

Debate on the ICC in the UK House of the Commons
Westminster Hall
Tuesday 14 January 2003

Tony Worthington (Clydebank and Milngavie): My reason for requesting the debate is that like many Government supporters, I was extremely proud that after decades of effort, we passed legislation in 2001 to give full support to the establishment of the International Criminal Court. That was the culmination of a process that started at Nuremberg. After the second world war, a judicial system had to be created because the inadequacy of creating a new tribunal or independent process after each outrage had been brought home to people. We needed an established international court in which the perpetrators of the worst crimes against humanity could be prosecuted. The sickening thought of future Idi Amins sitting safely in Saudi Arabia need be no more. If Saddam Hussein can be arrested, he can be prosecuted for any offences that he might have committed since the International Criminal Court was formed. That is truly foreign policy with an ethical dimension, if I may sound out of date.

The former Foreign Secretary and the Prime Minister played an active and special role in achieving the Rome statute that we incorporated into our law. Hon. Members of all parties said on Second Reading of the International Criminal Court Bill that they were in favour of the ICC in principle. Furthermore, the European Union, with our influence prominent, acted in unison with a common policy that was a formidable force for good to bring about the Rome statute. Eighty-seven countries have ratified the Rome statute to form the ICC; that has happened much quicker than many anticipated. That was a huge triumph to end a huge injustice where, in the words of Mary Robinson:

"It's less likely that somebody who has massacred 100,000 people or has been responsible for their death would be brought before any accountable court than somebody who commits a domestic murder."

It was therefore a great shock when I found out from isolated newspaper articles and sources abroad that my Government were leading the way in Europe to allow bilateral deals with the United States to exclude US citizens from the provisions of the ICC. In other words, we were excluding the 4 per cent. of the world's population who live in the most powerful state in the world from the International Criminal Court. That was a powerful and wrong message. Entrenching inequality before the law is a denial of the wishes of this House.

I fully accept the right of the United States not to ratify the International Criminal Court. I believe that its fears are misguided and, indeed, in the negotiations in which the United States played a full part that led up to the Rome statute people bent over backwards to accommodate its fears. The principle of complementarity was established and a role for the United Nations Security Council, on which the United States has veto powers, was written in to delay the responsibility of the ICC. Safeguards on the appointment of

prosecutors were established and there was a refusal to apply the law retrospectively. However, the United States is still not satisfied.

Angus Robertson (Moray): Does the hon. Gentleman agree that it is disappointing that the United States maintains its position, especially when one considers that the provisions of the court would cover prosecution for the attacking or bombarding by whatever means of towns, villages, dwellings or buildings that are undefended and not military objectives, such as those in New York?

Tony Worthington : I shall come back to that point. However, the wretched events of 11 September certainly constitute war crimes, and I should have thought that the United States would welcome the establishment of an international criminal court. Unfortunately, not only is the United States not ratifying the ICC but it is seeking to undermine it. In the middle of last year, it blackmailed the United Nations by saying that it would withdraw all its peacekeeping forces from East Timor and Bosnia unless it obtained immediate agreement that none of its people would be subject to any action by the International Criminal Court and that they would have impunity. It obtained a year-long exemption from the provision of the ICC, which runs out this summer.

The United States is now aggressively seeking to negotiate bilateral impunity agreements for its citizens with every country that has signed up to the ICC. Up to now, 14 nations have signed such agreements, although none has ratified them. They tend to be weak countries that are dependent on American favours; they are heavily leaned on if they do not sign. For example, the Philippines was threatened with loss of cash for army retraining and Romania with lack of progress to NATO membership if they did not sign bilateral agreements.

In addition, the United States Congress has passed the American Servicemembers' Protection Act 2002. It has sought to prohibit any US co-operation with peacekeeping operations unless US forces have been exempted. It precludes American assistance to any country unless that country has concluded a bilateral treaty with the United States that stops the surrender of US personnel to the court. Extraordinarily, the Act authorises whatever action is necessary to release from captivity any American personnel detained in The Hague or elsewhere.

Given American attitudes, it was crucial that the European Union stood together to resist demands for bilateral agreement that would undermine the International Criminal Court and that we responded with one voice to demands that severely undermined the credibility of the International Criminal Court. I am told that powerful voices in the European Union wanted to reject American demands. We were not one of them. We led those who were seeking to accommodate the Americans. That led to a position at the meeting of the Council of the European Union on 30 September that established the principles under which bilateral treaties could be signed. The Government claim that they are seeking to allow bilateral treaties with America in a way that does not undermine the ICC. I think that most people find it very difficult to square that circle.

I know that the Government are embarrassed by their role. They are not a modest Government and, rightly so. They have a lot to be proud of. They are fond of pointing out their achievements in international affairs—how they have led the way on certain matters, shown that they are at the heart of Europe, are setting the agenda and so on. However, the Government have been utterly silent on this matter, which has major implications for a piece of legislation of which we are proud. Apart from a couple of questions in the other place and my modest contribution, they have given no information voluntarily.

As a Government supporter, I think that there should have been a statement on the International Criminal Court. I am particularly indebted to the organisation Parliamentarians for Global Action, of which I am a member and which worked successfully to persuade countries to sign up to the ICC. I am grateful to Human Rights Watch and to Amnesty International because, without them, I would have had no information about what was happening.

The debate gives the Government an opportunity to explain a policy that they have not wanted to explain voluntarily. The situation in which we find ourselves has considerable implications. The likely war with Iraq will be the first one in which British military action will be subject to ICC scrutiny. British military action, however, will not be under British military control. What discussions are taking place with the Americans to ensure that British forces are not involved in activity that could be subject to ICC concern?

I return, by way of example, to the point that was made by the hon. Member for Moray (Angus Robertson). The ICC treaty contains a provision that outlaws attacks on military targets that clearly cause excessive harm to civilians. A court could find that the use of cluster bombs was, in some circumstances and some locations, a war crime. What action are the British Government taking to ensure that their troops are not involved in actions that could lead to charges being brought against them? What steps are the Government taking to ensure that their forces are not implicated in actions that are taken by American commanders, which may be in breach of their own statutes?

In a written answer to my questions in a debate on the action that was being taken to enact a bilateral treaty with the United States, the Minister for Europe told me that preliminary discussions had taken place with American officials on 17 October while they had been on a sweep of meetings in European capitals to negotiate bilateral deals. Other EU countries are rejecting such deals out of hand. What is the time scale on that matter? Does he intend that the bilateral deals should be completed before the summer, when the United States one-year exemption vis-à-vis peacekeeping forces will expire?

One important question is whether the Americans have accepted the terms on which the EU will negotiate bilateral deals. The Foreign Secretary and the EU have said that the bilateral deals proposed by the Americans in other cases, such as in East Timor, infringe the Rome statute. The guiding principles do not give the Americans all that they have demanded with regard to non-surrender agreements, for example, with regard to the categories of people who are granted impunity.

My information is that the Americans have not accepted the guidelines that the EU is laying down for bilateral deals. I would be grateful if the Minister would confirm that. Will the Minister give us a cast-iron assurance that those guidelines will not be departed from and that if the Americans do not accept them then, like the other EU countries, we will not have a bilateral treaty with the Americans?

What action will the British Government take to ensure that Parliament is kept in touch with what is being done in its name? The contrast with the European Parliament and the Council of Europe is pronounced. The European Parliament debated the issue thoroughly and heartily condemned the principle of bilateral agreements. We must be informed about what is happening. Why will the Government not be open and transparent on this issue? Will the Minister give us an assurance that the House will be informed of all future developments? The EU Council instructed states to keep it in touch after its meeting on 30 September. The Government should surely be obliged to keep us in touch.

How would we respond if any other country approached us, or the EU, seeking a bilateral impunity deal? America is not the only significant country that has not ratified the ICC. If other countries, such as India, which supply peacekeepers, also sought to withdraw from UN forces, would the exemption policy also extend to them—if not, why not? Surely, we should be stressing equality before the law.

I would welcome the Government's views on the assertions made by the legal advisors of Human Rights Watch about the illegality of the use in this context of article 98 agreements. That respected and well-informed organisation believes that parties to the ICC have a legal obligation that prevents them from entering into article 98 agreements with parties such as the United States, which is the only country to have repudiated the Rome statute. Article 98 was not intended to allow a state that had refused to co-operate with the court to negotiate a web of agreements to secure exemption for its citizens or otherwise undermine the effective functioning of the ICC. It is surely common sense that signing such an agreement with the United States, which is committed to undermining the court, contravenes the obligations that Governments undertook on signing or ratifying the Rome statute. There would have been outrage if, while the Bill was passing through Parliament, a Minister had stated that if challenged by the United States, the Government would cave in and grant it impunity.

Article 27 of the statute incorporates the fundamental principle that no one is immune for crimes under international law such as genocide, crimes against humanity and war crimes. It says absolutely explicitly that the Rome statute

"shall apply equally to all persons without any distinction based on official capacity",

yet we are sanctioning bilateral agreements with the United States that are in direct contradiction of that ethos. Does the Minister agree with the report in the *Financial Times* of 27 August, in which it was said that the European Union's legal experts advised that countries would be violating their obligations under the Rome statute if they entered into

a US impunity agreement? To put it another way, our Government will be breaking a law passed in 2001 if they sign an impunity agreement with the United States.

Another question—my speech is bound to be all questions because we have been given no information—is whether the Minister agrees that, in the end, it will be for the international criminal court as an independent international judicial body and not states such as Britain or the United States to decide what legal effect should be given to any bilateral impunity agreement.

Is the Minister aware that if Americans who are suspected of war crimes are returned to America, they return to a country that does not have laws to deal with many international crimes under the Rome statute? As the United States cannot prosecute such crimes, a suspect would enjoy de facto impunity. We could not assume that, on the principle of complementarity, a suspect would be dealt with by the United States courts. Not all war crimes defined in the Rome statute are expressly defined as crimes under federal law when committed abroad. Crimes against humanity, apart from torture, committed abroad are not included under federal law.

Does the Minister agree with Amnesty International that if we sign an impunity agreement with the United States, we shall have to renegotiate all or almost all extradition agreements with other states, as most bilateral extradition treaties have re-extradition clauses? Such clauses provide that the state extraditing a person to another state normally retains the right to agree to the re-extradition of that person to another state or international court. If a state agreed to the US impunity agreement, it would have to renegotiate all or almost all extradition agreements that have re-extradition clauses. A new clause would have to be inserted to provide that the second state retained the right to agree to extradition except when the person was a US national or fell within other categories of persons covered by the agreement. What work will have to be done as a result of a bilateral agreement?

Does the Minister agree with Amnesty International that the US impunity agreement is designed to prevent US nationals from appearing as witnesses—even as expert witnesses—before the International Criminal Court? Since such witnesses appear only if they themselves consent, under the US impunity agreement they could be prevented from attending even if they were willing to help the court in its search for truth. The right to testify would be taken away by their own Government. Does the Minister agree that that is the meaning of the proposed bilateral agreement with the US?

Is the Minister aware of those points? What undertakings have the Americans given that they will update their laws to ensure that any war criminal from their country will face justice? A statement from the Council of the European Union confirms that:

"the European Union and the United States fully share the objective of individual accountability for the most serious crimes of concern to the international community."

However, the annex to that statement points out that

"any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity."

Is the US willing to accept the stipulation that it should amend its laws to fit in with the ICC statute?

A further question needs an answer. Does the EU remain adamant that applicant countries must ratify the ICC statute as a condition of entry into the EU and that the conditions for a bilateral agreement for applicant countries will be the same as those for current members of the EU?

Like many others, I feel great sadness about the attitude of the Bush Administration. It sends a dangerous message that the most powerful nation on earth sees itself as above international law. Enormous safeguards were included in the Rome statute to prevent politicisation of the ICC. Ironically, our stance weakens the position of any British nomination for prosecutor to safeguard the court from politicisation, because, in the eyes of most ratifiers of the convention, we have taken actions that weaken the court.

The policy followed by the Bush Administration contradicts the good work done by Americans since Nuremberg, as well as their helpful attitude in establishing the tribunals in Yugoslav and Rwanda and in helping us to establish a tribunal in Sierra Leone. I am disappointed that my own Government have undermined legislation introduced by the House less than two years ago—because that is the effect of impunity agreements.

I would like the Minister's assurance that, at the very least, he will answer my questions in a letter. Much better would be to use the facility of a written statement to the House to explain the current state of play.

2.24 pm

Angus Robertson (Moray): I congratulate the hon. Member for Clydebank and Milngavie (Tony Worthington) on securing the debate. I am a relatively new Member of this House, so I had to go back through the *Hansard* records of its proceedings to find out quite how many questions he has tabled and debates he has taken part in. This morning, I read his contributions to the debate of 3 April 2001 on the International Criminal Court Bill, and I supplemented my reading by looking at the substantial debates in the Scottish Parliament on the International Criminal Court (Scotland) Bill, which my party supported.

My interest in the International Criminal Court stems from my previous existence as a journalist—especially in the early 1990s, when I reported from the former Yugoslavia and saw scenes that were the results of clearly criminal actions by human beings against one another. My interest in history has also shown me that that is not a new development.

Those are a couple of the reasons why my party and I are such strong supporters of the ICC. That is consistent with being in favour of an ethical foreign policy.

My interest in this subject was rekindled a few months ago when a constituent of mine who is an American citizen and whose father worked at the criminal trials in Japan after the second world war came to my surgery. I read about the international military tribunal for the far east with great interest and that reinforced my belief that it is right and proper for every state to support the ICC. Indeed, I pay tribute to the work that the Government have done to try to expedite the signing by the United Kingdom—which of course includes Scotland and the other jurisdictions in the UK.

My other particular interest in the ICC relates to the European dimension. That has been alluded to by the hon. Member for Clydebank and Milngavie, and it is an extremely important dimension bearing in mind the United States of America's efforts to secure article 98 agreements, which are essentially moves to seek exemptions for US service personnel. That is a new policy, which the George Bush Administration are pursuing; it was not pursued by the previous Democratic Administration of President Bill Clinton. Bush's Administration is clearly pressurising many international states to sign bilateral agreements that would prevent the surrender of any US citizen or anyone who has ever worked for the US military—including contractors—to the ICC, which we all hope will deal effectively with the worst crimes known to humanity.

However, after months of campaigning, the Bush Administration have concluded such agreements with only 17 countries. Only six of those countries have satisfied the Rome statute, and two of them—Romania and East Timor—are now emphasising that their Parliaments must ratify the agreement before it can take effect. Those 17 countries are Afghanistan, Dominican Republic, East Timor, El Salvador, The Gambia, Honduras, India, Israel, Marshall Islands, Mauritania, Micronesia, Nepal, Palau, Romania, Sri Lanka, Tajikistan and Uzbekistan. The hon. Member for Clydebank and Milngavie rightly said that those countries are particularly prone to diplomatic pressure to sign up to such agreements.

I welcome the moves of Germany—supposedly one of our close allies in the European Union—and Canada, which is a strong NATO partner. They expressly said that they will not sign such an agreement. On November 4, the Canadian Foreign Minister, Bill Graham, announced that Canada considers an existing agreement covering the conduct of United States personnel on Canadian soil sufficient to meet US concerns. After the Council of the European Union released its conclusions on 30 September, Germany's Foreign Minister, Joschka Fischer, announced that Germany was

"against the conclusion of special agreements and we will not conclude such an agreement."

If any right hon. or hon. Members have not yet had the chance to consider the full analysis by the German Foreign Ministry of the agreement reached at the Council, I

would commend it to them. It makes it clear that pursuing the route of signing a article 98 agreement is inconsistent with the International Criminal Court as established.

The Council of the European Union discussed the matter at great length on 30 September and released guiding principles for member countries that are considering bilateral agreements with the United States. The principles state:

"Entering into US agreements—as presently drafted—would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute."

For such an agreement to be legal for those parties, it would need to include at least:

"No impunity: A guarantee that an appropriate investigation and potential prosecution would be undertaken by national jurisdictions.

No reciprocity: The exclusion of nationals of ICC States Parties from coverage of such an agreement.

No universal scope: The limitation of coverage to those persons present in a territory"—

because they have been sent by a signing state—and

"Ratification: The agreement must be approved according to the constitutional procedures of each individual state."

In addition, the Council emphasised that the

"Rome Statute provides all necessary safeguards against the use of the Court for politically motivated purposes".

I share entirely the concerns raised by the hon. Member for Clydebank and Milngavie, especially on prosecutors. I wish any nominees from the United Kingdom every success in securing a position at the forthcoming selections. However, I would be very surprised if other signatory states did not view any candidate from one of the minority of states that have signed up to the special agreements as compromised in one way or another.

Will the Minister clarify whether he shares the opinion of Foreign Minister Joschka Fischer that the principles that the European Union has outlined represent a concrete move towards a clear rejection of article 98—or does he not see the EU's principles as hindering the UK from entering such an agreement with its US allies? It has to be one or the other; it cannot be both.

Of course, it is up to the United States Administration to form their own policy on the International Criminal Court. As a great fan of the United States and a great supporter of much of its policy, I am very disappointed by the position that it is taking towards the ICC. However, I take some comfort from recent polls on the question conducted by the Chicago Council on Foreign Relations and the German Marshall Fund of the United States. They recently released the full findings of Worldviews 2002—the most comprehensive survey ever, apparently, of US and European foreign policy attitudes. The second and final phase of the release of the survey findings shows that 71 per cent. of American respondents support the United States' participation in the International Criminal Court.

I also note with interest the findings of Monroe Leigh of the American Bar Association, which quite clearly show the United States constitution's compatibility with the Rome statute of the International Criminal Court. Those are matters for the United States, but I hope that it listens to the views of people around the world, and pays attention to the increasing scepticism about its diplomatic initiative.

There is another dimension to the issue that goes hand in hand with developments in and around Iraq. Clearly, if the United Kingdom, with or without a United Nations mandate, finds itself involved in armed military action in Iraq, there could be consequences, given that the ICC will shortly be up and running. We should consider the situation as outlined by the ICC:

"if nationals of States Parties to the Statute are victims of suspected crimes within the jurisdiction of the Court in the territory of a State which is not a Party to the Statute committed by persons who are not nationals of a State Party, the Court wouldn't be in a position to investigate except if either the State of territoriality or the State of nationality of the suspected person accepts the jurisdiction of the Court, or if the situation is referred to the Court by the Security Council."

If the UK and the US were to pursue a military campaign in Iraq—and I hope that that would occur only if there were a new mandate from the UN Security Council—and the regime of Saddam Hussein were toppled, it would raise some big questions. If during a future campaign against Iraq, war crimes were committed against UK troops, would the post-war military administration enter Iraq into the ICC? Bearing in mind that one surmises that the UK would play a role in establishing the new Government in Iraq, would the UK try to pursue a policy whereby that new Government would sign up to the ICC, or would the UK request that the UN Security Council referred the matter to the prosecutor of the ICC for investigation? That point is germane when one considers that military conflict may be only a few weeks away.

I should like to touch on a point relating to the timetabling of developments at the ICC. At the February meeting, judges will be elected, and in March 2003, there will be the formal inauguration of the ICC. My question is about nominations for judges and

prosecutors. The Minister will be aware that the UK nominee for the position of judge is Adrian Fulford, an English judge. I wish him success. I am interested in how future nominations for positions on the ICC, the European Court of Justice or other bodies will be pursued, particularly as the Government have said that they would like a more open system of appointment for judges, and bearing in mind that there are three criminal jurisdictions in the UK.

Of course, if Scotland were a normal independent country, a Scottish Government would—as would any other normal Government, such as that of Ireland—ensure that a nominee from the Scottish legal system were put forward at every point. That is not always so in the UK, although it sometimes happens, as with the example of Judge Edward who serves on the European Court of Justice. However, there is no guarantee, and I view that as a less than ideal circumstance. Nevertheless, I would still like to hear from the Minister what system the Government have in mind for future nominations.

I shall finish with a quotation that I think is germane to ICC developments, and which comes from the time of the Nuremberg trials. It is of the chief US prosecutor, Justice Robert Jackson, who said:

"The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment."

That was right then, and it is right now. If we are to reach agreements, it should be without exemptions. I look forward to the Minister's reply to my questions, and to those of the hon. Member for Clydebank and Milngavie.

2.40 pm

Ross Cranston (Dudley, North): I congratulate my hon. Friend the Member for Clydebank and Milngavie (Tony Worthington) on securing the debate. He has a passionate commitment to the International Criminal Court—that is well known—and his reputation generally on matters to do with international development is widely acknowledged in the House. When I was Solicitor-General, I was privileged to play a small part in the passage of the legislation, and I support the ICC unreservedly. However, I hope that my hon. Friend will forgive me if I put to one side his concerns for a moment, though I hope to return to them at the conclusion of my remarks. I declare my membership of the Bar.

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The Government are to be congratulated on their promotion of the International Criminal Court. As my hon. Friend the Member for Clydebank and Milngavie said, the Government adopted a positive role both at the diplomatic conference at Rome and in the

preparatory meetings leading up to that. After a long struggle—over decades—the Rome statute on the International Criminal Court was finally agreed in July 1998. We took that positive position despite the misgivings of our close ally, the United States. We have continued to support the court. Next month, as the hon. Member for Moray (Angus Robertson) said, there will be the assembly of state parties in New York, and the judges of the court will be elected. We have nominated Justice Fulford. Before his elevation to the High Court, Sir Adrian Fulford was an eminent criminal practitioner.

The success or failure of the ICC, as with other new institutions, does not turn simply on whether Governments agree, or pass the necessary legislation. An institution depends vitally on the resources—the human resources in particular—associated with it. In the case of the court, that means the quality of its judges, of both the prosecutors and defence lawyers who appear before it, and of the support staff, such as those in the registry. That quality cannot always be guaranteed. In many developing countries, the best lawyers do not want to become judges, and the judiciary must be recruited from the public sector. Practising lawyers migrate to commercial law, which is more lucrative, and abandon advocacy before the criminal courts.

As for financial resources, there are problems with the existing international criminal tribunals—or, at least, with the international criminal tribunal in Rwanda. There have been operational problems. Verdicts have been handed down in relation to only nine defendants, although over 50 detainees are still on trial, or awaiting trial. At the current rate at which cases are proceeding, that court will still be trying cases in 150 years' time.

There are also problems with the UN-sponsored trials in East Timor. The court there is not an international criminal tribunal but is sponsored by the UN as a hybrid court. Again, under-funding and neglect has meant that key appointments have not been made, and cases are proceeding in a desultory fashion.

When we turn to the former Yugoslavia, we can take some comfort from the quality of the tribunal; the efforts of Governments, especially ours, has resulted in a good record. I mention particularly the contribution of the English Bar. No better illustration can be found of the contribution that the UK has made than the trial of Milosevic. The presiding judge is Judge May, whose control over an extremely difficult trial has won universal admiration—although possibly not from the defendant. The prosecutor is Geoffrey Nice QC, and the amicus—he was appointed by the court because Milosevic is defending himself—is Stephen Kay QC. This country is making a superb effort, and its high standards are acknowledged by other countries.

It would be invidious to mention other lawyers from this country, although the senior lawyers whom I have mentioned are not the only ones to have made a contribution to the ICC; many junior lawyers are involved. For example, *The Times* last week contained an article on the International Criminal Court by Sylvia de Bertodano, a London barrister who has practised in various courts and is now contributing to the hybrid court in East Timor. The international criminal tribunal on the former Yugoslavia augurs well for the International Criminal Court. It can work.

I wish to make one subsidiary point. Too often in the House, I have to listen to negative comments about the greed of lawyers and about their obstructionism. As with any profession, there are unattractive aspects to lawyers' practices. As MPs, we sometimes attract opprobrium—and in some it is cases justified.

Mr. Malcolm Savidge (Aberdeen, North): You get it for both.

Mr. John McWilliam (in the Chair): Order. I do not work in the international court.

Ross Cranston : English judges and lawyers have done the country proud and, as I said, that has been acknowledged well beyond our shores. Leading practitioners have been to The Hague, to Arusha, and to Indonesia to appear before and work for international criminal tribunals. Although they are paid, they earn much less than they would receive if they were still practising in London; and their practices suffer when they are absent. The English Bar has also done a considerable amount of pro-bono work; for example it has voluntarily engaged in advocacy training for lawyers from other countries who are to appear before the existing international criminal tribunals. I am sure that that will continue for the ICC. The efforts to establish an international criminal Bar for the purposes of the ICC will come to fruition in June 2003. Again, our lawyers have played an important part in that.

To conclude, I make three points. First, I hope that the successful operation of the international criminal tribunal for the former Yugoslavia, and the future success of the ICC, will convince the United States of the value of acceding to the Rome treaty. Secondly, the Government deserve credit for all that they have done within the confines of realpolitik. Finally, as well as taking credit on behalf of the Government, my hon. Friend the Minister for Europe would not be remiss if he paid tribute to our legal profession for what it has done in demonstrating that an international criminal tribunal can be made to work.

2.49 pm

Dr. Julian Lewis : The hon. Member for Moray (Angus Robertson) referred to the debate on 3 April 2001 on the International Criminal Court Bill. I was privileged to take part in that debate and I outlined then six good reasons for supporting the establishment of the International Criminal Court. The first was to punish past killers, the second to deter future killers, the third to embarrass those who shelter killers, the fourth to force countries to put killers in their midst on trial—preferably domestically—and the fifth to prove beyond doubt that the killings took place. The sixth was to bring out aspects of the truth that might otherwise remain hidden.

Like the hon. Member for Moray, I had read a great deal about former international military tribunals dealing with atrocities. I had personal reasons for doing that because my family was caught up in such events before I was born. I read of the way in which some of the worst war criminals were sheltered after the war by countries that ought to have known better, were helped to get there by various organisations—including even

some branches of the Roman Catholic Church—that ought to have known better, and were massaged by certain intelligence services that ought to have known better. There were cases that were not properly investigated, such as that of Mengele in Brazil. His family remained in regular contact with him from West Germany until his death—a contact that could easily have been found out if the West German Government had wanted to make the effort.

Like the hon. Member for Moray, I believe that there is a need for an international machine to cope with what he rightly called the worst crimes known to humanity. So far so good; however, this is the third debate on the subject in which I have participated, and it is the one that has made me most gloomy. In the first debate, I was extremely enthusiastic and in the second I was very enthusiastic, but was beginning to have doubts about the ways in which some people might regard the ICC as liable to interpret its work. In today's debate, I am becoming very concerned. If we are considering the worst crimes known to humanity, we should make sure that the ICC confines itself to those.

There are two ways of dealing with atrocities. There is the method that we have now: when the atrocities are sufficiently appalling, a special ad hoc international court is set up to deal with them—whether they be those perpetrated by the Nazis or the Japanese, or those that occurred in the Balkans or Rwanda—and only them. The disadvantage of doing it that way is that it takes a great deal of effort to set up such a court. There must be many borderline cases in which justice is not done because the countries concerned will not make the effort to set up a special court. That is the argument for having a standing court.

Unfortunately, it is beginning to dawn on me that there is a way in which the standing court could go badly wrong. Those doubts have been reinforced by some of the contributions that I have heard this afternoon. We know the saying, "The Devil makes work for idle hands." My concern is that a standing court, once set up, will look for things to investigate that might not come into the category that the hon. Member for Moray rightly defined as the worst crimes known to humanity. If a standing court is not to lose credibility, it should not be playing with definitions, as sometimes happens in domestic courts and even in quasi-legal inquiries. I heard talk of it possibly being appropriate for such a court to investigate the use of cluster bombs, but that would stretch the definition of what the court is designed to do.

I can foresee circumstances—I raised this during the debate that took place in 2001—in which there might be a danger of people trying to take a case to the international court about the fact that certain countries practise a policy of nuclear deterrence, on the basis that the threat of the use of nuclear weapons could be construed, in some bizarre way, as a war crime or a crime against humanity. We must recognise reality; we interfere with countries' sovereignty only in the most extreme and important cases in which the crimes committed are most dire. As someone who has proved myself, on two previous occasions, to be a friend of the idea of an International Criminal Court, I appeal to Members present and to those who read the debate who want the ICC to work, as I want do, not to regard it as a tool for the creeping generalisation of some sort of world order of

government. It should not be that. Its purpose should be to deal with the worst crimes known to humanity. If it confines itself to those cases, it will continue to receive cross-party support in this House.

2.56 pm

Mr. Michael Moore (Tweeddale, Ettrick and Lauderdale): The hon. Member for New Forest, East (Dr. Lewis) has made a perfectly valid case. I suggest that if the court were not properly set up and did not receive the right backing from across the world, none of his worries would come to pass. We shall, indeed, be in difficult circumstances if we get ahead of ourselves, as he may, perhaps, have been suggesting.

I add my congratulations to the hon. Member for Clydebank and Milngavie (Tony Worthington) on securing the debate. He has raised his concerns in various ways in the past—most recently in a debate on Europe in the Chamber—and it has been useful for us to have those concerns set out in more detail today. I look forward to the Minister's response to the points that have been raised, with which I have considerable sympathy.

Genocide, war crimes and crimes against humanity are all horrors of the present day in just about every continent on earth, but they have been a feature of our history for many centuries. The international community has set out the principles of law that should apply to us all, from the Geneva conventions to the United Nations charter. Those principles are complex, but the principle that civilised values should be shared, imposed and supported across the world is something with which few right-thinking people would disagree.

Since the second world war, there has been widespread recognition of the need to develop a justice system that is recognised around the globe and can give effect to those international conventions and laws. The purpose of such a system is not only to bring to justice those who commit offences but to act as a deterrent to those who might be tempted to follow suit and, importantly, to ensure that the victims of crime, their relatives and countrymen do not take the law into their own hands to get retribution. The failure to tackle the Nazis after the war—alluded to by the hon. Member for New Forest, East—the troubles of investigating the Rwandan genocide and, most recently, the creation of The Hague tribunal to deal with the former Yugoslavia have taught us different lessons about how we have coped, or not, as the case may be, with the problems that international law throws up. The hon. and learned Member for Dudley, North (Ross Cranston) rightly pointed out several of the shortcomings in the tribunals that exist.

Liberal Democrats were eager to support the International Criminal Court when it was created—while recognising such shortcomings and a desire to get rid of them—and we supported the passage of the legislation through the House. As we gather just before the judges are selected and the court begins its work, we should be celebrating. It is a fantastic achievement of which the Government should be rightly proud. Instead, we find ourselves in considerable uncertainty as a result of the position of the US Administration.

We have always understood the American reservations. President Clinton signed the Rome statute but made sure that we were all aware that it would never be ratified. There is a world of difference between not ratifying the statute and actively trying to undermine it; unfortunately that is the US Government's present position. There are several reasons why the United States might be motivated to do that. One might be the profound issue of sovereignty, meaning that it does not accept that any body other than its sovereign courts can have jurisdiction over its citizens. That point might carry more weight if the United States showed slightly more respect for the citizens of other countries whom it alleges have committed international crimes. The people who are caught up in Guantanamo bay at the moment might like to pause and consider the irony of that.

Dr. Julian Lewis : For the sake of clarity, is the hon. Gentleman suggesting that what might or might not be happening in terms of prison conditions on Guantanamo bay could be the sort of circumstance that he imagines being examined by the International Criminal Court?

Mr. Moore : I was making a separate point. We do not want to be sidetracked into a debate on Guantanamo bay, but the rights and jurisdiction of those who are there is not best practice as we would enjoy it. The Americans should not be so worried about other jurisdictions when that is the case.

Mr. Savidge : Does the hon. Gentleman think perhaps that the ICC could be the ideal court to deal with people who are accused of terrorist and other offences?

Mr. Moore : It could be. There is a genuine debate to be had, but the core issue at this time is surely that we need to understand the motivation for the American action. I hope that the Minister will give us an insight into that. Attempts to sidestep the whole ICC by article 90 waivers and bilateral agreements are very worrying.

Surely at a time when we are, rightly, trying to exploit our special relationship with the United States, we should be persuading it to change its approach on this matter. Indeed, if we go back to the debate on Second Reading of the International Criminal Court Bill, the then Foreign Secretary, who is now the Leader of the House, said:

"I regret that the United States does not yet feel able to ratify a statute which it has signed . . . We will continue, as a friend and ally, to encourage the United States to join the International Criminal Court . . . the best way to do so is to show our own confidence in the court by taking part in it."—[*Official Report*, 3 April 2001; Vol. 366, c. 223.]

Surely that is not the same as being party to the bilateral agreements that will undermine the court.

Perhaps the Minister will make the European Union position clear when he responds because it appears that the Government are in something of a bind. They are committed to exploring and finding a bilateral agreement with the United States, but they are

committed also to a set of guiding principles agreed on 30 September at the Council of Ministers that suggests that the draft agreements promulgated by the United States are incompatible with the ICC itself.

Given that there is the prospect of our signing a bilateral agreement with the United States, if the Government agree to give the Americans certain rights, the Government must accept some rights themselves. I ask the Minister whether the Government have now had serious second thoughts about the criminal court. If other countries approached us, would we consider bilateral agreements with them, too? Is our position that we shall actively seek to get exemptions of bilateral agreements with other countries?

The deferral of last year's application of the International Criminal Court was a compromise designed to avoid the ICC being stillborn. What is the Minister's assessment of the prospects of that process being resolved peaceably and effectively, leaving us, at the end of the deferral period in a few months' time, with an International Criminal Court that can credibly start to do its work? If the deferral period ends, and few countries have signed up to the bilateral deals that have been mentioned already, what is the Minister's assessment of what will happen next? It is an alarming prospect that we may find ourselves without an institution that has found cross-party support, as well as worldwide support.

At a time when the United States is making a serious case that those who commit horrendous crimes should be fully accountable in the international arena, its action is deeply damaging. Our Government's connivance with that is worrying. I hope that the Minister can resolve that issue for us this afternoon.

3.6 pm

Mr. Richard Spring (West Suffolk): I open by congratulating the hon. Member for Clydebank and Milngavie (Tony Worthington) on securing this debate on a subject of considerable interest that, although it was debated some months ago, perhaps must be looked at again. We are all interested to hear the replies to the questions put by the hon. Gentleman and by the hon. Member for Moray (Angus Robertson). I also take this opportunity to congratulate my hon. Friend the Member for New Forest, East (Dr. Lewis) on a clear and incisive contribution to the debate.

Hon. Members might recall that we opposed the passage of the International Criminal Court Bill at Third Reading because of its shortcomings, which we felt would cause considerable problems in its practical operation. Support was expressed for the principles behind the establishment of such a court. It is absolutely right in theory and in practice that the international community makes judgments about crimes against humanity.

The 20th century witnessed many bloody wars and saw genocide and crimes against humanity on a scale previously unimaginable. People internationally have a right to react to that. Many of today's conflicts, upon which I shall touch later, revolve around ethnic strife and tensions. Those tensions increase the potential for genocidal acts.

I shall recount a little of the history behind the establishment of the court, and the motivation underlying it. The international community, rightly horrified by terrible crimes against humanity and the genocide perpetrated during the second world war, determined that the guilty should be brought to justice. The principle holds good today, as it did then; that those who commit such crimes should not—cannot—be permitted to escape justice.

Ad hoc tribunals that we have seen in the past may prove necessary again in the future. They can focus on a specific incident or issue and have the flexibility to address the actual circumstances of individual situations and crimes. However, the purpose of such trials must also be one of deterrence. It is open to question how effective such tribunals that are set up for particular cases will prove to be in that respect. They do not seem to have deterred Mr. Mugabe, for example, who, by anyone's standards, is certainly on the way to conducting himself with grotesque inhumanity.

However, while no one can dispute the value of bringing war criminals to justice, we continue to worry about the blueprint for the ICC and how it will work in practice. Concern is centred on a lack of protection for our troops, who are engaged in international operations and peacekeeping. To echo the comments of my hon. Friend the Member for New Forest, East, as it is currently conceived, the court runs the serious risk of becoming a political court. Despite expressing our concerns during the passage of the International Criminal Court Bill and tabling amendments to deal with them, the Government appeared unwilling to listen. The build-up to a possible war in Iraq puts the spotlight firmly on such matters.

It will come as no surprise to hon. Members that we are not alone in our concerns about the ICC and how it will operate in practice. Reference has been made to that this afternoon. The statute of Rome, which established the ICC in 1998, was signed by 120 countries. However, far fewer than that number have so far ratified it; I believe that 87 is the latest figure. The court entered into force in April 2002 as the 60th country ratified the statute on that date, but it is worth noting how many have not. We should question why that is so.

As we have heard at length this afternoon, the most notable country to have grave reservations is the United States. It has led to President Bush's decision to "unsign" the statute. I can understand that country's worries, but it is not alone. Russia, China, India and Israel also have grave reservations and have not ratified the statute. That means that more than half the world's population is not technically covered and the serious concerns of many other countries have led to their securing opt-outs, such as France's seven-year opt-out. The worries at the root of those countries' reservations resonate the concerns of Opposition Members.

In today's world, peacemaking and peacekeeping play an increasingly important role, as they should do. Many countries torn apart by civil war and conflict are reliant on external peacekeepers to give them the stability that they need to rebuild their countries. Peacekeepers are provided by countries as an act of good will. As we pointed out during

the Bill's passage through Parliament, at the heart of our concerns is the way in which the court could become a political court; a weapon that could be used by potential enemies to target British, American, French or other troops and officials who are behaving properly. The filing of charges in the court could leave them open to indictments for legitimate actions in the course of their duties. The Government have failed repeatedly to secure protection for our troops in that regard.

Angus Robertson (Moray): Does the hon. Gentleman not agree that the use of political and diplomatic pressure to seek exemptions by one country runs the serious risk of politicising the ICC?

Mr. Spring : Countries have to make a judgment. For example, given its huge predominance of military and economic capability and its vulnerability, especially now, the United States is sensitive to actions against its troops. We can see that at every level. We must accept that reality and try to work with it. We are particularly concerned that the Government refused repeatedly to accept our amendment that was aimed at protecting our armed forces. Their broad stance—placing human rights law above the protection of armed forces—means that British armed forces will be less able in the future to fight effectively without fear of arrest. Most ironically, it damages the cause of human rights, as countries will not risk using their troops for potential peacekeeping and humanitarian work, as witnessed by America's threatened withdrawal last summer. The provision of troops is an expression of international good will by countries; good will that may well disappear if the troops become vulnerable. At all costs, we must avoid creating a situation in which it is difficult for law-abiding nations to pursue just action because their officials or soldiers—not those from countries that scorn all law—have to answer to such a political body.

The Minister is aware that if it proves necessary for military action to take place in Iraq, and if it is carried out without the backing of a specific UN resolution, British soldiers who are simply doing their jobs could face prosecution under the terms of the court. We supported from the outset the principle of bringing to justice war criminals and those who commit crimes against humanity. We still do. However, the issue is being distorted. My party's support in Parliament was conditional on the introduction of measures to protect our troops; a seven-year opt-out from jurisdiction over war crimes, greater protection for the armed forces and discretion for the Secretary of State with regard to requests for arrest and surrender.

I ask the Minister to clarify the Government's position on a number of key points. Does he accept that if the Government had adopted those measures, British troops would be better protected? Will he tell us once and for all what protection, if any, our troops will have from malicious prosecutions in the ICC? Now is an extremely important time to clarify the situation. Will he explain why the Government opted not to secure a seven-year veto from prosecution for our troops? He might argue now that a veto was not necessary. If that is the case, it was not the view taken by the French. Does he think that the French Government took an unnecessary step, or is it just another area in which our Government and that of France disagree?

What assessment has the Minister made of comments by Admiral Sir Michael Boyce that, in such circumstances, the rules of engagement might be changed to the point of giving those who do not adhere to international laws first strike? Finally, how does the establishment of the court sit with the doctrine of pre-emption in foreign policy espoused by President Bush and supported by the Prime Minister?

This House, and our troops who are sent abroad on peacekeeping missions to defend our national interest, deserve answers to those questions, particularly at this most anxious time.

3.16 pm

The Minister for Europe (Mr. Denis MacShane) : I congratulate my hon. Friend the Member for Clydebank and Milngavie (Tony Worthington) on having obtained this debate. He is right to insist that the House should debate the issue. There were debates in our Parliament leading up to the passage of the law establishing the International Criminal Court and its ratification, and we have heard some points reiterated today. I am happy to try, through normal parliamentary means, to discuss this sensitive issue with colleagues from all parties. It is not my direct responsibility, but I know, from many intense conversations that Ministers have had in the Foreign Office and from questions that have been asked in the House and in the other place, that the matter is important.

On the other hand, there has been a great deal of hypothetical questioning, which it is difficult to answer. I cannot guarantee what will happen; I am not a soothsayer. I know that the provisions of the ICC—this is an important point of debate with the United States of America—make it clear that countries have to undertake their own prosecutions against people accused of any of the serious crimes mentioned in the court's statutes. It is inconceivable that a British or American service person would not face the most relentless investigation and prosecution under British and American laws were he or she to be accused, in the course of a conflict, of any of the crimes mentioned, and I think that the same applies in the case of the other democracies. Let us be honest in admitting—I think of American servicemen, such as Lieutenant Calley after the Mai Lai massacre, who faced the severest sanctions because of such accusations—that the United States has a very good record in that respect. When it comes to motes and beams, I wonder whether every aspect of the post-1945 wars of decolonialisation in which the European powers were severally involved did not contain instances that were not perhaps investigated as fully as the misdeeds of which American servicemen were accused in Vietnam and in other conflicts.

Mr. David Drew (Stroud): Does my hon. Friend agree that one of the main reasons for the Americans' unwillingness to sign up to the ICC is that their mentality is to protect their service people at all costs? We all know that American service people committed criminal acts in this country, only to be whipped home before they could be subject to our criminal justice system.

Mr. MacShane : My hon. Friend is perhaps taking us a little far from the International Criminal Court. We are talking, as the hon. Member for New Forest, East (Dr. Lewis) forcefully reminded us, of the worst crimes against humanity, not infractions, serious though they may be, that can be dealt with by military or other discipline. The fundamental problem, if my hon. Friend will allow, is of course that although criticisms are made of the current Administration, under the American constitution it is the US Senate that is required to ratify treaties. In over 200 years of existence, it has shown a great reluctance to do so.

Presidents may sign or unsign but there was never, in anybody's judgment, a majority on the Hill for the ratification of that treaty. That is why I say now, as I have said in other debates and publicly, that we need to engage with American elected representatives. We need to engage with American public opinion before the President acts to unsign, rather than protest when the Administration, reflecting what they suspect is the view of their own legislature, cannot accede to what we would like to see happen. I had very good conversations with the executive director of Human Rights Watch, Mr. Ken Roth, who protested, much as some hon. Members have, about aspects of our Government's discussions with the United States and with our other partners on this issue.

I must say pretty bluntly to Mr. Roth that, as an American citizen, he should persuade his fellow citizens, as we have had to persuade our fellow citizens, to support the ICC. He should persuade his elected representatives, as we have persuaded ours, to support, legislate for and ratify the ICC. I found it frankly a bit much to be lectured in the Foreign Office by Mr. Roth—and I have enormous respect for Human Rights Watch—when he should be in New York or in Milwaukee or Peoria persuading his fellow Americans that this is a good and great institution.

If I may, I shall quote from an article in the excellent magazine "Renewal". It was written by the noted American political scientist and philosopher, Mr. Michael Walzer, who is on the progressive left of American politics. He says:

"Consider the issue of criminal justice: the American refusal to join the International Criminal Court . . . I think that the Bush administration's policy is wrong. But it is not crazy or incomprehensible"

if understood roughly along these lines: when war is just and necessary as in the Gulf in 1991 or in Kosovo in 1999, it is the United States that bears the brunt of the fighting. According to the same article, our European allies oppose American unilateralism only this far:

"they want a role in deciding when war is just and necessary, but they are content once a decision is made to leave most of the fighting to American soldiers. Americans are supposed to accept the risks of war, and now they are supposed to accept the legal liabilities. It is American soldiers, and hardly anyone else, who will be accused of war crimes—and they will be accused both when there are

legal reasons to think that crimes have been committed and when there are political reasons to pretend that crimes have been committed".

That is a long quotation to read into *Hansard*, but that was a member of the American liberal community rightly stressing the concerns that must be felt. The famous Kipling poem about Jolly this and Jolly that reminds us that when we want him to do the fighting, we can call on him.

Mr. Moore : I think that I can speak on behalf of the Chamber and say that we always leave debates in which the Minister is involved much better informed, and we shall do so again today. However, will he tell us the Government's position on bilateral deals and how it fits with the EU guiding principles?

Mr. MacShane : I am happy to do so, but it needs to be set in context. It was pointed out earlier that India, the world's largest democracy, has not only refused to ratify the ICC but has now signed a bilateral deal with the United States. France, one of the leading democratic partners in Europe, is insisting on article 124, which allows a seven-year opt-out. When I discussed that with members of the Administration in Washington, France's action was thrown back in my face.

It is precisely because we need to make the court work that simply to say that we are right, that we are the only ones in step and that everyone else is wrong and should conform with us, is not sensible international policy. We understand the US objections to the court: given that country's role on the world stage, it is particularly open to the threat of frivolous or politically motivated prosecution. We do not share its fear of the court, however, because the Rome statute contains sufficient safeguards to prevent it, not least the principle of complementarity.

Mr. Savidge : Will the Minister give way?

Mr. MacShane : No, I cannot. I must get these points on the record.

That is why we worked hard last July to achieve UN Security Council resolution 1422, which allowed the US to continue to contribute to peacekeeping in Bosnia without flouting the ICC.

In reply to the hon. Member for Tweeddale, Ettrick and Lauderdale (Mr. Moore), I can say that the resolution allows another 12-month deferral when it comes up for reconsideration. The US is seeking more permanent solutions. It is seeking bilateral agreements under article 98.2 of the Rome statute; and it is seeking to work under the statute to protect what it sees as its own service personnel.

Tony Worthington : Will the Minister give way?

Mr. MacShane : No, I cannot. I am happy to write to my hon. Friend. He asked a long list of questions; if I had done nothing but answer them, I could not have set matters in context.

The original proposal from the US for an agreement to exempt all its citizens from the jurisdiction of the court would be inconsistent with article 98.2 and consequently the statute. With our EU partners, we have drawn up guiding principles, providing that a solution to the problem should not confer immunity for US citizens; that there should be no exemptions for nationals of a state party, such as the UK; and that there should be exemptions only for citizens "sent" or mandated by their Government. We believe that those principles, which are consistent with article 98.2, provide the basis for entering into bilateral agreements. It will be up to each EU member state to decide what to do.

The British Government held a round of discussions with the US on 17 October 2002. They were of a purely preliminary nature, and the US Government have not come back to us; they have said that they would reflect on them, but they have not yet reverted to us. The US held similar discussions with other EU partners, particularly Austria, Italy and Spain.

I cannot answer my hon. Friend the Member for Clydebank and Milngavie on whether there will be a bilateral agreement; but I can say that the House will be fully informed. I do not know whether the US is willing to amend its laws to fit in with the ICC statute. I am not an American legislator. I can say, however, that witnesses can appear before the ICC, but that will be the decision of the witnesses. If a Government choose to impose a court order preventing a citizen from participating in an ICC hearing, it will be a matter for that Government.

I agree with my hon. and learned Friend the Member for Dudley, North (Ross Cranston) on the contribution of lawyers. We are creating an international legal system and we are getting there with some difficulty.

This debate reflects real difficulties and we should cease name-calling and try to work our way through the problems. The British Government want to see the ICC established and working. However, we must bring the rest of the world with us. It is no use standing alone with some of the democracies of the world, saying that everyone else must bend in with our laws when some countries have not ratified. The most important contributor to safeguarding the peace and security of the world has concerns that need to be addressed.