

## **"Original Intent at The Global Criminal Court"**

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As the Clinton administration's chief negotiator of the treaty on the International Criminal Court, I have lost my patience with the largely Euro-American debate about special agreements designed to protect American suspects from surrender to the court. These agreements are permitted by Article 98 of the treaty for a reason, but they also have their limitations.

The administration of President George W. Bush wants to sign Article 98 agreements with European and other governments to insure American nationals are immune from the jurisdiction of a court the U.S. now doesn't recognize. The European Union initially resisted, claiming any deals might weaken the court, yet now sounds more open to compromise.

The technical legal issue of securing such agreements has become caught up, and distorted, by the trans-Atlantic tussle over the court. It is worth recalling that the original intent of Article 98 agreements was to ensure that Status of Forces Agreements (SOFAs) between the United States and scores of countries would not be compromised and that Americans on official duty could be specially covered by agreements that fit Article 98's terms. I first put that requirement on the table in early 1995 in Madrid.

SOFAs are the U.S. military's security blanket for its global deployments of military personnel. They ensure that U.S. courts have the right to investigate and prosecute American personnel who, though present on foreign soil, are covered by U.S. law. The negotiated provisions of SOFAs vary from country to country, but the general principle of America's right of primacy over its personnel is sacred in these agreements.

Similar provisions protecting the rights of the "sending state" in criminal cases also populate diplomatic mission agreements and agreements for U.N.-established or authorized peacekeeping operations, such as those in Afghanistan and Sierra Leone. Such protection, offered in the extraordinary circumstances of international peace and security, gives the sending state the confidence to deploy its official personnel without them being subjected to unwarranted criminal charges, particularly in a war-torn foreign society.

Throughout five years of treaty negotiations, the Article 98 safeguard was a major U.S. objective and it was successfully achieved. When Article 98 refers to the "sending state," it means the state that deploys an individual (including its top civilian officials) on official duty. Significantly, Article 98 does not prevent the new court from investigating and even indicting an American official. But if there is an Article 98 agreement with another country, that country would not be able to surrender an indicted official covered by that agreement to the court without

Washington's consent.

The EU reportedly has offered this type of protection to Washington. It is an improvement over earlier efforts to erroneously interpret Article 98 and limit its protection only to Americans deployed on peacekeeping missions.

However, the Bush administration overreaches if it attempts, with Article 98 agreements, to immunize any U.S. national living abroad or traveling for any reason from surrender to the court and to blanket the entire world with such agreements. The negotiating objective never was to protect American mercenaries or any other citizen engaged in unofficial actions. (We would have used "state of nationality" rather than "sending state" if that had been our intent.) As I often said as a negotiator, rogue citizens act at their own risk. Nor was it ever our intent to set up a global network of Article 98 agreements, even where they are not plausibly needed. But nothing prevents a specific SOFA or a negotiated Article 98 agreement from protecting retired officials for crimes allegedly committed on official duty.

Washington may still balk at the EU's efforts. There is another compromise that would enable the international criminal court to proceed with investigations of alleged perpetrators of atrocity crimes elsewhere in the world and for the United States to rest easy about its own highly improbable exposure to the new court. President Bush could declare that SOFAs constitute valid Article 98 agreements. Partnership for Peace-member governments could formally accept that declaration through an exchange of letters. Any government that challenges the declaration would jeopardize its relations with Washington.

As long as U.S. law makes military and civilian officials unambiguously punishable in U.S. courts for the new court's atrocity crimes -- genocide, crimes against humanity, and serious war crimes -- then concern over top government officials being harassed by the international court should diminish. But U.S. legal codes require urgent amendment to ensure this protection under the SOFAs as well as before the new court. The Bush administration promised to undertake this task last May and should now follow through.

Mr. Bush could also pledge that once the truly important Article 98 agreements are concluded and provided the court has been performing professionally, the U.S. will adopt a non-confrontational posture towards the court. No one claimed international justice would be easy, but solutions are achievable.

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