Re-shaping the “Monroe Doctrine”: United States Policy Concerns in Latin America Urgently Call for Ratification of the International Criminal Court

Tom Madison
Washington University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_globalstudies

Part of the Human Rights Law Commons, and the International Law Commons

Recommended Citation

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Global Studies Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.
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, 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. 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.

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. 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. According to Alvin Plexico, a Pentagon official, the operations will “strengthen the US-Paraguay military-to-military relationship and improve joint training.”

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.


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. 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.

Further concerns about the reluctance of the U.S. to join the ICC have been raised by MERCOSUR. MERCOSUR is an economic bloc which includes Uruguay, Brazil, and Argentina, in addition to Paraguay. Allowing the presence of the U.S. military in Paraguay allegedly goes against the framework of MERCOSUR. 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.

Many unsettling questions remain about the U.S. military presence in Paraguay. 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.

8. Id.
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. The Monroe Doctrine stated that the United States would protect the interests of the Western Hemisphere from outside sources of interference. 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.

During the Cold War, U.S. policy focused on combating communism in Latin America. This made human rights policy a second-tier concern. As a result, the U.S. tolerated and even supported regimes that were “violating human rights but deemed anti-communist.”

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

---

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].


19. Id.

20. Id.
intervention. 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. However, the current changes in U.S. policy toward Latin America must take into account the serious security threats posed by drugs and terrorism. The new U.S. policy must also reflect the need to alter the character of U.S. involvement in Latin America 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. Targeting the illegal drug trade has been recognized as an essential component of U.S. policy. 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.


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.\textsuperscript{27}

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.\textsuperscript{28} Lawless areas have drawn the attention of U.S. policymakers because drug traffickers and terrorists establish operations in these areas.\textsuperscript{29} 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.\textsuperscript{30} Concern for the lawless conditions in the Triple Frontier area led to current U.S. military operations in Paraguay.\textsuperscript{31}

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.\textsuperscript{32} This

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

\textsuperscript{28} For much of the Bush administration’s anxiety has to do with the relative facility with which Islamist terrorists, including Hezbollah, Hamas, and al-Qaeda, 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) . . . .

\textsuperscript{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.

\textsuperscript{30} “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.

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{33} 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.\textsuperscript{34}

Strong U.S. leadership and engagement with the countries of the Western Hemisphere is needed to address the present crisis in Latin America.\textsuperscript{35} 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.\textsuperscript{36}

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.\textsuperscript{37} Indeed, the Bush Administration has identified the critical need for the U.S. to act multilaterally in the region.\textsuperscript{38} Acting multilaterally in the region requires the adoption of a Latin

---

\textsuperscript{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.

\textit{Id.} at 19.

\textsuperscript{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. \textit{Challenges and Opportunities, supra} note 1, at 8.

\textsuperscript{35} \textit{Id}

\textsuperscript{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.

\textit{Id.}

\textsuperscript{37} “But in recent decades, Washington has arguably begun to respect Latin nations’ sovereignty far more than usual.” \textit{U.S. and Latin American Relations, supra} note 15.

\textsuperscript{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.” \textit{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.  

III. A SHORT HISTORY OF THE INTERNATIONAL CRIMINAL COURT: OVERWHELMING ACCEPTANCE IN LATIN AMERICA AND UNFOUNDED FEAR 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.” 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. 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.

Responding to the need for a permanent international criminal tribunal, the Rome Statute of the ICC was adopted on July 17, 1998. 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.

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.

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.


44. Id. at 109.

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. Latin America has changed dramatically in the last twenty years with democratically elected governments now in control, but significant human rights concerns remain. Therefore, because Latin America still feels it needs to strengthen judicial systems and increase international monitoring of human rights, it supports the ICC.

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. 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. 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.

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.


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.


than many ICC signatory countries. 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.

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. 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.

The primary U.S. objection to the ICC is that U.S. nationals would face frivolous prosecution before the Court. 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.

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. Indeed, the Rome Statute provides protections...
for accused persons that are arguably more comprehensive than the U.S. Bill of Rights.59

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.”60 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.61

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.62 ASPA also included sanctions that prohibited some forms of U.S. aid from going to certain countries that have joined the ICC.63

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.64 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.


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.

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.65

The BIAs seek to exploit article 98 of the Rome Statute.66 Article 98
states that the ICC cannot request a state to “act inconsistently with its
obligations under international law . . . or international agreements.”67
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.68 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.69 Instead, the article
was meant to only cover existing agreements that were in force at the time
the statute was adopted.70

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.”71 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.72

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.

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.  

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. 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.  

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. The Nethercutt Amendment guaranteed further spending cuts, including the withholding of anti-terrorism funds, to countries that refused to sign BIAs.  

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.


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.


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. The Amendment was reauthorized on November 14, 2005. For fiscal year 2006, Latin American countries face cuts in economic aid of up to $30.3 million.

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. 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. This is ironic because Latin America has been identified as a region in desperate need of U.S. policy attention.

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.


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.
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. 84 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. 85 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. 86

The Bush Administration must develop a strong and coherent policy to address the problems presently confronting Latin America. 87 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. 88 It was the one-hundredth country to join the Court. 89 Although the U.S. threatened to
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.  

Mexico’s ratification of the ICC has drawn close attention by Congress because of its strategic importance. “[Mexico] ranks as the second biggest U.S. trading partner and the biggest entry point for illegal migrants and cocaine,” The confrontation between the U.S. and Mexico over the ICC has reached a critical point. 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.”

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. 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 . . . .” These
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. 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.

Latin American nations are reacting angrily to the Bush Administration’s demand that they sign BIAs. Indeed, eleven Latin American countries have decided to take the aid reductions rather than forgo their support of the ICC. 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.”


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.

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. 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.

Thus, the Bush Administration has created an intense ideological confrontation with Latin American nations regarding the ICC. Unfortunately, U.S. opposition to the ICC has been placed ahead of urgent U.S. policy priorities for the region. 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.”

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.
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.
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.\textsuperscript{107} 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.\textsuperscript{108} 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.\textsuperscript{109}

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.\textsuperscript{110} The U.S. opposition campaign against the ICC reflects a general hostility by the Bush Administration towards multilateral diplomacy.\textsuperscript{111} However, this attitude within the administration must be changed to achieve its stated policy goals in Latin America.\textsuperscript{112} The

\textsuperscript{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.”\textit{Id}.

\textsuperscript{108} \textit{Id}. See also text accompanying note 107.

\textsuperscript{109} See Press Release, supra note 106 and text accompanying note 107.

\textsuperscript{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, \textit{Counterproductive to Pressure Mexico on World Court}, MIAMI HERALD, Nov. 7, 2005, at A22.

\textsuperscript{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, \textit{United States Hostility to the International Criminal Court: It’s All About the Security Council}, 15 EUR. J. INT’L L. 701, 719 (2004).

\textsuperscript{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.113

U.S. support of the ICC would advance the recent movement in Latin America toward establishing the rule of law and instituting functioning democracies.114 These changes are essential if the Bush Administration is to attain its policy goals in the region.115 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.116

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.117 If the U.S. continues to lose
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. 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.

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. These include drug trafficking, terrorism, and democracy building because these activities have a direct impact on the U.S.

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. The U.S. should act swiftly in making policy and diplomatic decisions that account for the increased role China will play in the region. 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.


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, 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.

* B.A. (2001), Augustana College; J.D. Candidate (2007), Washington University School of Law. I would like to thank my parents (Ken and Renae) and the rest of my family (Anne and Rob) for their unconditional love and support. I also thank my dear friends in Nicaragua, where a large part of my heart remains, for their insight and perspective. I am also grateful to Washington University School of Law for opening me to the always challenging, and hopefully always rewarding, world of practicing law.

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.