

AMICC

AMICC RESPONSE TO THE U.S. ADMINISTRATION INTERNATIONAL CRIMINAL COURT POLICY

This fact sheet examines the actions taken and legislation passed by the United States in its campaign to undermine the International Criminal Court (ICC) after the removal of its signature from the Rome Statute. It details U.S. objections to the ICC and provides AMICC's responses to the concerns, pointing out the misconceptions that underlie several of them. It also examines the consequences of the U.S. abstention in the Darfur referral by the Security Council and the apparent recent change in U.S. policy with respect to the Court. Finally, it demonstrates that U.S. public opinion and the views of most Americans do not necessarily accord with the policy of the current Administration towards the Court.

I. U.S. POLICY OF OVERT OPPOSITION TO THE ICC

Suspension of U.S. Signature

On May 6, 2002, former Under Secretary Marc Grossman announced the results of the Bush Administration's policy review of the U.S. position towards the Court. The results led to the Administration's unprecedented step of suspending its signature from the list of signatories to the Rome Statute. The U.S. also informed the Secretary General that the U.S. recognized no obligations toward the Statute and wanted its intention not to become a party reflected in the UN depository's status list.¹ This has been the clearest and most significant display of United States opposition to the Court. The U.S. believes that with this action it has relieved itself of its obligation not to defeat the object and purpose of the treaty and has made unmistakably clear its intention not to ratify the Rome Statute. The UN Secretariat stated that as treaty depository, it takes no position on the effect of the signature suspension. The Secretariat emphasized that, under its view of international law, it is up to the States Parties to the Rome Statute to determine the consequences of the U.S. action. In particular, they must decide whether, or to what extent, the declaration of suspension relieved the U.S. of the obligation accepted by its signature not to actively defeat the object and purpose of the Statute. Legal experts have come to the conclusion that it was a legal act, but unprecedented and undesirable for the development of international law. The United States' signature still remains on the depository list, but beside it is a footnote that describes the communication sent to the Secretary General.² Therefore, if another

¹ This suspension was affected by a letter from John Bolton, Under Secretary of State for Arms Control and International Security, to the UN Secretary General, as depository of the Rome Statute. The U.S. signature remains, but a footnote has been added next to the United States in the list of signatories that includes the text of the Administration letter. <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

² The footnote states: "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

administration deems that U.S. membership to the Court is desirable, another note would be added to the signature and the suspension would be reversed.

Although the Bush administration stated that its intention was to “respect the right of other states to be part of the ICC,”³ it has tried to weaken the effectiveness of the Court whenever possible. Immediately after announcing the signature suspension, the U.S. enacted legislation in an effort to undermine and severely inhibit the Court. The Administration informed all governments at the highest levels that it “will regard as illegitimate any attempt by the court or state parties to the treaty to assert the ICC’s jurisdiction over American citizens.”⁴ The United States also threatened to suspend all peacekeeping operations until it obtained a Security Council resolution that would provide blanket immunity for peacekeepers from arrest, detention, or prosecution by the ICC.⁵

Underlying the outcome of the 2002 U.S. policy review was the belief that the U.S. can better protect its sovereignty by attacking or ignoring the Court rather than by observing or joining it. The United States has used this as justification to weaken the Court whenever possible and to enact legislation in an effort to inhibit the Court’s proper functioning.

Bilateral Immunity Agreements and Anti-ICC Legislation

Thus far, the Bush administration and Congress have enacted Presidential agreements and legislation to try and undermine the Court. They include Bilateral Immunity Agreements (BIAs), so-called Article 98(2) agreements, the American Servicemembers Protection Act (ASPA) and the Nethercutt Amendment attached to the Foreign Operations Appropriations Bill.⁶

By signing a BIA with the United States, a country agrees to not surrender U.S. nationals to the ICC. To date, because of the threat of losing millions in military and economic aid, 100 countries have signed BIAs. The ASPA legislation cuts U.S. military aid and assistance to nations who refuse to sign BIAs and promise not to aid in the prosecution of U.S. citizens before the Court. The Nethercutt Amendment goes a step further and suspends Economic Support Fund assistance to ICC States Parties, as well as to non-state parties, who have not signed BIAs with the U.S.

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.”

³ Department of Defense, “Secretary Rumsfeld Statement on the ICC Treaty,” FDCH Federal Department and Agency Documents (May 6, 2002).

⁴ *Id.*; DEMARCHE ON THE U.S. GOVERNMENT POLICY ON THE INTERNATIONAL CRIMINAL COURT FROM SECRETARY OF STATE TO AMBASSADORS (May 6, 2002), on file with author.

⁵ On July 12, 2003, the Security Council unanimously (15 – 0) passed Resolution 1422 and expressed its intention to renew it annually. The resolution requests that “...if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, [the ICC] shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.” In an effort to gain support for a second renewal of Resolution 1422 (numbered Resolution 1487), the U.S. proposed an amended text to extend it for a 12-month period. Due to a lack of support among Security Council members, the U.S. withdrew its request. Resolution 1487 expired on June 23, 2004.

⁶ More information regarding this legislation can be found on <http://www.iccnw.org/documents/usandtheicc.html>.

However, the Dodd Amendment was incorporated into the ASPA text. It reads: “Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”

Adverse Effects

Enacting the above measures has had adverse repercussions. The relationship between the U.S. and its allies, especially due to restrictions placed on members of NATO, has become strained. Air Force General Richard Meyers said that building strong ties with other militaries is essential to the success of the war on terrorism and that the U.S. cannot do it alone.⁷ The Department of Defense has voiced concerns that ASPA has reduced foreign troop training opportunities and hurt the government’s ability to fight terrorism abroad. General Bantz J. Craddock, U.S. Southern Commander, stated that 11 of the 22 countries affected by sanctions under ASPA are from Latin America, thus “hampering the engagement and professional contact that is an essential element of our regional security cooperation strategy... extra-hemispheric actors are filling in the void left by restricted U.S. military engagement with partner nations...”⁸

There is no question that the U.S. has the right and duty to protect its personnel on missions overseas from frivolous complaints. However, language currently used in UN Status of Mission and Troop Contribution Agreements already ensures that neither troop receiving states nor the UN are capable of taking jurisdiction over qualifying U.S. peacekeepers for any purpose other than to turn them over to the U.S. authorities.

Furthermore, the principle of complementarity in the ICC Statute removes any doubt that under virtually any and all circumstances, the U.S. can guarantee its exclusive right to investigate, and if warranted, try U.S. citizens accused of committing atrocities abroad. These existing protections place checks on the power of the ICC but do not undermine the rule of law by excluding an entire category of persons, in direct contravention to the universally recognized Nuremberg principle of individual criminal accountability. This initiative, combined with U.S. action to suspend military aid to ICC states parties,⁹ is rightly being perceived around the world as part of a U.S. campaign to destroy the Court. The U.S. feels that it is justified in opposing the Court in its current form.

⁷ Rick Maze, “New Rules May Hinder U.S. Training for Foreign Troops,” *The Americas* (May 9, 2005).

⁸ Congressional Quarterly Inc., Section: Capital Hill Hearing Testimony. Committee: House Armed Service. Headline: Fiscal 2006 Defense Budget. Testimony by General Bantz J. Craddock (March 9, 2005), www.cq.com.

⁹ On July 1, 2003, President Bush announced a suspension in military aid to 35 state parties to the ICC. Waivers for the ASPA prohibition on U.S. military assistance were provided to ICC parties that have concluded, or are in the process of concluding, bilateral immunity agreements.

II. U.S. JUSTIFICATIONS FOR ITS ICC OPPOSITION

The Administration's public statements about the ICC recycle many of the misstatements and misperceptions about the Court that have been used to discredit it in the past, but also emphasize a few new points. The Administration identifies seven main reasons why the ICC does not advance the cause of justice and is not in the U.S. national interest. These include claims that the ICC is an institution of "unchecked power;" that it dilutes and usurps the authority of the UN Security Council; that it threatens U.S. sovereignty; that it interferes with states' ability to use force in self-defense or for humanitarian purposes; that it prevents U.S. cooperation with its allies due to the risk of political prosecutions; and that the Court inhibits justice by interfering with alternative justice mechanisms such as truth commissions. Finally, the Administration counterbalances its rejection of the ICC with policy justifications favoring the promotion of domestic, and as a last resort, ad hoc international proceedings to address atrocity crimes.

Point 1. "Unchecked Power" of the ICC

A common concern is that the ICC does not have any constraints on its powers, nor does a system of checks and balances exist at the Court.

In his remarks before the Center for Strategic and International Studies, Former Under Secretary Grossman said that "in the rush to create a powerful and independent court in Rome, there was a refusal to constrain the Court's powers in any meaningful way." To the contrary, there were four years of intense ICC negotiations that preceded the Rome diplomatic conference at which the Statute was adopted. The United States participated fully, constructively and aggressively in all these negotiations. At Rome, other countries made many concessions to the U.S. that limit ICC jurisdiction.¹⁰ This bald assertion also disregards the numerous limits in the Rome Statute on the Court's jurisdiction and the oversight authority of the Assembly of States Parties. Furthermore, it ignores the fact that the Court is not an integrated entity with a single mind and purpose, but consists of four independent organs deliberately designed in the Statute to have contrasting, and sometimes competing, institutional functions and objectives.

The proper checks and balances that Grossman says were excluded from the final draft of the Rome Statute included U.S. demands for exclusive UN Security Council authority to decide whether or not the Court could take up a case and, when that proposal failed, a request for a broad exemption for U.S. servicepersons and officials. Instead of violating the Nuremberg principle of individual criminal accountability by allowing *de facto* exemptions from the Court for the five permanent Security Council members, or a *de jure* exemption for the U.S., the negotiating states adopted numerous other safeguards that both limit the power of the ICC and maintain its equal treatment of all parties.

¹⁰ For example, they agreed not to give the Court "passive personality" jurisdiction, which would have expanded the Court's jurisdiction to include cases when the victim of an atrocity was the national of a state party.

Limited Jurisdiction

The ICC Statute limits the Court's jurisdiction over persons to the two most traditional bases: crimes occurring on the territory of a state party or by an accused who is the national of a state party.¹¹ Only if the Security Council refers a case under its UN Charter Chapter VII enforcement authority can the Court admit a case even though neither state has accepted the Court's jurisdiction.

Moreover, the ICC will have very limited subject matter jurisdiction to try individuals accused of the most serious crimes condemned by all nations: genocide, crimes against humanity, and war crimes.¹² The Court's jurisdiction is limited to "the most serious crimes of concern to the international community as a whole."¹³ This high legal threshold necessitates that the criminal act must have occurred on a large scale, must shock the conscience of humanity, and must, in general, be the result of deliberate plans or policies by a nation or organization.¹⁴ Thus, the Court does not have jurisdiction over all war crimes, only the worst.¹⁵

Perhaps the most significant limitation on the Court's jurisdiction is that it is a court of last resort. The principle of complementarity in the Statute ensures that no case can be admitted unless a state with jurisdiction is either unable or unwilling to act.¹⁶ As a result, the Court is obliged to defer to national proceedings – whether or not they lead to prosecution – except when it can be shown that the state in question is incapable of acting, has no independent judicial system, is unwilling to conduct proceedings, or has invoked complementarity in bad faith.

Checks and Balances

The Rome Statute further limits the Court's reach by including an intricate system of checks and balances that restrain each organ of the Court. These checks include the oversight that the Assembly of States Parties provides, the limitations placed on the Prosecutor by the Pre-Trial Chamber and the regional representation requirements of the Court

First, it is important to remember that the ICC is not monolithic, but has four independent organs whose purposes and priorities are designed to check and balance each other. The Assembly of States Parties, the governing body of the Court, has ultimate oversight authority over the Court. For example, if a judge, the Prosecutor, or the Registrar acts prejudicially, the Assembly can remove him or her.¹⁷ The Assembly, not the Court itself, is ultimately responsible for managing

¹¹ Rome Statute, Art. 12(2). A non-party state can also consent to the Court's jurisdiction over entire situations occurring in its territory under limited circumstances. *Id.* Art. 12(3), Rules of Procedure and Evidence Rule 44(2).

¹² The crime of aggression has not yet been defined and may be adopted by the Assembly of States Parties in 2009.

¹³ Rome Statute, Preamble, Art. 5(1).

¹⁴ "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Rome Statute Art. 30(1).

¹⁵ "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." Rome Statute Art. 8(1).

¹⁶ Rome Statute, Art. 17.

¹⁷ Rome Statute, Art. 46.

the administration of the Court, deciding what measures to take when a State Party fails to cooperate with the Court, and controlling the budget of the Court.¹⁸

In addition, the Prosecutor's office has no authority to decide on its own to pursue a case. While the Prosecutor can undertake a preliminary review or assessment of available information on his or her own initiative, he or she cannot begin a formal field investigation without the approval of the Pre-Trial Chamber.¹⁹ Furthermore, the judges and Prosecutor are responsible for overseeing each other's impartiality whenever it might reasonably be doubted on any ground.²⁰ The need for disqualification can be raised at any time by a person being investigated, or in the case of a judge, the Prosecutor. A majority of the judges can decide whether or not to disqualify a judge, and the Appeals chamber can decide whether or not to disqualify the Prosecutor.²¹ On the side of the defense, the establishment of the International Criminal Bar and the efforts to create an Office of the Defense Counsel will create additional independent bodies that will place even more checks on the actions of the Court's organs.

Moreover, the ability of one Court organ to act alone is also constrained by the Statute's regional representation requirements. For example, there is little likelihood that the judges themselves would band together to influence proceedings for political purposes since they must be elected by a two-thirds majority of the Assembly and no two judges may be nationals of the same state.²² Even if a trial chamber (made up of three judges from three different countries) acted inappropriately, the appeals chamber (made up of five judges from five additional countries) could overturn its decision. Similarly, the Prosecutor and Deputy Prosecutor must be elected by an absolute majority of Assembly members and must be of different nationalities from one another.²³

Finally, the Statute provides ample opportunity for both an accused and the state of nationality to themselves rein in the Court by giving them the ability to stop a case from proceeding. For example, the Prosecutor must immediately notify the state of nationality about an impending investigation,²⁴ and both the state and the accused can challenge the ICC's jurisdiction and the admissibility of the crime.²⁵ The state can also decide to conduct its own investigation and ask the Prosecutor's office to defer its investigation in accordance with the complementarity principle.²⁶

Point 2. The ICC Usurps the Power of the UN Charter

The Court violates the UN Charter by diluting and undermining UN Security Council responsibility for the maintenance of peace and security.

¹⁸ Rome Statute, Art. 112.

¹⁹ Rome Statute, Art. 15(3).

²⁰ Rome Statute, Art. 41(2)(a) and 42(7).

²¹ Rome Statute, Art. 41(2)(c) and 42(8).

²² Rome Statute, Art. 36(7).

²³ Rome Statute, Art. 42(2).

²⁴ Rome Statute, Art. 18(1).

²⁵ Rome Statute, Art. 19.

²⁶ Rome Statute, Art. 18(2).

Grossman emphasizes the fact that that the Security Council was not given absolute authority to stop the Prosecutor from proceeding with a case, and that the Statute includes the crime of aggression in the Court's jurisdiction. First, the Security Council and the ICC have two entirely different functions that in no way conflict. The responsibility of the Security Council to maintain peace and security is a political, not a judicial, role. Conversely, the ICC has no authority to judge either the political nature of an act or the motives of a state in any particular situation. It only may indict and try individuals accused of committing a crime included in its Statute. For crimes against humanity and genocide, it is not even necessary for the acts to occur during an armed conflict, and thus they need not be associated with a threat to international peace and security. Moreover, and significantly, the Statute authorizes the Security Council to act under Chapter VII of the UN Charter to suspend proceedings on a case or situation annually, and to renew this resolution indefinitely, if it perceives a conflict between the work of the Court and the maintenance of peace and security.²⁷ Therefore, the ICC does not usurp the power of the Security Council, but rather complements it, and will submit to the SC if it is in the interest of international peace and security.

Second, although opponents of the Court, including Grossman, often say that the Prosecutor has the authority to investigate and try persons for the, as-yet-undefined, crime of aggression, this is absolutely false. Until aggression is defined by an agreement of the Assembly of States Parties, which under the terms of the Statute cannot occur until 2009, no persons will be investigated or tried for this crime.²⁸ Furthermore, the ICC Statute says explicitly that any definition must be consistent with the requirements of the UN Charter.²⁹ There are currently widely differing opinions about how the crime should be defined and the conditions under which the Court should exercise jurisdiction over it. This includes disagreement as to whether the Security Council's "primary responsibility" for the maintenance of international peace and security³⁰ necessarily means that this authority is exclusive. This complex and controversial question will be debated for years to come. If the U.S. wants to direct this debate, it must remain involved in it through becoming a member of the Assembly of States Parties.

Point 3. The ICC Undermines U.S. Sovereignty

The Court threatens the sovereignty of the United States.

To the contrary, the Court is the outgrowth of the hard work and strength of purpose of approximately 150 sovereign states, including the United States, to build an institution that can try persons accused of the most serious crimes imaginable when states lack the ability or will to do so themselves. Largely because of the detailed work of the expert U.S. team that helped draft the Court's Statute, and the texts of the Elements of Crimes and the Rules of Procedure and Evidence, the crimes that the Court can try, and the ways it can obtain jurisdiction, are firmly

²⁷ Rome Statute, Art. 16.

²⁸ Rome Statute, Art. 5(2), 121, 123.

²⁹ Rome Statute, Art. 5(2).

³⁰ UN Charter, Art. 24(1).

rooted in customary international and treaty law and practice in terms that the United States has long recognized and followed.

Like any other treaty, the ICC Statute does not claim to bind in any way countries that have not ratified it, nor does it have that effect. The Court will not have jurisdiction over states or governments, but only over persons. States have no obligation to cooperate with the Court unless they have chosen to exercise their sovereignty by ratifying the Statute or by accepting its jurisdiction over a particular crime. Thus, until the U.S. chooses to ratify the Statute, the Court will not be able to reach or prosecute U.S. citizens who remain in the United States, and the U.S. will have no obligation to make them available to the Court. The only exception to this would arise if the Security Council referred a case to the Court. However, this could happen only with the consent of the United States, since it has a veto in the Security Council.

Grossman, however, argues that the power of the Court to detain and try Americans under certain circumstances is in itself a violation of U.S. sovereignty. It is universally accepted, including by the U.S., that all states have the right to legislate and enforce the law in their own territory, including the ability to try foreigners who commit crimes within their territory or to extradite accused criminals to third states when they are found in their territory. This inherent right of states has long been recognized to be in conformity with the U.S. Constitution. It is incontestable that if an American goes to France and commits a crime, France can try him or her under French law and procedure. In the case of serious atrocities, France will merely have the additional option of allowing the ICC to try that person instead of trying him or her itself. As a party to the Court's Statute, France now shares its jurisdictional authority with the ICC. A sweeping rejection of this right is in fact an attack on the sovereignty of other states.

It is important to note that U.S. law enforcement officials themselves regularly act on this right. For example, Zacarias Moussaoui, a French citizen, was convicted of conspiring to plan the September 11th attacks in the U.S. The crime of which he has plead guilty occurred in the U.S., so even though he is a French national, France has not questioned the authority of the U.S. to try him. ICC jurisdiction over U.S. citizens is based entirely on this long-established fundamental principle and practice of international law. The Court will have no more or less authority to try U.S. citizens than individual states do currently.

The U.S. not only recognizes the right of states to transfer their jurisdiction to international courts, but also it has been instrumental in creating such courts and in encouraging states to cede jurisdiction to them. For example, the U.S. has participated in the international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) – both of which could try U.S. citizens – and urged others to participate without sovereignty concerns arising.³¹

³¹ See, e.g., *Ntakirutimana v. Reno*, 184 F.3d 419 (1999), in which extradition of a Rwandan citizen to the ICTR was allowed even in the absence of an extradition treaty.

Point 4. The ICC Inhibits the Right of States to Use Force to Protect Moral and Security Interests

The ICC will hinder states from taking action in their own self-defense due to the fact that the Prosecutor or judges may decide whether this action was legal under the Statute.

Grossman says that that because the ICC prosecutor and judges will second-guess the policy decisions of states without their consent, the existence of the Court will have a chilling effect on their willingness to use force either in self-defense or in humanitarian operations. As discussed above, the Court has no authority to make judgments about state security decisions or policies. The Court will investigate state policies only to ascertain whether they directed the commission of a crime within the Court's jurisdiction. Furthermore, the Court cannot examine the legality of a leader's decision to use force – whether to act in self-defense in accordance with the UN Charter or to undertake a humanitarian intervention – until the crime of aggression is defined.³²

Beyond the Court's current lack of jurisdiction to judge whether an individual's responsibility for an act of force qualifies as a crime of aggression, it is inconceivable that political leaders would be hesitant to act in self-defense because of the existence of the ICC. If a state believes that it is in danger, it will always do everything it can to protect itself. Moreover, if a state is defending another state against attack or undertaking a humanitarian intervention to protect a vulnerable population, it can protect its leaders from accusations of aggression by securing the consent of the state in danger, or of the Security Council in accordance with the requirements the UN Charter.

Point 5. Political Pressures on the ICC

The ICC will be politically motivated against United States leaders and personnel.

Grossman repeats the often-raised fear that the Court will be politically motivated against U.S. leaders and servicemembers. Again, it is important to bear in mind the very limited jurisdiction of the Court, including the very few crimes it can investigate and the extremely high threshold that must be met before the Court can take up a case. The Court will have jurisdiction over the worst kinds of leaders who conspire with deliberate intent to commit atrocities, not over military persons who make mistakes during combat. One of the most important safeguards against politically motivated prosecutions is the centrality of the principle of complementarity to the Court's functioning. As discussed above, this means that the ICC must defer to domestic investigations and courts whenever a state has a functioning legal system and acts in good faith. Thus the U.S., even as a non-party state, has the right to take over any investigation of U.S. nationals and remove it from the Court's jurisdiction.

There is no way to prove in advance that despite the matrix of checks and balances in the ICC Statute,³³ in practice the Court will not become enmeshed in any worst case scenario that can be concocted. Nevertheless, the following political realities ensure that attempts to misuse the Court

³² See discussion in § II.2, *above*.

³³ See II.1, *above*.

for political purposes would fail, even in the unlikely event that they were tried. First, parties to the ICC are overwhelmingly countries upholding the rule of law, including our EU and NATO allies. No enemies of the U.S. have joined, and it is extremely unlikely that they will in the future, since joining the ICC would give the Court automatic jurisdiction over crimes committed on their territories or by their citizens. Even if countries joined the Court hoping to use it politically, they would not be able to do so because each state has only one vote in the Assembly of State Parties.³⁴ The Assembly's decisions, depending on the topic, require at least a simple majority³⁵ — many more than a state with a blatantly political agenda would be able to muster. Furthermore, the Statute's regional representation requirements will ensure that the Court's organs are removed from political pressures.

Ultimately, if a misuse of power occurs and remains unchecked, the ICC will lose its greatest asset: its reputation for impartiality. As a new international court, the ICC will lack any independent means by which to coerce State compliance with its orders. Without an independent police force, the success of the Court will depend almost entirely on the willingness of its member states to cooperate. As a result, the Court's only source of power will be the moral authority it accumulates as it matures into a respected institution. Only if states believe that the ICC is acting legitimately will they heed its decisions. The ICC could not long survive as a rogue court.

Point 6. The ICC harms the Promotion of International Justice

The ICC will harm efforts to promote international justice by encouraging despots to cling to power and by impeding domestic reconciliation processes, such as amnesties and truth commissions.

The ICC Statute does not prohibit any of these alternative mechanisms or even address them. Moreover, there is an enormous difference between the kinds of criminals whose guilt is so great that there is no question of a legitimate amnesty, and large numbers of lower level participants that no judicial system can competently or efficiently process. The prosecution of the worst kind of leaders in national courts, or failing that by the ICC, will in the long-term promote respect for the rule of law and national reconciliation.³⁶

Furthermore, it is extremely improbable that a dictator would refuse to give up power merely because of an ICC indictment. First, if despots have been in power for some time, it is unlikely that their countries will have ratified the ICC Statute, so none of the crimes they have committed within their states' territory could even be addressed by the ICC. Nor could a new government granting an amnesty be required to cooperate with the Court and surrender an accused. Should

³⁴ Rome Statute, Art. 112(7).

³⁵ Rome Statute, Art. 112(7). Decisions on substantive matters require a two-thirds majority.

³⁶ For the perspective of a country that has searched long for a workable peace, see the remarks of Sierra Leone at the UN 6th Committee, Nov. 12, 2001: "While it was clear that the ICC would not have jurisdiction over crimes committed in Sierra Leone, the negotiations for its establishment created greater awareness in the international community with respect to the principles of international criminal justice and the significant role that accountability can play in the consolidation of peace and reconciliation. That awareness, we believe, has motivated the current negotiations for establishment of a Special Court for Sierra Leone."

the new government ratify the Rome Statute, the Court would only have jurisdiction over crimes committed after the ratification. And if a situation were to arise in which an indictment would be a threat to the maintenance of peace, the Security Council could always request a deferral of any ICC investigation or prosecution.³⁷

It is conceivable that if a dictator would only agree to step down with a grant of amnesty, the Court could find that the state was “unwilling” or “unable” to prosecute that leader. However, the Court’s fundamental obligation to respect and complement national criminal justice makes it much more likely that the Court would decide that a national amnesty law was a legitimate legal proceeding to which it must defer. The probability of this outcome is further supported by the Prosecutor’s obligation, when deciding whether or not to initiate an investigation, to examine whether “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”³⁸ Because the Court is conceptualized and structured as a court of last resort, there is no reason for the ICC not to respect a genuinely negotiated amnesty for truth or peace.

Point 7. U.S. Preference for Domestic Criminal Accountability

Domestic courts are the best manner in which to hold criminals accountable for their actions; the ICC will inhibit countries from developing and improving their national court systems.

The Administration states that it will devote resources to ensuring that the national courts of other countries are capable of investigating and prosecuting atrocity crimes. To justify its intentions, it argues that domestic prosecutions support the growth for the rule of law. The ICC is completely in accord with this philosophy, which is why it is a court of last resort. Significantly, through the process of implementing the ICC Statute, countries are strengthening their ability to prosecute these crimes. The existence of the ICC will also help strengthen the will to prosecute domestically, because if states do not act themselves, the ICC will act for them.

However, as history shows, domestic courts are frequently unable to tackle these types of crimes. Often atrocities arise out of the disintegration of states and the institutions of law and order. It is disingenuous for the U.S. to pretend that it is going to become broadly involved in nation building and to promptly assist all the states that lack functioning courts to prosecute top-level criminals. Furthermore, even states that are technically able to try offenders themselves might prefer to avoid domestic turmoil by sending them to an international court. Nor is the creation of more ad hoc tribunals an acceptable alternative. The Security Council clearly has “tribunal fatigue” – a reality that impelled the creation of the ICC. Neither the Security Council’s permanent members, nor the other UN members, will want to create costly new courts to compete with the ICC. Finally, not every situation involving serious crimes is a Chapter VII breach of peace and security authorizing Security Council action.

³⁷ Rome Statute, Art. 16.

³⁸ Rome Statute, Art. 53(1)(c), 2(c). The Pre-Trial chamber reviews this decision.

III. THE CURRENT POLICY OF THE U.S.

Anti-ICC legislation and policies can prevent U.S. cooperation with the Court, but it cannot prevent action by the ICC. To date, three states parties have referred cases to the Prosecutor: the Democratic Republic of Congo (DRC), Uganda and the Central African Republic; and Côte d'Ivoire (Ivory Coast), a non-state party, has consented to jurisdiction. In addition, the UN Security Council passed a resolution to refer the situation in the Darfur region of Sudan to the Court. The Prosecutor has initiated investigations in the DRC, Uganda and Darfur. There are currently 99 States Parties to the ICC.³⁹

The Darfur Referral

In March 2005, the Security Council voted to refer the situation in Darfur to the ICC. Resolution 1593 passed 11-0, with four members abstaining: the United States, Algeria, Brazil and China. Since the U.S. did not veto the Security Council Resolution referring the case to the ICC, it appears that it may be ending its staunch resistance to the Court. Moreover, this action places doubt upon, and has severely undermined, the United States' objections to the Court.

Furthermore, in May 2005, U.S. Deputy Secretary of State Robert Zoellick, issued remarks on Darfur during a briefing on Sudan. He stated that the role of the ICC in Sudan sends "a signal about accountability" and is "useful deterrence against others and allows us to emphasize a tool... need[ed] to stop violence."⁴⁰

U.S. Public Opinion

It appears that Americans do not necessarily agree with the actions of the Bush Administration towards the ICC. A poll conducted by Zogby International and the International Crisis Group showed that 91% of Americans feel that the U.S. should cooperate with the ICC to help bring to justice those responsible for the atrocities in Darfur. The poll clearly indicates a strong national consensus that the U.S. should be aiding the ICC rather than opposing it.⁴¹

American citizens do not agree with the current administration's efforts in trying to limit the power of the Court. Americans see the positive effects of the Court; serving as a tool to bring to justice to those who have committed grave atrocities and to bring peace and reconciliation to those who have suffered. A majority of U.S. citizens are not as fearful as this administration is to the reach of the Court.

³⁹ Information taken from www.icc-cpi.int.

⁴⁰ U.S. Department of State, "Press Briefing on Sudan," <http://www.state.gov/s/d/rm/46922.htm>.

⁴¹ "Do Americans Care About Darfur?," An International Crisis Group and Zogby International Opinion Survey. Africa Briefing Number 26, June 1, 2005, www.crisisgroup.org.

IV. CONCLUSIONS

The Bush administration should take heed of the fact that the only way the U.S. can protect its interests at the Court is by actively participating in the Assembly of States Parties so as to shape a strong and fair institution. By joining the Court, the U.S. would also be able to take advantage of the many benefits written into the treaty for state parties. For example, parties to the Court can choose not to accept the Court's jurisdiction over war crimes for seven years.⁴² By invoking this provision, the U.S. could see how the Court handles such cases from the beginning and the United States could withdraw from the Statute if the Court exceeds its authority by engaging in political prosecutions.⁴³ As a party, the U.S. could also protect its nationals from prosecution for the crime of aggression, or any other new crimes added to the Statute, if it found the definitions unacceptable.⁴⁴

The U.S. can have a positive influence, as is shown by its past work on the Court. Throughout its strenuous participation in all the years of ICC negotiations, U.S. delegations made extensive contributions to the Court's present form. These include provisions giving strong deference to national courts, the inclusion of almost all of the U.S. Bill of Rights, and definitions of crimes in complete conformity with the U.S. Uniform Code of Military Justice. If the U.S. continues to work actively with the Court as an observer, player and referee, it will have the position and authority to guard itself against perceived threats. This will be impossible if it undermines its influence and credibility through active hostility or arbitrary refusals to cooperate with the ICC.

Again, the only effective way for the United States to protect national interests affected by the ICC is to work closely and constructively with it and to ratify the Rome Statute as soon as possible. "Separation" from the ICC and the efforts to undermine it will forfeit all influence on the future form of the Court.

Updated by AMICC Volunteer Professional Associate: Briony MacPhee

⁴² Rome Statute, Art. 124.

⁴³ Rome Statute, Art. 127.

⁴⁴ Rome Statute, Art. 121(5).