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on

# "The Impact on Latin America of the Service-members' Protection Act"

Mr. Chairman,

I appreciate the opportunity to discuss the situation of the United States in regard to the International Criminal Court (ICC) and the role of so-called "Article 98" agreements in protecting American personnel from the unwarranted exercise of third-party jurisdiction by the ICC.

The United States plays a unique role in international security affairs. We serve as an anchor of regional security in conflict-prone areas around the globe. We have unique capabilities in lift, logistics, and intelligence, and are frequently called upon to support the efforts of the international community in peacekeeping and other emergencies. The United States maintains the overseas deployment of more than 200,000 soldiers, sailors, airmen and marines.

Our armed services are trained to obey the law, including the law of armed conflict. The United States deploys military lawyers with its forces in the field, in an effort to assure that the conduct of the American military conforms to the ideals of the law. Maintaining the

standards of military law involves important components of planning, training, and advice, as well as discipline against any willful violations.

The responsibility for assuring the lawful conduct of military forces in the discharge of their duties is a solemn one. In peacetime, it is a duty exercised by the "sending" country that deploys its armed forces abroad. It is helpful to recall that in the model "status of forces agreements" used by NATO and by the United Nations in peacekeeping, the jurisdiction for investigation and prosecution of any crimes committed in the course of official duties belongs primarily to the state deploying the forces overseas.[1] This responsibility of the sending state also has been a long-standing feature of bilateral "status of forces agreements" ("SOFAS").

The United States Government has had significant reservations about some aspects of the Treaty of Rome that created the International Criminal Court in 2002. This stems both from a sense of fairness towards our armed forces and a concern about the efficacy of American military operations. To be sure, in any military action, we abide by the principles of battlefield law, including the duty of proportionality that seeks to avoid unnecessary collateral damage, and the duty of confining military targeting to permissible military objects. But as we saw in the Kosovo campaign in 1999, there are many difficult and unsettled problems in the practical application of the law of war, both in air and ground campaigns. One might hesitate to give an international judge the effective power to rewrite our rules of engagement.

So, too, the jurisdiction of the International Criminal Court may extend after a treaty review conference in 2009 to the prosecution of the crime of "aggression." This is an offense with unsettled parameters. The chief American prosecutor at Nuremberg, United States Supreme Court Justice Robert H. Jackson, observed in 1946 that it is difficult to define aggression, although we knew the Nazis had committed it.[2]

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[1] See generally, Dieter Fleck, ed., The Handbook of the Law of Visiting Forces, Oxford University Press 2001.

[2] See Foreword by Justice Robert H. Jackson, in Sheldon Glueck, The Nuremberg Trials and Aggressive War (1946) ("There are many theoretical difficulties which cause violent debate but which do not plague us practically in the Nürnberg case at all. What is aggression and what is self-defense? These questions might cause considerable trouble in other circumstances. … The Nürnberg trial … has avoided wrangles over definitions.")

In the present day, the United States may find circumstances where we must decide whether to use military force, without an authorizing vote of the United Nations Security Council. The willingness of the Security Council to take action against a threat to international peace and security is sometimes hard to predict. It may be influenced by the particular membership of the Council, their national ambitions, and even their energy politics.

Thus, the United States may face situations where it must decide to act alone or with coalitions of the willing, and without the aegis of a Council resolution. Article 51 of the UN Charter recognizes the inherent right of self-defense in case of an armed attack. But in a world of weapons of mass destruction and catastrophic terrorism, the United States may have to respond before an attack is actually launched against our shores. There are also situations of genocidal violence against a vulnerable population, in which we may wish to consider intervention as part of a moral duty to protect the innocent. These very acts of selflessness may be styled by others as an illegal use of force or even "aggression."

Thus, in my view, there is still a potential hazard to American security interests from an irresponsible exercise of the jurisdiction of the International Criminal Court. These hazards are made more acute by the claim under the Rome treaty that an American national could be subjected to the Court's jurisdiction, even though the United States has not become a party to the treaty.

I am pleased to note that the first prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has wisely chosen to exercise the jurisdiction of the ICC in cases where the treaty court was invited to intervene by a war-torn country, or where the Security Council has made a referral under its Chapter VII powers.[3] Mr. Moreno-Ocampo has not sought to inject the court into the decision-making processes of NATO, or to target the nationals of third-party states that have declined to join the court, unless there is Security Council approval.

Nonetheless, the potential is still present under the Rome treaty for such an event to occur. Both at the Rome treaty conference in 1998 and at

[3] See Security Council resolution 1593, March 31, 2005 (resolution concerning Darfur).

the preparatory commissions working on court rules thereafter, the United States asked for a provision to make clear that any third-party nationals would not be subjected to the new court's jurisdiction, unless a case was referred by the Security Council. This was founded on a fundamental principle that a treaty does not bind non-parties.

The United States has sought such a guarantee against unwarranted jurisdiction from the ICC preparatory commissions on repeated occasions.[4] I testified before the Senate Foreign Relations Committee in the year 2000, to ask that the Congress allow more time to permit the American ambassador at post-Rome conferences to obtain the necessary guarantees. But it became apparent thereafter that the claim of a right to assert prosecutorial power over third-party nationals has become an article of faith for some ICC supporters, including some leaders of the preparatory conferences.

Hence, the decision was reached by the Congress and the Executive to protect U.S. personnel who serve their country overseas through the modality of bilateral state-to-state agreements. It is well to note that such agreements are actually anticipated by Article 98(2) of the Rome treaty. Article 98(2) states that the International Criminal Court

> "may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

If the conference leadership at Rome had acted on the request of the United States to exclude the exercise of the court's jurisdiction over third-party nationals – citizens of states that have not joined the International Criminal Court – then bilateral agreements would not be needed.

[4] See, e.g., Ruth Wedgwood, The Irresolution of Rome, 64 Journal of Law and Contemporary Problems 193 (2001), also available at https://www.law.duke.edu/journals/lcp/articles/lcp64dWinter2001p193.htm

But this request at Rome was rebuffed. Washington then logically turned to its friends and allies around the globe, and asked each for a bilateral agreement that would preserve the long-standing arrangement of shared responsibility for national prosecution of any criminal matters that might occur during overseas deployments. We have sought, reasonably, to prevent the surrender of Americans to an international court that we have not joined.

Under these agreements, the United States, as the so-called "sending state," would generally retain primary jurisdiction for the investigation and prosecution of any alleged offenses arising in the discharge of official duties. The "receiving state," i.e., the foreign country where American troops have been stationed or deployed, would frequently retain jurisdiction to investigate and prosecute any offenses committed in a private capacity. But no personnel would be surrendered by the receiving state to the ICC without the consent of the United States as sending state.[5]

I do not agree with the critics who claim that Article 98(2) is limited to the particular Status of Forces Agreements that happened to be in force at the time of the conclusion of the Rome treaty. That would make little sense, since we may enter into an agreement with a new country to help meet a new threat, or modify a Status of Forces Agreement to support a new effort.

Nor should Article 98(2) be read to exclude bilateral agreements that protect non-military U.S. personnel and other U.S. persons, or informal bilateral arrangements. The protection of U.S. persons abroad has long been a part of consular conventions as well as the old-fashioned friendship, commerce and navigation treaties. In a world of global commerce, thousands of American civilians and tourists, as well as government contract personnel, will travel abroad. They deserve protection from the jurisdiction of an international body that we have not joined.

To suppose that the use of the word "sending State" in Article 98(2) of the Rome treaty is limited to people who were officially dispatched by a government would be an unduly narrow reading of a text hurried to

[5] The Article 98 agreements are usually reciprocal, also requiring the permission of the "receiving state" for any surrender of its own nationals to the ICC.

completion in five weeks under pressure cooker conditions. The text was so quickly rendered that the United Nations has offered repeated "corrigenda" and technical corrections.

The exclusion of jurisdiction over all U.S. persons may be necessary to protect individual military personnel on a visit away from their primary overseas base, as well as military personnel deployed in situations where there is sometimes no formal status of forces agreement. It may be needed to protect intelligence personnel, American relief and aid workers, and private contractors, not to mention a bewildered tourist.

We are here this afternoon, of course, to discuss the issue of how the United States enters into such bilateral agreements for the protection of its personnel, and what inducements it may provide to other countries to conclude such agreements.

In the framework legislation known as the "American Service-members Protection Act" (ASPA), the United States Congress has served notice on other countries that we wish to have a firm and binding assurance that the accountability for the actions of our personnel abroad will remain the shared responsibility of the United States and the country visited, as appropriate. Americans should not be dispatched to an international treaty-based court when we have not joined the treaty.

Many foreign partners have agreed to preserve this shared jurisdiction between the two countries. After all, good relations with the United States still carry a high mark. But some states have been pressured to overturn the traditional arrangement. The European Union has reportedly threatened to exclude candidate countries from joining the European Union if they have entered into Article 98(2) agreements. Other states may fail to complete Article 98(2) agreements because they have higher priorities in their domestic politics and lawmaking.

Hence, the Congress has provided an incentive for reaching agreement, by stating that a Rome treaty party will not be eligible for American military assistance if it should refuse an Article 98 agreement. Section 2007 of ASPA provides for a potential cut-off of foreign military financing (FMF), international military education and training (IMET),

and excess defense articles (EDA), and drawdown of defense articles and services.[6]

In addition, the "Nethercutt Amendment" was subsequently added to Foreign Operations appropriations legislation. This proviso bars federally-funded aid in the form of Economic Support Funds (ESF) for any state acceding to the Rome treaty that also fails to provide a bilateral guarantee precluding the criminal transfer of U.S. persons.[7]

However, Section 2007(b) of the American Service-Members Protection Act also provides the President with clear authority to waive any restriction on the extension of military aid. To do so, the President must determine that a waiver is "important to the national interest of the United States." Such waivers have to be reported to the Congress after the fact. The Nethercutt Amendment for fiscal year 2006 contains similar waiver authority, with prior notice to Congress.

Thus, if a foreign government that has been a good partner to the United States is unable to secure conclusion of an Article 98 agreement because of the vagaries of domestic politics, still there is a provision in the law for presidential waiver of the requirement.[8]

It is possible that in some circumstances, a President would wish to continue assistance under the FMF, IMET, EDA, or ESF programs, even though the country in question is not willing at the time to enter into an Article 98 agreement. The American Service-Members Protection Act and the Nethercutt Amendment permit the President to accommodate such programs through their waiver provisions. As noted, the President must find that it is "important to the national interest of the United States to waive such prohibition."

There are a number of countries in Latin America and the Caribbean that have joined the ICC, but have not yet entered into Article 98

[6] The member states of NATO, major non-NATO allies (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), and Taiwan, are permitted military and economic assistance without restriction.

[7] The Nethercutt Amendment does not prohibit economic aid to states qualifying for assistance under the Millennium Challenge Act of 2003, nor funds for democracy and rule of law.

[8] In addition, section 2015 of ASPA also permits unrestricted assistance "to international efforts to bring to justice" figures such as Saddam Hussein, Osama bin Laden, other members of al Qaeda, and "other foreign nationals accused of genocide, war crimes or crimes against humanity."

agreements with the United States. These countries apparently include Barbados, Bolivia, Brazil, Costa Rica, Ecuador, Mexico, Paraguay, Peru, St. Vincent and the Grenadines, Trinidad and Tobago, Uruguay, and Venezuela. Argentina is not subject to ASPA and Nethercutt aid conditions because it is a classified as a "major non-NATO ally."

One can appreciate that the United States may share important interests with these countries. We seek partners in our efforts to deter narcotics trafficking. We wish to stabilize new democracies. We need to take joint action against any threats involving international terrorism.

But there is nothing in the operative language of the ASPA or the Nethercutt Amendment that discourages or restricts the President of the United States in the use of waiver provisions to accommodate a situation of acute and compelling, or indeed, even an "important" interest.

The Congress may choose to provide the President with its views on circumstances that warrant accommodation of non-Article 98 states, through the exercise of the waiver power. But this involves communication and persuasion, and does not require any change in the statute.

Any broad attempt to exempt particular states through legislation could present the difficulties of fast-changing situations. Similar problems might attend any legislative attempt to exempt particular programs or program amounts. Certainly any attempt to accommodate a particular country must conform to the rule against legislative vetoes and the requirements of the presentment clause of the Constitution, as set forth by the United States Supreme Court in the Chadha case.[9]

In the attempt to negotiate with foreign states for appropriate protections for Americans, the President may need all the tools that he has at his disposal, and the Congress would surely support this effort. But the Congress has an important role in its capacity to highlight and focus national attention upon those situations where it believes that the President would advance America's interests by the exercise of the ASPA and Nethercutt waiver provisions.

[9] See INS v. Chadha, 462 U.S. 919 (1983).

One hopes, as well, that the member states of the Rome treaty will come to the view that an international court has sufficient work to do through criminal referrals by the United Nations Security Council and by consent of states of nationality. Any maximalist extension of ICC jurisdiction, to sweep up the citizens of states that have not joined the treaty, will test the limits of international law and undermine the durability of the court.