

# 4 Protect U.S. Interests More Effectively by Supporting the International Criminal Court

*Stephen Rickard*

## Summary

In the nearly seven years since the Rome Statute created the International Criminal Court (ICC), the Court has taken significant strides toward proving its critics in the United States wrong. The ICC, for example, has not fallen under the control of “rogue states” or behaved “irresponsibly.” It has proven itself useful in situations where atrocities have occurred. And it is on its way to demonstrating that the possibility of future prosecution can deter political and military leaders from engaging in war crimes and thereby save innocent lives and reduce the need for costly international military interventions. The United States should ratify the Rome Statute. But a still-skeptical Bush administration need not go that far to adopt a new policy toward the ICC that will protect United States interests much more effectively.

### President Bush should:

- ▶ *Establish an independent, high-level commission to evaluate the ICC and, by January 2007, make recommendations for United States policy. The commission should have a mandate to recommend whether the United States should join the Court in time to participate in a conference, scheduled for 2009, to review and amend the Rome Statute.*
- ▶ *Sponsor a United Nations Security Council resolution referring the Darfur crisis to the ICC.*
- ▶ *Announce that the United States will cooperate with the ICC on a case-by-case basis when such participation is clearly in the national interests of the United States.*
- ▶ *Contribute to the ICC’s Victims Trust Fund.*
- ▶ *Launch a review of United States law to close any gaps or loopholes on war crimes.*

*Stephen Rickard is director of the Open Society Institute’s Washington Office.*

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## Background

The Rome Statute creating the International Criminal Court was completed on July 18, 1998. The treaty came into effect on July 1, 2002, after 60 states had ratified it. The Court does not have universal jurisdiction, and it can hear cases involving only three categories of criminal activity: *genocide*, *crimes against humanity*, and *war crimes*.<sup>1</sup> Even within these categories, the Rome Statute directs the ICC’s prosecutor to focus only on instances involving severe and systematic abuse. Unless it is responding to a Security Council referral or a voluntary submission by a state, the Court can only consider a case if: (a) the events in question took place on the territory of a party to the Court, or (b) the accused is a citizen of a party to the Court. The Rome Statute also created a trust fund for the benefit of the victims.

In short, the ICC provides justice and financial support for the victims of a limited number of the very worst crimes committed on the territory of countries that chose to join the Court or by the citizens of countries that join the Court. The Court only acts, however, if national authorities decline to investigate allegations of such crimes. Thus, the ICC is a safety net “below” dictatorships and failed states, not an appeals court “above” states. If a nation investigates an allegation in good faith—even if it declines to prosecute—the ICC may not intervene.

United States negotiators at the Rome Conference achieved most of their objectives. They did not, however, succeed in restricting the Court to hearing only cases referred to it by the United Nations Security Council. The decision to permit the ICC’s prosecutor to initiate cases independently was the main reason that the Clinton administration criticized the Rome Statute and initially refused to sign it. However, on the eve of leaving office, President Clinton did sign the Rome Statute and expressed a desire that the United States would have a constructive relationship with the ICC. He also indicated that he would not recommend ratification of the Rome Statute without changes.

## The Bush Administration’s First Term

During its first term, the Bush administration repeatedly stated that it had accepted the ICC as a *fait accompli* and did not wish to harm the Court. The administration’s deeds, however, were seen to be considerably more hostile. The administration launched an energetic campaign to negotiate a worldwide system of “bilateral immunity agreements” (BIAs) that prohibit parties from surrendering United States citizens to the Court; the administration used sanctions aggressively to penalize states that were reluctant to sign BIAs and threatened to veto the renewal of UN peacekeeping missions unless the Security Council gave peacekeepers blanket immunity from prosecution before the Court. On May 6, 2002, the

Bush administration took the unprecedented step of revoking the United States signature on the Rome Statute. Twice during the 2004 presidential debates, President Bush ruled out United States participation in the Court.

The Bush administration and the ICC's critics sought to justify their position by citing a number of concerns. These included the possibility that the ICC would be controlled by "rogue states" hostile to the United States, that the ICC's judges would come from "rogue states," and that the parties would select a "political" prosecutor uncontrolled by the Security Council (and United States veto power) who would launch prosecutions against the United States and Israel.

## The ICC's Record

Until recently the ICC's most outspoken critics, such as then Under Secretary of State John Bolton, could argue that critical aspects of the Court were "untested" and that the degree to which it would function as intended "remains essentially unknown."<sup>2</sup> Today, however, we have a significant amount of information and experience with which to test competing predictions. Almost seven years have passed since the adoption of the Rome Statute. The Court has been operating for nearly three years. The Rome Treaty has been ratified by 97 countries. Eighteen judges and a prosecutor have been selected. And three investigations are underway.

So far, the ICC's performance has proven the predictions of the Court's sharpest critics to be wrong. These critics were wrong about who would control the Court, wrong about the judges, wrong about the danger of a "politicized" prosecutor, wrong about how the prosecutor would handle cases filed against the United States and Israel, and wrong about what cases he would investigate.

For years ICC critics predicted that "rogue states" like Iran, Sudan, and Syria would dominate the Court. Not one of those states has joined. In fact, of the 50 countries in the world that Freedom House rates as "not free," only 7 are among the 97 parties to the Court. These countries are Afghanistan, Cambodia, Central African Republic, Congo, Guinea, Liberia, and Tajikistan; it would be quite a stretch to argue that any of them is "out to get" the United States through the Court or otherwise. Conversely, 62 of the 91 countries considered "free" by Freedom House are parties to the ICC. The domination of the ICC by "free" and democratic nations allied with the United States is even more pronounced among the Court's judges; in fact, none of these judges is from a country rated "not free" and only 2 of the 18 judges are from countries Freedom House rates as "partly free" (Trinidad and Bolivia).

Even the ICC's harshest critics acknowledge that the Court's parties chose a highly respected, apolitical prosecutor, Luis Moreno Ocampo of

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Argentina, who, among other things, has taught law at Harvard and Stanford. One of his first public acts was to dismiss every complaint filed with the ICC against the United States and Israel as outside the Court’s jurisdiction. The prosecutor has two investigations under way—involving the conflicts in Uganda and the Congo—and he has announced that he will send investigators to the Ivory Coast.<sup>3</sup> The Central African Republic has also requested that the prosecutor investigate atrocities within its borders. In these instances, the states themselves invited the prosecutor to undertake his action. Surely this must be considered important, apolitical work.

### **Toward a Better Policy on the ICC**

America’s closest allies do not understand the reluctance of the United States to join them in ratifying the Rome Statute. But the Bush administration, even without ratification, has several reasons to adopt a more constructive and effective policy toward the ICC while maintaining its “wait-and-see” attitude. Such an approach would protect U.S. interests far better than the counterproductive policies of the last four years.

First, the administration needs to recognize an important fact: the provisions of the Rome Statute will be reviewed, and perhaps modified, in 2009. Only parties to the Statute are eligible to participate in its review. This review may involve a redefinition of the ICC’s jurisdiction to include the crime of “aggression.” For this reason alone, the United States has a vital stake in its outcome.

Second, the administration should acknowledge that whatever concerns it still harbors, the ICC has not jeopardized United States interests abroad. On the contrary, the Court has the potential to contribute to United States efforts like those aimed at ending the conflict in Uganda and stabilizing Congo. In fact, it appears that by his launching investigations, the ICC’s prosecutor helped bring the antagonists in Uganda to the negotiating table and encouraged neighboring states to pull their forces out of Congo. Future actions by the ICC might help stop the genocide in Darfur and bring to justice terrorists accused of committing crimes against humanity.

Third, should Washington choose to ratify the Rome Statute, the administration has the option to exempt the United States for a period of seven years from the Court’s jurisdiction over cases involving war crimes. Few ICC critics argue that the Court’s genocide and crimes against humanity jurisdiction are threats to the United States. Rather, the critics’ concerns in the United States have always centered on the Court’s war crimes jurisdiction. If it were to ratify the Rome Statute in 2009 and “opt out” of the Court’s war crimes jurisdiction for seven years, the United States would have until 2016 to evaluate the ICC’s work before subjecting itself to the Court’s war crimes jurisdiction. If the United States is not satisfied that the Court has developed in a positive manner, it can choose

to withdraw from the treaty before that time. In the meantime, the United States will still be able to participate in the review conference in 2009, take part in the selection of future prosecutors and judges, and influence the Court's development in other ways.

### **President Bush should:**

- ▶ *Establish an independent, high-level commission to evaluate the ICC and, by January 2007, make recommendations for United States policy. The commission should have a mandate to recommend whether the United States should join the Court in time to participate in a conference, scheduled for 2009, to review and amend the Rome Statute. Should this commission recommend joining the Court, this timetable would leave the administration more than two years to seek Senate approval to ratify the Rome Statute before the 2009 review conference.*
- ▶ *Sponsor a United Nations Security Council resolution referring the Darfur crisis to the ICC. The United Nations Commission of Inquiry into the Darfur situation has recently strongly recommended "that the Security Council immediately refer the situation of Darfur to the International Criminal Court." The Bush administration has supported ad hoc tribunals created by the United Nations Security Council in the past, and while the ICC does not operate solely under the Security Council, the Rome Statute does provide for such an arrangement. Referring cases to the ICC is preferable to creating new ad hoc tribunals because the Court is available to pursue Security Council mandates with minimal delay and start-up cost. The Bush administration can and should, therefore, view the ICC as a "standing" ad hoc tribunal, and it should introduce a Security Council resolution referring the Darfur crisis in Sudan to the ICC. The Bush administration has labeled the Darfur situation "genocide" and the United States and all the other parties to the Genocide Convention have an obligation to prevent and punish acts of genocide. The Court, due to its limited jurisdiction, cannot investigate Darfur without Security Council action because Sudan is not a party to the Rome Statute.*

ICC action is a useful intermediary step between inaction and sending combat forces. Republican Representative Frank Wolf recently made this point in supporting an ICC referral of the Darfur situation despite his reservations about the Court. "If the [UN] commission [investigating Darfur] recommends sanctions, a weapons embargo and a travel ban on suspected perpetrators, 'and with it was a referral to the International Criminal Court, frankly I would take the deal and go,' Mr. Wolf says. 'It would be better than doing nothing.'" (*Wall Street Journal*, January 17, 2005) Other ICC critics, such as former Bush Justice Department official Jack Goldsmith, have also supported a Darfur referral despite their reservations about the Court.

- ▶ *Announce that the United States will cooperate with the ICC on a case-by-case basis when such participation is clearly in the national interests of the United States.* The Bush administration should also announce that it is willing to cooperate with the Court when it deems this to be in the interests of the United States. The misnamed American Service Members Protection Act includes substantial waiver authorities that permit the administration to cooperate with the Court in certain instances that do not involve United States citizens. If the administration concludes that it needs additional authority to cooperate with the Court, it should seek such authority from the Congress.
- ▶ *Contribute to the ICC's Victims Trust Fund.* Even if President Bush decides not to join the ICC, his administration should support the victims of genocide and other atrocities through the Court's Victims Trust Fund, which is under the direction of, among others, Archbishop Desmond Tutu of South Africa and Queen Rania of Jordan.
- ▶ *Launch a review of United States law to close any gaps or loopholes on war crimes.* The United States justifiably points to its tradition of prosecuting persons accused of war crimes. But changes in United States practices, particularly its increasing use of civilian contractors to carry out military functions, and continuing developments in the law make it advisable to conduct a systematic review of United States law, including the Uniform Code of Military Justice, to ensure that it does not contain gaps or loopholes that are covered by the Rome Statute but not by United States law. The president should immediately order such a review.

## Conclusion

Whatever the theoretical merits of the Bush administration's objections to the ICC, these objections have so far failed the acid test of reality. The Court is developing in a responsible, apolitical manner, and it can be an important complement to U.S. policy. Without committing the United States to join the Court, President Bush can craft a policy toward the ICC that will remove the issue as a significant source of controversy between the United States and the world's other democracies while simultaneously enhancing important U.S. policy initiatives.

1. The crime of aggression is included in the Statute, as it was at the Nuremberg trials, but it cannot be applied to any defendant unless and until future negotiations resolve its definition.
2. Remarks at the American Enterprise Institute, November 3, 2003.
3. While the Ivory Coast is not a party to the Rome Statute it used a procedure which allows non-parties to voluntarily request the Court to investigate and take action on situations that arise within their borders.

# Help Develop Institutions and Instruments for Military Intervention on Humanitarian Grounds

*Anne-Marie Slaughter*

## Summary

In September 1999, after a decade marred by genocide, ethnic cleansing, massacres, and mass starvation in countries like Bosnia and Herzegovina, Somalia, Haiti, Rwanda, and Serbia, the United Nations Secretary-General Kofi Annan challenged the General Assembly's member nations to define when the international community may and may not intervene to resolve such humanitarian crises. Annan urged the member nations to "reach consensus—not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom."

In the past five years, distinguished scholars and former government officials have laid the conceptual groundwork in international law and politics for a new approach to "intervention for purposes of humanitarian protection." A United Nations High Level Panel has grappled with the humanitarian intervention issue. Many national governments have acquired a clearer understanding of the link between state security and the security of individuals. Nevertheless, millions of people—victims of crimes against humanity as well as individuals suffering the effects of civil conflict, famine, and disease—are in urgent need of decisive government action. For the dead in the latest genocide in Darfur, time has run out.

In its second term, the administration of George W. Bush has an extraordinary opportunity to put humanitarian intervention on a firmer legal footing and create the instruments and institutions necessary to make actual intervention easier and more effective. These actions would demonstrate to the world that the United States cares about fighting both terrorism and genocide.

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### **President Bush should:**

- ▶ *Deliver a major speech affirming that the United States supports the emerging norm of a collective international responsibility to protect populations against genocide and other large-scale killing in cases where individual governments have failed to fulfill their own obligations toward their people.*
- ▶ *Create a commission composed of prominent defense and humanitarian experts from the United States and other NATO countries to examine the feasibility of creating a NATO rapid-reaction force specially trained and ready for intervention in humanitarian crises.*
- ▶ *Endorse the proposal of Canada's Prime Minister Paul Martin for the creation of an informal group of leaders of the G-20 nations, which can, in a timely manner, coordinate diplomacy on urgent international issues and humanitarian crises. The United States should work with the Canadian government to cosponsor the first meeting of this proposed group in tandem with the United Nations General Assembly meeting in September 2005.*
- ▶ *Task the United States national security advisor with reviewing the 2002 National Security Strategy and recommending ways of incorporating into it an emphasis on human security as well as state security.*

### **Background**

Following Kofi Annan's challenge, the Canadian government and a group of major foundations established the International Commission on Intervention and State Sovereignty (ICISS). Composed of a distinguished group of diplomats, politicians, scholars, and nongovernmental experts from around the globe, the ICISS is headed by Gareth Evans, Australia's former foreign minister, and Mohamed Sahnoun, a special advisor to the United Nations secretary-general. In December 2001 the Commission issued an important report, *The Responsibility to Protect*.

The analysis in the ICISS report was based upon the premise that the intense controversy over military protection for humanitarian purposes flowed from a "critical gap" between the immense and unavoidable reality of mass human suffering and the existing rules and mechanisms for managing world order. To fill this gap, the Commission identified an emerging international obligation, which it described as the "responsibility to protect."

The new and bold aspect of the ICISS report is that it places the responsibility to protect upon both the state and the international community. The Commission insists that an individual state has the primary responsibility to safeguard its people. However, when a state fails to meet this responsibility, a secondary responsibility falls on the international community acting through the United Nations. The report

states: “Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”

This statement was reinforced recently by the United Nations High Level Panel on Threats, Challenges, and Changes, which was constituted in December 2003 to identify the principal threats to global security and to propose a set of measures to enable the United Nations to respond to them effectively. The former prime minister of Thailand, Anand Parachun, chaired the panel; its members included Gareth Evans, Brent Scowcroft, the former national security adviser to President George H. W. Bush, Sadako Ogata, the former United Nations high commissioner for refugees, Gro Brundtland, the former prime minister of Norway, and other distinguished former officials of the United Nations and national governments. The panel backed the responsibility to protect in no uncertain terms: “We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.”

Global leaders must pay equal attention to developing the means to mount humanitarian interventions. One existing institution in need of new direction and another institution still on the drawing board are likely to play critical roles in changing the practice of humanitarian intervention in cases like the genocide that occurred in Rwanda and the genocide now taking place in Darfur. The first is NATO, which was the vehicle for humanitarian intervention in Kosovo and took on important peace-keeping and stability operations in Bosnia and Afghanistan. NATO’s ability to project force around the world, coupled with the legitimacy it derives from the democratic nature of its members and its ability to speak for the North Atlantic community as a whole, make the alliance a natural instrument for humanitarian intervention. NATO is vulnerable, however, to charges that it represents only the West or, at best, advanced industrial democracies.

The second institution would circumvent NATO’s identity problem. This institution would be an informal network drawing its members from the G-20, an existing network of finance ministers from Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, and the European Union. The G-20 was created after the East Asian and Russian financial crises of the late 1990s to help reform global financial architecture. Canada’s prime minister, Paul Martin, has pushed for the creation of a so-called L-20, which would

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– UN HIGH LEVEL PANEL  
ON THREATS, CHALLENGES,  
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gather the presidents and prime ministers of the G-20 countries in a roughly representative forum for diplomacy at the highest level. The L-20 would serve as a kind of informal economic and security council, allowing leaders to come to agreement on pressing issues in a forum that reflects 65 percent of the world's population and 90 percent of its economic power. China and France have been favorable toward this idea; it is likely that an initial meeting could take place during the autumn of 2005.

## **The Bush Administration's First Term**

The Bush administration has shown a willingness to intervene in practice to help resolve humanitarian crises but has paid very little attention to the formal rules governing humanitarian intervention. The administration had no official reaction to the ICISS report, although recently it has repeatedly referred to the Sudanese government's "responsibility to protect" its own citizens in its responses to questions about its handling of Darfur. Before and during the post-9/11 hostilities in Afghanistan, the administration moved quickly to reach out to humanitarian groups in order to avoid a humanitarian disaster after major combat operations concluded. President Bush deployed United States Marines off the coast of Liberia in an effort to apply pressure that would force an end to that country's civil war and induce West African nations to introduce peacekeepers. Then Secretary of State Colin Powell played a leading role at the United Nations and in Africa trying to resolve the humanitarian crisis in Darfur.

The second Bush administration must demonstrate whether it is willing to help shape a set of rules that will legitimize intervention for humanitarian purposes under specified conditions and make it easier to mobilize such interventions in the international community quickly enough to make a difference on the ground. The administration should appreciate that the establishment of rules governing when the world may intervene for humanitarian reasons would legitimize international responses and increase the probability of action in a way that would relieve the ultimate burden on United States forces. At the same time, the administration should demonstrate to the world that its moral leadership includes not only fighting against the evil of terrorism but also fighting for the victims of mass murder and ethnic cleansing.

## **Toward a New Policy on Humanitarian Intervention**

Had the responsibility to protect been established as a principle of United Nations membership when Saddam Hussein was killing Iraqi citizens with poison gas in the late 1980s, the Security Council would have had the

authority to act against him on that basis alone. Given that the United States took the lead in many instances in pushing for humanitarian intervention throughout the 1990s, and turned to NATO in the case of Kosovo when it appeared that the United Nations Security Council was blocked, Washington would lose nothing by endorsing the principle of a responsibility to protect. Washington would clearly stand to gain by endorsing this principle because it would help spur other UN member states to take timely and effective action—for example, in Darfur today. Since each state must have the capacity to meet its responsibility to protect, the United States can push this principle not only in terms of intervening when a government has failed, but also in terms of working to strengthen a government’s capacity and integrity before it is required to act.

For these reasons, changing the global rules regarding humanitarian intervention would have direct practical benefits to the United States to the extent that they facilitate quick action in response to humanitarian crises and deprive other nations of excuses either for inaction or for blocking the action of nations seeking to intervene for purposes of humanitarian protection. By endorsing humanitarian intervention, the United States would also signal a profound shift in the definition of national and international security to include the security of individual citizens as well as the security of the state as a whole. This shift is ultimately necessary to deal with the threat of terrorism, AIDS, and other challenges the 21st century holds in store.

Revelations in the 9/11 Commission Report about the difficulties United States policymakers had in grasping the extent of the threat al Qaeda posed before September 11, 2001, reveal the continued existence of a Cold War mentality that focuses only on states as the principal actors in the international system. This mindset defines national security and international security only in terms of threats to state security—the survival of entire states. Further, the protection of individuals from violence—human security—has been understood as the province of domestic governments.

It is increasingly obvious that persistent threats to human security within a state merit international engagement. The inability of a state to provide human security for its citizens—for example, when it becomes a failed state—can translate quickly into a threat to other states. A state unable to provide human security for its citizens can become a site for terrorist groups or a breeding ground for radical ideologies that preach violence to individuals who see no other avenue of hope. Alternatively, a government’s attacks on its own people often cause prolonged civil strife that typically results in massive civilian deaths and dislocation. Such disruptions generate large refugee flows that can draw neighboring states into the conflict and create long-term regional instability.

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For these reasons, it makes sense for the administration to uphold a doctrine of intervention for purposes of humanitarian protection as justified on moral, legal, and security grounds. Such a doctrine is only the first step, however. To address humanitarian crises and their fallout effectively, the administration must make it easier to use force on a relatively small scale as quickly as possible. Further, to minimize the need to use force, the administration should create a range of options for taking timely preventive measures together with other nations.

The next several months offer President Bush a window of opportunity to place the United States firmly in the vanguard of an emerging consensus to make it legally and practically possible to protect some of the world’s most vulnerable populations against mass murder, in many cases at the hands of their own governments. Protecting the world’s most vulnerable will enhance U.S. security by entrenching international recognition of the link between a government’s domestic behavior and its potential international threat. The four actions below would help establish an overall legal and conceptual framework for humanitarian intervention and create many of the practical tools necessary to turn global hand-wringing into concrete help for victims of humanitarian crises.

#### **President Bush should:**

- ▶ *Deliver a major speech affirming that the United States supports the emerging norm of a collective international responsibility to protect populations against genocide and other large-scale killing in cases where individual governments have failed to fulfill their own obligations toward their people. The president should endorse the work of the International Commission on Intervention and State Sovereignty and the United Nations High Level Panel on Threats, Challenges, and Changes. He should state unambiguously that he believes the responsibility to protect to be a corollary of United Nations membership. And he should call upon other world leaders to follow suit. The president should also task officials in the Department of State and the Department of Defense to work with their counterparts around the world and at the United Nations to begin developing a set of criteria under which intervention would be justified; they should use the ICISS report as a frame of reference and seek Security Council endorsement of such criteria.*
- ▶ *Create a commission composed of prominent defense and humanitarian experts from the United States and other NATO countries to examine the feasibility of creating a NATO rapid-reaction force specially trained and ready for intervention in humanitarian crises. This commission should consider the vital necessity of quick deployment to prevent needless deaths, but it must also be sensitive to the difficulties of using violence,*

including high-altitude bombing, to prevent killing. The commission should also assess the extent to which a NATO force could support interventions by more regionally based troops, such as forces acting under the authority of the Organization for African Unity, the Organization of American States, and the Association of Southeast Asian Nations.

- ▶ *Endorse the proposal of Canada's Prime Minister Paul Martin for the creation of an informal group of leaders of the G-20 nations, which can, in a timely manner, coordinate diplomacy on urgent international issues and humanitarian crises. The United States should work with the Canadian government to cosponsor the first meeting of this proposed group in tandem with the United Nations General Assembly meeting in September 2005.* A flexible, manageable network of representative world leaders can quickly coordinate diplomacy on urgent international issues like humanitarian crises, where a difference of weeks can literally save thousands of lives. The L-20 would be an informal forum driven by personal contacts between the leaders of the United States' closest allies.
- ▶ *Task the United States national security advisor with reviewing the 2002 National Security Strategy and recommending ways of incorporating into it an emphasis on human security as well as state security. The administration should revise its September 2002 National Security Strategy to acknowledge the way in which threats to human security around the world evolve into threats to state security and, ultimately, to United States security. The administration should develop an integrated concept of human and state security and a corresponding strategy to address threats to each in a timely manner.*

# Improve Coordination with Allies to Promote Democracy

*Ted Piccone*

## Summary

Leaders of both parties in the United States have recognized that the spread of democracy abroad over the past 15 years has enhanced America's national security. Together with its allies, the United States has helped democracy take root in Central and Eastern Europe and across Africa and Latin America. Unfortunately, however, inconsistent and even counterproductive actions by the United States over the past four years in countries like Iraq, Venezuela, and Haiti have made promoting democracy more difficult. These missteps have given friends of democracy good reason to question the United States' intentions. These actions have also created divisions between the United States and its allies, and democracy's opponents have sought to exploit these rifts.

Since he won re-election in November 2004, President Bush has pledged Washington's support for "effective multilateral action" to promote democracy. In his inaugural address, the president called for a "concerted effort of free nations to promote democracy" as the antidote to tyranny. In striving to fulfill this ambition, the president should start by working with the United States' democratic allies, old and new, to develop a common, consistent strategy to nurture the growth of democracy in priority states by applying diplomatic pressure and providing financial incentives.

### President Bush should:

- ▶ *Be consistent in demonstrating the United States' support for democratic reforms in countries around the world.*
- ▶ *Establish a special global fund that will help foster democracy in priority states, and change aid criteria to provide enhanced financial assistance, debt*

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*relief, and trade privileges as rewards to countries that implement democratic reforms.*

- ▶ *Strengthen the Community of Democracies by, among other things, creating a multinational secretariat and a Democracy Transition Center that would assist democratic reformers in transitional democracies and in authoritarian states.*
- ▶ *Support efforts by the Democracy Caucus to reform the United Nations' human rights system by endorsing criteria for membership on the United Nations Human Rights Commission and by forming a caucus secretariat to coordinate common positions on democracy and human rights issues in United Nations bodies.*

## Background

The appearance of new and stronger democratic states around the world is one of the most encouraging developments of the past 20 years. The United States has played an important role in fostering democratic change in these countries. The United States government, for example, supported the creation of international mechanisms to protect Latin American democracies from military coups. It also offered NATO membership as an incentive to Central and Eastern European nations to democratize their security institutions. The United States has provided hundreds of millions of dollars in foreign aid to foster the development of parliaments, free media, and other institutions of civil society around the world. With bipartisan backing, the U.S. government provided rhetorical support for democratic reformers and financial aid for nascent democracies and democracy-building programs. The United States has also supported trade embargoes and other economic sanctions as well as military action against dictatorial regimes. In too many instances, however, the promotion of democracy has taken a back seat to the promotion of “higher order” interests like securing economic and trade advantages and sources of energy, obtaining rights for military bases, defeating the Soviet Union, and, especially now, waging war against terrorism.

The enlargement of the European Union (EU) stands as one of the most successful efforts to encourage democratization. Born out of a long experience with war and persecution, the EU has opened its doors to new democratic states as a way of securing peace and consolidating the continent's democratic, market-oriented regimes. The grand bargain—compliance with EU norms on democratic governance and human rights in exchange for participation in the EU's customs and single currency regime, access to EU markets, and direct financial assistance—has accelerated democratic consolidation throughout Central and Eastern Europe, with prospects for extension as far afield as Turkey. Complementary incentives for states to join NATO if they democratize their security institutions have also played an important role.

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Despite the positive trends of the past 20 years, including the recent developments in Ukraine, the momentum of democratic change unleashed by the end of the Cold War has diminished. Some newer democracies remain vulnerable to the challenges of globalization and are struggling to improve living standards quickly enough to meet the high expectations of their people. At the same time, autocratic leaders have little incentive to implement political reforms and have thwarted democratic change without paying a political price.

Helping democratic reformers meet these new challenges requires a new paradigm that will reward democratic behavior with preferential benefits, such as enhanced development assistance, trade privileges, and debt relief. Providing this help is not only morally correct, it is also a wise investment. And it will strengthen democratic allies of the United States. Empirical evidence shows that low-income democracies consistently outperform low-income autocracies in terms of economic growth, life expectancy, literacy rates, and access to public health.<sup>1</sup>

In June 2000, more than 100 governments gathered in Warsaw to launch the Community of Democracies (CD), a global forum for promoting democracy and human rights. The Warsaw Declaration commits these countries to work together to strengthen democracy at home and abroad. A CD foreign ministers meeting in Seoul resulted in agreement on ways the Community can assist fragile democracies. A Convening Group of ten countries—Chile, the Czech Republic, India, Mali, Mexico, Poland, Portugal, South Africa, South Korea, and the United States—serves as a coordinating body to exchange information and, when invited, to facilitate action to support democratic consolidation. The Convening Group is also responsible for deciding what governments to invite to CD meetings; it makes these decisions based upon a set of democratic principles endorsed in the Warsaw Declaration.

The Community of Democracies can do more to spur multilateral efforts to promote democracy. For example, the Convening Group can do more to negotiate common policies and aid strategies toward countries like Ukraine, which have reached the democratic tipping point, and toward countries like Burma, which suffer illegitimate regimes. To date, however, the lack of a governing structure, funds, and political support have rendered the CD far less effective than it could be. The European democracies and Japan have not put their full weight behind the CD, giving less-enthusiastic states like India and South Africa a chance to water down or block even modest actions.

The CD agreed in Warsaw to organize caucuses and coalitions in existing international organizations to support democracy and human rights. Since then, modest steps have been taken to organize a Democracy Caucus at the United Nations for the purpose of coordinating common positions on democracy and human rights issues before UN bodies. Currently,

membership in the Democracy Caucus is limited to those states invited to the CD ministerial meetings. Chile, which presently chairs the CD process, has sponsored a series of meetings in Geneva and New York to begin exchanging information and crafting common positions on resolutions before the United Nations Human Rights Commission and the United Nations General Assembly.

The Democracy Caucus can become a key forum for mobilizing support for reforming the United Nations' human rights machinery, which has been in crisis for several years. Nondemocratic nations have successfully taken control of bodies like the United Nations Human Rights Commission (UNHRC)—electing Libya as the Commission's chair and, despite the genocide in Darfur, naming Sudan as a member—and aggressively protect each other from external scrutiny by UN bodies and nongovernmental organizations, while democratic states rarely forge a common front.<sup>2</sup> Unfortunately, the Democracy Caucus's leading members have been unwilling to provide the necessary resources to institutionalize it, and the Community of Democracies, as a permanent coordinating body. This has hobbled both initiatives.

## The Bush Administration's First Term

The Bush administration has made the promotion of democracy one of the signature features of United States foreign policy. It deserves credit for speaking out for freedom in the Middle East, Afghanistan, Burma, and Sudan.

After wavering, the Bush administration quietly embraced the Community of Democracies initiative as a mechanism to develop new ways of fostering cooperation to promote democracy. The Department of State has worked diligently, largely behind the scenes, to advance the process by undertaking small projects designed to demonstrate the value of such a global forum. It also played a constructive role in ensuring that governments that clearly failed to meet democratic standards were not invited to Seoul. Another promising step was President Bush's proposal to the United Nations General Assembly to create a United Nations Democracy Fund to assist states that are making progress in respecting universal democratic standards. The UN's Democracy Caucus has strong bipartisan support in the House and Senate and the Bush administration has energetically supported its creation. It is also winning support from other democracies as long as the Caucus is seen as a mechanism for strengthening and reforming the United Nations from within and not as a tool to undercut the world body.

The United States' effectiveness in championing the cause of democracy is threatened by the perception that it is waging its campaign against terrorism at the expense of democratic values and human rights.

“To wage war on terrorism, the administration has overlooked efforts by autocrats to repress democratic change.”

Advancing the cause of free and fair elections, if done in a framework of security and the rule of law, can help resolve conflicts and facilitate social and economic development. But doing so through military force has proven to be counterproductive to the United States’ democracy agenda. It has provoked anger and resentment toward U.S. leadership in the world. And it has diminished United States influence.

The gap between rhetoric and reality has grown wider as the Bush administration has struggled to build alliances to fight terrorism around the world. The occupation of Iraq, the prisoner abuse at Abu Ghraib, and allegations of similar abuse of detainees at Guantánamo have enflamed passions in the Islamic world and Europe and made it more difficult for the president to carry out his “forward strategy for freedom.” Democracy reformers in Arab countries have refused to accept overt United States assistance for fear of being ostracized as agents of a foreign government. The administration’s initial attempts to develop a multilateral effort to promote democracy in the Middle East backfired due to lack of consultation with fellow G8 governments and Arab regimes. It remains unclear whether its efforts will ever succeed.

The gap between high rhetoric and low performance in other regions has also diminished U.S. credibility overseas. In Latin America, the United States chose to back a short-lived military coup in Venezuela in 2002, which crippled its ability to play a constructive role when the deposed president, Hugo Chavez, returned to power. In Haiti, Washington stepped out of the way when armed opponents overthrew the island’s elected president, Jean-Bertrand Aristide, in 2004. The administration has given scant critical attention to the campaign by President Vladimir Putin to consolidate power in Russia by curbing the independence of the country’s press, judiciary, civil society institutions, and regional and national parliaments. And the administration, in a clear trade-off to make it easier to wage the war on terrorism, has chosen to overlook efforts by autocrats to repress democratic change in Pakistan, Azerbaijan, Uzbekistan, and other countries.

### **Toward an Effective Policy of Spreading Democracy by Improving Coordination with Other Democratic Countries**

President Bush has outlined an ambitious second term agenda for helping others “find their own voice, attain their own freedom, and make their own way” in order to protect the national security of the United States.<sup>3</sup> The next four years will provide the administration ample opportunity to demonstrate its support for democracy. The president can back his rhetoric with action and work with other democracies to forge common approaches for promoting democracy in countries where it is most

threatened and where it stands the best chance of success. The administration can set a new tone in its relations with the world. It can listen to others and prioritize multilateral strategies for promoting democracy. It can provide diplomatic support, financial assistance, and other forms of direct aid to fragile democratic states and struggling democratic activists in closed societies.

### **President Bush should:**

- ▶ *Be consistent in demonstrating the United States' support for democratic reforms in countries around the world.* The administration should retake the moral high ground by launching a series of actions to demonstrate that it will “do no harm” to the efforts of democratic reformers in fragile states and states with closed regimes. Such a policy requires the United States to condemn publicly and privately the worst violators of human rights, even those it needs to further other U.S. interests. The administration should reward good democratic performers with assistance from sources like the Millennium Challenge Account; and it should cut off discretionary aid to punish autocratic regimes that abuse fundamental human rights. The president should not embrace the despots of Russia, China, Saudi Arabia, Burma, Uzbekistan, Pakistan, and Azerbaijan, who repeatedly undermine democratic principles. The administration should find ways to honor and protect persons who risk their lives promoting democratic reform and human rights in a nonviolent manner.
- ▶ *Establish a special global fund that will help foster democracy in priority states, and change aid criteria to provide enhanced financial assistance, debt relief, and trade privileges as rewards to countries that implement democratic reforms.* The United States should join other countries committed to promoting democracy and offer a coordinated package of economic and trade privileges, including trade preferences, debt relief, and financial aid, to states that demonstrate progress toward democratic consolidation. Development instruments, like the Millennium Challenge Account, should become multilateral and global. The United States should also make common cause with donor countries at the Bretton Woods institutions to tailor financial assistance and development aid so it rewards good democratic performers. The administration should move forward with its allies on its plans to create a Global Democracy Fund at the United Nations. The Community of Democracies, along with representatives from civil society, should serve as the fund's governing board to ensure that genuine democratic reformers receive preferential treatment for development assistance and democracy-building aid.
- ▶ *Strengthen the Community of Democracies by, among other things, creating a multinational secretariat and a Democracy Transition Center that would*

*assist democratic reformers in transitional democracies and authoritarian states.* The secretary of state should use the CD as the United States' multilateral forum of choice for coordinating political and programming support to transitional democracies. The United States should immediately consult with its democratic allies on ways to institutionalize the CD so that it has the mandate, resources, staffing, and political support to carry out effective strategies for strengthening democracy in priority states. To begin, the secretary should work with our European allies to back Hungary's proposal for a new center to offer support and advice to democratic reformers in closed and open societies. The United States should push for these kinds of concrete results at the CD's ministerial meeting in Santiago in May 2005.

- ▶ *Support efforts by the Democracy Caucus to reform the United Nations' human rights system by endorsing criteria for membership on the United Nations Human Rights Commission and by forming a caucus secretariat to coordinate common positions on democracy and human rights issues in UN bodies.* The United States should consult with its democratic allies to forge a consensus to institutionalize the Democracy Caucus as a standing body for coordination at the United Nations. To be effective, the Caucus should create a secretariat staff responsible for convening meetings, sharing information, and crafting common positions on democracy and human rights issues. In addition, the administration should identify allies who support changing the way the United Nations Human Rights Commission chooses its members. Beyond just encouraging like-minded states to run for regional slots on the commission, the Democracy Caucus should support adoption of criteria that would render ineligible those states that are under United Nations sanctions or which refuse to cooperate with UNHRC decisions.

1. Morton H. Halperin, Joseph T. Siegle, and Michael M. Weinstein, *The Democracy Advantage: How Democracies Promote Prosperity and Peace*, Council on Foreign Relations, Routledge Press (2004).

2. See, for example, "Voting at UN Human Rights Body Shows Little Improvement," Democracy Coalition Project, May 10, 2004, available at [http://www.demcoalition.org/pdf/DCP\\_press\\_release\\_2004.pdf](http://www.demcoalition.org/pdf/DCP_press_release_2004.pdf)

3. Inaugural Address of President George W. Bush, January 20, 2005.

# Support Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women

*Alexandra Arriaga*

## Summary

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides an international standard for protecting the rights of women, addressing topics as diverse as ending violence, stopping trafficking, and supporting girls' education. CEDAW has been ratified by 179 countries and is supported by a broad, bipartisan coalition in the United States that represents tens of millions of Americans from every state. The United States played an active role in drafting and advocating for the treaty but, along with Iran, Somalia, and Sudan, has yet to ratify CEDAW.

The Bush administration has made promoting global respect for women a focus of its foreign policy. The administration has, for example, expanded its efforts to combat trafficking in women and girls, and to promote economic opportunity and inheritance rights. CEDAW ratification would bolster these and other efforts by sending a strong signal that the United States is committed to helping women become full participants in their societies.

The Bush administration found that the Convention is “generally desirable and should be approved.” By voicing support for CEDAW’s ratification, President Bush could reaffirm the long tradition of U.S. support for human rights and promote global respect for women.

## **President Bush should:**

- ▶ *Express public support for CEDAW by calling for Senate ratification.*
- ▶ *Require United States government reporting on human rights to include CEDAW compliance.*

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## Background

CEDAW is the only comprehensive international agreement on the rights of women. The treaty protects the right to be free from violence, receive equal protection before the law, access to education and employment opportunities, access to health care, and the right to participate in political and financial decisions. Experts agree that ratification of CEDAW would not require changes in United States law.

In the United States, more than 190 religious, civic, and community organizations representing millions of members across the country endorse CEDAW. The diversity of supporting organizations spans the AARP, Amnesty International, Business and Professional Women USA, the National Coalition of Catholic Nuns, the National Council of Women's Clubs, the National Education Association, the United Methodist Church, and the YWCA. Every industrialized nation and every country in the Western Hemisphere except the United States has ratified CEDAW; as of October 2004, 179 nations of diverse cultures, religious traditions, and political systems have ratified the treaty.

The United Nations adopted CEDAW in 1979 to help nations combat discrimination against women and end human-rights abuses against women. President Jimmy Carter signed CEDAW in 1980. The treaty was voted out of the Senate Foreign Relations Committee in both 1994 and 2002, but it has never come before the full Senate for a vote.

As with other human rights treaties, countries that ratify CEDAW report periodically on their implementation of the treaty. These reports are received by the CEDAW Committee, a group of experts at the United Nations, which reviews the submissions and offers recommendations for better implementation. CEDAW has spurred the passage and enforcement of laws in many of the 179 countries that have ratified the treaty. For example:

- ▶ Afghanistan ratified CEDAW and included language to promote women's rights in its new constitution of January 2004;
- ▶ Uganda, South Africa, Brazil, Australia, and others incorporated treaty provisions into their constitutions and domestic legal codes;
- ▶ Ukraine, Nepal, Thailand, and the Philippines passed new laws to curb sexual trafficking after ratification;
- ▶ Colombia and Japan made domestic violence a crime and required legal protection for victims after ratification;
- ▶ Turkey, to conform to CEDAW's standards, amended its national laws so that women are no longer required to ask their husbands for permission to work.

These are a few of the many examples that demonstrate the value and positive impact of the treaty. As the leading world power, the United States is in a unique position to hold countries accountable for enforcement of treaty obligations. Ratification would give the United States added leverage with foreign nations to comply with CEDAW and improve conditions for women. Specifically, the United States would be able to nominate a U.S. representative to serve on the CEDAW Committee at the United Nations to review treaty compliance, offer country-specific recommendations for further improving conditions for women, and contribute directly to the international interpretation and implementation of the treaty. Lack of United States ratification makes it easy for other countries to point to U.S. inaction on CEDAW as an excuse for not honoring their own treaty requirements.

### The Bush Administration's First Term

During his first term, President Bush underscored the importance of protecting the rights of women while he made the case for war in Afghanistan. He also highlighted the treatment of women as a distinguishing factor separating nations that espouse freedom from those that spread fear and repression.

In his State of the Union address of 2002, President Bush affirmed, "We have a great opportunity in this time of war to lead the world toward the values that will bring lasting peace. . . . We have no intention of imposing our culture. But America will always stand firm for the non-negotiable power of the state; respect for women; private property; free speech; equal justice; and religious tolerance." Then Secretary of State Colin Powell avowed, "We, as a world community, cannot even begin to tackle the array of problems and challenges confronting us without the full and equal participation of women in all aspects of life." These are strong statements, and yet the Bush administration has not used the international legal agreements that are available to help meet this challenge. CEDAW ratification would provide U.S. diplomats with a unique tool to hold countries accountable to their own commitments to uphold the rights of women.

In 2001, the Bush administration sent a letter to the Senate signaling its priorities for treaty ratification. The administration ranked CEDAW in the third of five categories, indicating that CEDAW is "generally desirable and should be approved." The Department of State took the lead in preparing the letter. However, in 2002, the Department of Justice requested the opportunity to review CEDAW and comment on U.S. ratification. Later that year, the administration turned down an invitation to testify about the treaty before the Senate Foreign Relations Committee, citing the need to complete its review on the implications of treaty implementation.

“Ratification would give the United States added leverage with foreign nations to comply with CEDAW and improve conditions for women.”

“The treaty does not seek to intrude into the decisions made within a family, only to ensure that women are not denied legal rights.”

Republican Senators noted the ongoing review as a primary reason for the delay of further Senate action on the treaty. At the UN Commission on the Status of Women in 2004, the administration backed a resolution addressing violence against women that included language in support of CEDAW. Yet the Bush administration has not prioritized ratification, it has not indicated that it has finalized its review, and it lacks a coherent position on the treaty.

As countries move to ratify treaties, they can choose to attach “reservations, understandings, and declarations” as a way to define further the treaty’s provisions and ensure its terms are clear. In the past, the United States has attached reservations, declarations, and understandings to CEDAW that are designed to ensure treaty ratification does not require changes in current U.S. law.

The most frequent concerns that critics of CEDAW cite are that the treaty could possibly condone abortion, force women into armed ground combat, and threaten traditional family roles. These concerns are generally based on misunderstandings of the treaty.

The Department of State’s review found that the treaty supports women’s access to family planning services, but is silent on the issue of abortion. Countries with highly restrictive policies preventing abortion—such as Ireland, Rwanda, and Burkina Faso—ratified CEDAW without reservations or understandings on abortion, and they continue to report on implementation of the treaty. To ensure that there was no doubt on the question of abortion, Senator Jesse Helms attached an understanding to the treaty making clear that nothing in the treaty can be interpreted to provide the right to an abortion.

The treaty makes no reference to women in the military or women in combat. To be absolutely clear on its interpretation of the treaty, the United States attached a reservation stating that the United States is not obligated to place women in all units—such as combat units—of its armed forces. Where the CEDAW Committee has focused on women in the military, it has examined, for example, the consequences of not having women in various arenas of the military, such as in decision-making councils and in negotiations of peacekeeping and peacemaking efforts.

On issues of family, the treaty seeks to ensure that women have the same rights as men to enter freely into marriage, seek divorce, choose a name, or pursue an occupation and that women receive equal treatment before the law as parents and guardians of their children and as legitimate property owners. The treaty does not seek to intrude into the decisions made within a family, only to ensure that women are not denied legal rights.

In addition to the reservation and understanding cited above, the United States has attached reservations to make it clear that the United States is

not obligated to legislate equality in the private sector, to mandate paid maternity leave, and to ensure comparable worth (a concept of equal pay for work of equal value that may be broader than current U.S. law).

The U.S. understandings specify that no restrictions will be made to freedom of speech, expression, or association to the extent protected under the U.S. Constitution; that CEDAW implementation will occur in a manner consistent with state and federal jurisdiction; that the United States will determine any health care services for women that should be provided for free and that such services will not automatically be mandated by U.S. ratification; and that the CEDAW Committee is advisory in nature and its recommendations are nonbinding.

Finally, the U.S. declarations clarify that the treaty is not self-executing (that it does not establish new obligations outside of U.S. law) and specify the process for any dispute resolution between the U.S. and any other government. The current set of reservations, understandings, and declarations are comprehensive and should alleviate any concerns about the treaty's requirements.

## **Toward a New Initiative for Ratifying CEDAW**

There have been great advances in the last decade in addressing the rights of women internationally and in integrating issues affecting women into U.S. policy. The broad spectrum of domestic support for CEDAW and the diversity represented by 179 ratifying nations demand that the United States give renewed attention to the treaty and move to make U.S. ratification of CEDAW a priority.

The Bush administration will need to build sustained Senate support for CEDAW ratification. The president should offer his full support for ratification, and his administration should improve understanding about the benefits of CEDAW based on the experiences of other countries.

### **President Bush should:**

- ▶ *Express public support for CEDAW by calling for Senate ratification.* The Senate has occasionally requested a letter from the administration ranking the government's priorities for treaty ratification. At a time when the United States is working to advance women's status in Afghanistan, Iraq, and elsewhere, the Bush administration should upgrade the priority status for CEDAW ratification, from a category three to a category one.
- ▶ *Require U.S. government reporting on human rights to include CEDAW compliance.* The Department of State provides annual reporting on

human rights around the world, including conditions affecting women. Specifically, the Country Reports on Human Rights Practices and the Trafficking in Persons Report should include information on actions countries take to integrate CEDAW provisions into their laws and practices as a way to address the human rights of women and end human trafficking. In addition, the report entitled *Supporting Human Rights and Democracy: The U.S. Record* should include information on U.S. government initiatives and actions designed to advance the rights of women, citing the CEDAW provisions that apply.

## Conclusion

Millions of women across the country and around the world would view United States ratification of CEDAW as formal recognition of the legitimacy of their human rights and as a commitment to helping women become full participants in their societies. Ratification would provide the United States a powerful mechanism to enforce women's rights internationally and would also serve as a tool to help communities across the nation support the protection of the rights of women around the globe. To the world community, U.S. ratification of CEDAW would signal that the United States considers the rights of women to be integral to human rights in general and that the United States is committed to reaffirming the long tradition of U.S. support for international human rights agreements and for women worldwide.