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I have been asked today to discuss the International Criminal Court debates, particularly with respect to Article 16 and Article 98 and how they impinge on Canada-US security relations. For those unfamiliar with U.N. arcania, Article 16 and Article 98 are the clauses of the Rome Statute that the U.S. has been using to try to shield its soldiers, and many other people, including even mercenaries from the jurisdiction of the Court. In order to do so, I will need to set a little context, including describing the Canadian Government's (Canada's) position on Resolution 1422 . I will also touch on the harm I think American policy towards the court is causing the United States itself.

### **Canada's Position**

I represented Canada in the Security Council debate when resolution 1422 was first passed in July, 2002, and when it was renewed in June, 2003. The Government of Canada believed deeply then and, I understand, believes deeply now that the creation of the International Criminal Court (ICC) was an important step forward in the development of international law and of international relations. Ending impunity for the world's monsters, ending immunity from prosecution for the most heinous violations of international humanitarian law was, and is, both manifestly positive in itself and important as a deterrent of future crimes.

It is, therefore, a potentially important instrument for preserving stability and security, no small consideration at a time of heightened fears of the consequences of failed states and terrorism. The Government of Canada opposed U.S. attempts to exempt Americans, and anyone else, from the Court's jurisdiction. Although we respected the right of the Government of the United States to disassociate itself from the Rome Statute, we thought U.S. objections were essentially ideological, a reflection of an exaggerated "exceptionalist" mindset.

American exceptionalism is currently in fashion in some circles but it is not something new under the sun. It dates from the Independence War and has been remarked on differentially by observers as diverse as De Tocqueville, Margaret MacMillan, author of *Paris 1919*, Michael Ignatieff of Harvard and Harold Koh of Yale. American exceptionalism has been in some cases exceptionally beneficial. American leadership, power and activism contributed enormously in the last century to the growth of international law, democracy and human rights. But when American exceptionalism has come to mean that the U.S. expects one law for the goose and another for the gander, "when the United States actually uses its exceptional power

and wealth to promote a *double standard*” to quote Harold Koh of Yale, it is not benign. American exceptionalism with respect to the court became American exemptionalism.

Most fundamentally, we disagreed with the U.S. position because we thought it meant that all people were not equal and accountable before the law, a principal we could not accept. More specifically as regards resolution 1422, we believed

- that it was unnecessary and *ultra vires*;
- that it diminished the importance of accountability and justice for victims
- that it undermined fundamental principles of international law;
- that in seeking to impose its interpretation of Article 16 of the Rome Statute, the U.N. Security Council was effectively arrogating to itself the right to rewrite such treaties; and that in purporting to act under Chapter VII of the U.N. Charter, while failing to identify a threat to international peace and security, the Council exceeded its mandate under the Charter.

Initially, there was widespread opposition in the Council to acquiescing in the U.S. objectives, but gradually heavy U.S. pressure, combined with a somewhat less objectionable resolution, persuaded the Council to hold its nose and pass Resolution 1422.

### **Undermining the Legitimacy of the Security Council**

The U.S. asked the Council, Lewis Carroll-like, to stand Article 16 of the Rome Statute on its head, to make general exceptions to the jurisdiction of the Court. It was clear in the negotiating history of the statute that recourse to Article 16 was to be on a case-by-case basis only, where a particular situation -- for example the dynamic of a peace negotiation -- would warrant a twelve-month deferral. Moreover, the Statute foresees that the Council would request the court to defer action only in cases of threats to international peace and security.

In the absence of a threat to international peace and security, the Council’s passing a Chapter VII resolution was *ultra vires*. Acting beyond its mandate under the Charter undermined the standing and credibility of the Council in the eyes of the membership, and the world it was seen as an instrument of U.S. foreign policy. Ominously, the Council’s passage of 1422 set a negative precedent under which the Security Council could purport to change the negotiated terms of any treaty it wished, e.g. the nuclear Non-Proliferation Treaty, through a Security Council resolution.

The Council did not have to pursue this fraught course of action. Solutions existed outside the ambit of Council responsibility. The United States, as did all countries, had several options to protect its interests without vetoing United Nations peacekeeping missions, which were so vital to millions of people around the world. In the first place, as the Secretary-General observed for the missions in the Balkans, which was the particular case in point, the ICTY already had primacy of jurisdiction over the ICC.

Also, no mandate renewal beyond the Balkans was foreseen for UN missions in which the USA had stationed personnel operating on the territories of States party. The first option, therefore, was to do nothing because the ICC did not have jurisdiction over any US personnel on UN peacekeeping missions. Second, and the absence of ICC jurisdiction notwithstanding, the USA could simply have withdrawn its forces from

current missions. Their doing so would have been regrettable and would have been completely without consequence but, as the US contributed a relatively small number of personnel to all UN peacekeeping missions but one, 704 of 45,159 UN peacekeeping personnel all told, adjustments could have been made. Third, the USA could have declined to participate in future UN missions. Fourth, for all UN or coalition missions in which it did decide to participate, the United States could have negotiated appropriate bilateral agreements with receiving states, as foreseen under article 98 of the Rome Statute.

### **Preventing Politically Motivated Investigations and Prosecutions.**

We understood the concerns in Washington and elsewhere that had been triggered by ill-founded complaints against senior U.S. and other officials that had been initiated in national and international jurisdictions. We had no desire to see the citizens of Canada or of any other peace-keeping country subjected to political harassment in judicial fora. At the same time, we did not think there was adequate reason to believe that the ICC would be a court of politically-motivated prosecution. In fact, we believed its very existence would deter such prosecution in national courts. The ICC Statute's extraordinary array of safeguards and checks and balances would screen out frivolous claims, were any to be submitted. Many of these safeguards were proposed by the United States and were willingly incorporated by other states. The safeguards included:

- with the exception of the crime of aggression, which was set aside for seven years, at least, the careful definition of crimes accepted by all states parties, with rigorous thresholds, focusing on major and deliberate atrocities.
- the election of the judges and prosecutors by the Assembly of States Parties, in accordance with established criteria of professionalism and competence.
- the requirement that the Prosecutor assess complaints and screen out all but the most serious ones.
- the requirement that accusations pass an independent review by a Pre-Trial Chamber and then by an Appeals Chamber.
- the capacity of the States Parties to remove prosecutorial officials in the highly unlikely event that they abused their power.
- and, not least, the principle of complementarity.

For the *non-cognoscenti*, this principle meant that the ICC could not act in those cases where states fulfilled their duty to investigate and prosecute credible allegations of crimes. Citizens of countries that diligently investigated and prosecuted crimes by their own nationals would not be investigated or prosecuted by the ICC. In short, we did not believe that Council action was needed to address the risk of politically motivated prosecutions. That risk was already fully addressed by the ICC Statute. That view was shared by many Americans, including Kenneth Roth, president of Human Rights Watch and a former federal prosecutor for the U.S. Attorney's Office for the Southern District of New York and the Iran-Contra investigation.

### **Failure to support accountability and justice**

Passage of 1422 sent an unacceptable message that some people - - peacekeepers - - and some countries—those that chose not to accede to the treaty --were above the law. Given the many safeguards, and given the principle of complementarity, the only way resolution 1422 could come into effect was both where a peacekeeper had engaged in the most serious international crimes and where his, or her, own national legal systems had refused to investigate or prosecute the crime. Thus the effect of resolution 1422 was to grant immunity from prosecution for major crimes against international law.

The ICC's principal purpose was to bring the world's monsters, the perpetrators of heinous crimes, to justice. We believed that it was the logical and necessary extension of previous international tribunals, such as those at Nuremberg, The Hague and Arusha -- albeit with more safeguards and even higher standards of due process. We were, therefore, distressed that the Council in passing resolution 1422 came down on the side of impunity, and for the most serious of international crimes.

### **Weakening the Basic Foundations of International Law**

Claims to exemption from ICC jurisdiction, by any state, entail a rejection of some very important and well-established principles of international law. Whether a state chooses to be a party to the ICC Statute or not, there should be no doubt that the jurisdictional reach of the ICC is limitless and that its approach is entirely founded in established law. States have jurisdiction over crimes committed on their own territory. It is also clear that states may exercise their jurisdiction over international crimes individually, through national trials, or jointly, through international trials. This principle was established at Nuremberg and affirmed many times since. We believe that a system based on law -- the fair, predictable, equal application of principles agreed to by all is in everyone's interest. Resolution 1422 attempted to entrench an unacceptable double standard in international law. We thought that the Resolution was in any case unnecessary.

### **U.S. Tactics**

The U.S. first sought to obtain a perpetual exemption from the jurisdiction of the Court. When that proved unachievable, the U.S. sought, and was ultimately granted by the Council, a one-year exemption, renewable in perpetuity, or until the Council decides to revoke it. We believed that the Rome Statute did not support such an interpretation and that the Council should not purport to so interpret it. In any case, the Council can only "request" the Court not to act. It cannot direct the Court not to act; whether the Court acts is up to the states parties to decide.

Further, if Resolution 1422 is, as we believe *ultra vires*, U.N. member states are not bound to respect it in any case. It is to cover this eventuality, presumably, that the current U.S. administration is pursuing the fallback option of negotiating generalized immunity under Article 98 of the Statute. Article 98, also meant to apply on a case-by-case basis was to cover situations that were already governed by status of forces agreements. The US is pursuing, with every state in the world with which it has relations, whether it has any forces stationed in the country or not, the conclusion of bilateral agreements to exempt Americans from being surrendered to the ICC. Countries have come under very intense pressure to sign such agreements; some have lost military aid and have been threatened with other grave repercussions if they fail to sign. An overly zealous member of the State Department wrote to the Government of Jordan on the eve of the Iraq war, when the U.S. was looking for all the Arab/Islamic support and cooperation it could find, to threaten that the King's

visit to Washington would be cancelled if Jordan did not sign an Article 98 agreement. The Jordanians ignored the threat.

As of March 2, 2004, the US State Department reported that it has concluded 75 such agreements. In November 2002, Canada informed the US that it will not enter into such an agreement, as both countries are already parties to the NATO Status of Forces Agreement, which provides adequate protection for US forces. Canada believes that the bilateral agreements sought by the United States go far beyond the kinds of non-surrender agreements envisioned by article 98 of the Rome Statute. Article 98 contains the term “sending state”, because it was intended to provide for the existence of Status of Forces Agreements. Such agreements were intended to provide limited protection for service members serving abroad.

The US proposal seeks exemption not only for service members, but for all nationals (who are in no way “sent” by the state), ven mercenaries would be protected as would contractors for the US government, of any nationality, even if they were nationals of an ICC State Party. Further, the US proposals contain no obligation to investigate or prosecute credible allegations of serious international crimes (genocide, crimes against humanity, war crimes), and therefore could lead to impunity.

## **Conclusion**

At issue in the Security Council in the summer of 2002 was the very idea of a permanent court. The court was attacked by the U.S. with little or no regard for the collateral damage it would cause to the U.N. Charter and to international law. Washington pressed the Security Council relentlessly to re-interpret the Rome Statute and to override the plainly stated views of the states party to that treaty and the history of its negotiation. Capitals were demarched to have uncooperative U.N. Ambassadors recalled. Threats were made to others, including allies, to persuade them to stifle their opposition. Countries were picked off one at a time until the holdouts, notably Mexico, decided to fold. Ultimately, resistance to U.S. pressure crumbled and Resolution 1422 passed 15-0. The ICC experience may have persuaded Washington that it could win any contest in the Security Council if only it brought enough pressure to bear. At the same time, other states learned the lessons of the ICC vote, as well. Enormous resentment built in New York, both of the U.S. and of its ally in this venture, the U.K. Some appear to have been strengthened in their resolve not to let the Council again bend to such pressure. The muscular U.S. tactics on the ICC were to backfire on Iraq.