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# American Justice and the International Criminal Court

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There has been considerable debate in the United States about the International Criminal Court (ICC), much of it in this very room. Rather than rehearse many of those arguments, however, I thought it might be helpful to give you a report from the front, describing current efforts by the United States to protect its citizens from the illegitimate assertion of authority over them. As President Bush has argued as far back as the 2000 campaign, the problems inherent in the ICC are more than abstract legal issues; they are matters that touch directly on our national interests and security, and therefore also affect the security of our friends and allies worldwide. As a result, the United States is engaged in a global campaign to conclude bilateral agreements that will ensure US persons are not subjected to the ICC's jurisdiction.

For numerous reasons, the United States decided that the ICC had unacceptable consequences for our national sovereignty. Specifically, the ICC is an organization that runs contrary to fundamental American precepts and basic constitutional principles of popular sovereignty, checks and balances, and national independence.

United States military forces and civilian personnel and private citizens are currently active in peacekeeping and humanitarian missions in almost one-hundred countries at any given time. It is essential that we remain steadfast in preserving the independence and flexibility that America needs to defend our national interests around the world. As President Bush said:

The United States cooperates with many other nations to keep the peace, but we will not submit American troops to prosecutors and judges whose jurisdiction we do not accept. Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable International Criminal Court.

Accordingly, in order to protect all of our citizens, the United States is engaged in a worldwide effort to conclude legally binding, bilateral agreements that would prohibit the surrender of US persons to the Court. These Article 98 agreements, so named because they are specifically contemplated under Article 98 of the Rome Statute that created the ICC, provide US persons with essential protection against the court's purported jurisdictional claims, and allow us to remain engaged internationally with our friends and allies.

Thus far, the United States has concluded and signed Article 98 agreements with seventy countries all over the globe, representing over 40 percent of the world's population. Each Article 98 agreement meets our key objective, ensuring that all US persons are covered by the terms of the agreement. This broad scope of coverage is essential to ensuring that the ICC will not become an impediment to US activities around the world. We must guarantee the necessary protection to our media, delegations of public and private individuals traveling to international meetings, private individuals accompanying official personnel, contractors working alongside official personnel (particularly in the military context), participants in exchange programs, former government officials, arms control inspectors, people engaged in commerce and business abroad, students in government sponsored programs, to name just a few categories of persons. The orderly conduct of news reporting, diplomatic relations, economic activity, tourism, military

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operations, humanitarian programs, cultural and education exchanges, and other contacts between peoples around the world depend upon rules that are fair, well understood, and subject to appropriate due process.

Article 98 agreements serve to ensure that US persons will have appropriate protection from politically motivated criminal accusations, investigations, and prosecutions. These straightforward agreements require that our partners agree, either reciprocally or non-reciprocally, not to surrender US persons to the International Criminal Court, not to retransfer persons extradited to a country for prosecution, and not to assist other parties in their efforts to send US persons to the International Criminal Court. We have worked hard to find mechanisms and formulations in these agreements that meet our requirement of blanket coverage while also responding to the needs of our bilateral partners.

Indeed, our current tally attests to the growing consensus worldwide that Article 98 agreements that provide for coverage of all US persons are legitimate mechanisms provided for in the Rome Statute itself. Of the seventy countries that have signed Article 98 agreements with us, fifty are signatories or states parties to the Rome Statute. Based on our extrapolations from negotiations currently underway, not only do we anticipate a rising number of total Article 98 agreements, but even more agreements from States Parties and signatories to the Rome Statute. Our ultimate goal is to conclude Article 98 agreements with every country in the world, regardless of whether they are a signatory or party to the ICC, or regardless of whether they intend to be in the future.

The United States decision to seek these bilateral agreements originated during the open debate in the UN Security Council on Resolution 1422. A number of ICC proponents, including European Union (EU) members, encouraged us not to resolve these issues in the Security Council, but rather to do so on a bilateral basis. Following this advice from our European friends, we began in the late summer of 2002 to seek Article 98 agreements as an arrangement that would satisfy our concerns, but also fall within the Rome Statute provisions.

Ironically, the EU subsequently rejected the advice of some of its own members, and established a coordinated position that has made it difficult for its member states to conclude acceptable Article 98 agreements with the United States. Moreover, the EU is also now putting pressure on EU aspirant countries to apply restrictive conditions on such agreements with us. Some EU officials have argued that the wording of Article 98 of the Rome Statute limits the categories of persons that can be covered by bilateral non-surrender agreements, and the EU has imposed guidelines to this effect. On the contrary, the Rome Statute does not impose any obligation on states parties to refrain from entering into non-surrender agreements that cover all their persons, while those who insist upon a narrower interpretation must, in effect, read language into Article 98 (2) that is not contained within the text of that provision.

From our perspective, the EU is imposing an unfair choice upon our friends and allies, particularly those countries seeking to join the EU. It is difficult to see how our attempt to use provisions of the treaty to protect US persons would do unacceptable damage to the spirit of the treaty, when the treaty itself provides for such agreements. Indeed, parties to the Rome Statute have used Article 124 to exempt their nationals for a period of seven years from the Court's war crimes jurisdiction, yet there has been no suggestion that triggering these treaty provisions will undermine the Court. One EU member, France, has already invoked that exemption in order to protect its citizens from accusations with respect to war crimes. We hope that senior EU officials in Brussels will reconsider their insistence on attaching overly restrictive conditions to Article 98 agreements, given the wide support we are receiving on this issue elsewhere in the world. We also continue to discuss, on a bilateral basis with EU member states, our desire to conclude properly-crafted Article 98 agreements with them.

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Increasingly, Article 98 agreements play an important role in US bilateral relationships regardless of whether a state is a party to the Rome Statute. Of importance here is the decision by the Congress to ensure that these agreements are a foundation for military cooperation relationships around the world. *The American Servicemembers Protection Act*, which was enacted with strong bipartisan support by both houses of the Congress, prohibits military assistance to countries that have ratified the Rome Statute but not entered into Article 98 agreements with the United States. Additionally, there are strong reasons for entering into these agreements with States that are not party to the Rome Statute. First, a State not currently a party to the Rome Statute may become one at any time. Second, the ICC may request that a non-party arrest and surrender to the Court a US person on its territory. The Rome Statute contains no requirement for the state to notify the United States, or receive our consent, before such a surrender. Concluding an Article 98 agreement is thus important to future cooperation on a range of diplomatic, military, and security initiatives. It also sends an important political signal that American concerns are widely shared around the world.

It is a misconception that the United States wants to use these agreements to undermine the ICC. To the contrary, we are determined to be proper in our relations with the Court, proceeding in a manner specifically contemplated by the Rome Statute itself. Moreover, in each agreement, the United States makes clear its intention to bring to justice those who commit genocide, crimes against humanity and war crimes. This is the stated goal of ICC supporters, and a goal that the United States has and will maintain.

Proponents of the ICC refuse to concede that the Court poses any problems for the United States. One of the principal arguments of the ICC's supporters has been that it will function, in effect, as a court of last resort. For countries that have functioning judicial systems, they contend, there is no reason to question the legitimacy of those countries investigating and prosecuting their own nationals accused of crimes covered by the Rome Statute. Indeed, this concept, given the name complementarity, was touted in the debates leading up to the Rome Statute, and in the lobbying campaign in the United States after the signing of the Statute, as perhaps the main reason the United States had nothing to fear from the ICC.

This is certainly the view that most European governments hold. They tell us in our bilateral discussions with them about Article 98 agreements that the ICC is mostly for use in failed states, where there is no functioning judicial system, and where, absent the ICC, there would be no capacity whatever to administer justice, as defined in the Rome Statute. In many cases, these governments have told us that they would envision investigating and prosecuting their own citizens in their national courts, rather than resorting to the ICC in the first instance, thus asserting their prerogatives under the doctrine of complementarity. One major problem with this view, of course, is that the doctrine itself is untested, and whether and under what circumstances the ICC's prosecutor will accept assertions of national jurisdiction remains essentially unknown.

What the United States is basically seeking, through Article 98 agreements, is nothing more than what states parties to the Rome Statute claim they already have. If someone were to assert that the American judicial system was corrupt, incompetent or tolerant of war crimes and crimes against humanity, and therefore amounted to the kind of failed state for whose judicial system the ICC was intended to substitute, that would be one thing. We would, I can assure you, certainly be prepared to contest those assertions. Not surprisingly, however, no one seriously makes this argument. No one contends, openly at least, that the American judicial system would not, properly and diligently, perform its function in appropriate circumstances. Nor could they. As Secretary Powell has said: "We have the highest standards of accountability of any nation on the face of the earth."

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Of course, since the United States is not even a party to the Rome Statute, there is even less reason why we should be treated more harshly than states parties. It is neither reasonable nor fair that the crimes laid out in the Rome Statute should apply to a greater extent to States that have not agreed to its terms than to those that have. This aspect of the Rome Statute is, among other things, a fundamentally unfair and highly dangerous break from the long-established premise of the International Court of Justice that there is no jurisdiction without the consent of states parties.

But let us return to the fundamental point that complementarity, one of the supposed bedrocks of the ICC, is being denied the United States by those countries that do not accept Article 98 agreements. Here, we can only conclude that another agenda is at work, namely the continued determination of some ICC supporters who hope to cajole the United States into adhering to the Rome Statute, ironically under the rubric of better protecting its own citizens. This is an interesting approach, and one that is doomed to failure. We will not join the ICC, and we will continue to press for Article 98 agreements.

Subjecting US persons to this treaty, with its unaccountable prosecutor and its unchecked judicial power, is clearly inconsistent with American standards of constitutionalism. This is a macro-constitutional issue for us, not simply a narrow, technical point of law. Our concerns about politically motivated charges against US persons are not just hypothetical. Recently in Belgium, allegations of war crimes were brought against the President, the Vice President, the Secretaries of State and Defense, and former President Bush under that country's notorious and far-reaching universal competence statute. That problem was brought closer to home when senior Belgian officials themselves were charged under the statute, and the law was subsequently amended to limit its scope. Without sufficient protection against such frivolous charges, responsible officials may be deterred from carrying out a wide range of legitimate functions across the spectrum, from actions integral to our national defense to peacekeeping missions or interventions in humanitarian crises or civil wars, such as in Liberia. Simply launching criminal investigations has an enormous political impact. Although subsequent indictments and convictions are unquestionably more serious, a zealous independent Prosecutor can make dramatic news just by calling witnesses and gathering documents, without ever bringing formal charges.

Accumulated experience strongly favors a case-by-case approach to resolving serious political and military disputes, rather than the inevitable resort to adjudication. One alternative to the ICC is the kind of Truth and Reconciliation Commission created in South Africa. This approach was intended to make public more of the truth of the apartheid regime in the most credible fashion, to elicit admissions of guilt, and then to permit society to move ahead without the prolonged opening of old wounds that trials, appeals, and endless recriminations might bring.

Another alternative, of course, is for the parties themselves to try their own alleged war criminals, as the doctrine of complementarity supposedly contemplates. In fact, the fullest cathartic effect of the prosecutorial approach to war crimes occurs when the responsible population itself comes to grips with its past and administers appropriate justice. The international effort should encourage warring parties to resolve questions of criminality within national judicial systems, as part of a comprehensive solution to their disagreements. Removing key elements of the dispute to a distant forum, especially the emotional and contentious issues of war crimes and crimes against humanity, undercuts the very progress that these peoples, victims and perpetrators alike, must make if they are ever to live peacefully together.

We strongly support states fulfilling their sovereign responsibility to hold perpetrators of war crimes accountable rather than abdicating that responsibility to the international community. For this reason, the United States has been a major proponent of the special court in Sierra Leone because it is grounded in sovereign consent, combines domestic and international participation in a manner that will generate a lasting benefit to the rule of law within Sierra Leone and its regional

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environs, and interfaces with the truth and reconciliation commission of that country to address accountability for a wide range of perpetrators.

In the past, the United States has supported the establishment of ad hoc tribunals, such as those for Yugoslavia and Rwanda, which, unlike the ICC, are created and overseen by the UN Security Council, under a UN Charter to which virtually all nations have agreed. But we are now moving beyond that. The international community can help equip local governments to try cases domestically in a credible manner. We are doing this in the Balkans and in Rwanda. On October 30, 2003 the United States pledged \$10 million at a donors' conference in The Hague to support domestic war crimes trials in Bosnia and Herzegovina. We are supporting preparations for war crimes trials in Croatia and Serbia and Montenegro, something that would have been unthinkable a few years ago. We are also supporting such efforts in Rwanda. Now, the Security Council tribunals are beginning to look at transferring cases under their jurisdictions to domestic courts.

In matters of international justice, the United States has many foreign policy instruments to utilize that are fully consistent with our values and interests. We will continue to play a worldwide leadership role in strengthening domestic judicial systems and promoting freedom, transparency and the rule of law. We seek no immunity for our citizens, but only a simple, non-surrender agreement as contemplated in the Rome Statute. We fully commit ourselves, where appropriate, to investigate and prosecute serious, credible accusations of war crimes, crimes against humanity and genocide that have been made against any of our people. We respect the decision of states to become parties to the Rome Statute, but they in turn must respect our decision not to be bound by jurisdictional claims to which we have not consented. As President Bush stated in his *National Security Strategy*,

We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court, whose jurisdiction does not extend to Americans and which we do not accept.

States parties to the Rome Statute have created an ICC to their liking, and they should live with it. The United States did not agree to be bound, and must not be held to its terms.