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Panel IV

Commentary—Bringing Terrorists to Justice

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As the Staff Judge Advocate for the US Southern Command, I am exposed to a number of international legal issues occurring in the international community. Interestingly, given my position, I am exposed to the Central and Latin America position on these issues which often causes me to delve deeply into the positions the US government takes.

Mike Newton's thesis is that the decision as to how and where crimes against international law are dealt with is a question of national political will. To date, this thesis echoes the US position that it has the requisite ability to prosecute the types of crimes that many other nations want the International Criminal Court (ICC) to have jurisdiction over. The United States has the Uniform Code of Military Justice, a fairly extensive federal criminal code, and supporting state subordinate criminal codes. The United States also has an effective, independent judiciary, which is certainly not true in many areas of the world. However, something I think that is occasionally missed by those

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advocating the US position is that there are many nations that recognize that they do not have the rich history of an independent and impartial judiciary, nor do they have the type of separation of powers to remove bias and corruption from the court systems like the United States does. For these countries, many seem to prefer the ICC in lieu of their own domestic courts as they simply do not trust their own judicial and political systems. Hope has turned to frustration which has turned to despair in such countries and it is accordingly, not surprising that such countries see the ICC as holding out hope for achieving on an international scale, what has proven unattainable on the domestic scale. Recognizing then that the United States does have the rich, independent infrastructure and a proven history of being able to deal with war criminals and the like as well as the political will to handle those accused of crimes against international law, it might nonetheless behoove the anti-ICC advocates to consider that other nations and their citizens do not have the luxury of the same rich history. There may be very logical reasons as to why other countries would sign and ratify the Rome Statute that have nothing to do with the US view on the statute.

Chris Greenwood's point that terrorism certainly did not begin on September 11th is exactly correct. While terrorism became of greater importance to many US citizens on that date, it certainly was not created on that date. Many countries in the region in which I work have long histories of terrorism within their borders. As an example, Colombia has lost some 200,000 people to various acts of terror by the Revolutionary Armed Forces of Colombia over the last 40 years.² Peru has had its share of problems with the Sendero Luminoso terrorist group.³ These examples bring to mind the idea that other places in the world have been dealing with the problem of terrorism for many years. The United States must be prepared to do so as well.

Finally, against the backdrop of this panel about challenges in bringing terrorists to justice and the previous panel on coalition operations, the likely passage of the American Servicemembers' Protection Act (ASPA) gives me some

2. The Revolutionary Armed Forces of Colombia are also known as the FARC.

3. Sendero Luminoso is also known as the Shining Path.

concern.⁴ While there is much to like about the contents of this bill, if signed by the President, it is likely to make working in coalition operations and with friend and allies much more difficult in some situations than ever before. Basically this bill, with the exception of NATO countries, prohibits the US government from providing any kind of security assistance to countries that are party to the ICC. Currently, every country in South America, except for Surinam, and every country in Central America, except El Salvador and Honduras, have signed or ratified the Rome Statute.⁵

The caveat to the ASPA is that such security assistance may be provided by the United States to such countries as have entered into an Article 98 agreement agreeing not to permit extradition of US service-members to the ICC

4. **Editor's note:** The American Servicemember's Protection Act became law when President Bush signed the Emergency Anti-Terror Bill on August 2, 2002. Notably, the ASPA finds that "the United States will not recognize the jurisdiction of the International Criminal Court over United States nationals," and provides that no United States court, and no agency or entity of any state or local government, including any court, may cooperate with the ICC in response to a request for cooperation submitted by the ICC pursuant to the Rome Statute. ASPA, § 2004(b). The ASPA also prohibits the extradition of permanent resident aliens or US citizens to the ICC; the use of appropriated funds to assist the ICC; the participation of US service-members in any chapter VI or VII operations, the creation of which is authorized by the UN on or after the date the Rome Statute enters into effect (unless the President certifies that the service-members will not risk criminal prosecution by the ICC); and the provision of "military assistance" to a country that is a party to the ICC (this prohibition does not apply to NATO countries or major non-NATO allies (Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea and New Zealand) and Taiwan); the President is authorized to waive this prohibition on military assistance if in the national interest of the United States. ASPA, §§ 2004–2007. Finally, the statute grants the President the prospective authority to "use all means necessary and appropriate to bring about the release of any (covered) person who is being detained or imprisoned by, or on behalf of, or at the request of the International Criminal Court." See ASPA, § 2008(a). Covered persons include "members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court." See ASPA, § 2013(4).

5. For a current update on signatories to the Rome Statute, see Country by Country Ratification Report, accessible at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty10.asp> (Oct. 23, 2002).

from their countries.⁶ The US State Department is currently pursuing such agreements with nations throughout the world but is not having great success. Absent such agreements in our area of operations, it will become increasingly difficult to plan, fund, and conduct coalition operations with many of our long-term allies in the Southern Hemisphere.

6. Article 98 of the Rome Statute provides

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.