

ADMINISTRATION UPDATE

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US POLICY ANNOUNCEMENT: NULLIFICATION OF SIGNATURE

The results of the Bush Administration's policy review of the United States position on the ICC were announced by Under Secretary Marc Grossman at the Center for Strategic and International Studies on May 6, 2002. As expected, the Administration took the unprecedented act of nullifying its signature on the Rome Statute for the ICC by informing the Secretary General that that the US recognizes no obligations toward the Statute and would like its intention not to become a party reflected in the UN depository's status list. The US believes that with this action it has relieved itself of any responsibility 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 has said that as treaty depository, it takes no position on the effect of the nullification. It has emphasized that, under its view of international law, it is up to the States Parties to the Rome Statute themselves to determine the consequences of the US action, especially whether or to what extent the declaration of nullification relieves the US of the obligation accepted by its signature not to actively defeat the object and purpose of the treaty. [Read about the Bush administration's past and current ICC policy.](#)



[Under Secretary Bolton's May 6th letter to the Secretary General](#) informing him, as treaty depository, of the US signature nullification



[Under Secretary Grossman's May 6th 2002 remarks at the Center for Strategic and International Studies](#)



[Secretary of Defense Rumsfeld, Statement on the ICC, May 6, 2002](#)



[Ambassador-at-large Pierre Prosper May 6th press briefing to foreign correspondents regarding the US signature renunciation](#)



[Demarche on the US Government Policy on the International Criminal Court from Secretary of State to Ambassadors](#)



[State Department spokesman Richard Boucher's May 6th press briefing](#)



[United States Mission to the OSCE Statement on the International Criminal Court](#) Delivered by Chargé d'Affaires Douglas A. Davidson to the Permanent Council, Vienna May 16, 2002

US ADMINISTRATION ARGUMENTS AGAINST THE ICC

Although the US Government signed the ICC Statute in December 2000, it now is opposed to and unwilling to join the ICC because:

- **The US claims that the ICC potentially could investigate and try US citizens without US consent even though the US is not a party to the ICC Statute.** Because the ICC Statute has jurisdiction to investigate and prosecute only individuals, not governments, long standing principles of criminal law influence how the Court will work. One of those principles is that an individual of any nationality who commits a crime on a state's territory can be prosecuted by that state -- without the consent of his or her respective government.

American citizens are frequently prosecuted in the courts of foreign countries for crimes they are alleged to have committed on foreign territory, without any requirement to obtain US consent for those prosecutions. US courts likewise prosecute foreign nationals who allegedly commit crimes on US territory without seeking the consent of their home state.

By ratifying the ICC Statute or signing a declaration for ICC jurisdiction in a particular situation, a state delegates to the ICC its existing and continuing right under international law, and its own domestic law,

to investigate, and if warranted, prosecute, any individual of any nationality who is alleged to have committed an atrocity crime on its territory. This legal power over the foreign national exists regardless of the consent or interests of his or her government. Legal arguments disputing this application of international criminal law have not proven convincing to most governments.

- **The US says that the Court has too much unchecked power and fears that its prosecutor will be uncontrollable.** However, the ICC has many checks and balances in its Statute that limit the authority of the prosecutor and judges. For example:
 - The Prosecutor cannot pursue an investigation without the approval of at least two judges.
 - The judges, the Prosecutor, or an accused can ask that either a judge or the prosecutor be disqualified if there are doubts about his or her impartiality.
 - An independent defense unit will be a watchdog against prosecutorial and judicial abuse.
 - No two judges may be from the same state, and, given the pattern of ratification, most of the 18 judges will be from countries that are America's allies and friends.
 - The Prosecutor must immediately notify a suspect's state of nationality about an impending investigation.
 - A state can decide to conduct its own investigation of a citizen suspected of ICC crimes and thus stop the Prosecutor from acting.
 - The Assembly of States Parties, made up of member states, has ultimate oversight authority over the Court. For example, if a judge or the Prosecutor acts inappropriately, the Assembly can remove him or her.

Additional safeguards include:

- The UN Security Council can prevent the Court from proceeding with specified investigations or prosecutions for a 12-month period, and can renew that request indefinitely.
 - A state can withhold, or choose to negotiate protected disclosure of, any information that it feels would prejudice its national security interests.
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- **The US says that the ICC could investigate and prosecute US leaders for the "crime of aggression"** (that is, the unlawful use of force by one state against another, for example, Iraq's invasion of Kuwait in 1990). However, until the Assembly of States Parties can agree on an actionable definition for this crime (which under the terms of the ICC Statute cannot occur for at least seven years) and the Statute is amended by seven-eighths of the states parties to include this definition, the Court has no authority to charge any individual with this crime. If the US were to join the Court, it could permanently "opt out" of the crime of aggression and thus shield its leaders and indeed all of its citizens from being charged with aggression.
 - **The US argues that the Court's very existence threatens US sovereignty.** However, the Court will not judge the actions of states or governments, but only persons. Moreover, like any other treaty, the ICC Statute does not obligate or impose duties on any state that is not a party to the treaty. States have no obligation to cooperate with the Court unless they have chosen to exercise their sovereign right to ratify the Court's Statute. Thus, until the US chooses to ratify the ICC Statute, the Court will not be able to gain custody of US citizens who remain in the United States, and the US will have no obligation to transfer them to the Court.
 - **The US fears that the Court will be politically motivated against US leaders and soldiers.** The Court can only investigate the designated types of very serious crimes of high magnitude that fall within the Court's jurisdiction -- crimes that would never conceivably be authorized as part of any military strategy by the U.S. armed forces.

Nonetheless, Washington argues that there is always the possibility of politically motivated charges being lodged against US leaders and soldiers. However, the ICC Statute has many safeguards, most introduced by US negotiators, to thwart politically motivated charges and thus maintain the integrity of

the Court. One of the primary safeguards is the power of the US, even as a non-party to the Court, to pre-empt the Court with its own national investigation of any such charges.

In spite of the safeguards, if the Court were to succumb to politically motivated charges lacking any legal merit, its own future, particularly its financial future, would be at great jeopardy as states that are members of the Court realize that they too could be subjected to such unwarranted actions.

Further, states that have joined the ICC are in large part America's allies and friends. Aggressive and rogue regimes would be at high risk of their leaders being prosecuted if they were to join the ICC. For example, if Iraq were to join the ICC, the Court then would be able to prosecute Saddam Hussein if his forces continued to commit crimes against humanity in the southern marshes of Iraq.

Finally, the ICC does not have a police force. Its power will depend entirely on the willingness of its members and the Security Council to enforce its decisions. The ICC will quickly lose credibility if it acts illegitimately.

- **The US says that it prefers to support trials in the country where the atrocity took place.** The founders of the ICC support this view, which is why they made it a court of last resort. Significantly, in joining the Court, many countries are adopting laws that strengthen their ability to prosecute war criminals themselves. The existence of the ICC also will help to strengthen states' will to act domestically, because if they do not, the ICC may have jurisdiction in a case and act on it.

History shows that national courts are frequently unable or unwilling to prosecute these types of crimes. Often atrocities arise out of the disintegration of states and the institutions of law and order. And even states that are capable of trying the accused themselves might occasionally prefer to avoid domestic turmoil by delegating such high-profile cases to an international court. For instance, Sierra Leone has said that:

"The result of this request [for a Special Court for Sierra Leone] is Resolution 1315 of the Security Council. The point here is that if the International Criminal Court had begun to function, Sierra Leone would not have requested the setting up of a Special Court. The perpetrators of those heinous crimes committed in my country, would have been handed to the Jurisdiction of the Court. [Read the full text.](#)

- **The US has constitutional concerns about the ICC Statute, particularly with the due process rights accorded defendants.** However, the ICC Statute contains the due process rights found in the US Constitution and now well recognized in international standards of due process, with the exception of the American right to jury trial.

In the negotiations, the US accepted the absence of jury trial because civil law systems, which formed the large majority of states negotiating the ICC Statute, do not have jury trials and because it actually is extremely impractical to empanel a jury of peers from the international community to pass judgment on the crimes and defendants of the ICC. Indeed, just as the ad hoc tribunals for the former Yugoslavia and for Rwanda rely on panels of experienced judges, so too would the ICC require the expertise and integrity of judges to examine these complex crimes. Any potential American defendant, as unlikely as that might be, would doubtless prefer expert judges to rule on his or her conduct than a cross-section of foreign nationals drawn from around the world. There is a real difference between an international trial and a domestic trial for these purposes.

In any event, US service members do not enjoy a constitutional right to jury trial under US law. Also, pursuant to the many extradition treaties to which the US is a party, the US may, and occasionally does, extradite a US citizen to foreign courts that lack the right to jury trial and other due process rights. The ICC's procedures are more analogous to US law than perhaps any other state's legal system, so it would be more advantageous for an American citizen to be tried before the ICC, if that unlikely event ever were to occur, than in most foreign courts.



[Read more about the Bush administration's objections and see AMICC's response.](#)