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### Support War Crimes Trials for Darfur

By Jack Goldsmith

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A U.N. commission chaired by the former president of the Yugoslav war crimes tribunal, Antonio Cassese, is expected to issue its recommendation this week on whether the International Criminal Court should investigate human rights abuses in the Darfur region of Sudan. If the Cassese commission does propose an ICC investigation, a Security Council referral will be necessary for the ICC to proceed, because Sudan has not ratified the ICC treaty.

This would place the Bush administration in a bind. The administration has condemned the Darfur abuses as genocide. But at the same time, it strongly opposes the ICC, which it believes is staffed by unaccountable judges and prosecutors who threaten politically motivated actions against U.S. personnel around the globe. These concerns explain why the United States has opposed ratification of the ICC treaty and has sought bilateral assurances that other nations will not send U.S. nationals to the ICC. News reports suggest that the Bush administration would oppose a Security Council referral on Darfur out of fear that it would confer legitimacy on the international court.

In fact such a referral would be consistent with U.S. policy on the ICC. The United States has never opposed ICC prosecutions across the board. Rather, it has maintained that ICC prosecutions of non-treaty parties would be politically accountable and thus legitimate if they received the imprimatur of the Security Council. The Darfur case allows the United States to argue that Security Council referrals are the *only* valid route to ICC prosecutions and that countries that are not parties to the ICC (such as the United States) remain immune from ICC control in the absence of such a referral.

This course of action would signal U.S. support not only for the United Nations but for international human rights as well, at a time when Washington is perceived by some as opposing both. And it would give the United States leverage in seeking genuine sanctions against Sudan, especially with France, which for oil-related reasons has quietly resisted U.S. efforts on Darfur. France would have a hard time opposing a package of sanctions that included U.S. support for an ICC referral. Opposition by China and Russia would be harder to overcome but would at least make clear to the world that those two powerful nations are even more opposed to the ICC than the United States.

U.S. support for a Security Council referral might also point the way to a compromise with European nations that are anxious to secure U.S. backing for the international court but oppose state-to-state deals that overtly immunize U.S. citizens from ICC jurisdiction. Agreement on the need for Security Council approval for ICC prosecutions would provide a more principled way for Europe to alleviate U.S. concerns about rogue ICC prosecutions. Critics would decry this approach as a double standard for Security Council members, who can protect themselves by vetoing a referral. But this double standard is woven into the fabric of international politics and

is the relatively small price the international system pays for the political accountability and support that only the big powers, acting through the Security Council, can provide.

The fears of "legitimizing" the ICC are overstated. It's too late to kill the International Criminal Court. The Security Council (including the United States) presupposed the ICC's authority when it voted in 2002 and 2003 to immunize U.N. peacekeepers from ICC prosecutions. And the institution is now up and running, preparing for cases already referred to it. For better or worse, the ICC is not going away anytime soon.

Another potential obstacle is a 2001 congressional bar on U.S. cooperation with the ICC. But this statute exempts acts taken pursuant to the president's constitutional authority, and it specifically permits the president to communicate to the ICC U.S. "policy with respect to a matter." The congressional ban would preclude U.S. financial support for the ICC, but all that means is that the United States can, for a change, enjoy the fruits of international justice without having to pay for it.

Not that there will necessarily be much fruit. Prosecutions by other international criminal courts have done little to bring reconciliation to Rwanda or the former Yugoslavia, or (as the Darfur tragedy shows) to deter future crimes in other nations. Nonetheless, it is possible that the concrete threat of an ICC prosecution could temper the killings in Darfur without adversely affecting the recent peace deal between Sudan's Islamic government and its southern rebels. If so, the Bush administration should play the difficult hand likely to be dealt it by the Cassese commission to its own political advantage. A more moderate stance toward the ICC could be a more effective one.

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