

**BACKGROUND BRIEFING ON THE POSSIBLE EFFECTS OF THE
INTERNATIONAL CRIMINAL COURT ON U.S. MILITARY PERSONNEL**

DoD News Briefing
Senior Defense Official
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Senior Defense Official: Good afternoon.

The International Criminal Court is much in the news over the last few days, and we thought we would share with you some thoughts that we had on the subject. Our principal objections to the ICC treaty are that it subjects U.S. nationals - in particular, the risk is great for our armed forces - to prosecution by prosecutors and in a court that are not accountable to any kind of authority that we could hold accountable as a country. The ICC treaty applies to - creates a situation where we -- our people could be prosecuted for crimes that are defined by the parties to the treaty. And nobody in our Congress would have a voice in the definition of those crimes, and yet Americans could be prosecuted criminally for violating these purported crimes. In the prosecutions, Americans would not be entitled to all of the protections that our Constitution affords to Americans in criminal prosecutions.

And then there's an objection to the treaty that is very fundamental and very broad-ranging. And that is, the treaty claims to apply even to countries that are not parties. And this is worth emphasizing: This is really a radical -- I would say an astonishing innovation in international law and a very unwelcome development that a number of countries would arrogate to themselves the right to adopt a treaty and impose it on states that haven't signed on, that haven't become parties to the treaty. This is a deviation from hundreds of years of international legal practice. It is an innovation that - that violates the principles of sovereignty that have been basic to the relations among states for centuries. And it's really hard to overstate how much of a problem it is that states would think that they could, in effect, get together with a few other states in the world and legislate for all the states in the world.

Now I think it's important to clarify that we are not, as a result of the International Criminal Court Treaty, making sweeping generalities about how this treaty is going to affect particular military missions or deployments of the United States around the world. We look at military deployments and military missions on a case-by-case basis. And we evaluate, in each case, whether the benefits of the activity outweigh the various costs. The way we look at it, the International Criminal Court Treaty creates risks, which is to say, costs, that will affect our calculation about whether we want to participate in particular activities. But the judgments are going to be made on a case-by-case basis.

Now I'll address two of the recent matters that have arisen in the U.N. in this connection. One is East Timor. The United States has decided when -- even though we support the East Timor peacekeeping operation in principle, that the added risks created by the ICC necessitate our withdrawing the U.S. peacekeepers from the East Timor mission. And the order has now been given to withdraw them now that the treaty has come into force as of July 1st.

In Bosnia, we have decided that we are going to continue to participate in the peacekeeping mission in Bosnia, notwithstanding the added risks created by the ICC. But, in the U.N., we have made it clear that we would not support the renewal of the U.N. Security Council resolution providing the mandate for the Bosnian peacekeeping mission unless that resolution contains protections against prosecution under the International Criminal Court.

It's important to stress that the United States is not attempting to impose its will on other countries. In this debate, it is the parties to the International Criminal Court Treaty who are attempting to impose their treaty on non-parties.

All we are doing is saying that the countries that are parties to this treaty and that like the idea of the treaty and the court should feel free to use the court, but they should not assert the right to subject Americans to that treaty, or subject Americans to prosecution in that court.

We are seeking protection for our forces, right now, in a series of actions that include work at the United Nations to try to get a resolution that would provide blanket protection for Americans participating in U.N.-sponsored peacekeeping missions. We are also working on getting bilateral agreements with countries around the world that they will not transfer U.S. nationals to the court for prosecution without U.S. consent. And we are also working on adjusting the status of forces agreements that we have with countries around the world to provide appropriate protections for the -- for our people with regard to the International Criminal Court.

And with that, I think we'll be happy to take your -- take your questions.

Q: (Inaudible.)

Senior Defense Official: Can I make just two points from a military perspective? Just two short points. From a uniformed military perspective, we feel that we have an obligation to protect our service members from politically motivated prosecution from a court that's not accountable to the American people. We think that's an obligation. Military operations are hard enough without exposing our service members to double jeopardy. And I recognize it may not be double jeopardy in a true legal sense, but it puts them at risk of a second trial.

And the second point that I'd leave with you, the U.S. military has been and will continue to be a strong advocate for accountability for war crimes and crimes against humanity, and our opposition to this treaty should not in any way be viewed as lessening that.

That's it.

Q: Could you give us -- (inaudible) -- in East Timor. Secretary Rumsfeld said earlier that he was withdrawing three people from

East Timor. How many does that leave there, or would they now all be gone? And I believe he also said that it wasn't related to the ICC. Could you please explain the discrepancy there?

And could you also explain a little bit more clearly about Bosnia? It's my understanding that it would affect U.S. personnel with the U.N. action there, about 45 or 46 of them, but not the 3,100 that are there for SFOR and IFOR.

Senior Defense Official: On East Timor, I believe the number of people that we're withdrawing is three.

Q: And that leaves zero then?

Senior Defense Official: And that leaves -- (aside) -- in the U.N. mission.

Staff: Sir, there were three there. One returned from the rotation for other reasons. There are two left. And so we're withdrawing the two --

Senior Defense Official: That's right. I knew -- I knew there was this three-versus-two issue -- (laughter) -- and I didn't remember what the answer was.

Q: And could you resay the answer so that it'll --

Senior Defense Official: Okay, there were three -- there were three Americans involved in peacekeeping in East Timor, one of whom had already returned. So we are withdrawing the other two.

Q: And they are assigned to what unit? They were a U.N. peacekeeping team? Is there a name for that?

Senior Defense Official: Yes. The name --

Staff: It's the U.N. Mission in East Timor.

Senior Defense Official: U.N. Mission in East Timor.

(Cross talk.)

Q: Are there any other -- (inaudible.)

Senior Defense Official: These were active --

Senior Defense Official: One was a reservist; two were active duty. The one that returned was one of the active duty. So it's one active duty, one reservist that are coming.

(Cross-talk.)

Senior Defense Official: One active duty and one reservist are coming back.

Q: Any other military folks that remain in East Timor assigned to different duties that might be construed -- as peacekeeping?

Senior Defense Official: I don't believe so. Yeah, why don't you --

Senior Defense Official: There's a group from U.S. Pacific Command that fluctuates between 10 and 20 that is there to assist Pacific Command units in things like ship visits and things like that, completely unrelated to the U.N. mission.

Senior Defense Official: So they're not peacekeepers.

Senior Defense Official: Not peacekeepers.

Q: Why are you just pulling out peacekeepers if the treaty blanketly applies to everyone everywhere?

Senior Defense Official: We're not singling out peacekeepers. The subject matter of the U.N. resolutions, because the U.N. provides mandates for different peacekeeping missions, is peacekeeping. But as I said, we are also working on getting bilateral agreements with countries that would cover U.S. nationals generally, and we are also working on modifying our status of forces agreements to cover U.S. military personnel stationed in various countries around the world.

Q: But peacekeeping missions, you're telling the U.N., "Give U.S. troops immunity in your missions or it won't participate." And then the other issues.

Senior Defense Official: No. No. We are saying give U.S. peacekeepers immunity from the U.N. or it will increase the risks and will cause us to recalculate whether we want to participate.

Q: But Secretary Rumsfeld, as Thom said, did say that these three from East Timor were not related to the International Criminal Court, but you say that they are. Pulling them out.

Senior Defense Official: As I was saying, there are a whole set of considerations that we have that go into a cost-benefit analysis as to whether we want to participate in some activity or not. The --

Q: I'm just trying to find out if this was the first step taken related to the ICC, pulling these out of East Timor.

Senior Defense Official: I think it was -- it's part of the mix. But as I said, there are a mix of consideration that go into deciding whether we are going to participate in a particular mission or not. I don't know exactly what Secretary Rumsfeld said about this, but --

Q: He said it's unrelated.

Q: He said they'd made the decision some time ago and it was not related perfectly to the --

Senior Defense Official: Not related perfectly, maybe, that sounds right. But he's very precise, so --

Q (Off mike) -- Bosnian numbers, the difference between the SFOR and the peacekeeping force?

Senior Defense Official: Do you have the Bosnian numbers?

Senior Defense Official: I might not have the exact numbers here. Somebody over there does. But basically, you have a certain number of U.S. personnel who are part of the U.N. mission there. U.N. Mission in -- the U.N. mission in Bosnia -- we have some participants in the International Police Task Force there. So they work -- they're directly there under the U.N.

The SFOR mission is under NATO, and our -- the bulk of our force there -- in fact, the armed forces that are there -- are there under the SFOR mandate.

Q: Could they not -- could the U.S. forces that are assigned under NATO -- could they not come under the jurisdiction of ICC?

Senior Defense Official: No, no, they are under risk of coming under the ICC.

Q: Could you explain why, then, the difference between these troops?

Senior Defense Official: The decision was made that -- as I said, there are a whole set of considerations that we weigh --

Q: But can you explain what that -- what the balance was in the SFOR troops, as opposed to the U.N. troops, why the difference was drawn between the two?

Senior Defense Official: We didn't draw the distinction that way. What we --

Q: But you seem to have. By saying that the U.S. soldiers assigned to the U.N. international peacekeeping - international police force --

Senior Defense Official: These aren't necessarily U.S. soldiers. In fact, I don't know that there are any U.S. soldiers. There's -- my recollection is, there's two people --

Staff: Forty-six civilian police.

Senior Defense Official: -- and 46 civilian police, right.

Q: Forty-six civilian police --

Staff: The CIVPOL (civilian police) function is different from the military function under SFOR.

Q: Right.

Staff: But the resolution which was vetoed covered all of it.

Q: Okay. I understand what you're saying is that you're taking it as a whole and looking at it. But can you explain to us why you look at SFOR as a whole and say, "No, we'll leave them there"?

Senior Defense Official: Okay, but I want to make it clear; we didn't -- we are not saying that we are even taking the people under the U.N. mandate out. What we are saying is, we are not willing to allow the U.N. mandate to be renewed unless we get the protection in that mandate. That's why we vetoed the resolution. That is a separate matter from whether we are willing to continue to participate in the mission without the U.N. mandate behind it.

And so -- I mean, I just -- I think there's a lot of misunderstanding about this. A lot of people interpreted our vetoing the resolution as saying we are going to take out the Americans from Bosnia who were covered by that resolution. That's not what we're saying.

Q: (Off mike) -- because the 2,500 of the larger mission, it's NATO pay-as-you-go indefinite mandate. So the question we're trying to figure out, even if we're asking it wrong: The administration's view about the threat of the ICC -- what impact will that have on the 2,500 American troops under the indefinite NATO pay-as-you-go SFOR mandate, no U.N. mandate?

Senior Defense Official: They are going to remain there. Our policy has been, we went in with our allies; we're going to go out with our allies. That remains our policy.

We note that the risk of that deployment is greater now than it was on June 30th, because the ICC came into force on July 1st. And so they are there at greater risk, but we have decided that given the importance of the mission, given the various diplomatic considerations involved in working with our allies on this important issue, we have decided that we're going to keep them there, despite the higher risk. But it is a risk that we are working to mitigate through these various means that I outlined, and we're going to continue in that project.

Q: As far as the liability issue here, you've focused on U.S. military. But -- okay. This is, let's say, a pilot who comes over, drops a bomb. It hits some civilians. The civilians' families -- the casualties' families sue maybe the pilot, the commander, the service, the United States government. Could this also pose a liability risk for contractors, for the maker of the plane that dropped it, for the maker of the munition, especially if it's precision-guided and it's supposed to hit exactly where it's aimed? Could we have some contractor liability as well?

Senior Defense Official: The court is not for private causes of action. So, I think the issue that you raised is not related to the treaty.

Q: Excuse me, I'm sorry. I'm not a lawyer. You say private causes of action. Are you saying that it would be impossible for either a family or a government of a nation in which the incident occurred where civilians accidentally were killed, it would be impossible for anyone there to use the court to sue a contractor?

Senior Defense Official: It would not be -- it would be impossible, I believe, for a private -- you know, the family -- a private plaintiff to come forward and try to use the court. But the government could work

through the treaty to try to get the prosecutor to prosecute that case. And that's what puts our people at risk.

There are -- the treaty provides for several ways that an investigation or a prosecution could be initiated. And one way is at the request of a state party to the treaty.

Another way is if the prosecutor on his own, his or her own -- if the prosecutor simply decides that the prosecutor wants to bring a case. This is one of the problems of accountability. The prosecutor doesn't work for any -- any entity that we could hold accountable. The prosecutor works for this collection of countries that are parties to the treaty. And if that prosecutor decides to launch an investigation or a prosecution under the treaty, the prosecutor has the power to do that.

Q: So, there could be contractor liability in that set of circumstances, not from the families, but from the prosecutor deciding to go ahead or the government requesting the prosecutor to go ahead?

Senior Defense Official: It is a criminal court, so it would have to be criminal liability, a matter of criminal liability brought to the attention of the prosecutor.

Q: Could -- criminal liability, though, could involve a fine?

Q: (Off mike) -- restricted to war crimes, crimes against humanity, genocide, mass murder, rape --

Senior Defense Official: One of the questions, the interesting questions that arises from this question of who could be held, what kinds of parties could be held liable criminally is that it is an open question. And undoubtedly, over time, the court will come up with new ideas on how it wants to read the application of the very broad language in the treaty. And this is one of the dangers. I mean, in our society, we have -- we have specific institutions that are responsible for crafting our statutes and then courts who review them and make sure that the statutes comport with the Constitution. You don't have any of those kinds of protections here, and nobody knows exactly what direction this court is going to take.

Q: What rights for an accused would someone have in the United States that would not be available in the International Criminal Court?

Senior Defense Official: The right to a jury trial is --

Senior Defense Official: Right. The right to a jury trial, and there are evidentiary protections in American law that wouldn't necessarily apply in the International Criminal Court.

Q: What about the issue of double jeopardy -- I'm sorry -- that -- (title and name withheld) -- brought up?

Senior Defense Official: Well, just for example, if a U.S. service member was tried and found guilty -- or found not guilty by a court martial, the court could come after him and initiate a trial. Okay?

Again -- well, that's then technically a double jeopardy; it's two trials for the service member. '

Q: You talked a little bit about Bosnia, which is both a U.N. and a NATO thing. And you basically said, "Okay, we're standing by our NATO commitment, even though we have problems with the U.N. thing." There are many other, I think, U.N. operations whose mandates are coming up for renewal. And in the past, for example, I think the one in Macedonia years ago that China decided it didn't like that and went -- and so they vetoed it, and it went "Poof!" and that went away. What is the U.S. going to do, in terms of vetoing or voting for these other U.N. mandates as they come up? Or is it case by case?

Senior Defense Official: It's going to be case by case. We are hoping to reach agreement with the members of the security council on protections that would apply in blanket fashion to U.N. peacekeeping missions. We're working on that. The basic principle that we're bringing to our discussions with the Security Council members is that the treaty is okay for parties, but it shouldn't be imposed on non-parties. And if we can get an agreement that the treaty works (for) the parties and does not apply to the United States, because we're not a party, then I think we've solved the problem. Our position, as I said, is very much in line with standard law for many centuries. And all we're trying to do is make it clear that this very radical step of suggesting that a treaty can apply to non-parties is not really pushed on us. And if we can work that out, we can get all of these various U.N. peacekeeping missions renewed.

Q: And if you don't work it out, what are we going to do?

Senior Defense Official: We hope to work it out.

Q: There are four more coming up for extension in July. Have you made a decision on those four yet?

Senior Defense Official: We hope to work out this protection before those --

(Cross talk.)

Q: -- agreement that you were talking about?

Senior Defense Official: We'll have to decide what we're going to do as a government on those if we don't get the protections that we think we're entitled to.

Q: (Off mike) -- talked about the jeopardy of military personnel. Could you talk about the civilian side, the Pinochet scenario, or someone who routinely stands at this podium during wartime, either while traveling officially or after retirement, gets grabbed and arrested? What -- how high a level is that a concern to you? And secondly, can you address some of the political reality? You can't separate what you're doing from the world today. America is the last lone superpower. Many peacekeeping missions simply are not approved unless this country sends its troops. Does that give you a certain confidence that you will get your way in the Security Council?

Senior Defense Official: I think you've hit two important reasons why we think it's reasonable to suppose that we will ultimately work out a consensual arrangement among the Security Council members. One of them is that the United States is more exposed, as it were, to risk under the ICC than any other country in the world because we are more active all around the world in places where people want us to be, where they want our troops, where they want our protection. And we're present in many places around the world to contribute to the security of various countries, including ourselves. And so, I think people recognize that we have a special interest and a special exposure to the risks here.

Secondly, that -- the very fact that countries do want to cooperate with us and do want our protection and do want our participation in peacekeeping and other missions gives us the ability to go and talk with them and be listened to. And we're approaching this very respectful of the rights of other countries. Our demands are really very minimal. We just want our basic sovereignty respected. We want the traditional position of international law, that sovereign countries are not held to be subject to treaties that they haven't joined, to be respected.

Q: Are there alternative ways or some small set of alternative ways to package these guarantees that are being kicked around, or do we simply want a wooden stake through the heart of the proposition of the treaty that says non-signatories are covered? I mean, will we settle for a solution or do we want an issue?

Senior Defense Official: We are intent on getting a solution. And we think we will. I mean, we think we have a very modest and well grounded position. As I said, we're not trying to impose our will on anybody. We just don't want anybody imposing this treaty on us. And we think that if we take that position and explain it and just do the patient diplomacy that's required, we will get a solution to this problem.

The -- we're not talking about gutting the treaty. It's not necessary to gut the treaty to protect what we're concerned about. The treaty can function among its parties. And the court can apply to the parties to the treaty that want to participate in the court. And that's fine with us.

Q: If I could follow on Thom's question, the Pinochet example, what are the concerns and the risks for U.S. officials, assuming that there is no -- there are not enough bilaterals worked out or there's not a U.N. resolution. What are the risks of people traveling who have been involved in prosecuting a war that not everybody who's part of the ICC agrees with?

Senior Defense Official: Well, one of the things that the treaty does is it asserts jurisdiction over civilian officials. And so that does create risks for not just our military personnel but civilians also.

Q: You say that an international criminal court cannot be applied against countries that do not recognize the treaty. How could you ever set up an international criminal court for a country like, say, Yugoslavia or another country, I don't know, possible in the future an Iraq or -- that obviously wouldn't recognize the treaty, and yet the

international community may have a legitimate interest in conducting war crimes trials?

Senior Defense Official: I guess the short answer to that question is, history knows from World War II until July 1st of this year that there have been a number of ways that countries and the international community have dealt with war crimes. And those various ways have worked reasonably well, not entirely with no controversy, because there was a certain amount of improvising, and the Nuremberg tribunal was improvised, but it became a model. And there are cases where countries have tried their own people. There are cases where countries have consented to handing over individuals to an international tribunal. That's what happened with Milosevic. I mean, there are various ways that war crimes get investigated and prosecuted that do not require the creation of this new structure, and, as I said, this particularly problematic element of it, which is the idea that it's a treaty that applies to non-parties.

Q: But the U.S. position seems to be that it should require the consent of the state that is being -- you know, whose nationals are being accused of war crimes. And that strikes me as being, you know, a precedent that would make it much more difficult to do that in the future.

Senior Defense Official: Oh, we -- as I said, there are many cases where there have been international tribunals set up, as with Nuremberg, as in the Rwanda case, as in the Yugoslavia case. I mean, there are ways of doing this that don't create the kinds of problems that the ICC does.

Q: Those examples have usually been at the end of wars. And that seems sort of an extreme thing to have to get to that; you know, to go through to get to that point.

Q: The genocide must have occurred.

Q: It has to occur in order for it to be -- (inaudible).

Senior Defense Official: Right. Yeah.

Q: And it will have to have occurred on a scale large enough to create a special tribunal for that incident.

Senior Defense Official: That's correct.

Q: I have a factual question and then a follow-up. Does the United States not already have a bilateral agreement in place with Bosnia that applies to the SFOR?

Senior Defense Official: We have the --

Senior Defense Official: (Inaudible) -- included in the Dayton accords. That status-of-forces agreement.

Q: Does that cover your concerns as applies to the ICC or not?

Senior Defense Official: It does cover some of the concerns that apply to it. It covers our people in Bosnia while they are in Bosnia. It would not cover them for allegations regarding acts that they did in Bosnia if they later are, you know, on vacation in some other country some years from now.

Staff: Maybe one more.

Q: Well, I had a follow-up. I wanted to ask about blow-backs. When I talk to some of our most steadfast allies in the war on terrorism, they are very concerned about what the United States is doing. And they have said it seems the United States is talking out of both sides of its mouth, on the one hand, here at the time when the United States is trying to get support from the world community to do what we want to do in the war on terrorism, and yet we're trying to isolate ourselves and put ourselves above international law, including that which is agreed to by our allies. Are you concerned that this is going to have an effect on our relationship with these people in the future?

Senior Defense Official: I'm concerned that that's a misstatement of what we're trying to do. And I think if we do the kind of patient diplomacy that I was referring to before and explain to people what our thoughts are, what our concerns are, I think we can overcome a certain amount of that sentiment and make sure that people understand our position better. As I said, our position in this matter is really very modest. All we're saying -- (chuckles) -- is, "Don't try to impose a treaty on us that we haven't signed and ratified." And so it is not the United States that is throwing its weight around in this controversy. It's the -- this very new development within the International Criminal Court Treaty that represents a throwing around of weight. And all we're doing is saying we would like to stand on the long and well-thought-through traditions of international law and have our sovereignty respected.

Thank you.