The United States and the International Criminal Court:
The Bush Administration’s Approach and a Way Forward Under the Obama Administration

By
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I. INTRODUCTION

In the Bush Administration’s range of policies that had negative ramifications for the promotion and respect for international human rights, its approach to the International Criminal Court (ICC) was of particular significance. What was striking was not the Administration’s position on the United States’ becoming part of the court—the Clinton Administration also had concerns over joining—but rather the intense, virulent assault that the Bush Administration advanced on the Court. Despite official claims to the contrary, the Bush Administration’s approach, which was far more strident during its first term, appeared to be an intensive effort to cripple the Court.

The Bush Administration’s attacks on the ICC did not fundamentally or irrevocably alter the legal landscape of international human rights and justice or the advancement of the ICC’s mission or work. It did, however, have a major impact on U.S. credibility to promote these crucial goals.

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It is vital that the Obama Administration chart a different course. U.S. ratification of the Rome Statute is an important goal. However, the Administration should also take a number of steps to develop a constructive relationship with the ICC long before a decision on ratification may become ripe. Efforts to establish a more positive relationship with the Court will help the U.S. repair relationships with its allies and reassume its role as a global leader in advancing human rights and international justice.

II.
THE BUSH ADMINISTRATION’S MULTI-PRONGED ASSAULT ON THE ICC

The International Criminal Court was established in 1998 following a round of intensive negotiations that took place in Rome. The signing of the treaty establishing the court, known as the “Rome Treaty,” was the result of years of diplomatic efforts to create a permanent international court to try genocide, crimes against humanity, and war crimes. Under the Clinton Administration, the U.S. government played a major role in the negotiations, but in the end, was dissatisfied with a number of elements in the treaty. In particular, the U.S. disapproved of provisions in the treaty granting the ICC’s prosecutor the discretion to begin investigations at his or her own initiative, as well as provisions allowing the court to exercise jurisdiction over citizens from non-states parties for crimes that allegedly took place on the territory of an ICC state party. At the same time, the treaty addressed a variety of U.S. concerns regarding other important issues. While President Clinton ultimately signed the treaty, he did so in the final hours before the signature deadline, and with caveats indicating that ratification was unlikely.

2 These included, for example, an authority by the Security Council to defer ICC investigations and prosecutions. See Establishment of a Permanent International Court: Hearing Before the S. Foreign Relations Comm., 105th Cong. 724 (1998) (testimony of David Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference).
Some of the Bush Administration’s concerns were similar to those of the Clinton Administration and were based on fears that the ICC would be a politically-driven institution that would pursue cases against U.S. citizens. Nevertheless, the Bush Administration’s campaign against the ICC was of a qualitatively different nature than the Clinton Administration’s and of a far greater intensity.

Specifically, the Bush Administration deliberately punished states that were party to the ICC—including democratic, human-rights-respecting allies. The U.S. government also threatened United Nations’ efforts to assist countries in crisis where such efforts would directly or indirectly legitimize the ICC. The Administration’s approach seemed to be driven by ideology, divorced from a real assessment of the risks posed by the Court and without regard for the negative ramifications that would result from attacks against allies that supported the Court.

The highlights of the Bush Administration’s campaign were:

A. “Unsigning” the Rome Treaty

On May 6, 2002, then Under Secretary of State for Arms Control and International Security John Bolton submitted a letter to then U.N. Secretary-General Kofi Annan stating that the United States did not intend to become a party to the ICC and that the Clinton Administration’s signature no longer carried any legal obligations. While there are differing opinions as to the legal effect of this action, it carried major political significance.

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4 Press Release, U.S. Dep’t of State, International Criminal Court: Letter to UN Secretary General Kofi Annan, (May 6, 2002), http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm (“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 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”). Signature of a treaty imposes legal obligations upon a state “to refrain from acts which would defeat the object and purpose” of that treaty. Vienna Convention on the Law of Treaties, art. 18(a), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Although the United
B. Bilateral Immunity Agreements (BIAs)

BIAs are agreements that shield U.S. citizens from ICC prosecution in the event that these citizens are implicated in serious crimes on the territory of states that are subject to ICC jurisdiction. These agreements are inconsistent with states parties’ obligations under the ICC statute. Nevertheless, the Bush Administration placed intense pressure on states to conclude BIAs. As of 2006, over 100 such agreements had been signed.

C. The American Servicemembers’ Protection Act of 2002 (ASPA)

ASPA was perhaps the most notorious and damaging aspect of the Bush Administration’s anti-ICC policy. The legislation prohibited U.S. cooperation with the ICC; authorized the President to use all means necessary and appropriate to free U.S. and certain allied personnel detained by the ICC (the “invasion of The Hague” provision); refused military aid to ICC states parties (except major U.S. allies); and prohibited U.S. participation in peacekeeping unless immunity from the ICC was granted for U.S. personnel.

States is not a party to the Vienna Convention, the treaty’s provisions are considered to be customary international law.

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The impact of ASPA included the withholding of military assistance from some 20 ICC states parties because of their resistance to BIAs, including emerging democracies such as Benin, Croatia, and Mali, along with states across Latin America, including Bolivia, Brazil, Costa Rica, Ecuador, Paraguay, Peru, Uruguay, and Venezuela.9

D. The Nethercutt Amendment

In December 2004 Congress adopted the Nethercutt Amendment as part of the U.S. Foreign Appropriations Bill.10 This amendment authorized far wider cuts than did ASPA for ICC states parties that refused to sign BIAs. Specifically, the amendment authorized cuts to these countries’ Economic Support Fund (ESF) assistance programs, including funds aimed at helping U.S. allies promote democracy, fight terrorism and corruption, and resolve conflict.11 The Nethercutt Amendment threatened over 50 governments with cuts in aid, including major allies such as Poland, which was in the “coalition of the willing,” and Jordan, which was involved in training Iraqi police.12 Ultimately, aid was cut to seven ICC states parties and two intergovernmental programs that funded multiple ICC states parties (affecting at least ten ICC states parties in total, although not Poland and Jordan).13


13 See CICC, Countries opposed to signing a US Bilateral Immunity Agreement (BIA): US aid lost in FY04 & FY05 and threatened in FY06,
Some of the more significant cuts were Peru ($4 million), Ecuador (over $1 million), and Kenya (over $1 million).\textsuperscript{14}

\textbf{E. Attacks on the ICC at the United Nations}

The Bush Administration pressed for and secured, in Security Council Resolutions 1422 (2002) and 1487 (2003), immunity before the ICC for personnel from non-ICC states parties involved in U.N. operations.\textsuperscript{15} Like BIAs, the immunity provisions in these resolutions conflicted with ICC treaty obligations for states parties.\textsuperscript{16} Initially, the U.S. government went so far as to veto continuing a peacekeeping operation in Bosnia in 2002 because it was unable to secure similar immunity provisions in the authorizing Security Council Resolution.\textsuperscript{17} In addition to its efforts to secure immunity through Security Council resolutions, the U.S. government regularly sought to delete reference to the ICC in the work of the Security Council and General Assembly even where such reference was highly relevant, such as in the text of a Security Council resolution on the protection of civilians during armed conflict.\textsuperscript{18}

\textsuperscript{14} Id.


\textsuperscript{18} See The American Non-governmental Organization Coalition for the International Criminal Court, \textit{Chronology: From ‘Signature Suspension’ To Immunity Agreements To Darfur}, (Oct. 23, 2006), available at
III.
THE IMPACT OF THE U.S. CAMPAIGN AGAINST THE ICC AND A SHIFT IN APPROACH

While the Bush Administration’s campaign against the ICC seriously undercut the U.S.’s credibility as a leader in human rights, accountability, and the rule of law, it did not fundamentally thwart the ICC’s forward progress or its perceived legitimacy. Notably, the Court benefitted from the principled support from states around the world, even though in some instances these states conceded to U.S. demands to enter into BIAs. Indeed, the Court never became the rogue institution feared by the United States. Judges were elected, major officials were appointed, and the Court opened investigations in four situations—northern Uganda, the Democratic Republic of Congo, Central African Republic, and Darfur, Sudan—where some of the gravest crimes have been committed since the court’s jurisdiction began. The ICC’s attention to its substantive work—leading in 2009 to its first trial, of Congolese warlord Thomas Lubanga—helped bring legitimacy to the Court and undercut unjustified claims against it.

Over time, the Bush Administration softened the intensity of its attacks on the Court. A major turning point was the U.S. decision to allow the Security Council to refer Darfur to the ICC in March 2005. This represented the first time the United States did not oppose a major ICC-supportive initiative at the Security Council. By enabling the referral—albeit through abstaining from the vote—the United States implicitly accepted the ICC as a legitimate judicial institution that could serve the important function of ensuring justice and accountability for serious crimes.


Many of the cuts in assistance to allies who supported the Court were also ultimately revoked. On October 17, 2006, President Bush signed into law an amendment to ASPA, which removed restrictions on aid for military education and training. On January 22, 2008, Congress further amended ASPA to eliminate restrictions on foreign military financing for nations that refused to enter into BIAs.  

The Bush Administration continued to moderate its opposition to the ICC in its last years. The U.S. government stood firmly behind the Security Council’s decision to grant the ICC jurisdiction to address the conflict in Darfur, including by in 2007 and 2008 insisting that the government of Sudan cooperate fully with the ICC and making clear it would not support deferral of the ICC’s work in Darfur.  

The Administration even abstained from the vote to renew the peacekeeping operation in Darfur in 2008 when language in the Resolution was interpreted as undercutting the ICC’s role. 

One factor that may have resulted in this shift in the Bush Administration’s approach to the ICC was the realization that

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opposition to the Court at times conflicted with other important U.S. interests. For example, a key way to help victims in Darfur, a major policy priority, was to bring the perpetrators of these crimes to justice, and the ICC provided the most viable means to bring about prosecutions.

The Bush Administration’s policy of cutting military aid to allies that were party to the ICC proved to be particularly problematic. As General Bantz J. Craddock, then Head of US Southern Command, said: “Providing opportunities for foreign military personnel to attend school with U.S. service members is essential to maintaining strong ties with our partner nations. Decreasing engagement opens the door for competing nations and outside political actors who may not share our democratic principles to increase interaction and influence within the region.”23 Vice Admiral James G. Stavridis of the U.S. Southern Command in 2006 similarly said that the U.S. “has lost the opportunity to forge relationships with the military officers from [the sanctioned] countries and to educate them on the democratic principles by which our military operates.”24 More generally, then Secretary of State Condoleezza Rice said in 2006: “[W]e’re looking at the issues concerning those situations in which we may have, in a sense, sort of the same as shooting ourselves in the foot” by cutting aid to “countries with which we have important counterterrorism or counterdrug” initiatives or cooperation on Afghanistan and Iraq.25

A second important factor behind the Administration’s change of policy was that the Court became a legitimate functioning institution. Attacking the ICC based on fears that the Court would operate on the basis of political considerations when such fears did not materialize in practice became increasingly impractical.

In some instances, allies pushed back to reject U.S. initiatives against the Court. The most notable example of this was the defeat of the U.S.’s effort to renew Resolution 1487, which had given personnel from non-states parties engaged in U.N. operations

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24 Id. at 3 (quote from Sept. 19, 2006).
25 Id. at 1 (quote from Mar. 10, 2006).
immunity before the ICC.\textsuperscript{26} Defeat of this Resolution was fueled by revelations of U.S. abuses in Baghdad’s Abu Ghraib prison, which coincided with the U.S.’s push for renewal. Security Council members who had previously bowed to U.S. demands were emboldened to push back on what was essentially a separate standard for U.S. personnel and personnel from other non-ICC states parties.\textsuperscript{27}

The softening of the Bush Administration’s approach to the ICC was a positive development. But the harm to U.S. credibility caused by its earlier approach to the Court was considerable.

IV.
THE OBAMA ADMINISTRATION: A WAY FORWARD

The Obama Administration should put the United States back on a solid footing as a promoter of human rights and justice. Of course, ratification of the Rome Treaty, which would allow the United States to fully support and participate in the ICC’s work, should remain one of the Administration’s major goals.

Apart from ratification, however, there are a number of important steps that the Obama Administration should take to develop a more constructive relationship between the U.S. and the Court. These include, but are not limited to:\textsuperscript{28}

**Assisting the court in its cases:** Effective U.S. assistance and cooperation can play a valuable role in strengthening the Court’s work as the ICC seeks to apprehend and prosecute suspects. Specifically, the Obama Administration could provide the ICC with valuable assistance by sharing relevant information and evidence, by facilitating and pressing for the arrest of individuals sought by the court, and by supporting appropriate Security Council resolutions, such as those referring cases to the Court or calling for cooperation with the Court.


\textsuperscript{27} Id.

Participating in the ICC’s Assembly of States Parties (ASP) and the ICC’s review conference in a genuine and respectful manner: ICC states parties meet several times a year at ASP meetings to discuss important matters regarding the ICC. Meetings cover issues such as the Court’s budget and strategic plan and a definition for the crime of aggression for possible use by the Court. As such, these meetings provide an opportunity for the U.S. to learn about and exchange views on the Court’s work.

Contributing to the ICC’s Trust Fund for Victims: The ICC Trust Fund for Victims is a novel component of international justice that will help ensure that victims receive reparations and other forms of compensation. A significant feature of the fund is that it gives support to projects that benefit communities of victims regardless of whether the ICC issues judgments with respect to these individuals. U.S. contributions to this fund would provide much needed support for these communities.

Withdrawing or otherwise rejecting the Bush Administration’s purported “unsigned” of the ICC statute and signaling opposition to the remaining provisions of ASPA: As stand-out components of the Bush Administration’s approach to the ICC, especially during its first term, the Obama Administration should openly disavow the “unsigned” of the Rome Treaty and remaining provisions of ASPA to send an important message that a new era has begun.

Implementing these measures would have a range of benefits. It would help restore U.S. standing with friends and allies that make up the vast majority of the court’s members. It would ensure a positive U.S. contribution to advancing the world’s first permanent international criminal court. It would pave the way for the U.S.—historically an advocate for human rights, the rule of law, and international justice—to become a party to an institution that seeks to promote these ideals.

Moreover, given the evolution of the Bush Administration’s approach to the ICC in its final years, a more positive approach would not reflect a radical repositioning by the Obama Administration. Constructive engagement with the Court rather would represent a continuation of an ongoing trend.

The Obama Administration has indicated that it is reviewing the U.S.’s relationship with the ICC. While this review is pending, the U.S. is losing opportunities to engage positively with the court, such as by attending ASP meetings. The Obama Administration should no longer delay in taking steps to develop a more
constructive relationship with the Court. The Administration has much to gain and little to lose by signaling that it is committed to justice, human rights, the rule of law, and respect for other nations dedicated to the same principles.