



United States Mission to the OSCE

Reply on the International Criminal Court and Article 98 Agreements

As delivered by Ambassador Larry Napper, Head of Delegation
to the Human Dimension Implementation Meeting, Warsaw
October 8, 2004

Mr. Moderator,

I would like to address the comments raised concerning Article 98 agreements. The United States has a unique role and responsibility to help preserve international peace and security. At any given time, U.S. forces are located in close to 100 nations around the world, for example, conducting peacekeeping and humanitarian operations and fighting inhumanity. We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our country is committed to a robust engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission.

As a result, the United States is entering into legally binding, bilateral agreements that would prohibit the surrender of U.S. persons to the ICC without our consent. These agreements are specifically contemplated under Article 98 of the Rome Statute that created the ICC and provide U.S. persons with essential protection against the Court's purported jurisdictional claims. Thus far, the United States has concluded Article 98 agreements with 95 countries over the globe, 68 of whom are either states parties or signatories to the Rome Statute.

I should note that the U.S. decision to seek these bilateral agreements originated during the open debate in the U.N. 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 European Union 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 enter into acceptable Article 98 agreements with the United States. Moreover, the EU is also now putting pressure on EU aspirant countries and others 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 may 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. 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 enter into properly-crafted Article 98 agreements with them.

Increasingly, Article 98 agreements play an important role in U.S. bilateral relationships regardless of whether a State is a Party to the Rome Statute. The United States Government places great importance on these agreements in making decisions related to 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 are party to the Rome Statute. This prohibition may be waived with respect to those countries that have 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 U.S. 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. Entering 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, as a general rule, in these agreements, 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.

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.