivated purposes. Without appropriate checks and balances to prevent its misuse, the ICC represents a dangerous temptation for those with political axes to grind. The prosecutor's *proprio motu* authority to initiate an investigation based solely on his own authority or on information provided by a government, a nongovernmental organization (NGO), or individuals[67] is an open invitation for political manipulation.

One example is the multitude of complaints submitted to the ICC urging the court to indict Bush Administration officials for alleged crimes in Iraq and Afghanistan. The Office of the Prosecutor received more than 240 communications alleging crimes related to the situation in Iraq. Thus far, the prosecutor has demonstrated considerable restraint, declining to pursue these cases for various reasons, including that the ICC does not have "jurisdiction with respect to actions of non-State Party nationals on the territory of Iraq," which is also not a party to the Rome Statute.[68]

All current ICC cases were referred to the ICC by the governments of the territories in which the alleged crimes occurred or by the Security Council. Comparatively speaking, these cases are low-hanging fruit—situations clearly envisioned to be within the authority of the court by all states. Even so, they have not been without controversy, as demonstrated by the AU reaction to the arrest warrant for President Bashir and attempts to have the Security Council defer the case.[69]

However, the ICC's brief track record is no assurance that future cases will be similarly resolved, especially given the increasing appetite for lodging charges with the ICC.[70] A far more significant test will arise if the prosecutor decides to investigate (and the court's pre-trial chamber authorizes) a case involving a non-ICC party without a Security Council referral or against the objections of the government of the involved territory.

This could arise from the prosecutor's monitoring of the situation in Palestine.[71] Even though Israel is not a party to the Rome Statute, the ICC prosecutor is exploring a request by the Palestinian National Authority to prosecute Israeli commanders for alleged war crimes committed during the recent actions in Gaza.[72] The request is supported by 200 complaints from individuals and NGOs alleging

67. Rome Statute of the International Criminal Court, Art. 15.
68. Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court, letter, February 9, 2006, at *http://www2.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf* (August 3, 2009).
69. Article 16 of the Rome Statute allows the U.N. Security Council to defer an ICC investigation or prosecution for a renewable period of 12 months, "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." See also James Sturcke, "UN Extends Darfur Peacekeeping Mandate in Last-Minute Vote," *The Guardian*, August 1, 2008, at *http://www.guardian.co.uk/world/2008/aug/01/unitednations.sudan* (August 3, 2009).
70. American Society of International Law, "U.S. Policy Toward the International Criminal Court," p. 18, and International Criminal Court, Office of the Prosecutor, "Communications, Referrals and Preliminary Analysis," at *http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref* (August 3, 2009).
71. Catherine Philip and James Hinder, "Prosecutor Looks at Ways to Out Israeli Officers on Trial for Gaza 'War Crimes,'" *The Times*, February 2, 2009, at *http://www.timesonline.co.uk/tol/news/world/middle_east/article5636069.ece* (August 3, 2009).
72. International Criminal Court, Office of the Prosecutor, "Visit of the Palestinian National Authority Minister of Foreign Affairs, Mr. Riad al-Malki, and Minister of Justice, Mr. Ali Khashan, to the Prosecutor of the ICC (13 February 2009)," at *http://www2.icc-cpi.int/NR/rdonlyres/4CC08515-D0BA-454D-A594-446F30289EF2/280140/ICCOTP20090213Palestinerev.pdf* (August 3, 2009), and Sebastian Rotella, "International Criminal Court to Consider Gaza Investigation," *Los Angeles Times*, February 5, 2009, at *http://articles.latimes.com/2009/feb/05/world/fg-court-palestinians5* (August 3, 2009).

war crimes by the Israeli military and civilian leaders related to military actions in Gaza.[73]

Palestinian lawyers maintain that the Palestinian National Authority can request ICC jurisdiction as the de facto sovereign even though it is not an internationally recognized state. By countenancing Palestine's claims, the ICC prosecutor has enabled pressure to be applied to Israel over alleged war crimes, while ignoring Hamas's incitement of the military action and its commission of war crimes against Israeli civilians. Furthermore, by seemingly recognizing Palestine as a sovereign entity, the prosecutor's action has arguably created a pathway for Palestinian statehood without first reaching a comprehensive peace deal with Israel. This determination is an inherently political issue beyond the ICC's authority, yet the prosecutor has yet to reject the possibility that the ICC may open a case on the situation.

Alternatively, the prosecutor could raise ire by making a legal judgment call on a crime under the court's jurisdiction that lacks a firm, universal interpretation, such as:

- "Committing outrages upon personal dignity, in particular humiliating and degrading treatment"[74];
- "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated"[75]; or
- Using weapons "which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict."[76]

In each of these cases, a reasonable conclusion could be made to determine whether a crime was committed. For instance, many human rights groups allege outrages on personal dignity and "humiliating and degrading treatment" were committed at the detention facility at Guantanamo Bay, Cuba. The U.S. disputes these claims. Excessive use of force has been alleged in Israel's attacks in Gaza, while others insist Israel demonstrated forbearance and consideration in trying to prevent civilian casualties.[77] There is also an ongoing international effort to ban landmines and cluster munitions. If the ICC member states agree to add them to the annex of banned weapons, it could lead to a confrontation over their use by non-party states, such as the U.S., which opposes banning these weapons. These are merely some scenarios in which politicization could become an issue for the ICC.

Disruption of Diplomatic Efforts. ICC decisions to pursue investigations and indictments can upset delicate diplomatic situations. Although the U.N. Security Council has been largely deadlocked over placing strong sanctions on the government of Sudan for its complicity in the terrible crimes in Darfur, it did pass a resolution in 2005 referring the situation in Darfur to the ICC. In summer 2008, the ICC announced that it would seek an indictment against Sudanese President Omar al-Bashir for his involvement in crimes committed in Darfur. On March 4, 2009, a warrant was issued for his arrest.[78]

Issuing the arrest warrant for Bashir was certainly justified. His government has indisputably supported the janjaweed militias that have perpetrated

73. International Criminal Court, Office of the Prosecutor, "Visit of the Minister of Justice of the Palestinian National Authority, Mr. Ali Khashan, to the ICC (22 January 2009)," at *http://www.icc-cpi.int/NR/rdonlyres/979C2995-9D3A-4E0D-8192-105395DC6F9A/280141/ICCOTP20090122Palestinerev.pdf* (August 3, 2009).
74. Rome Statute of the International Criminal Court, Art. 8(2)(c)(ii).
75. *Ibid.*, Art. 8(2)(b)(iv).
76. *Ibid.*, Art. 8(2)(b)(xx). Likely candidates are landmines and cluster munitions, which are targets for bans under international treaty and are used by the U.S.
77. Alan M. Dershowitz, "Israel's Policy Is Perfectly 'Proportionate,'" *The Wall Street Journal*, January 2, 2009, at *http://online.wsj.com/article/SB123085925621747981.html?mod=googlenews_wsj* (August 3, 2009).
78. Press release, "ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan," International Criminal Court, March 4, 2009, at *http://www.icc-cpi.int/NR/exeres/0EF62173-05ED-403A-80C8-F15EE1D25BB3.htm* (August 3, 2009).

massive human rights abuses that rise to the level of crimes against humanity. His complicity in the crimes demands that he be held to account. Regrettably, the decision to refer the case to the ICC and the subsequent decision to issue an arrest warrant for the sitting Sudanese head of state have aggravated the situation in Darfur and may put more innocent people at risk.

In response to his indictment, Bashir promptly expelled vital humanitarian NGOs from Sudan.[79] Bashir may ultimately decide he has nothing to lose and increase his support of the janjaweed, encouraging them to escalate their attacks, even against aid workers and U.N. and AU peacekeepers serving in the African Union/UN Hybrid operation in Darfur (UNAMID). It could also undermine the 2005 peace agreement meant to reconcile the 20-year north–south civil war, which left more than 2 million dead.

Moreover, the decision to seek the arrest of Bashir, cheered by ICC supporters, may actually hurt the court in the long run. African countries, which would bear the most immediate consequences of a more chaotic Sudan, have called on the Security Council to defer the Bashir prosecution. Sudan's neighbors may be forced to choose between arresting Bashir, which could spark conflict with Sudan, or ignoring the court's arrest warrant. Indeed, all AU members except for Botswana announced in July 2009 that they would not cooperate with the ICC in this instance. South Africa subsequently announced that it would honor the ICC warrant in August 2009.[80] Whether the AU decision will have broader ramifications for the court's relationship with African governments remains to be seen. Some African ICC parties have mentioned withdrawing from the Rome Statute.

The desire to see Bashir face justice for his role in the crimes committed in Darfur is understandable and should not be abandoned. However, premature efforts to bring Bashir to justice may be counterproductive. The priority in Sudan is to reduce the violence, stop the atrocities, restore peace and security, reconstitute refugees, and set the region on a path to avoid a return to conflict. This requires strong action by the AU and the international community, including economic and diplomatic sanctions designed to bring maximum pressure to bear on Bashir and his allies. It may require military intervention. Once this is achieved, justice can be pursued by the Sudanese themselves through their courts, through an ad hoc tribunal, or even through the ICC.

In another situation, the Ugandan government referred alleged crimes committed by the Lord's Resistance Army in northern Uganda to the court in 2004 in hopes of "engaging the western powers who had ignored the situation in northern Uganda"[81] and pressuring the LRA to negotiate a peace. Regrettably, the LRA has responded by announcing that it will not agree to peace talks until the ICC arrest warrants are withdrawn. If Uganda could resolve its long festering conflict with the LRA by agreeing not to prosecute its leader, it would have no ability to call off the ICC prosecution. Thus, the ICC's involvement could be a real impediment to peace in Uganda, assuming the LRA would abide by an agreement.[82]

The desire to address tragedies such as those in Darfur and Uganda is as laudable as the international community's unwillingness or inability to act is frustrating. The perpetrators of war crimes, genocide, and crimes against humanity should be held to account, but ICC investigation and arrest war-

79. Xan Rice and Tania Branigan, "Sudanese President Expels Aid Agencies," *The Guardian*, March 5, 2009, at *http://www.guardian.co.uk/world/2009/mar/05/sudan-aid-agencies-expelled* (August 3, 2009).

80. Republic of South Africa, Department of Foreign Affairs, "Notes following the Briefing of Department International Relations and Cooperation's Director-General, Ayanda Ntsaluba," updated August 3, 2009, at *http://www.dfa.gov.za/docs/speeches/2009/ntsa0731.html* (August 7, 2009).

81. Payam Akhavan, "Uganda: ICC Warrants Not Stopping Peace Search—Expert," interview by Rosebell Kagumire, *The Monitor* (Kampala, Uganda), at *http://allafrica.com/stories/200710280004.html* (August 3, 2009).

82. The LRA is notoriously unpredictable and intransigent, and there is no guarantee that its leaders would abide by a peace agreement.

rants cannot substitute for decisive action to stop the perpetrators and resolve such situations. Because the vast majority of the court's discretion lies within the Office of the Prosecutor, there is little opportunity to resolve disputes, conflicts, or sensitive political issues diplomatically after a case is brought to the ICC.

Furthermore, the ICC prosecutor and judges are unlikely ever to be held accountable if their decisions lead to greater carnage in Darfur or prolong the conflict in Uganda. They are free to act without considering the potential consequences. Others are not so lucky.

The long-term implications of supporting the ICC, which has become a wild card in a foreign and security policy, are significant, and they emphasize the need for the ICC to keep its distance from political issues.

The Undefined Crime of Aggression. It would be irresponsible for the U.S. to expose its military personnel and civilian officials to a court that has yet to define the very crimes over which it claims jurisdiction. Yet that is the situation the U.S. would face if it ratified the Rome Statute. The Statute includes the crime of aggression as one of its enumerated crimes, but the crime has yet to be defined, despite a special working group that has been debating the issue for more than five years.

For instance, some argue that any military action conducted without Security Council authorization violates international law and is, therefore, an act of aggression that could warrant an ICC indictment. The U.S. has been the aggressor in several recent military actions, including military invasions of the sovereign territories of Afghanistan and Iraq, albeit with the U.N. Security Council's blessing in the case of Afghanistan. U.S. forces bombed Serbia in 1999 and launched dozens of cruise missiles at targets in Afghanistan and the Sudan in 1998 without explicit Security Council authorization. While charges of aggression are unlikely to be brought against U.S. officials *ex post facto* for military actions in Iraq and elsewhere—certainly not for actions before July 2002 as limited by the Rome Statute—submitting to the jurisdiction of an international court that judges undefined crimes would be highly irresponsible and an open invitation to levy such charges against U.S. officials in future conflicts.

If the U.S. becomes an ICC party, every decision by the U.S. to use force, every civilian death resulting from U.S. military action and every allegedly abused detainee could conceivably give cause to America's enemies to file charges against U.S. soldiers and officials. Indeed, any U.S. "failure" to prosecute a high-ranking U.S. official in such instances would give a cause of action at the ICC. For example, the principle of complementarity will not prevent a politicized prosecutor from bringing charges against a sitting U.S. President or Secretary of Defense. That is, the U.S. Department of Justice is unlikely to file criminal charges against such officials for their decisions involving the use of military force. This decision not to prosecute would be a prerequisite for the ICC taking up the case.

At best, the U.S. would find itself defending its military and civilian officials against frivolous and politically motivated charges submitted to the ICC prosecutor. At worst, international political pressure could compel the ICC's prosecutor to file charges against current or former U.S. officials. Until the crime of aggression is defined, U.S. membership in the ICC is premature.

What the U.S. Should Do

The serious flaws that existed when President Clinton signed the Rome Statute in December 2000 continue to exist today. The Bush Administration's policy toward the ICC was prudent and in the best interests of the U.S., its officials, and particularly its armed forces. Since the ICC came into existence, the U.S. has treaded carefully by supporting the ICC on an ad hoc basis without backing away from its long-standing objections to the court. The U.S. has simultaneously taken the necessary steps to protect U.S. persons from the court's illegitimate claims of jurisdiction.

Despite intense pressure to overturn U.S. policies toward the ICC, the Obama Administration appears to appreciate the possible ramifications of joining the court. Indeed, as a candidate, Obama expressed the need to ensure that U.S. troops have "maximum protection" from politically motivated indictments by the ICC and did not openly support

ratification of the Rome Statute.[83] However, the Obama Administration has expressed less caution than either the Bush or Clinton Administrations did about the ICC. Specifically, during her confirmation hearing as Secretary of State Hillary Clinton stated:

> The President-Elect believes as I do that we should support the ICC's investigations….
>
> But at the same time, we must also keep in mind that the U.S. has more troops deployed overseas than any nation. As Commander-in-Chief, the President-Elect will want to make sure they continue to have the maximum protection.… Whether we work toward joining or not, we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.[84]

News reports indicate that the Obama Administration is close to announcing a change in U.S. policy toward the ICC, including affirming the 2000 signature on the Rome Statute and increasing U.S. cooperation with the court.[85] On her recent trip to Africa, Secretary of State Clinton stated that it was "a great regret but it is a fact that we are not yet a signatory [to the Rome Statute]. But we have supported the court and continue to do so."[86]

These steps are premature if the Administration seriously wishes to provide "maximum protection" for U.S. troops. Instead, to protect U.S. military personnel and other U.S. persons and to encourage other member states to support reforms to the Rome Statute that would address U.S. concerns, the Obama Administration should:

- **Not re-sign the Rome Statute.** The Obama Administration is under pressure to "re-sign" the Rome Statute, reversing the Bush Administration's decision. In critical ways, this would be tantamount to signing a blank check. The Rome Statute is up for review by the Assembly of States Parties in 2010, and key crimes within the court's jurisdiction have yet to be defined and long-standing U.S. objections to the treaty have yet to be addressed. The Obama Administration should use the possibility of U.S. membership as an incentive to encourage the state parties to remedy the key flaws in the Rome Statute.
- **Maintain existing Article 98 agreements.** Until the Rome Statute is reformed to address all of the U.S. concerns, the Obama Administration should confirm and endorse all existing Article 98 agreements. The U.S. is militarily engaged in Iraq and Afghanistan, has troops stationed and in transit around the globe, and in all likelihood will be involved in anti-terror activities around the world for many years. Now is not the time to terminate the legal protections enjoyed by U.S. military personnel and officials deployed in foreign nations. Even if the U.S. joins the ICC at some future date, the U.S. should not terminate the Article 98 agreements because they are consistent with the Rome Statute and would serve as a useful protection if the court overreaches.
- **Establish clear objectives for changes to the Rome Statute for the 2010 review conference that would help to reduce current and potential problems posed by the ICC.** In 2010, the Assembly of States Parties is scheduled to hold the first review conference to consider amendments to the Rome Statute. A key issue on the agenda is agreeing to a definition of the crime of aggression, which is technically under the ICC's jurisdiction, but remains latent due to the states parties' inability to agree to a definition. Rather than accede to an anodyne definition, the U.S. should either seek an explicit, narrow definition to prevent politicization of this crime or, even

83. American Society of International Law, "International Law 2008—Barack Obama," at *http://www.asil.org/obama.cfm* (August 3, 2009).

84. John Kerry, "Questions for the Record: Nomination of Hillary Rodham Clinton," American Non-Governmental Organizations Coalition for the ICC, p. 66, at *http://www.amicc.org/docs/KerryClintonQFRs.pdf* (August 3, 2009).

85. See Kralev, "U.S. Warms to Global Court."

86. Associated Press, "Clinton Suggests US Could Join War Crimes Court," My Way News, August 6, 2009, at *http://apnews.myway.com/article/20090806/D99TAKU00.html* (August 7, 2009).

better, seek to excise the crime from the Rome Statute entirely, on the grounds that it infringes on the Security Council's authority. Moreover, the review conference should reverse the Rome Statute's violation of customary international law by explicitly limiting the ICC's jurisdiction only to nationals of those states that have ratified or acceded to the Rome Statute and to nationals of non-party states when the U.N. Security Council has explicitly referred a situation to the ICC.

- **Approach Security Council recommendations to the ICC on their merits and oppose those deemed detrimental to U.S. interests.** The U.S. abstentions on Security Council resolutions on Darfur indicate only that it is not U.S. policy to block all mentions of the ICC. However, accepting the reality of the ICC does not mean that the U.S. should acquiesce on substantive issues when they may directly or indirectly affect U.S. interests, U.S. troops, U.S. officials, or other U.S. nationals. Many concerns about the Rome Statute have not yet been adequately addressed. The U.S. should abstain if the resolution addresses issues critical to U.S. interests and would not directly or indirectly undermine the U.S. policy of opposing ICC claims of jurisdiction over U.S. military personnel and its nationals. Moreover, the U.S. should insist that all resolutions include language protecting military and officials from non-ICC states participating in U.N. peacekeeping operations.

Conclusion

While the International Criminal Court represents an admirable desire to hold war criminals accountable for their terrible crimes, the court is flawed notionally and operationally. The ICC has not overcome many of the problems plaguing the ad hoc tribunals established for Yugoslavia and Rwanda. It remains slow and inefficient. Worse, unlike ad hoc tribunals, it includes a drive to justify its budget and existence in perpetuity rather than simply completing a finite mission.

Its broad autonomy and jurisdiction invite politically motivated indictments. Its inflexibility can impede political resolution of problems, and its insulation from political considerations can complicate diplomatic efforts. Efforts to use the court to apply pressure to inherently political issues and supersede the foreign policy prerogatives of sovereign nations—such as the prosecutor's decision to consider Israel's actions in Gaza—undermine the court's credibility and threaten its future as a useful tool for holding accountable the perpetrators of genocide, war crimes, and crimes against humanity.

President Clinton considered the ICC's flaws serious enough to recommend against U.S. ratification of the Rome Statute unless they were resolved, and President Bush concurred. These issues remain unresolved and continue to pose serious challenges to U.S. sovereignty and its national interests. Unless the serious flaws are addressed fully, President Obama should similarly hold the ICC at arm's length. To protect its own interests and to advance the notion of a properly instituted international criminal court, the U.S. should continue to insist that it is not bound by the Rome Statute and does not recognize the ICC's authority over U.S. persons and should exercise great care when deciding to support the court's actions.

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