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# RE-SHAPING THE “MONROE DOCTRINE”: UNITED STATES POLICY CONCERNS IN LATIN AMERICA URGENTLY CALL FOR RATIFICATION OF THE INTERNATIONAL CRIMINAL COURT

The United States has identified important policy goals for Latin America,<sup>1</sup> but its opposition to the International Criminal Court (ICC) blocks the accomplishment of these goals. Essentially, all major Latin American nations have ratified the ICC.<sup>2</sup> However, these countries are now cut off from cooperating with U.S. policy initiatives in the region because of U.S. opposition to the ICC.<sup>3</sup>

## I. INTRODUCTION: WHAT IS THE UNITED STATES MILITARY DOING IN PARAGUAY?

The confrontation between the U.S. and Latin America over the ICC became apparent recently when the U.S. military sent 400 troops to a remote region of Paraguay to conduct operations for eighteen months.<sup>4</sup> U.S. and Paraguayan officials say that the goal of recent joint military exercises is to increase collaboration on counter terrorism, drug-fighting, and humanitarian aid efforts.<sup>5</sup> According to Alvin Plexico, a Pentagon official, the operations will “strengthen the US-Paraguay military-to-military relationship and improve joint training.”<sup>6</sup>

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1. The policy goals are focused on combating Latin American security threats caused by drugs and terrorism. “Several countries are confronting costly threats to security—even in terms of narco-terrorism or violent crime—that undermine the rule of law and political stability.” *Challenges and Opportunities for U.S. Policy in the Western Hemisphere: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on International Relations*, 108th Cong. 7 (2004) (statement of Roger Noriega, Assistant Secretary of State for Western Hemisphere Affairs, U.S. Department of State), available at <http://www.foreignaffairs.house.gov/archives/108/90359.pdf> [hereinafter *Challenges and Opportunities*].

2. International Criminal Court Assembly of States Parties, <http://www.icc-cpi.int/region&id=5.html> (last visited Sept. 5, 2006). The twenty Latin American countries that have ratified the ICC include regional powers such as Argentina, Brazil, Mexico, and Venezuela. *Id.*

3. *Fiscal 2006 Defense Budget: Hearing Before the H. Armed Services Comm.*, 109th Cong. (2006) (testimony of General Bantz J. Craddock, Commander, U.S. Army Southern Command), available at <http://www.amicc.org/docs/Craddock?20Statements%203-05.pdf> [hereinafter *Fiscal 2006 Defense Budget*].

4. Sam Logan, *U.S. Rethinks Military Presence in South America*, ISN SECURITY WATCH, Sept. 21, 2005, <http://www.isn.ethz.ch/news/sw/details.cfm?ID=12899>.

5. Kevin Gray, *U.S. Military in Paraguay Unsettles South America*, RESOURCE CENTER OF THE AMERICAS.ORG, Sept. 28, 2005, <http://www.alertnet.org/thenews/newsdesk/N26651120.htm>.

6. See Logan, *supra* note 4.

However, the current U.S. military operation in Paraguay has brought attention to the confrontation between the U.S. and Latin America over the refusal of the U.S. to join the ICC. Argentina has expressed a general Latin American concern that these military exercises should not occur until the United States agrees to join the ICC.<sup>7</sup> As support for its position, Argentina cites the ICC's goal of universal justice, encouraging the U.S. to add this goal to its foreign policy scheme.<sup>8</sup>

Further concerns about the reluctance of the U.S. to join the ICC have been raised by MERCOSUR.<sup>9</sup> MERCOSUR is an economic bloc which includes Uruguay, Brazil, and Argentina, in addition to Paraguay.<sup>10</sup> Allowing the presence of the U.S. military in Paraguay allegedly goes against the framework of MERCOSUR.<sup>11</sup> One MERCOSUR member, Brazil, called for transparency in the military cooperation between Paraguay and the U.S. and expressed its disagreement with Paraguay's decision to permit military operations.<sup>12</sup>

Many unsettling questions remain about the U.S. military presence in Paraguay.<sup>13</sup> Indeed, growing numbers of protestors in the region are demanding that the U.S. offer legitimate reasons for its refusal to join the ICC if it plans to remain in Paraguay.<sup>14</sup>

7. *Concern in Argentina at U.S. Troops in Paraguay*, RESOURCE CENTER OF THE AMERICAS.ORG, Sept. 13, 2005, [http://www.americas.org/item\\_21778](http://www.americas.org/item_21778).

8. *Id.*

9. *Brazil Denounces U.S. Military Presence in Paraguay*, BRAZZIL MAG., Sept. 14, 2005, [http://www.brazzilmag.com/index.php?option=com\\_content&task=view&id=3947&Itemid=49](http://www.brazzilmag.com/index.php?option=com_content&task=view&id=3947&Itemid=49).

10. *Id.*

11. *Id.*

12. *Id.*

13. Larry Birns, a political analyst and executive director of the Council on Hemispheric Affairs in Washington, stated that the increased military ties with Paraguay could damage political relationships in the region. He called on Washington to address the unsettling questions surrounding the operations before further damage is done. Birns said the operations have the potential for "damaging regional geopolitical ramifications far beyond anything that Washington may have anticipated as of now. We would like to remove this temptation before it gets Washington into trouble." Kelly Hearn, *U.S. Military Presence in Paraguay Irks Neighbors*, CHRISTIAN SCI. MONITOR, Dec. 2, 2005, at 25.

14. The protestors are concerned with the refusal of the United States to ratify the ICC. Their concerns were magnified by the recent decision of the Paraguayan legislature to grant immunity from international prosecution to the U.S. soldiers conducting operations in Paraguay.

On January 17, members of Paraguayan social and political organizations marched in Asunción and burned U.S. flags to protest the presence of U.S. soldiers in their country, and to condemn the Paraguayan legislature's decision last year to let in the troops and grant them immunity from prosecution. The protests are being held on the 17th day of each month, with a larger national mobilization planned for May, 2006, as a new contingent of U.S. troops is expected to arrive in June. The protests are also being coordinated with activists in other countries.

*March Against U.S. Troops*, WEEKLY NEWS UPDATE ON THE AMERICAS, Jan. 29, 2006 (#835),

This Note explores the growing tensions between the U.S. and Latin America over the role of the ICC. It argues that U.S. ratification of the ICC is essential to accomplish urgent policy priorities in the region.

## II. THE EVOLUTION OF U.S. POLICY REGARDING LATIN AMERICA

The United States has a history of political and military intervention in Latin America that dates back to the Monroe Doctrine.<sup>15</sup> The Monroe Doctrine stated that the United States would protect the interests of the Western Hemisphere from outside sources of interference.<sup>16</sup> However, after the Monroe Doctrine was adopted, military intervention, combined with a desire to dominate the region economically, shaped U.S. policy toward Latin America.<sup>17</sup>

During the Cold War, U.S. policy focused on combating communism in Latin America.<sup>18</sup> This made human rights policy a second-tier concern.<sup>19</sup> As a result, the U.S. tolerated and even supported regimes that were "violating human rights but deemed anti-communist."<sup>20</sup>

U.S. policy toward Latin America changed significantly following the decline of the perceived communist threat. This policy shift has made it possible for the U.S. to give greater respect to the sovereignty of Latin American nations and to increase its concern for human rights in the region. Further, the U.S. has been able to address regional issues through multilateral efforts rather than its historical tendency towards unilateral

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available at [http://www.americas.org/item\\_24687](http://www.americas.org/item_24687).

15. The concept of U.S. control over affairs of the Western Hemisphere, known as the "Monroe Doctrine," first took hold nearly 200 years ago. Since that time the doctrine has become deeply entrenched in our policy toward Latin America. "Ever since [adoption of] the Monroe Doctrine, the United States has regarded Latin America largely as U.S. 'turf.' It has been almost second nature for administrations in Washington, D.C., to intervene politically and militarily and to dominate economically in the region." *Introduction! U.S. and Latin American Relations*, WORLD AND I, Sept. 2004 [hereinafter *U.S. and Latin American Relations*].

16. James Monroe, Message from the President of the United States to Both Houses of Congress at the Commencement of the First Session of the Eighteenth Congress (Dec. 2, 1823), available at <http://web.lexis-nexis.com/congcomp> (search "Enter search terms" for "State of the Union," restrict search by "Congress," select "18(1823-1825)"; follow "State of the Union Address" Dec. 2, 1823, 15 pp. hyperlink; follow "Replica of Original-Complete" hyperlink). See also U.S. State Dep't, The Monroe Doctrine, <http://usinfo.state.gov/usa/infousa/facts/democrac/50.htm>. President James Monroe made the Monroe Doctrine's bold pronouncement of the U.S. role in the Western Hemisphere in 1823, when Latin America was just emerging from colonization. *Id.*

17. See *U.S. and Latin American Relations*, supra note 15.

18. Kati Suominen, *U.S. Human Rights Policy Toward Latin America*, SPECIAL REPORT (U.S. Inst. of Peace), Jan. 23, 2001, at 2, available at <http://permanent.access.gpo.gov/websites/usip/www.usip.org/pubs/specialreports/sr65.pdf>.

19. *Id.*

20. *Id.*

intervention.<sup>21</sup> These changes give the U.S. an opportunity to reshape the centuries-old Monroe Doctrine.

*A. Current Latin America Policy Concerns: Drug Trafficking and Terrorism*

The Latin American policy concerns of the U.S. and its desire to promote democracy reflect the changing security situation in the region after the fall of communism.<sup>22</sup> However, the current changes in U.S. policy toward Latin America must take into account the serious security threats posed by drugs and terrorism.<sup>23</sup> The new U.S. policy must also reflect the need to alter the character of U.S. involvement in Latin America<sup>24</sup> and acknowledge past problems of heavy-handed intervention.

U.S. policymakers have clearly identified drug trafficking and terrorism as the principal concerns in Latin America.<sup>25</sup> Targeting the illegal drug trade has been recognized as an essential component of U.S. policy.<sup>26</sup> Further, the terrorist threat posed by increasing activity of Islamic

21. Greater respect by the U.S. for the sovereignty of Latin American nations coincides with a willingness to use multilateral efforts to address crucial regional issues. This shift towards multilateralism has been marked by increased U.S. participation in the region's joint institutions, and surprisingly, this increase has been sustained even after the events of September 11, 2001.

[I]n recent decades, Washington has arguably begun to respect Latin nations' sovereignty far more than usual. Especially in the wake of the disintegration of the Soviet Union and the demise of the world communist threat, America has become reluctant to take matters into its own hands in dealing with Latin problems and has become more comfortable with addressing them through joint institutions such as the Organization of American States, the World Trade Organization, or the incipient Free Trade Area of the Americas. As U.S. unilateralism has increased post-September 11 vis-a-vis the Near East and South Asia, so it has decreased with regard to its own backyard south of the border.

*U.S. and Latin American Relations*, *supra* note 15. The trend toward multilateralism is evidenced by U.S. participation in the developing Free Trade Area of the Americas (FTAA). Robert B. Zoellick, then U.S. Trade Representative, named the FTAA a top policy priority for the U.S. The FTAA would create a free trade zone among the thirty-four democratic nations of the Western Hemisphere. Press Release, Office of the U.S. Trade Representative, U.S. Announces Regional Seminar on the FTAA (July 2, 2002), [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2002/July/US\\_Announces\\_Regional\\_Seminar\\_on\\_the\\_FTAA.html?ht=](http://www.ustr.gov/Document_Library/Press_Releases/2002/July/US_Announces_Regional_Seminar_on_the_FTAA.html?ht=).

22. Press Release, U.S. Dep't of State, State's Noriega Outlines Priorities for Western Hemisphere (Mar. 2, 2005), available at <http://usinfo.state.gov/usinfo/>.

23. See *Challenges and Opportunities*, *supra* note 1. Security threats in Latin America remain due to drugs and terrorism. *Id.*

24. See generally *id.*

25. *Id.*

26. The Bush Administration has focused on attacking the cocaine and heroin trade in Colombia and in the Andes region. Its policy recognizes that "the profits from illegal drug sales support violent criminal gangs and terrorist groups." *Challenges and Opportunities*, *supra* note 1, at 13.

militant groups in Latin America has become a primary policy focus of the U.S.<sup>27</sup>

Of special concern to the U.S. are “lawless areas” in Latin America that are comprised of zones where the national government does not have effective control.<sup>28</sup> Lawless areas have drawn the attention of U.S. policymakers because drug traffickers and terrorists establish operations in these areas.<sup>29</sup> Specific lawless areas that are of great concern include the Triple Frontier area (encompassing the shared border areas of Argentina, Brazil and Paraguay), the Darien peninsula in Panama, and the Maicao region in Colombia.<sup>30</sup> Concern for the lawless conditions in the Triple Frontier area led to current U.S. military operations in Paraguay.<sup>31</sup>

### *B. The Crisis in Latin America Requires Immediate U.S. Policy Attention*

A U.S. Congressman recently summarized the situation in Latin America as a crisis caused by drug trafficking and terrorist activity.<sup>32</sup> This

27. Islamic terrorist groups may easily establish themselves in both large cities and remote, ungoverned areas throughout Latin America.

For much of the Bush administration’s anxiety has to do with the relative facility with which Islamist terrorists, including Hezbollah, Hamas, and al-Qa’ida, can establish themselves in the big cities, provincial capitals, and ungoverned areas of South and Central America. There are six million people of Muslim descent living in Latin America; 1.5 million live in Brazil (which contains more Lebanese Arabs than Lebanon itself) . . . .

Julio A. Cirino, Silvanal Elizondo & Geoffrey Vawro, *Latin America’s Lawless Areas and Failed States: An Analysis of the “New Threats,”* in 21 NEWPORT PAPERS 7 (Paul D. Taylor ed., U.S. Naval War College 2004).

28. The Naval War College “adopted the label ‘lawless areas’ to identify those regions not effectively controlled by the state.” *Id.* at 10.

29. “Lawless areas” are dangerous because the national government does not have control of the area, allowing for the establishment of many types of illegal activity. *Id.*

“Lawless areas” are where:

rogue elements—organized crime and terrorist groups—have comfortably settled. The sovereign power of the state is its ability to enforce the law and provide security for a country and its citizens. Thus, if the state is unable to enforce the law in portions of its territory, then we have the setting for a new lawless area and its entire array of illegal activities, which, importantly, have their own independent codes of conduct that function in place of national law.

*Id.*

30. *Id.* at 9.

31. The official purposes of the operation that focused on the Triple Frontier area were to bolster counter terrorism, to fight drugs, and to provide humanitarian aid. Gray, *supra* note 5.

32. Congressman Bill Delahunt of Massachusetts, in a hearing before the International Relations Committee of the House of Representatives, candidly characterized the situation in Latin America as a crisis:

But at the same time I think as we look at the landscape of Latin America, you know, honesty compels us to really conclude that we are in a crisis. One can list the countries. I think it was you, Roger [Noriega], who mentioned Cuba, Venezuela, and Haiti. Paraguay has been a

crisis poses a direct threat to the U.S. and requires immediate attention from U.S. policymakers.<sup>33</sup> However, present foreign aid to the region falls far short of what is needed to address the crisis, especially when compared to the tremendous military aid pumped into the region during the 1980s.<sup>34</sup>

Strong U.S. leadership and engagement with the countries of the Western Hemisphere is needed to address the present crisis in Latin America.<sup>35</sup> Increasing development and security aid to the region will effectively address the crisis if the assistance targets security threats, improves the capacity of local governments to meet social needs, and creates economies that allow all people to participate in growth.<sup>36</sup>

Recalling the long and sordid history of U.S. intervention in Latin America, the key to addressing the important issues of the region is for the U.S. to align its policy with the priorities of the collective national governments in the region.<sup>37</sup> Indeed, the Bush Administration has identified the critical need for the U.S. to act multilaterally in the region.<sup>38</sup> Acting multilaterally in the region requires the adoption of a Latin

single-party state for how many years now? For decades. Certainly not an example of a vibrant, healthy democracy.

*Challenges and Opportunities*, *supra* note 1, at 32.

33. Adolfo A. Franco, Assistant Administrator for Latin America and the Caribbean of the U.S. Agency for International Development, stated that the crisis in the region is a result of drug trafficking and terrorism. He emphasized that the gravity of the crisis was due to Latin America's proximity to the U.S.:

Nowhere else do events—such as the political instability we witnessed in Bolivia, the terrorism that we have in the Andean region, drug trafficking in South America and the Caribbean, and the economic crisis of the region—have such a profound effect on our national interest and the well-being of the American people.

*Id.* at 19.

34. U.S. aid for Latin America is approximately \$839 million, with roughly \$200 million of that amount sent to Colombia and Haiti. In the past, when force was used to achieve policy goals in the region (for example, Central America in the 1980s), the U.S. spent billions of dollars. Now, with the U.S. trying to aid development efforts in those countries and help stabilize institutions and promote democracy, aid has dwindled. *Challenges and Opportunities*, *supra* note 1, at 8.

35. *Id.*

36. Roger F. Noriega, the Assistant Secretary of State for Western Hemisphere Affairs, stated the following:

United States development and security assistance can be decisive if it is used well. The ideal role for U.S. assistance is to help governments improve their own ability to meet basic social needs, deal with acute threats to security, and retool their economies so that their people can take full advantage of economic growth.

*Id.*

37. "But in recent decades, Washington has arguably begun to respect Latin nations' sovereignty far more than usual." *U.S. and Latin American Relations*, *supra* note 15.

38. Roger F. Noriega noted that "multilateralism works in the Americas. The Organization of American States and the Summit of the Americas process are used by regional governments to revise common strategies and to put their political weight behind a comprehensive economic and political agenda." *Challenges and Opportunities*, *supra* note 1, at 8.

American policy that will allow the U.S. to work alongside countries in the region to address the present crisis.<sup>39</sup>

III. A SHORT HISTORY OF THE INTERNATIONAL CRIMINAL COURT:  
OVERWHELMING ACCEPTANCE IN LATIN AMERICA AND UNFOUNDED  
FEARS LEADING TO OPPOSITION  
FROM THE U.S.

The ICC was developed in response to “the need for the establishment of an international institution that could address serious violations of international humanitarian law.”<sup>40</sup> Ad hoc tribunals were created during the mid-1990s to deal with grave violations of international humanitarian law committed in the former Yugoslavia and Rwanda.<sup>41</sup> The problems encountered with these temporary tribunals underlined the urgent need for the adoption of a stable and permanent international criminal court to deal with the most severe crimes.<sup>42</sup>

Responding to the need for a permanent international criminal tribunal, the Rome Statute of the ICC was adopted on July 17, 1998.<sup>43</sup> Upon receipt of the required sixtieth country ratification, the ICC became a reality; the treaty of the Rome Statute entered into binding force on April 11, 2002.<sup>44</sup>

A. *Widespread Support for the ICC in Latin America*

The Rome Statute has received widespread support in Latin America where, as of October 2005, twenty-one countries have ratified the ICC.<sup>45</sup>

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39. *Id.*

40. Leila Nadya Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 38 (Sarah B. Sewall & Carl Kaysen eds., 2000). See also David J. Scheffer, *The U.S. Perspective on the ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 116, 45 (Sarah B. Sewall & Carl Kaysen eds., 2000). Everyone in Rome shared a common goal: “that an international court should be able to prosecute tyrants who commit mass murder, mass rape, or mass torture against their own citizens . . .” *Id.*

41. Sadat, *supra* note 40, at 38.

42. The temporary tribunals had a variety of problems, bringing to light the need for a permanent international criminal court:

The problems that the two ad hoc tribunals faced in recruiting top-flight prosecutors and judges, financing their activities, and obtaining custody of suspects—not to mention the allegations of corruption that beset the Rwanda tribunal—did not dampen enthusiasm for the ICC. Rather, they underlined the urgent need for a stable, new, permanent institution that would be ready for any situation.

*Id.*

43. See M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT, VOLUME 1: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT* 89–91 (2005).

44. *Id.* at 109.

45. International Criminal Court Assembly of State Parties, *supra* note 2.



The ICC is popular in Latin America because it offers protections to a region that recently suffered periods of authoritarian rule that led to serious human rights violations.<sup>46</sup> Latin America has changed dramatically in the last twenty years with democratically elected governments now in control, but significant human rights concerns remain.<sup>47</sup> Therefore, because Latin America still feels it needs to strengthen judicial systems and increase international monitoring of human rights, it supports the ICC.<sup>48</sup>

### *B. The Bush Administration and U.S. Opposition to the ICC*

With Bill Clinton serving as president, the United States supported the ICC when the Rome Statute was enacted in 1998.<sup>49</sup> When George W. Bush became president, however, the U.S. withdrew its support for the ICC and stated publicly that it was not bound by the treaty.<sup>50</sup> U.S. opposition to the ICC is primarily based upon fears that American soldiers and political leaders could be brought before an international court on frivolous and politically motivated grounds.<sup>51</sup>

Other opponents of the ICC emphasize that the U.S. has historically supported human rights and is better qualified to prosecute war criminals

46. Armed conflict and authoritarian rule caused human rights violations and created much support in Latin America for a tribunal that would bring the perpetrators of gross human rights abuses to justice.

Attitudes to the International Criminal Court in Latin America are inevitably shaped by the recent history of the region, which has been characterized by periods of serious and widespread human rights violations, with little, if any, effort to seek justice against those responsible . . . . Over the past 20 years, following periods of armed conflict or authoritarian rule, countries in Latin America have struggled with the issue of justice for serious human rights violations.

Margaret Popkin, *Latin America: The Court and the Culture of Impunity*, CRIMES OF WAR PROJECT, December 2003, [http://www.crimesofwar.org/icc\\_magazine/icc-popkin.html](http://www.crimesofwar.org/icc_magazine/icc-popkin.html).

47. Despite the rise of democracy in Latin America, many governments still struggle to deal with human rights issues. "Over the past two decades, the era of military regimes and massive human rights violations has given way to democratically elected governments. Yet the region's civilian governments continue to face urgent human rights problems." Suominen, *supra* note 18.

48. In Latin America, long-term solutions, including the ICC and strengthening internal justice systems, are viewed as necessary to address human rights violations. "Today's challenges in the region require long-term approaches: fostering judicial systems, professionalizing police and armed forces, building vibrant civil societies, and strengthening inter-American and international institutions working on human rights." *Id.*

49. President Bill Clinton held a "long commitment to establish an appropriate international criminal court." Scheffer, *supra* note 40, at 116.

50. John R. Bolton, Under Sec'y for Arms Control and Int'l Security, Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002).

51. HUMAN RIGHTS WATCH, U.S. AND THE INTERNATIONAL CRIMINAL COURT, <http://www.hrw.org/campaigns/icc/us.htm>.

than many ICC signatory countries.<sup>52</sup> Additionally, some observers believe that the ICC will not function without U.S. support, so therefore, the U.S. should not join the ICC until all the conditions the U.S. desires are in place.<sup>53</sup>

*C. U.S. Opposition to the ICC is Based Upon Unfounded Fears*

An examination of the Rome Statute reveals that U.S. opposition to the ICC is based upon unwarranted fears and an inaccurate view of the statute.<sup>54</sup> The opening pronouncements of the Rome Statute, which state its overarching purpose, are consistent with the ideals and laws of the U.S., including a desire to protect against the worst human atrocities.<sup>55</sup> The primary U.S. objection to the ICC is that U.S. nationals would face frivolous prosecution before the Court.<sup>56</sup> This objection is completely unfounded because the statute explicitly states that the U.S. would retain jurisdiction over its nationals and maintain a preference over the ICC for any prosecution.<sup>57</sup>

The U.S. should not fear the ICC because the Rome Statute actually represents a significant advancement in international law regarding protections for the rights of the accused and ensures prosecution only of the most serious crimes.<sup>58</sup> Indeed, the Rome Statute provides protections

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52. International Criminal Court: The States Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Apr. 13, 2007).

53. In order for the permanent court to be effective, it may need the significant support of the U.S.

to sustain a costly investigative capability, to build its infrastructure in The Hague, to achieve custody of indictees, and to work with the U.N. Security Council for enforcement initiatives . . . . We fear that without the United States, the effectiveness of the permanent ICC will fall far short of its potential.

Scheffer, *supra* note 40, at 116.

54. LOUIS HENKIN ET AL., HUMAN RIGHTS DOCUMENTARY SUPPLEMENT 932 (2001).

55. Consistent with the ideals and laws of the United States, the Preamble states that an International Criminal Court is needed because "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." *Id.*

56. HUMAN RIGHTS WATCH, *supra* note 51.

57. The preamble provides that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." HENKIN ET AL., *supra* note 54, at 932. Thus, the primary contention that United States politicians and servicemen will face frivolous prosecutions is explicitly dealt with in the preamble. Furthermore, articles 17 and 18 regarding admissibility also make U.S. concerns moot. *Id.* at 933–34. These articles defer to the criminal jurisdiction of an individual State to prosecute its nationals or others regarding international crimes covered by the statute. *Id.* Therefore, the U.S. has prosecutorial preference, which prevents U.S. nationals from being brought before the ICC. *Id.* at 932.

58. See HENKIN ET AL., *supra* note 54, at 933–34.

for accused persons that are arguably more comprehensive than the U.S. Bill of Rights.<sup>59</sup>

U.S. participation in the ICC would prove better for U.S. nationals than existing international arrangements because “an American citizen would enjoy more due process before the ICC than before the courts of most countries to which the United States extradites its citizens.”<sup>60</sup> The United States should abandon its misguided opposition and join the ICC because the Court’s jurisdiction is limited to only the most heinous international crimes, which all nations agree should be vigorously prosecuted.<sup>61</sup>

#### IV. LEGAL MEASURES TAKEN BY THE U.S. TO UNDERMINE THE ICC

Although U.S. fears regarding the ICC are unfounded, the Bush Administration has actively opposed the Court through a campaign of legal initiatives aimed at undermining the Court’s effectiveness. When it became apparent that the ICC would achieve ratification in 2002, the U.S. swiftly responded by enacting the American Servicemembers’ Protection Act (ASPA), which contains provisions prohibiting U.S. cooperation with the ICC.<sup>62</sup> ASPA also included sanctions that prohibited some forms of U.S. aid from going to certain countries that have joined the ICC.<sup>63</sup>

##### A. *Bilateral Immunity Agreements*

The U.S. position of actively undermining the ICC, as it is spelled out in the ASPA, has been strengthened by the promotion of Bilateral Immunity Agreements (BIAs). The United States utilizes the BIAs to exempt its citizens from the jurisdiction of the ICC.<sup>64</sup> A BIA is entered

59. Articles 66 and 67 of the ICC cover the “presumption of innocence” and “rights of the accused.” *Id.* at 974–75. These articles guarantee a person accused before the ICC a presumption of innocence, a right to counsel, a right to present evidence and to confront witnesses, a right to remain silent, and a right to have charges proven beyond a reasonable doubt. *Id.* See also HUMAN RIGHTS WATCH, QUESTIONS AND ANSWERS ABOUT THE ICC AND THE UNITED STATES [hereinafter HUMAN RIGHTS WATCH Q&A], <http://www.hrw.org/campaigns/icc/usqna.htm>.

60. HUMAN RIGHTS WATCH Q&A, *supra* note 59.

61. Article 5 of the Rome Statute describes the “Crimes within the jurisdiction of the Court.” The crimes covered by the statute include: the crime of genocide, crimes against humanity and war crimes. HENKIN ET AL., *supra* note 54, at 933–34.

62. 22 U.S.C. § 7401 (1999).

63. The House Armed Services Committee reported in March 2005 that “[s]anctions enclosed in the ASPA statute prohibit International Military Education and Training (IMET) funds from going to certain countries that are parties to the Rome Statute of the International Criminal Court.” *Fiscal 2006 Defense Budget*, *supra* note 3.

64. BIAs attempt to shield U.S. citizens from the jurisdiction of the ICC. Coalition for the International Criminal Court, U.S. Bilateral Immunity Agreements, <http://iccnow.org/documents/USandICC/2005/FS-BIAsAug2005.pdf>.

into with only one other state, and it provides that the contracting state cannot transfer any current or former U.S. government official, military personnel, or national to the jurisdiction of the ICC.<sup>65</sup>

The BIAs seek to exploit article 98 of the Rome Statute.<sup>66</sup> Article 98 states that the ICC cannot request a state to “act inconsistently with its obligations under international law . . . or international agreements.”<sup>67</sup> Therefore, the Court allegedly cannot force a state to act contrary to the BIA it has signed with the U.S., ensuring that the U.S. will remain beyond the scope of the ICC.

### *B. Legal Challenges to U.S. Opposition Measures*

The United States has urgently pushed to undermine the ICC by signing BIAs with as many states as possible, yet these agreements face serious legal challenges.<sup>68</sup> Many legal commentators argue that the BIAs are contrary to the intent of the Rome Statute because article 98 was not intended to allow the formation of new agreements.<sup>69</sup> Instead, the article was meant to only cover existing agreements that were in force at the time the statute was adopted.<sup>70</sup>

These commentators further argue that the U.S. has incorrectly interpreted article 98 because the BIAs undermine the purpose of the ICC “to ensure that genocide, crimes against humanity and war crimes be addressed either at the national level or by an international judicial body.”<sup>71</sup> Although the United States has signed over ninety BIAs, the agreements remain a contentious international issue with many states publicly refusing to succumb to U.S. pressure to sign the agreements.<sup>72</sup>

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65. It should be noted that the BIAs are not limited to just protecting members of the U.S. military. They also extend immunity to government officials and other nationals. “Dubbed bilateral immunity agreements (BIAs) by leading legal experts, the US-requested agreements provide that current or former government officials, military [sic] and other personnel (regardless of whether or not they are nationals of the state concerned) or nationals are not transferred to the jurisdiction of the ICC.” *Id.*

66. Article 98 of the Rome Statute, which created the ICC, is titled “Cooperation with respect to waiver of immunity and consent to surrender.” Rome Statute of the International Criminal Court art. 98, July 17, 1998, available at [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

67. *Id.*

68. Experts in international law argue that the BIAs should not be upheld. “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 . . . .” Coalition for the International Criminal Court, *supra* note 64.

69. *Id.*

70. *Id.*

71. *Id.*

72. As of August 2005, over ninety countries have signed BIAs with the U.S. “Fifty-three states

Indeed, over half the states that are party to the ICC have not signed a BIA with the U.S.<sup>73</sup>

In spite of the legal questions surrounding the validity of the BIAs, the U.S. has continued to utilize the agreements and has threatened to withhold aid if states refuse to sign. In August 2002, upon the passage of the ASPA, the U.S. began using economic threats to coerce states into signing BIAs.<sup>74</sup> At that time, the U.S. State Department clarified that section 2007 of ASPA prohibited giving military assistance to countries that are a party to the Rome Statute, but the president could waive the ban on military aid if the state entered into a BIA.<sup>75</sup>

*C. Economic Threats to Countries that Refuse to Enter into a Bilateral Immunity Agreement with the U.S.*

The U.S. has only intensified its program of economic threats toward countries that have taken a stand against entering into a BIA. In December 2004, Congress approved the “Nethercutt Amendment” as part of a federal spending bill.<sup>76</sup> The Nethercutt Amendment guaranteed further spending cuts, including the withholding of anti-terrorism funds, to countries that refused to sign BIAs.<sup>77</sup>

The Nethercutt Amendment increased funding cuts and included additional countries to be affected, including many South American

have publicly refused to sign these agreements on the basis of their obligations under international law and the Rome Statute and their commitment to ending impunity.” *Id.*

73. “Nevertheless, over half of the States Parties to the ICC have not signed BIAs.” *Id.*

74. AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL COURT: US EFFORTS TO OBTAIN IMPUNITY FOR GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES 18 (2002), [http://web.amnesty.org/library/pdf/IOR400252002ENGLISH/\\$file/IOR4002502.pdf](http://web.amnesty.org/library/pdf/IOR400252002ENGLISH/$file/IOR4002502.pdf).

75. In August 2002, the U.S. State Department

briefed foreign ambassadors on US opposition to the court and to warn them of the prohibition in Section 2007 of the American Servicemembers Protection Act (ASPA), which entered into force on 2 August 2002, against military assistance to countries that are a party to the treaty establishing the court, but allowing the US President to waive this ban if the state enters into an impunity agreement with the USA or if he decides that it is in the national interest.

*Id.*

76. Human Rights Watch, U.S.: Congress Tries to Undermine War Crimes Court, [http://www.iccnw.org/pressroom/membermediastatements/2004/HRW\\_NethercuH\\_08Dec04.pdf](http://www.iccnw.org/pressroom/membermediastatements/2004/HRW_NethercuH_08Dec04.pdf).

77. *Id.* Human Rights Watch provided the following assessment of the Nethercutt Amendment:

The United States intensified its assault on international justice with Congress’ approval yesterday of the “Nethercutt Amendment” . . . . This provision, part of an overall spending bill, mandates withholding antiterrorism funds and other aid from countries that refuse to grant immunity for U.S. citizens before the International Criminal Court.

*Id.*

countries.<sup>78</sup> The Amendment was reauthorized on November 14, 2005.<sup>79</sup> For fiscal year 2006, Latin American countries face cuts in economic aid of up to \$30.3 million.<sup>80</sup>

#### *D. The Harmful Effects of Opposition Legal Measures in Latin America*

The U.S. opposition program, implemented through ASPA provisions and the BIAs, cuts military and development aid to countries that have joined the ICC.<sup>81</sup> Because of the overwhelming support for the ICC in Latin America, the region has suffered a disproportionate impact, with eleven countries receiving cuts in aid.<sup>82</sup> This is ironic because Latin America has been identified as a region in desperate need of U.S. policy attention.<sup>83</sup>

78. The Nethercutt Amendment increased funding cuts for up to fifty countries over their refusals to enter BIAs:

Many of the countries affected have already had military assistance withheld under previous legislation, but the latest provision expands funding cuts and includes additional countries. Over fifty nations could be affected, including Ecuador, Paraguay, Bolivia, Peru, Venezuela, and Cyprus. These countries have concluded that their current legal obligations as ratifiers of the Rome Statute (the ICC's treaty) prevent them from signing the agreements proposed by the Administration, which would violate Article 98 of the Rome Statute. But many of these allies have standing SOFAs (Status of Forces Agreements) with the U.S. that extends U.S. jurisdiction to include U.S. personnel within their territory.

Press Release, Citizens for Global Solutions, U.S. Sanctions Key Allies over ICC Participation: Cuts Support for over 50 countries, including anti-terror initiatives (Dec. 8, 2004), [http://iccnw.org/documents/CGS\\_Nethercutt\\_08Dec04.pdf#search=%22%20%22ecuador%2C%20paraguay%2C%20bolivia%2C%20peru%2C%20venezuela%2C%20and%20cyprus%22%22](http://iccnw.org/documents/CGS_Nethercutt_08Dec04.pdf#search=%22%20%22ecuador%2C%20paraguay%2C%20bolivia%2C%20peru%2C%20venezuela%2C%20and%20cyprus%22%22).

"Nine Latin American countries risk losing an additional \$21 million in military funding for training and equipment purchases in 2005 and 2006, including allies in the war on drugs like Bolivia and Peru. Mexico's cut would be \$3.6 million." Pablo Bachelet, *MEXICO: U.S. aid threatened by global court pact*, MIAMI HERALD, Oct. 23, 2005, at A17, available at 2005 WLNR 17143772.

79. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 109-102, 83 Stat. 2172, 2229 (2005). "On November 14th, the President signed into law the 'Nethercutt Amendment' to the Foreign Operations Appropriations bill. Similar to FY 2005, the amendment cuts Economic Support Funds to all countries that refuse to sign bilateral immunity agreements with the U.S. or are not provided Presidential waivers." American Nongovernmental Organizations Coalition for the International Criminal Court, Nethercutt Amendment reauthorized for FY 2006, [http://www.amicc.org/usinfo/congress\\_texts.html](http://www.amicc.org/usinfo/congress_texts.html) (last visited Feb. 8, 2006).

80. Mexico, Brazil, Peru, Ecuador, Paraguay, and Venezuela stand to lose \$30.3 million in U.S. economic support funds. Citizens for Global Solutions, Latin American Nations Targeted in the FY 2006 Foreign Ops (Nov. 15, 2005), [http://www.globalsolutions.org/programs/law\\_justice/latin\\_amer\\_nations.html](http://www.globalsolutions.org/programs/law_justice/latin_amer_nations.html).

81. See *Fiscal 2006 Defense Budget*, *supra* note 3 and text accompanying note 63.

82. "Of the 22 nations worldwide affected by these sanctions, 11 of them are in Latin America, hampering the engagement and professional contact that is an essential element of our regional security cooperation strategy." *Id.*

83. *Id.*

U.S. military officials have recognized that the cuts in aid to Latin America gravely threaten U.S. efforts to combat terrorism and drug-trafficking in the area.<sup>84</sup> The tangible effect of cutting aid to Latin America is that the U.S. loses contact with the region, allowing others to fill the power void.<sup>85</sup> Therefore, the U.S. is missing out on a promising opportunity to help Latin American governments develop democratic institutions that would assist the U.S. in confronting serious problems within the region.<sup>86</sup>

The Bush Administration must develop a strong and coherent policy to address the problems presently confronting Latin America.<sup>87</sup> Serious policy analysis recognizes that the administration's opposition to the ICC, and specifically the cuts in aid to Latin America, only undermines necessary policy development for the region.

#### *E. Mexico Takes a Stand*

Mexico ratified the Rome Statute on October 28, 2005.<sup>88</sup> It was the one-hundredth country to join the Court.<sup>89</sup> Although the U.S. threatened to

84. General Bantz J. Craddock, Commander of the U.S. Southern Command, testified before the House Armed Services Committee, in March 2005, that the cuts in aid result in a lack of training and equipment for forces in Latin American countries, weakening their ability to adequately address policy concerns. "For the SOUTHCOM area of responsibility, that's 11 nations that I cannot now do military education exchange training with their militaries nor provide foreign military financing for articles that they will need in their defense establishment to equip their armed forces, to fight the narcoterrorists, things like that." *Id.*

85. "The impact obviously is we're going to lose contact. And as I mentioned previously and based on your question, others will fill in the void . . ." *Fiscal 2006 Defense Budget, supra* note 3.

86. General Craddock stressed that the U.S. must maintain contact with Latin American militaries in order to ensure that the military and civilian leaderships in Latin American countries achieve policy goals by working within the democratic process. Craddock stated that "in Latin America where contact is the coin of the realm, where engagement is really where we make the progress in reinforcing these democratic institutions and ensuring that militaries understand the democratic process and the subordination to civilian leadership, it's critical we have contact across the board." *Id.*

87. The Bush Administration has been inattentive to Latin America, and the BIAs further exacerbate the problem:

This Administration's Latin America policy is more notable for the lack of a policy than for any specific or coherent policy, and the Administration's myopic tendency to rush in when there is a problem, and ignore the region the rest of the time only undermines our credibility in Latin America.

*Challenges and Opportunities, supra* note 1, at 2.

88. "On 28 October 2005, Mexico became the 100th state party to the Rome Statute marking an important milestone towards universal support of the International Criminal Court. Over half of the international community have now ratified." Press Release, Amnesty International, Mexico: 100th Ratification of International Criminal Court Marks an Historic Development in International Justice (Oct. 28, 2005), <http://www.amnestyusa.org/news/document.do?id=ENGAMR410802005>.

89. *Id.*

cut back its economic aid to Mexico by 40% when Mexico ratified the Rome Statute, Mexico defied the U.S. and refused to enter into a BIA.<sup>90</sup>

Mexico’s ratification of the ICC has drawn close attention by Congress because of its strategic importance.<sup>91</sup> “[Mexico] ranks as the second biggest U.S. trading partner and the biggest entry point for illegal migrants and cocaine.”<sup>92</sup> The confrontation between the U.S. and Mexico over the ICC has reached a critical point.<sup>93</sup> As observed by Paulina Vega, the Latin America and Caribbean coordinator for the Coalition for the International Criminal Court, “The United States will have to evaluate just how far its rejection of the ICC goes.”<sup>94</sup>

U.S. government officials are now calling on the Bush Administration to change its stance regarding the penalties imposed on countries that join the ICC rather than provoke a crisis with Mexico and other Latin American countries.<sup>95</sup> The U.S. officials are especially frustrated with the domestic implications of “[w]ithdrawing aid to Mexico for anti-drug programs that keep illegal drugs out of the United States . . . .”<sup>96</sup> These

90. The Bush Administration warned Mexico that joining the Court “would lead to the cut of an \$11.5 million program to help [Mexico’s] justice system deal with drug trafficking, according to human rights groups that support the Dutch-based court . . . . That amounts to almost 40 percent of the U.S. economic aid Mexico receives.” Bachelet, *supra* note 78, at A17.

91. “Mexico’s ratification of the court is being monitored especially closely by human rights groups and members of Congress because the country is so critical to Washington’s strategic interests.” *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. “A growing number of U.S. defense and congressional officials fear such a move will cost Washington influence in a region already vulnerable to political instability and are pushing President Bush to issue a first-ever waiver of the sanctions.” *Id.*

Mexico last week became the 100th country to join the International Criminal Court, and in so doing put pressure on the White House to decide how far the United States will go to provoke a crisis with its Latin neighbor. Prudence would suggest that the U.S.-Mexico relationship is too important for strategic and other reasons to put at risk because of Mexico’s decision to act in its own best interest. But the White House has shown little prudence when it comes to the ICC.

Editorial, *Sure Path to Losing Friends and Influence*, MIAMI HERALD, Nov. 7, 2005, at A22.

96. Editorial, *supra* note 95. “U.S. military aid to Mexico is particularly sensitive because Mexican security forces are key in combating drug trafficking into the United States.” *U.S. and Mexico at Odds Over Tribunal International Criminal Court*, SEATTLE TIMES, Oct. 29, 2005, at A13.

Requested US military and police aid to Mexico this year totals US\$59.7m. The bulk of this is for antidrugs purposes: US\$40m under the International Narcotics Control (INC) programme and US\$18.4m under the ‘Section 1004’ Counterdrug programme run by the Pentagon. US military aid to Mexico, previously not enthusiastically welcomed, has been increasing steadily over the past decade, driven by the antidrugs effort. While between 1996 and 2000 it totalled US\$141m [sic] in 2004 alone it reached US\$54m — 80% more than economic aid.

*MEXICO-US: Facing consequences of ICC ratification*, LATIN AM. WKLY. REP., Nov. 1, 2005, at 11,



officials recognize the harmful effects that U.S. opposition measures have on important relationships with Latin America.

#### V. THE UNITED STATES SHOULD ABANDON ITS CURRENT OPPOSITION AND JOIN THE ICC TO FURTHER POLICY GOALS IN LATIN AMERICA

Latin American nations have reacted strongly against the pressures placed upon them by the U.S. In addition, the U.S. opposition program against the ICC is crippling its ability to address urgent policy matters in the region. The Bush Administration has gone beyond the statutory authority of ASPA and placed poor Latin American countries in an unfair diplomatic position by forcing them to sign the BIAs.<sup>97</sup> The U.S. threats to cut aid are unfair and go beyond reducing military aid, including possible decreases in aid for items such as hurricane relief and public health.<sup>98</sup>

Latin American nations are reacting angrily to the Bush Administration's demand that they sign BIAs.<sup>99</sup> Indeed, eleven Latin American countries have decided to take the aid reductions rather than forgo their support of the ICC.<sup>100</sup> U.S. relations with Latin America appear to be worsening, as the *Washington Post's* Jackson Diehl recently observed, "[h]ere's a sad but safe new year's prediction: U.S. relations with Latin America, which plunged to their lowest point in decades in 2005, will get still worse in 2006."<sup>101</sup>

available at <http://www.latinnews.com/lwr/secure/oobptc.pdf>.

97. Poor countries are forced to sign BIAs and violate their international obligations because they are threatened with losing vital U.S. aid. "[T]he Bush administration has been exercising unconscionable diplomatic tactics that go beyond the provisions of the ASPA: threatening poor countries in all regions of the world to violate their international obligations or otherwise lose vital US financial and political support." Irune Aguirrezábal Quijera, *The United States' Isolated Struggle Against the ICC*, ICC MONITOR, Sept. 25, 2003, at 3.

98. Caribbean nations have faced cuts in funding for everything from hurricane relief to rural dentistry. "U.S. Assistant Secretary of State Stephen Rademaker has reportedly threatened to deny benefits of the New Horizons program, which includes funds for hurricane relief and rural dentistry and veterinary efforts, to countries in the Caribbean Community." *Id.*

99. Commentators are beginning to measure the effect of the Bush Administration's program of opposition on Latin American attitudes toward the U.S. "The White House takes its jousting with imaginary enemies so seriously that real-world problems are cropping up. Latin American countries, in particular, are becoming angry over administration demands that they promise to protect U.S. officials, soldiers and even citizens from prosecution." Editorial, *International Justice: Losing Friends*, THE SEATTLE POST-INTELLIGENCER, Sept. 5, 2005, at B5. "Costa Rican Foreign Minister Roberto Tovar last month called the U.S. immunity proposals 'offensive' and added: 'One can be poor, but dignified.'" Bachelet, *supra* note 78.

100. "Eleven countries in the hemisphere, including such democratic governments as Brazil and Costa Rica, no longer can participate in U.S.-funded military training programs." Editorial, *supra* note 99.

101. Jackson Diehl, *Our Latin Conundrum*, WASH. POST, Jan. 2, 2006, at A13.

A. *The Ideological Confrontation with Latin America Over the ICC*

Latin American nations have resolved to continue supporting the ICC in the face of contrary U.S. pressure. This position is reflected by the Organization of American States, which passed a resolution in 2003 offering strong support for the ICC despite pressure from U.S. opposition.<sup>102</sup> The important South American nations which form the MERCOSUR trading bloc adopted an even stronger resolution in June 2005, which prohibited each member nation from entering into a BIA with the U.S. or any other nation.<sup>103</sup>

Thus, the Bush Administration has created an intense ideological confrontation with Latin American nations regarding the ICC.<sup>104</sup> Unfortunately, U.S. opposition to the ICC has been placed ahead of urgent U.S. policy priorities for the region.<sup>105</sup> The frightening result of the U.S. opposition campaign is that it “shows that the President would rather allow drug trafficking and terrorism than support the prosecution of war crimes and atrocities.”<sup>106</sup>

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102. Org. of American States [OAS], Promotion of the International Criminal Court A.G. Res. 1929, OAS Doc. XXXIII-O/03 (June 10, 2003), available at [http://www.amicc.org/docs/OAS6\\_10\\_03.pdf](http://www.amicc.org/docs/OAS6_10_03.pdf).

103. MERCOSUR offered the following regarding its opposition to the BIAs:

We restate the necessity of guaranteeing the independence and efficacy of the International Criminal Court, as well as its universal reach through the cooperation of all States. Together we adopt a common position for MERCOSUR with regard to Section 2 of Article 98 of the Rome Statute. We commit to not enter into multilateral or bilateral agreements with third States which would affect the jurisdiction of the International Criminal Court or other obligations established in the Rome Statute.

MERCOSUR, *Presidential Declaration of MERCOSUR's Commitment to the Rome Statute of the Int'l Criminal Court*, June 20, 2005, available at [http://iccnw.org/documents/USandICC/2005/MERCOSUR\\_Decl\\_BIA\\_Jun05.pdf](http://iccnw.org/documents/USandICC/2005/MERCOSUR_Decl_BIA_Jun05.pdf).

104. Richard Dicker, director of the International Justice program of Human Rights Watch, said that “[t]he United States is bullying smaller, weaker countries because of an ideological obsession with an illusory threat . . . .” HUMAN RIGHTS WATCH, *supra* note 76.

105. Richard Dicker, director of the International Justice program of Human Rights Watch, stated that the “Bush Administration is putting its ill-conceived campaign ahead of other interests the U.S. government claims are its highest priorities.” *Id.*

106. Brian Thompson, Program Manager for Int'l Law and Justice, Citizens for Global Solutions Statement, *in* Press Release, Citizens for Global Solutions, U.S. Sanctions Key Allies over ICC Participation (Dec. 8, 2004), [http://www.iccnw.org/pressroom/membermediastatements/2004/CGS\\_Nethercutt\\_08Dec04.pdf](http://www.iccnw.org/pressroom/membermediastatements/2004/CGS_Nethercutt_08Dec04.pdf).

*B. The Bush Administration Should Abandon the Opposition Campaign Against the ICC to Achieve Urgent Policy Priorities in Latin America*

The Bush Administration should immediately abandon its opposition campaign against the ICC and instead support the Court in order to achieve urgent policy priorities in Latin America. The economic sanctions that are central to the U.S. opposition campaign are completely unnecessary because the ICC established its legitimacy during the first few years it existed.<sup>107</sup> The Court has only taken on the most appalling cases of crimes against humanity and thus has established that it will not pursue the frivolous prosecutions that the U.S. has so greatly feared.<sup>108</sup> Indeed, the prosecutor for the ICC has stated publicly that he will not pursue allegations against the United States and the United Kingdom in Iraq.<sup>109</sup>

If the U.S. would abandon the opposition campaign against the ICC, it could adopt a unified policy toward Latin America and turn its primary focus to urgent human rights concerns, such as drug trafficking and terrorism.<sup>110</sup> The U.S. opposition campaign against the ICC reflects a general hostility by the Bush Administration towards multilateral diplomacy.<sup>111</sup> However, this attitude within the administration must be changed to achieve its stated policy goals in Latin America.<sup>112</sup> The

107. One commentator described the economic sanctions as “particularly unnecessary” because “the court has been in existence for over two full years now, and not only has the prosecutor taken up some of the most appalling crimes against humanity in the Congo and Uganda, but he’s also publicly rejected pursuing allegations against the U.S. and the U.K. in Iraq.” *Id.*

108. *Id.* See also text accompanying note 107.

109. See Press Release, *supra* note 106 and text accompanying note 107.

110. By abandoning its opposition against the ICC and its insistence that countries sign BIAs, the U.S. could restore aid to the region, which could be used to combat terrorism and drug trafficking. As a result, the U.S. would gain credibility in Latin America because it would join the region in supporting the ICC. The U.S. could also give serious attention to important policies such as combating drug trafficking and terrorism.

A policy of support for the ICC would yield the greatest results for both the U.S. and the Latin American region. “[H]uman rights policy will lack credibility and effectiveness unless it is consistent with other policies and actions. Mixed signals give mixed results: a policy tool, whether sanctions or quiet diplomacy, can yield only modest results when contradicted by other policies.” Suominen, *supra* note 18, at 6. “The Bush administration has this all wrong. Refusing to join the ICC weakens the U.S. effort to organize a global strategy against terrorism.” Editorial, *Counterproductive to Pressure Mexico on World Court*, MIAMI HERALD, Nov. 7, 2005, at A22.

111. This approach, however, contradicts the Bush Administration’s recognition that a multilateral policy is needed to confront drug trafficking and terrorism. “Conservative Republicans, like John Bolton, present a litany of justifications for United States opposition that are in large part nothing more than a general hostility to multilateral diplomacy and international organizations.” William A. Schabas, *United States Hostility to the International Criminal Court: It’s All About the Security Council*, 15 EUR. J. INT’L L. 701, 719 (2004).

112. One Latin American expert recently recognized the United States’ self-interest in achieving its policy priorities in Latin America:

greatest available means for the administration to make this necessary policy shift would be joining the ICC.<sup>113</sup>

U.S. support of the ICC would advance the recent movement in Latin America toward establishing the rule of law and instituting functioning democracies.<sup>114</sup> These changes are essential if the Bush Administration is to attain its policy goals in the region.<sup>115</sup> Further, U.S. ratification of the Rome Statute would be a diplomatic means of showing support to the many emerging Latin America democracies that are struggling to establish the rule of law in the face of terrorism threats and persistent drug trafficking.<sup>116</sup>

*C. The China Factor: With China's Increasing Influence in Latin America, the U.S. Must Take Immediate Action to Improve Relations with the Region*

Perhaps the most immediate reason for the U.S. to ratify the ICC is China's growing presence in the region.<sup>117</sup> If the U.S. continues to lose

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Ultimately, the United States must look at its policy towards the region in strategic terms in its own right. U.S. interests are clear: the security of the United States requires a prosperous and stable Hemisphere. Our policies should not be simply extensions of U.S. domestic politics, whether it is in the appointment of officials or in the support of candidacies for international organizations. Nor should assistance be simply predicated on whether countries are willing to comply with the United States, whether regarding Article 98, or particular votes in international matters not directly relevant to the Hemisphere. It should be based on a policy a [sic] genuine engagement that seeks the commonalities of interests and builds on the successes of this era of democratization while ensuring that it will endure. For that to happen [sic] the Western Hemisphere must move up on the priority list of U.S. foreign policy.

*Keeping Democracy on Track: Hotspots in Latin America: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on International Relations*, 109th Cong. 43 (2005) (statement of Arturo Valenzuela, Ph.D., Director, Center for Latin American Studies, Georgetown University).

113. Schabas, *supra* note 111, at 719.

114. The United States has the opportunity to play a leading role in strengthening democratic institutions in Latin America:

Some have suggested that the establishment of an international criminal court could also have considerable symbolic importance, as a demonstration of a collective international interest in and commitment to the prosecution and punishment of offenses of intense concern to the world community. United States' [sic] participation and leadership in such efforts would be in keeping with dramatic trends of recent years, including the strong movement toward the rule of law and the restructuring of societies along democratic lines.

Benjamin R. Civiletti, *American Bar Association Task Force on an International Criminal Court New York State Bar Association Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court*, 27 INT'L LAW. 257, 264 (1993).

115. *Id.*

116. *Id.*

117. See generally R. EVAN ELLIS, U.S. NATIONAL SECURITY IMPLICATIONS OF CHINESE INVOLVEMENT IN LATIN AMERICA (Strategic Studies Institute, U.S. Army War College) (June 2005), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB606.pdf>.

influence in Latin America over such issues as refusing to join the ICC, the Chinese are already poised to step in and fill the void.<sup>118</sup> The Asia-Pacific Economic Cooperation (APEC) summit held in November 2004 indicated deteriorating U.S. influence in Latin America, while at the same time the Chinese agreed to \$10 billion in investment commitments to the region.<sup>119</sup>

China's ties to Latin America have developed in a simplified context. The U.S. has to concern itself with difficult issues in its diplomatic relations with the region.<sup>120</sup> These include drug trafficking, terrorism, and democracy building because these activities have a direct impact on the U.S.<sup>121</sup>

The growing Chinese presence in Latin America will reduce the ability of the United States to influence important Latin American policy decisions; therefore, immediate steps must be taken to restore U.S.-Latin American relations.<sup>122</sup> The U.S. should act swiftly in making policy and diplomatic decisions that account for the increased role China will play in the region.<sup>123</sup> Joining the ICC is necessary for the U.S. if it hopes to develop closer relationships with its Latin American neighbors and achieve urgent policy goals at a time when the Western hemisphere is experiencing geopolitical changes.

118. Chinese investment and trade with Latin American countries has spurred a rapid growth in China-Latin America relations. This growth is evidenced by the fact that in 2003, 77% of Chinese foreign investment outside of Asia went to Latin America. *Id.* at 35 n.23.

119. Chietigji Bajpae, *China Fuels Energy Cold War*, ASIA TIMES ONLINE, May 2, 2005, <http://www.atimes.com/atimes/china/GC-2Ad07.html> (last visited Sept. 17, 2006).

120. Tim Johnson, *China Sways to Latin Tune*, TIMES UNION (Albany, N.Y.), July 10, 2005, at A10.

121. Many issues that the U.S. must confront regarding Latin America do not present obstacles to Chinese-Latin American relations. "Issues that bedevil U.S. relations with Latin America, such as drug trafficking, the fight against terrorism and threats to democratic rule, don't hinder China's ties to countries in the region . . ." *Id.*

122. If the U.S. continues to lose influence in Latin America relative to China, it will become preoccupied with China's activities in the Western Hemisphere. This will divert U.S. attention away from the issues of drug trafficking, terrorism, and the establishment of democratic institutions. "In general, the Chinese presence in Latin America reflects significant erosion in the relative power and geopolitical position of the United States, and the advent of a new century in which the United States is preoccupied about Chinese adventurism in the Americas." ELLIS, *supra* note 117, at 23.

123. The U.S. must determine if it is willing to permit China to increase its political relations in Latin America and also how to achieve important policy goals while competing with China for influence in the region.

[T]he United States needs to consider to what degree it is willing to accept a China that has increasing leverage in Latin America through its investment and trade presence—and a growing interest in the political course of the region. Now, rather than later, is the time for the United States to begin seriously considering how to most constructively engage the Chinese in the Western Hemisphere.

ELLIS, *supra* note 117, at vi.

## VI. CONCLUSION

It is in the best interest of the U.S. to ratify the Rome Statute and join the ICC. U.S. government officials have long recognized that an international criminal tribunal such as the ICC is necessary to achieve justice under some circumstances,<sup>124</sup> yet practical considerations may prove to be the strongest argument in favor of U.S. ratification of the Rome Statute. These practical considerations include concerns regarding terrorism and drug trafficking in the Western hemisphere. In order to form a unified policy that seriously addresses these concerns, the U.S. should abandon its current campaign against the ICC and join with the countries of Latin America in supporting the Court.

*Tom Madison\**

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124. David J. Scheffer, Ambassador at Large for War Crimes Issues, provided the following testimony before the House Committee on International Relations regarding the circumstances when international criminal prosecutions are warranted:

[W]e anticipate there will be instances in which it will be in the national interest to respond to requests for cooperation even if the United States is not a party to the ICC Treaty. We may decide that an international investigation and prosecution of a Pol Pot or Saddam Hussein and Idi Amin, a Foday Sankoh or some other rogue leader . . . would be in the national interest of the United States to support.

*The International Criminal Court: Hearing Before the H. Comm. on International Relations*, 106th Cong. 41 (2000) (statement of David J. Scheffer, Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the United Nations preparatory Committee for the International Criminal Court).

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