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Thank you, Mr. Chairman. I appreciate the opportunity to testify this afternoon on H.R. 4654, the "American Servicemembers' Protection Act of 2000." We all share the same minimum objective, namely, to ensure that members of the U.S. Armed Forces and U.S. Government officials are not prosecuted before the International Criminal Court (ICC) when it is established. However, as the chief negotiator for the United States on the ICC Treaty of July 17, 1998, and its supplemental agreements still being negotiated in the ICC Preparatory Commission, I believe that this legislation will cripple our ability to achieve our common objective. Indeed, H.R. 4654 will worsen our negotiating position at the very moment when we stand the best chance of securing agreement with other governments to protect our soldiers and government officials and continue our support for international justice.

The Administration opposes this legislation. H.R. 4654 infringes on the President's constitutional authority as Commander-in-Chief and to conduct foreign relations. It is counter productive not only because of its direct impact on critical negotiations relating to the International Criminal Court, but also because H.R. 4654 would seriously damage U.S. national policy objectives. It would hold national security and foreign policy interests hostage to the fate of our relationship with governments that support the ICC and to the willingness of other members of the Security Council to immunize our armed forces personnel from ICC jurisdiction.

As the Department has explained in letters to Chairman Gilman and Representative Gejdenson dated June 30, 2000, current law prohibits use of federal funds to "support" the International Criminal Court. But this bill is more sweeping and harmful to particular defense and foreign affairs programs. It would prohibit military aid to any country that has ratified the ICC Treaty, with exceptions only for NATO and major non-NATO allies. Moreover, by requiring that the UN Security Council grant immunity to U.S. personnel to participate in UN-authorized military activity, the legislation could effectively prevent U.S. military engagement on issues of critical national security concern.

The bill would have these detrimental consequences without providing the Administration with any new authority or any increased ability to protect U.S. service members from prosecution. Rather, it would tie the hands of the President as Commander in Chief and risk harming important U.S. interests by its inflexibility.

The Administration is actively pursuing the international protection objectives that are critical to the Executive Branch as well as to many members of Congress. In particular, at the ICC Preparatory Commission meetings in New York, where supplementary treaty documents

are being considered, we are proposing a measure that would ensure that service members and civilian officials of countries, such as the United States, that have not ratified the Treaty are not brought before the Court without the consent of their governments. We have made clear that without a favorable result the United States would be compelled to reconsider U.S. military participation in certain contingencies.

The latest round of ICC meetings ended on June 30. We made important progress at those meetings. But we have a very tough struggle ahead as we advance toward the next session in late November. We are deeply concerned that in addition to imposing unnecessary and dangerous restrictions on national security decision-making the legislation prejudges the outcome of ongoing negotiations on the protection objectives we are seeking to achieve. For this reason it would undermine the efforts of the U.S. negotiators and diminish the likelihood of obtaining those additional protections for U.S. service members.

Before I comment on particular provisions of the bill, I want to emphasize that the ICC Treaty is designed to bring to justice those most responsible for the most serious crimes of concern to the international community, namely, genocide, crimes against humanity, and war crimes. Since 1993 we have been deeply engaged in every phase of the ICC Treaty. We have supported the creation of an effective and appropriate international criminal court because there is a clear need for one in the wake of continued atrocities. Nonetheless, a fundamental flaw remains in the ICC Treaty regarding the Court's purported ability to prosecute under certain circumstances the nationals of non-party States, even those acting officially for responsible nations like the United States. Therefore, the possibility of our own exposure under the ICC Treaty remains and that is why we are seeking further protection in the ICC talks.

Section 4 of H.R. 4654 would prohibit specific forms of cooperation with the Court until the United States ratifies the ICC Treaty. The President already has that authority. But we anticipate there will be instances in which it will be in the national interest to respond to requests for cooperation even if the United States is not a party to the ICC Treaty. We may decide that an international investigation and prosecution of a Pol Pot, a Saddam Hussein, an Idi Amin, a Foday Sankoh, or some other rogue leader who has committed or is committing heinous crimes that no civilized government or people could possibly condone or acquiesce in, would be in the national interest of the United States to support.

Further, the Department of Justice advises that these restrictions on the United States' ability to participate in cooperative international activities, such as providing United States military or law enforcement personnel, advice, or equipment to assist in bringing prisoners before the court, or in executing the court's orders, may impair the President's powers as Commander-in-Chief, especially if such actions are deemed by the President to be necessary to further operations in which the United States armed forces are authorized to take part.

The Department of Justice further advises that insofar as such a court can be considered to be a type of international forum, the provision would seem to bar the President from communicating with that forum, whether by filing court papers or submitting the views of the United States or otherwise, if such conduct were considered "cooperation" with the forum. If

so construed, it would present an unconstitutional intrusion into the President's plenary and exclusive authority over diplomatic communications.

In the ICC negotiations, the U.S. Government has pressed other governments hard to accommodate our need to protect U.S. personnel from being surrendered to the ICC to stand trial while the United States is not a party to the Treaty. We made the progress we needed to in the June talks to pursue our equities in the next round of talks in late November. It is absolutely essential, however, that the U.S. not expand current limitations on cooperation with the ICC. To do so would ensure that we are unable to obtain additional protection within the ICC Treaty regime. I must be able to offer, in exchange for the protection that we are seeking, the ultimate cooperation of the United States with the ICC when it serves our national interests while our country is a non-party to the ICC Treaty. As I have often said, Section 4 is counter productive.

Section 5 of H.R. 4654 states that the President should use the voice and vote of the United States in the UN Security Council to ensure that the Council permanently exempts U.S. military personnel from criminal prosecution before the ICC in connection with UN peacekeeping operations. Section 5 further prohibits U.S. military participation in UN peacekeeping operations unless the President certifies that the Security Council has permanently exempted U.S. military personnel from ICC prosecution, or that each country in which U.S. personnel are present in a peacekeeping operation either is not a party to the ICC Treaty or has entered into an Article 98 agreement preventing the ICC from proceeding against U.S. personnel present in that country, or the President has taken other appropriate steps to guarantee that U.S. personnel will not be prosecuted by the ICC.

The Department of Justice believes that Section 5 could unconstitutionally intrude upon the President's authority as Commander in Chief. In its application, this provision could be construed to prevent the President from participating in United Nations peacekeeping efforts even where he determines that such participation is necessary for the safety of United States forces or the national security, for example, responding to a sudden attack to rescue U.S. forces in danger. Further, Section 5 can severely impede national interests and needlessly hold them hostage to the ICC Treaty. Under the Constitution, the President already has the authority to do all that is required in Section 5. But Section 5 ignores the President's responsibility to weigh national security considerations in deciding when and how to deploy U.S. military personnel under a wide and often unpredictable range of contingencies. The bill ties the President's hands in a way that can severely undermine this nation's ability and will to protect our national interests.

Section 6 is unnecessary, as we have already ensured in Articles 72 and 73 of the ICC Treaty that we will have complete control as a non-party or as a party to the ICC Treaty over the transfer of classified national security information to the ICC. The President already has the authority and is exercising the responsibility to ensure that appropriate procedures are in place.

Section 7 would prohibit providing U.S. military assistance to the government of a country that is a party to the ICC Treaty, unless the government has entered into an Article 98

agreement or is a NATO or major non-NATO ally. Thus, U.S. military assistance globally would be held hostage to the ICC Treaty regardless of U.S. national interests, regardless of whether our service members are protected through some means other than an Article 98 agreement, and regardless of what circumstances will arise in the future. This provision can only undermine our national interests. Again, the President already has this authority if he chooses to use it to advance national security objectives. The legislation requires the use of that authority in a way that is most likely to undermine relevant national policies.

The Department of Justice advises that in some circumstances this provision could be unconstitutional. If it were construed, for example, to prevent the United States from providing necessary military assistance that a friendly nation not exempted by Section 7(d) would use in operations supporting U.S. forces subjected to a sudden attack. The waiver provision in Section 7(b) is insufficient to cure this constitutional problem as it may not be practical in an emergency situation to complete the necessary reporting requirements.

Section 8 would authorize the President to use all means necessary and appropriate to free U.S. personnel being detained or imprisoned by or on behalf of the ICC. We would note that the ICC will be located in The Hague, The Netherlands. So, in a curious way, Section 8 contemplates an armed attack on The Netherlands, a close NATO ally of the United States. It is, to put it bluntly, an alarmist provision that only complicates our ability to negotiate our common objective of protection from prosecution. Under the Constitution, the President already has the authority to protect U.S. personnel wherever they are located in the world.

Section 9 of H.R. 4654 requires a report evaluating the degree to which each existing status of forces agreement (SOFA) or other similar international agreement protects U.S. personnel from extradition to the ICC under Article 98 of the ICC Treaty. Although we could provide such an assessment, the major issue lies in re-opening SOFAs to negotiation in order to seek full protection from extradition through a SOFA provision. Section 9 requires the President to transmit to Congress a plan for amending existing SOFAs or negotiating new international agreements, in order to achieve the maximum protection available under Article 98. Re-opening SOFAs could encourage host countries to insist on renegotiating other existing provisions.

Section 10 requires a report with respect to military alliances to which the United States is a party. This provision needlessly subjects our alliance command arrangements to factors pertaining to the ICC Treaty and thus suggests that, once again, our national security interests will be held hostage to the ICC Treaty. U.S. service members under operational control of foreign military officers are still under U.S. command and the administrative control of the United States. More importantly, the risks facing U.S. service persons are the same once they are in the territory of a state party to the ICC, regardless of the command or operational relationship they have with foreign military officers who are nationals of countries that are parties to the ICC. The degree of risk may vary based upon any existing status of forces agreement or other similar international agreement, as was discussed under Section 9.

The Department of Justice advises that both Sections 9(b) and 10(b) would impermissibly intrude on the President's constitutional powers over the nation's diplomatic relations and his

authority as Commander-in-Chief. Because the Constitution vests authority over the nation's diplomatic negotiations in the President, the President and his subordinates must have discretion to decide whether to enter into negotiations with foreign governments and to control the content of those negotiations. The requirement in these provisions that the President submit to Congress plans for amending certain agreements with foreign nations implies a Congressional mandate that the President negotiate such changes; so construed, they impermissibly infringe on the President's exclusive responsibility under the Constitution to determine the form and manner in which the United States will maintain relations with foreign nations.

In conclusion, many of the provisions of H.R. 4654 achieve exactly the opposite of the result intended, and would seriously harm our own national security and foreign policy interests. The legislation would cripple our negotiating leverage to achieve the common objective of protection of American service members from surrender to the ICC. Section 5 could make it impossible for the United States to engage in critical multinational operations. Section 7 could weaken essential military alliances. The bill raises fundamental constitutional issues and would seriously impair any future Administration's ability to pursue national security objectives.

As a negotiator who has faithfully worked and will continue to work to protect U.S. national interests and U.S. service members in the ICC Treaty regime, I respectfully ask you to withdraw this legislation so that I have a fighting chance to achieve additional protections for U.S. service members.

Thank you, Mr. Chairman.