

## **Information about the US and the ICC**

### **BACKGROUND**

The US government was a long-time leader in developing the standards of international criminal law now incorporated into the ICC's Rome Statute. It was also an early advocate of establishing international courts -- from Nuremberg to the UN ad hoc tribunals for the former Yugoslavia and Rwanda to the Special Court of Sierra Leone. As an early supporter of the ICC, it also made extraordinary contributions to the development of its Statute. Significant examples of US leadership and effectiveness at the ICC negotiations include the inclusion in the jurisdiction of the Court of crimes committed during internal armed conflicts, and the drafting of a supplemental code explaining the precise actions and intent that must be proved for each of the crimes in the Statute, which the Pentagon found to be in complete accord with US military law.

However, from the beginning, the US sought to ensure that it could maintain control over the ICC, initially arguing that the UN Security Council should be able to decide whether or not the Court takes a case, and later insisting on an exemption for US servicepersons and officials. These suggestions were rejected by other nations as violating the Nuremberg principle of individual criminal accountability. Nevertheless, US concerns were addressed through compromise solutions, including basing the court on the principle of complementarity, which means that the US will always have a primary right to investigate, and if warranted, try any US national accused of a crime within the jurisdiction of the Court.

### **US ADMINISTRATION POSITION**

Although the US, along with Iraq, Israel, China, Yemen, Libya, and Qatar voted against the adoption of the ICC Statute, and did not join the approximately 140 states in Rome that adopted the Statute by consensus in July 1998, the Clinton administration continued to participate fully in the ongoing negotiations and asked his Ambassador-at-large for War Crimes Issues, David Scheffer, to sign the Statute on December 31, 2000. At the same time, President Clinton recommended that his successor not ratify the treaty, which he called "flawed."

The Bush Administration has continued to insist on full exemption from the ICC's jurisdiction for officials and agents of the United States and other governments as long as they are not party to the Rome Statute. However, both ratifying and signatory states have emphasized that this demand, which would require the Court to give preferential treatment to some suspects over others, would violate international law, and would delegitimize the Court. At first, the Bush administration sent small low-level delegations to the ongoing negotiations, but beginning in 2002 it failed to send any delegation at all. Finally, in May 2002, the administration announced that it would not participate in any activity whatsoever involving the ICC and would not cooperate with the Court once it was established. Click here for more information <http://www.amicc.org/usinfo/administration.html>.

Since July 2002 till June 2004, against the wishes of many of its allies, the United States pushed for the adoption of Security Council [Resolution 1422](#) and its later renewal in [Resolution 1487](#), to shield all current and former officials and personnel from non-ICC countries who serve in UN missions from prosecution by the ICC. Resolution 1422 allowed the Security Council the option of renewing the exemptions annually. But by June 2004, the US announced its decision not to bring Resolution 1487 up for a vote. Hostility toward the

text increased in light of the revelations of prisoner abuse in Iraq. Shortly after announcing its decision, the US pulled out peacekeepers from several UN missions, including 2 from Kosovo and 7 from Ethiopia-Eritrea. Click here for more information [http://www.amicc.org/usinfo/administration\\_policy\\_pkeeping.html](http://www.amicc.org/usinfo/administration_policy_pkeeping.html).

Currently, the Bush Administration is conducting a vigorous campaign to conclude **bilateral international agreements** to remove US nationals from the reach of the Court. The administration claims that these agreements meet the requirements of Article 98(2) of the ICC Statute. However, Article 98(2) only addresses treaties between countries covering persons that they have sent to each other on official business. The Article's wording explicitly requires the existence of a "sending state" relationship, such as when US military and civilian personnel are sent to a receiving state by the US government pursuant to Status of Forces or Status of Mission agreements (SOFAs or SOMAs). Such treaties often say that if such a person commits a crime in a country where he or she has been sent, he or she is to be returned to the sending country. Although the US has said that it is not applying pressure on states to sign non-surrender agreements, some US government officials have indicated that a state's unwillingness to sign could affect US support for its entry into NATO and lead to the cut off of US military aid. While some officials have argued that the administration is obligated by the **American Servicemembers' Protection Act (ASPA)** to withhold military aid from states parties that do not conclude such agreements, administration Spokesperson Reeker has acknowledged that the ASPA "does not prevent the United States from providing military assistance to any country when the president determines that such assistance is important to the national interests." There have been reports in the media and by foreign officials and NGOs that threats have been made toward smaller countries to cut off non-military aid as well. As of October 2004, the State Department indicates that 95 countries have signed bilateral immunity agreements with the US, 68 of which are states parties or signatories to the Rome Statute. Click here for more information [http://www.amicc.org/usinfo/administration\\_policy\\_BIAs.html](http://www.amicc.org/usinfo/administration_policy_BIAs.html).

## REACTION IN CONGRESS

In the US Congress, while there are a few very vocal members adamantly opposed to the ICC and international obligations in general, most negative votes have arisen because members lack information, have been swayed by disinformation, or see the Court as low priority. Those who oppose the Court have many of the same concerns as the Administration, but are also guided by their belief in American exceptionalism and their perception that the ICC violates US sovereignty. The **American Servicemembers' Protection Act** (ASPA), signed into law in 2002, includes provisions prohibiting cooperation with the ICC; restricts US participation in UN peacekeeping operations; prohibits direct or indirect transfer of classified national security information, including law enforcement information, to the ICC, even if no American is accused of a crime; prohibits US military assistance to parties to the ICC; and provides preauthorized authority to free members of the armed forces of the US and certain other persons detained or imprisoned by or on behalf of the ICC. However, proponents of the Court included in the final version broad waiver authority for the President, strengthened by a stipulation that no part of the bill may interfere with the President's constitutional authority to make foreign policy. Moreover, the conference committee made a deliberate decision not to modify the amendment added in the Senate version that prohibits any portion of the bill from interfering with US efforts to bring to justice foreign nationals accused of atrocious crimes (**Dodd Amendment**).

The proposed **Nethercutt Amendment** to the Foreign Operations appropriations bill, which passed the the House in July 2004, would cut Economic Support Fund aid, including some counter-terrorism funds, to all state parties to the ICC that have not signed bilateral immunity agreements (BIAs) with the U.S. The Nethercutt Amendment differs from the American Servicemembers Protection Act (ASPA) by adding economic aid cut offs to ASPA cuts in military aid and by not allowing Presidential waivers for friendly States. In addition, existing Status of Forces Agreements (SOFAs) and other bilateral agreements already provide full U.S. jurisdiction over U.S. personnel and officials serving abroad. The amendment has not yet passed the Senate. Click here for more information <http://www.amicc.org/usinfo/congressional.html>.

## **INTERNATIONAL REACTION**

The EU has made the ICC a priority issue and has called repeatedly on Washington to reconsider its position on the Court. These interchanges have made it clear that the ICC is very likely to remain a continuing irritant in EU-US relations. Nations elsewhere also continue to raise the ICC in their bilateral relations with the United States. In all of these discussions other countries point out that the US position is not compatible with the American effort to achieve worldwide cooperation in the effort against terrorism. They also call attention to its inconsistency with the US's worldwide pursuit of the rule of law and the strengthening of judicial systems, as well as with American leadership in seeking accountability for international atrocities through tribunals such as those for Rwanda and Yugoslavia. In the eyes of these countries, the US appears to have turned its back on the lessons of the wars and atrocities of the 20th century, on its own extensive and important substantive contributions to the Rome Statute and on the United Nations. Click here for more information <http://www.amicc.org/usinfo/reaction.html>.

## **US PUBLIC OPINION**

Opposition to the International Criminal Court in the United States has altered somewhat in focus and approach since the ICC has become an inescapable reality. Since it is no longer possible to urge that the Court be stopped, opposition objectives now range from the official goal of maximum separation and self protection from the Court to proposals in Congress and some sectors of the public to preempt, delegitimize and incapacitate the Court as it begins.

Among the American public, a series of polls show that around 65% of respondents support immediate American participation in the Court and ratification of the Rome Statute. AMICC has found a strong public response in various parts of the country to the Court in the establishing of local alliances. As AMICC's membership attests, the ICC cause attracts a wide and diverse variety of organizations that believe that the Court will uniquely serve and promote the individual issues and objectives to which they are committed. Click here for more information <http://www.amicc.org/usinfo/opinion.html>.