

OVERVIEW OF THE UNITED STATES' OPPOSITION TO THE INTERNATIONAL CRIMINAL COURT

Brief Overview of U.S. Position toward the ICC

The United States has historically supported international mechanisms to enhance accountability for war crimes, crimes against humanity, genocide, and other violations of international humanitarian law. However, the United States voted 'no' to the Rome Statute during the Rome Conference in 1998 when its demand that it maintain its Security Council veto on possible cases was not met. In an effort to maintain US influence in the drafting process and due to a deep-seated belief in the principles underlying the ICC, President Clinton signed the Rome Statute on December 31, 2000, on the last day that the Rome Statute was open for signature, demonstrating an ongoing policy of "constructive engagement." After the Bush Administration entered office, on 6 May 2002, President Bush "suspended" the Clinton signature, demonstrating that the United States would no longer be involved in the ICC process and that it did not consider itself to hold any legal obligations under the treaty. Since then, the Bush Administration has undertaken a policy of "active opposition" to the Court through a global campaign to obtain immunity from ICC jurisdiction through a multi-pronged approach.

Bilateral Immunity Agreements (BIA)

As part of its efforts, the Bush administration has been approaching countries around the world seeking to conclude Bilateral Immunity Agreements (BIAs), purportedly based on Article 98 of the Rome Statute, excluding its citizens and military personnel from the jurisdiction of the Court. These agreements prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel, and US employees (including contractors) and nationals. These agreements, which in some cases are reciprocal, do not include an obligation by the US to subject those persons to investigation and/or prosecution. Many governmental, legal and non-governmental experts have concluded that the bilateral agreements being sought by the US government are contrary to international law and the Rome Statute. Furthermore, the United States has gone so far as to suspend military assistance to those States Parties which do not sign these agreements, amounting to arm-twisting and bullying of economically vulnerable States that support the ICC.

While 101 governments have reportedly signed BIAs, less than 40% of these agreements have been ratified by Parliament or signed as an executive agreement. In fact, many legal experts argue that the executive agreements are unconstitutional and require the approval of Parliament, and are thus not valid agreements. Furthermore, more than half of States Parties have resisted signing BIAs – despite large economic penalties imposed by the U.S. – and 53 countries continue to publicly refuse to sign. In addition, several intergovernmental bodies have publicly opposed these agreements and have encouraged other states to resist signing such agreements and continue to uphold the integrity of the Rome Statute.

For more information on BIAs, please visit <http://www.iccnw.org/?mod=bia>.

American Servicemembers' Protection Act (ASPA)

The first legislation adopted by the US Congress, in August 2002, is known as the American Servicemembers' Protection Act (ASPA). This legislation, often known as "The Hague Invasion Act," contains provisions restricting US cooperation with the ICC, making US support for peacekeeping missions largely contingent on achieving impunity for all US personnel, and even granting the President permission to use "any means necessary" to free US citizens and allies from ICC custody in The Hague.

The Coalition for the International Criminal Court is a global network of over 2,000 civil society organizations supporting a fair, effective and independent International Criminal Court.

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In particular, Section 2007 prohibits US military assistance to parties to the ICC that have refused to sign a bilateral immunity agreement. Officials in the Bush Administration have used this provision to warn countries that they could lose US military assistance if they became or were members of the ICC without pledging to protect US nationals serving in their countries from the Court's reach. The legislation, despite its harsh rhetoric, contains waivers that make all of these provisions non-binding; the Bush administration has selectively used these waivers but continues to pressure countries around the world to conclude bilateral immunity agreements – or otherwise lose essential US military assistance.

Fortunately, the Senate also included by unanimous consent a provision (Section 2015) offered by Senator Christopher Dodd (D-CT) that explicitly permits the United States to render assistance to international efforts to bring to justice foreign nationals accused of genocide, war crimes or crimes against humanity.

On 2 October 2006, President Bush waived International Military Education and Training (IMET) aid prohibitions to 21 ICC States Parties that have refused to conclude a BIA. Additionally, the Defense Authorization Act for FY 2007, which was signed by President Bush on 17 October, restores all IMET funding previously denied under ASPA. These developments, however, do not reinstate Foreign Military Financing (FMF) aid threatened by ASPA.

For more information on ASPA, please visit: <http://www.iccnw.org/?mod=aspa>.

For more information on the ASPA and Nethercutt waivers, visit: http://www.iccnw.org/documents/CICCF5-UpdateWaivers_final.pdf

The Nethercutt Amendment

In December 2004, Congress adopted the Nethercutt Amendment, as part of the US Foreign Appropriations Bill. This legislation is far more wide-reaching than ASPA and authorizes the loss of Economic Support Funds (ESF) to all countries, including many key US allies, which have ratified the ICC treaty but have not signed a bilateral immunity agreement with the US. While the President has the authority to waive the provisions of the Amendment, it poses the threat of broad cuts in foreign assistance, including funds for cooperation in international security and terrorism, economic and democratic development, human rights, and promoting peace processes. The Nethercutt provision was again debated in 2005, and was adopted in the joint Appropriations Bill for 2006.

On 28 November 2006, President Bush waived Nethercutt funding restrictions on 14 countries that were previously denied ESF aid. However, three countries – Ireland, Brazil, and Venezuela – still have a total of approximately \$15 million in ESF aid threatened.

For more information on Nethercutt, please visit <http://www.iccnw.org/?mod=nethercutt>.

ICC Immunity in Security Council Peacekeeping Resolutions (SC 1422/1487)

As part of the US campaign to get blanket immunity for US peacekeepers, the US advocated for Security Council Resolution 1422 in July 2002, which granted immunity to personnel from ICC non-States Parties involved in United Nations established or authorized missions for a renewable twelve-month period. The United States obtained Resolution 1422 after threatening to veto the renewal of a peacekeeping operation unless it obtained such immunity and despite strongly voiced opposition by many States. In June 2003, Resolution 1422 came up for renewal in the Security Council and was again met with opposition during an open debate. While the resolution was renewed (as Resolution 1487), France, Germany, and Syria abstained, representing a significant shift since the Resolution's unanimous adoption the previous year. Despite US efforts to renew this resolution again in 2004, the US withdrew the resolution after realizing that it would not garner enough votes for its passage.

For more information on Security Council Resolutions 1422/1487, please visit <http://www.iccnw.org/?mod=immunityresolutions>.

Some Resources on the United States' Opposition to the ICC

American NGO Coalition for the ICC (AMICC): www.amicc.org

Citizens for Global Solutions: http://www.globalsolutions.org/programs/law_justice/icc/icc_home.html

Washington Working Group for the ICC (WICC): <http://www.usaforicc.org/wicc>

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