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# East Central Europe: Status of International Criminal Court (ICC) Exemption Agreements and U.S. Military Assistance

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## Summary

In a broad effort to obtain U.S. exemptions from International Criminal Court (ICC) jurisdiction, the Bush Administration has sought to conclude bilateral agreements worldwide that would prohibit the transfer of U.S. citizens to the ICC. The European Union has strongly promoted the ICC and is opposed to the U.S.- proposed agreements. This report addresses twelve countries of east central Europe affected by the U.S. and European policies – Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Estonia, Latvia, Lithuania, the former Yugoslav Republic of Macedonia, Romania, Serbia and Montenegro, Slovakia, and Slovenia – and the status of their varied approaches to the transatlantic disagreement over the ICC. Many in this group are in the process of joining NATO and the European Union by mid-2004. Legislative prohibitions on U.S. military assistance to non-allied ICC parties went into effect in July 2003. However, President Bush has partially waived the prohibition's application to seven countries set to join NATO in 2004. Related CRS reports include CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court*, and *The International Criminal Court and U.S. Military Assistance* (in the CRS Foreign Operations Appropriations Electronic Briefing Book at [http://www.congress.gov/brbk/html/apfor40.html]). This report may be updated as necessary.

## Introduction

In July 2002, the Rome Statute that established the International Criminal Court (ICC) came into force and officially launched the first permanent world court with jurisdiction to try individuals for war crimes and other serious human rights abuses.[1] The United States has objected to elements of the Court's Statute and has sought to conclude bilateral agreements with most countries of the world to exempt U.S. citizens from

[1] For more information on the ICC, see CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court*.

possible surrender to the ICC. These so-called "Article 98 agreements" are named after Article 98 (2) of the Rome Statute, which bars the ICC from requesting a surrender from a state that would require it to violate its international obligations. In accordance with a U.S. law (P.L. 107-206) to restrict cooperation with the ICC, the Bush Administration suspended U.S. military assistance to certain ICC ratifying states, effective July 1, 2003. Policy regarding the ICC is one of several issues in dispute between the United States and many European powers.

This report addresses twelve countries of east central Europe affected by the U.S. and European policies – Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Estonia, Latvia, Lithuania, the former Yugoslav Republic of Macedonia,[2] Romania, Serbia and Montenegro, Slovakia, and Slovenia – and their varied approaches to the situation arising from the transatlantic disagreement over the ICC. All are parties to the ICC's Rome Treaty. All wish to maintain close relations with both the United States and the EU; many view the United State to be a key guarantor of their security, and all aspire to join the EU in the near or intermediate future. With respect to the ICC exemption issue, three groups of countries from the region have emerged thus far: those that have concluded exemption agreements with the United States (Albania, Bosnia, Macedonia, and Romania); those that are expected to accede to the EU and NATO by mid-2004 (Estonia, Latvia, Lithuania, Slovakia, and Slovenia, with Bulgaria and Romania expected to join the EU at a later date) and have not (except for Romania) entered into such agreements with the United States; and those (Croatia, and Serbia and Montenegro) that are neither signatories to an Article 98 agreement nor on the short list for EU or NATO membership.

## U.S. Policy

The United States is not a party to the International Criminal Court and does not recognize ICC jurisdiction over U.S. citizens. Undersecretary of State John Bolton has asserted that the Court runs "contrary to fundamental American principles" and has "unacceptable consequences" for national sovereignty.[3] As stated in the 2002 National Security Strategy of the United States, the Bush Administration has pledged to "work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms as multilateral and bilateral agreements that will protect U.S. nationals from the ICC." Accordingly, the United States has sought immunity provisions through the U.N. Security Council for U.N.-authorized peacekeeping operations, and has pursued bilateral agreements with countries that are party to the ICC to preclude extradition or surrender of U.S. citizens from each respective country to the ICC. To date, the United States has reportedly concluded over 70 such agreements.[4] U.S. officials have emphasized that the Administration will continue its global campaign to conclude additional agreements.

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[2] FYROM, referred to here as Macedonia for abbreviation purposes only.

[3] Bolton's address at the American Enterprise Institute, "American Justice and the ICC," November 4, 2003, is available at [www.aei.org].

[4] According to the State Department, some countries which have signed Article 98 agreements have asked not to be identified. The non-governmental Coalition for the International Criminal Court maintains a list of Article 98 agreements at [www.iccnow.org].

The National Security Strategy also included the pledge to "implement fully the American Service Members Protection Act (ASPA, P.L. 107-206), which has provisions intended to ensure and enhance the protection of U.S. personnel and officials." Section 2007 of the Act prohibits the United States from providing military assistance, effective July 1, 2003, to the government of a country that is a party to the International Criminal Court (ICC) and does not sign an agreement to exempt Americans from ICC prosecution, except for NATO countries and other major allies.[5] On July 1, 2003, the Administration suspended unallocated FY2003 funds for U.S. military assistance to 35 countries, totaling about $48 million.[6] The list of sanctioned countries included several from east central Europe: Bulgaria, Croatia, Estonia, Latvia, Lithuania, Serbia and Montenegro, Slovakia, and Slovenia. The ASPA grants the President authority to waive the restrictions on military assistance on national interest grounds, and includes additional waiver provisions. In consideration of their agreements concluded and ratified with the United States, the President waived the prohibition with respect to Albania and Bosnia. He temporarily waived the prohibition with respect to Romania and Macedonia to grant them time to ratify their agreements.[7] In November, the President waived the restrictions for Bulgaria, Estonia, Latvia, Lithuania, Slovakia, and Slovenia on national interest grounds.

## European Policy

Since 2001, the European Union has maintained a common position on the International Criminal Court that strongly emphasizes the EU's support for the Court's role in promoting respect for international humanitarian law. The EU has repeatedly reiterated its commitment to give full support to the court and to preserve the integrity of the Rome Statute. Countries acceding to and associated with the European Union claim to have aligned themselves with the EU's common position on the ICC.

With regard to bilateral agreements conditioning the surrender of persons to the ICC, the EU issued guiding principles for such proposals in September 2002. They include the principle that existing international agreements, including those regarding status of forces and extradition, should be taken into account. Exemption agreements should not allow persons who have committed crimes to enjoy total impunity from prosecution. They should cover only persons "sent" to another country in an official capacity, as opposed to blanket immunity for all citizens. They should not be reciprocal to allow nationals from ICC signatory countries exemption from ICC prosecution. While the principles differed somewhat from the U.S. approach, the EU refrained from calling for an outright ban of exemption agreements.[8] However, no EU member state has entered into such an agreement with the United States to date.

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[5] ASPA; title II of P.L. 107-206, the FY2002 supplemental appropriation act. Major non-NATO allies include Australia, Egypt, Israel, Japan, Jordan, Argentina, Korea, New Zealand, and Taiwan.

[6] *The International Criminal Court and U.S. Military Assistance,* in the CRS Foreign Operations Appropriations Briefing Book, updated October 23, 2003.

[7] Presidential Determination 2003-27, June 30, 2003; 2003-28, July 29, 2003; 2004-07, November 1, 2003. Macedonia has since ratified its agreement.

[8] Judy Dempsey, "EU ministers back off over criminal court," *Financial Times*, October 1, 2002, p. 12.

European representatives have expressed regret at the signing of the exemption agreements with the United States by Albania, Bosnia-Herzegovina, Macedonia, and Romania. They assert that the agreements do not meet EU guidelines, are inconsistent with the ICC Statute and international law, and should not be ratified. While the EU has adhered to its common position on the exemption agreements, the issue did not appear to interfere with the EU-western Balkans summit at Thessaloniki, Greece, in June 2003, where the EU endorsed a regional strategy to promote the eventual integration of all of the western Balkan states into the EU. Nevertheless, EU officials emphasize that future EU candidate countries are expected to share the values and policy positions of the EU, including with regard to the ICC.

## Current Status

The following chart illustrates the current status of the twelve east central European countries with respect to the Article 98 agreements, EU and NATO entry, and U.S. military assistance (comprising the Foreign Military Financing and International Military Education and Training accounts).

| | ICC party | Art. 98 agreement | NATO invitee (5/04) | EU association | FY03 allocated military | FY04 requested military aid |
|---|---|---|---|---|---|---|
| **Albania** | √ | 05/02/03 | | SAP[b] | $8.8 | $5.0 |
| **Bosnia** | √ | 05/16/03 | | SAP | $3.3 | $2.9 |
| **Bulgaria** | √ | -- | √ | EU candidate | $20.4 | $9.9 |
| **Croatia** | √ | -- | | SAP | $6.2 | $5.8 |
| **Estonia** | √ | -- | √ | acceding 5/04 | $10.4 | $7.5 |
| **Latvia** | √ | -- | √ | acceding 5/04 | $10.1 | $7.5 |
| **Lithuania** | √ | -- | √ | acceding 5/04 | $11.6 | $8.2 |
| **FYROM** | √ | 06/30/03 | | SAP | $12.6 | $10.7 |
| **Romania** | √ | 08/01/02[c] | √ | EU candidate | $26.4 | $10.5 |
| **Serbia-Mont** | √ | -- | | SAP | $0.9 | $0.5 |
| **Slovakia** | √ | -- | √ | acceding 5/04 | $15.5 | $9.0 |
| **Slovenia** | √ | -- | √ | acceding 5/04 | $5.0 | $5.0 |

[a] estimates of combined FY03 regular and supplemental appropriations; only portions unallocated by 7/1/03 were affected by the suspension for the rest of FY03.
[b] EU Stabilization and Association process for the western Balkan countries to promote
[c] not yet ratified.

For the seven countries invited to join NATO in 2004, the prohibition under the ASPA on U.S. military aid funds will no longer apply once they become full NATO members. None of the NATO invitees has concluded an Article 98 agreement with the exception of Romania, which was the first country to conclude such an agreement with the United States. Romania's agreement of August 1, 2002, took place several months before the November 2002 NATO summit in Prague, where the alliance extended invitations to the seven candidate countries. It also preceded the EU's official guidance on the matter. The Romanian government has subsequently decided not to submit the agreement to parliament for ratification until the EU and the United States come to some mutual understanding on the issue. As the situation currently stands, Romania is set to become a full NATO member before its current waiver expires. To address the situation of the new alliance members, legislation has been introduced in Congress (H.R. 2550, S. 1317) that would lift the prohibition on military aid to candidate countries that had concluded an accession protocol with NATO; in other words, all seven in the next round of NATO enlargement. The Senate Foreign Relations Committee reported out S. 1317 on November 6, 2003. After a reportedly extended debate within the Administration,[9] the President waived the prohibition for Bulgaria, Estonia, Latvia, Lithuania, Slovakia, and Slovenia on November 21. The waiver only applies to projects deemed by the President to support NATO integration or the military operations in Afghanistan and Iraq.[10]

Most of the same countries set to join NATO by mid-2004 are scheduled to accede to the EU at the same time (Estonia, Latvia, Lithuania, Slovakia and Slovenia). Their decision not to enter into Article 98 agreements with the United States is reflective of their imminent membership in the EU and desire to align themselves with EU policies. Bulgaria has also adopted this approach even though its entry into the EU is not expected until 2007 or later. Conversely, those countries with the most remote prospects of EU accession may be viewed as having greater interest in fostering close U.S. ties and security cooperation. Bosnia, Macedonia, and Albania face unstable regional environments and enjoy no security guarantees. They look to the United States to bring peace and stability to the war-torn western Balkan region and continue to support a U.S. military presence within their borders (in the case of Bosnia) or in close proximity (Kosovo).[11] At the same time, these states emphasize their continued commitment to the ICC and desire for close and intensified relations with the EU.

Outside of both of these groups are Croatia and Serbia and Montenegro, which have neither signed an Article 98 agreement nor are part of the next waves of EU or NATO accession. Both seek to strike some sort of balance on the matter between the United States and the European Union, but appear to lean toward the EU position. In addition, while Serbia and Montenegro needs U.S. support in order to join NATO's Partnership for Peace (PfP), Serbian Prime Minister Zivkovic has noted that it would be difficult to explain to the Serbian public why the government would agree to exempt U.S. citizens

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[9] Jackson Diehl, "Allies and Ideology," *Washington Post* op-ed, November 24, 2003.

[10] Presidential Determination 2004-09, November 21, 2003.

[11] Macedonia may have been motivated by the agreement's reference to the country's name as "Macedonia," instead of "the Former Yugoslav Republic of Macedonia," which is the interim name for the country until its dispute with Greece over use of the name "Macedonia" is resolved. State Department officials have stated that no change in U.S. policy on the issue was intended (State Department Daily Press Briefing, July 2, 2003).

from extradition to the ICC while the United States insists that Belgrade arrest and extradite its own citizens to the International Criminal Tribunal for the former Yugoslavia (ICTY).[12] The Croatian government has come under similar international pressure to cooperate with the ICTY. Neither Serbia nor Croatia was included in the President's November 21 waiver determination.

## Implications

The U.S. and European opposing positions on the Article 98 agreements have posed a dilemma for many east central European governments, forcing them to make an explicit choice on the matter and face the consequences. Many have sought some transatlantic accommodation on the issue to allow them to remain eligible for U.S. military assistance as well as supportive of the ICC and EU policy. U.S. Undersecretary of State Bolton criticized the EU for imposing an "unfair choice" on EU aspirant countries in east central Europe.[13] Nevertheless, President Bush's subsequent waiver of sanctions for Bulgaria, Estonia, Latvia, Lithuania, Slovakia, and Slovenia (and earlier waiver for Romania) resolved the issue for these countries, since they are all set to join NATO in 2004.

President Bush's July 1, 2003 determination with respect to the ASPA reportedly suspended a global total of less than $50 million in military assistance funds for the remainder of FY2003. Considerably greater funds for military assistance are at risk for FY2004. Critics have argued that adherence to this policy would be counterproductive with respect to other U.S. objectives. For countries in east central Europe, a ban on U.S. assistance that is intended to help reform, train, and modernize the armed forces of NATO candidate countries could impede the ability of these countries to meet NATO military standards. East central European states have contributed forces to multilateral military operations in Iraq and Afghanistan. A continued suspension of U.S. military assistance could adversely affect the ability and/or willingness of east central European countries to contribute and sustain their forces in Iraq, Afghanistan, or potentially elsewhere, at a time when the Administration is looking to increase international participation in such missions. These considerations may have influenced the Administration's decision in November to waive the sanctions for the new NATO members.

On the other hand, some supporters of the ASPA argue that a better solution for affected countries is for them to conclude Article 98 agreements that would permit a presidential waiver of the aid restriction. Since the issue is likely to remain an important one for the United States, they argue, a country's unwillingness to sign a non-surrender agreement may adversely affect U.S. support for closer military ties and assistance to such countries, including through NATO. Some ICC opponents are also critical of the apparent U.S. focus on negotiating exemption agreements with small nations rather than with larger powers, including key allies.[14]

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[12] Beta news agency via the British Broadcasting Corporation, July 20, 2003. It should be noted that the ICTY has no institutional relationship to the ICC.

[13] Bolton, op. cit.

[14] Betsy Pisik, "Amnesty for U.S. citizens boosted," *Washington Times*, October 9, 2003.

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