The U.S. Government and the International Criminal Court

Lincoln P. Bloomfield, Jr., Assistant Secretary for Political-Military Affairs
Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law
United Nations, New York
September 12, 2003

Thank you, Mr. Worthington, for your kind introduction, and for the opportunity to address this learned group on a subject that has drawn a lot of attention but which can probably benefit from even more. I applaud the Parliamentarians for Global Action for convening this event and regret that I am only able to spend a short time exchanging views with you.

My knowledge of the ICC [International Criminal Court] and the origins of the Rome Statute is admittedly modest; my perspective is that of a layman, a non-lawyer. I do, however, have some basis for pronouncing on the ICC. My bureau in the State Department is responsible for conducting bilateral Article 98 negotiations worldwide. It also oversees worldwide security assistance funding accounts that are affected by the law adopted by the U.S. Congress relating to the ICC, the American Servicemembers' Protection Act -- ASPA. Overall, my duties involve issues relating to conflict and security everywhere in the world, and this informs the views I wish to share this afternoon.

You are, no doubt, familiar with the U.S. objections to the Rome Statute as negotiated. Unlike other war crimes tribunals, such as for Rwanda and the former Yugoslavia, the ICC does not operate under the functional supervision of the U.N. Security Council, and is thus further removed from the will of sovereign states, to say nothing of democratic voters in sovereign states.

When Belgium's judicial authorities asserted universal competence and sought to prosecute leading American political and military figures for war crimes as a reflection of a fairly unique political perspective on the 1991 Gulf War, the policymaking branch of the Belgian government was able to weigh the nation's equities – such as the desirability of maintaining NATO's headquarters in its capital – and take legitimate legislative action to amend the judicial powers exercised by that country. The ICC can point to no equivalent oversight mechanism.

The lack of political accountability gives rise to my government's conclusion that, as the lead U.S. negotiator on the Rome Statute, Ambassador David Scheffer, told our Congress in 1998, the final result represented "consequences that do not serve the cause of international justice." President Clinton approved the signing of the Rome Statute 20 days before leaving office, although the U.S. under his Administration had voted against its final adoption. He said, "I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied."

His successor, President Bush, shares these "fundamental concerns," which the Bush Administration has often summarized as the potential for "politicized prosecutions." This phrase is not meant as a commentary on the caliber of the individuals designated to serve on the Court – and indeed, those that have been named are deservedly well regarded. Rather, it is the Court's lack of ready accountability to governments legitimately empowered to represent the people's interests to which we object.

Thus, across the political aisle in Washington, there was and is a consensus view that the Rome Statute is incompatible with U.S. standards of justice. The U.S. declined to become a party; the Bush Administration effectively "un-signed" the treaty 17 months ago. And yet, by its own design, the Statute purports to exert its authority over Americans even though the U.S. is not a party. Our Congress took particular exception to this notion.

Having withheld its consent to be bound, the U.S. is anything but indifferent about the prospect that Americans could be denied a trial by a jury of their peers, guided by rules of evidence and definitions under American law, including the

Constitution. These are anything but transitory or casual concerns; they are, rather, profound concerns that, for American political representatives and leaders, speak to their stewardship of the American republic, today and for the future.

That is why the U.S. Congress acted decisively to pass a law threatening to cut security assistance – part of our foreign aid – to governments that become parties to the Rome Statute. It is why the Administration sought in mid-2002 to block renewal of the U.N. peacekeeping mandate for Bosnia-Herzegovina until American concerns about exposing its own UN military peacekeepers to ICC prosecution could be assuaged.

This approach accomplished the purpose of underscoring American concern about the ICC, but it also generated consternation about the stabilization effort in the Balkans, such that the latter issue became a distraction. In the end, the Administration followed advice quietly given by some of our European allies. Their advice was to pursue bilateral Article 98 agreements under the Rome Statute.

And so, last summer, the Bush Administration lowered its public level of rhetoric and began a worldwide bilateral negotiations effort on Article 98 agreements. In retrospect, the Administration probably could have made a more public display of its change in approach, because in fact this also represented a significant policy evolution as well. As we explained to foreign governments in our diplomatic discussions, but did not particularly advertise to the international press and foreign public opinion, the Administration decided to set aside the U.S. objections to the ICC and accept the reality of the Rome Statute and the Court.

We informed governments that the U.S. does not seek to undermine the ICC, and asked in return that our decision not to become a party be similarly respected.

And yet, as September approached one year ago, we found that many European governments were taking positions that did not seem to acknowledge the U.S. effort to accommodate ICC supporters by pursuing our concerns in a practical way so as to put the whole issue behind us. Some of these governments took issue with the U.S. proposed text, while others informed us that there was pressure within Europe for governments not to reach agreement with the U.S.

On the margins of the UN General Assembly meetings one year ago, Secretary Powell met with the EU Foreign Ministers in an effort to clear the air at senior policy levels. It was a good meeting, and the Ministers assured the Secretary that the U.S. was free to negotiate bilaterally with EU and EU aspirant states This assurance was much appreciated.

A short time later, however, the EU issued “Guidelines” for Article 98 negotiations, which were inconsistent with the U.S. position. In the intervening year, these Guidelines have been advocated within Europe at political levels with ever-increasing intensity.

I believe this effort to impede the U.S. Article 98 campaign does not serve the interests of Europe, the EU or the states of Europe, and I would like to explain why, in the hope that further consideration will be forthcoming. My views, as noted, are not those of a legal expert, but rather a policy practitioner, one who appreciates that legal institutions and positions derive their legitimacy from the fidelity with which they serve fundamentally political ends.

The scope issue is central in this regard. The EU Guidelines call for Article 98 coverage to exclude persons not currently serving in their governmental capacities or as military personnel. The United States position is that the protection should apply to American citizens and our military personnel. There is little debate about covering serving U.S. military personnel, since we have had longstanding Status of Forces arrangements with our European allies.

However, the remaining difference on scope is significant. The public impression, particularly in Europe, is evidently widespread that the EU position alone is legally correct. With due respect, I wish to report my government’s view that the U.S. position is both legally correct and, as important, politically appropriate in the most formal sense of the term “political.”

The State Department’s Legal Adviser’s Office has painstakingly reviewed the arguments made against the U.S. scope position. Without delving into details beyond my professional competence, we are confident in our view that the text of the Rome Statute neither mandates the EU interpretation nor undermines the U.S. position. Indeed, our legal experts find support in the usage found in other conventions such as the Vienna Convention on Consular Relations, whose use of the term “sending state” refers to all persons who are nationals of the sending state.

Our legal experts, moreover, have reviewed again the preparatory work of the Rome Statute, to consult what the Vienna Convention on the Law of Treaties refers to as “supplementary means of interpretation.” Some may be surprised to learn that the records contain no official *travaux preparatoires* that would either confirm or determine the

meaning of Article 98(2) as relates to scope of coverage. In sum, the U.S. position on scope is legally supported by the text, the negotiating record, and precedent.

Why should the U.S. non-surrender agreements apply to all American citizens? Here, a practical perspective is appropriate, to explain why elected leaders – and not only American leaders – would find this approach entirely appropriate in the 21st Century.

The United States is a nation of immigrants; we have familial ties to localities all over the world. Our national interests know no bounds: we have diplomatic representation almost everywhere, and our private businesses and educational institutions are similarly represented far and wide.

The United States military is unique in its global presence and operations. Our personnel were found in over 100 countries over the past year. At one point in 2003, more that 400,000 U.S. military personnel were serving outside American territory. By next year, the U.S. will have over 50 treaty alliance commitments to defend the security of countries all over the world. One does not have to hold a view of American exceptionalism to acknowledge the profile and symbolic resonance of the American identity in the world.

But let us look further, at other citizens whose presence and involvement could readily be perceived by partisans as influential, even decisive, on one side or another of the violent conflicts that sometimes give rise to war crimes, genocide and crimes against humanity.

In Iraq this year, 600 media reporters, mostly American, deployed along with the coalition military forces, embedded in their operations. Non-governmental organizations numbering in the hundreds are, by the nature of their humanitarian mission, on the scene wherever societies are at risk from conflict. American corporations and their executives are posted in resource extraction areas where separatist or competing territorial claims remain unsettled.

The point, of course, is that American citizens, many of them educated and well-connected to influential actors abroad, are no less a target for potential resentment by the parties to a violent conflict than officials of the U.S. Government. You will note that Americans taken hostage in Lebanon, Colombia or the Philippines in recent years were evidently singled out not as much for their profession as for their nationality. The potential for accusations giving rise to politically motivated prosecutions cannot neatly be parsed among Americans.

Nor do we believe that European political leaders would necessarily view their equities differently. We have noted that some have required very broad, if ambiguous, immunity from exposure to any tribunal of persons related in any way to their peacekeeping deployments to Afghanistan, for example. It is also telling that Article 124 of the Rome Treaty contains a scope provision of its own, providing a party to the Statute with a period in which it can decide not to accept the jurisdiction of the Court with respect to war crimes alleged to have been committed “by its nationals.” At least one EU member state has availed itself of this immunity provision on behalf of its citizens.

The objection is also heard that the U.S. Article 98 proposal seeks to immunize Americans from prosecution for war crimes. This is neither the intent nor the reality. Some will point out that the judicial practices under the ICC may differ from those under the American system of justice. My view is that this disparity, while it may concern proponents of universal ICC coverage, is at the same time a prime factor in Washington’s misgivings, and a reason why the U.S. Government is seeking bilateral arrangements that will ensure that our citizens and soldiers are not surrendered to the ICC without the U.S. Government’s consent.

No one can say in 2003 how the Court will develop in the future, and whether it will be consistent or inconsistent with U.S. law and judicial standards. What we can say is that the United States has a demonstrated commitment to pursue justice for war crimes, genocide, and crimes against humanity. We can say that the American people, including our news media, are dogged in pursuing the facts, and seeing justice done, particularly when Americans are alleged to have committed such crimes. The U.S. has a good record of prosecuting these crimes.

And yet, while some among the ICC’s strongest supporters in Europe have advanced in their own countries the doctrine of universal competence, my government asks only a measure of appropriate deference to its own demonstrated national competence. We are, after all, talking about the judicial treatment of Americans.

And so, I repeat, the United States is pursuing a legitimate, reasonable course, acting in good faith, and hoping its concerns can be addressed without detracting from the interests of others.

With the U.S. having now engaged much of the international community of official experts for more than a year, I can report that nearly 60 governments agree with the United States position and have signed Article 98 non-surrender agreements with us. Since we have been pursuing these agreements without distinguishing Rome Statute parties from non-parties, the signatories of these bilateral agreements include large numbers of both parties and non-parties alike.

I have personally met with Foreign Ministers in recent weeks and months in Europe, Asia, Africa, Latin America, and the Middle East, often in the company of their legal advisers; and I can attest that their own commitment to justice for this category of crimes is not offended by the points of contention embodied in the EU Guidelines. There is, understandably, respect for the EU and attentiveness to its positions; but I perceive this to be more political than legal in character.

As a policymaker, I have grown concerned about the implications of continued European political support for legal guidelines that the United States cannot apply to itself. The transatlantic relationship is vitally important to all concerned, as is the relationship between the U.S. and the EU. As Secretary Powell said last week about U.S.-EU relations, "[N]ever has our common agenda been so large and mutually beneficial – from advancing free trade to counter-proliferation efforts."

I have to wonder whether the preferences of the EU's legal experts – incorporated one year ago into the EU Guidelines – have undergone a thoroughgoing examination by political and policy practitioners, weighing their strategic implications.

It is a curiosity, for example, that the EU should pursue a course of resistance to the Bush Administration's effort to resolve its concerns without undermining the ICC, when the effect of denying Article 98 agreements is to extend the reach of the ASPA law, which by its very design is intended to dissuade governments from acceding to the Rome Statute. Entering into Article 98 agreements with the U.S. would remove the threat of losing U.S. security assistance if a country becomes a party to the Rome Statute.

As the State Department official most concerned with the health and viability of our military alliances and coalitions, I find it unnatural that our deepest and traditional ally, Europe, should be an island among continents in contesting the U.S. pursuit of Article 98 coverage for our citizens. Such has been my concern that I raised this point with NATO Permanent Representatives and top officials at the inauguration of the new Allied Command – Transformation earlier this year.

My hope is that our European friends, at the political level, will calculate anew all of the equities at play on this issue – strategic, political, and pragmatic, as well as legal. If this is done, many of the points I have made here will, I am confident, carry weight, and the interests of Europe, the ICC, the United States, and the shared cause of justice will all be served.

Thank you again for hearing my perspective.

Released on September 16, 2003