

US Policy on ICC Counterproductive

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Washington's attitude towards the ICC threatens stability in the Balkans.

By Nicholas Whyte in Brussels (BCR No 439, 20-Jun-03)

American pressure on Balkan governments over the International Criminal Court, ICC, is generating unnecessary instability in the region and undermining America's own long-term strategy.

The reasons for the United States' general opposition to the ICC are barely comprehensible to outsiders. It seems on the face of it absurd to suggest that this carefully constructed edifice of international law, supported by 138 other countries and by almost all of the world's democracies, will inevitably be a forum where politically motivated anti-American prosecutors will launch spurious legal attacks on US personnel by accusing them of war crimes.

If the US were to participate in the ICC, the question of Americans being taken forcibly to The Hague to face international prosecutors would be unlikely ever to arise, as the ICC's procedures are firmly biased towards prosecution by national authorities: the court can only step in as a last resort if these fail to carry out investigations, and appropriate prosecutions, in good faith.

The US attitude is particularly paradoxical given Washington's important role in setting up and continuing to support the international tribunals for crimes committed in the former Yugoslavia and Rwanda as well as the Special Court for Sierra Leone. And experience so far from these bodies does not bear out Washington's apparent paranoia.

The chief prosecutor at The Hague found no basis to prosecute the US for civilian casualties in the 1999 Kosovo conflict, and it's difficult to see how a politically motivated indictment could get through the system of the ICC. Not only are the court's procedures rigorous, its judges come from 18 democratic countries, most of which are normally counted as US allies, with the president of the court a Canadian, his deputies from Ghana and Costa Rica, and the chief prosecutor Argentinian.

Anxiety in Washington about the court is so great that the US Congress has passed the American Service members' Protection Act, ASPA, which forbids any further US military assistance to ICC states that do not conclude a bilateral immunity agreement with America by July 1, 2003. NATO members, along with Australia, Jordan, Argentina, South Korea, and New Zealand are exempted from this requirement, and other states may be given waivers on the grounds that US national security interests justify continued aid.

The US has now signed 40 or so bilateral agreements with other states to prevent the ICC from getting its hands on US citizens. It is questionable whether these are actually compatible with the Rome Statute establishing the court, as the State Department claims. Certainly, the ICC's supporters argue that the deals that have been signed so far are in conflict with the Rome Statute and will probably be overridden by it.

The European Union has taken a firm line in favour of the ICC. Of the EU's fifteen current members, eleven are NATO members, and therefore already exempt under US legislation; the other four are neutral states receiving no military aid in the first place. Of the ten countries joining the EU next year (three are already

NATO members, five about to join and two neutral), none has deviated from the union's strong support for the court.

The divergence of policy between the US and EU has put pressure on several Balkan states, who feel they are being forced to choose between America and Europe. On the one hand, most of them attach great value to the military assistance they have received from the United States. Romania and Bulgaria will be in the next tranche of NATO members; Croatia, Albania and Macedonia hope to be in the one after. But all of these countries also aspire to EU membership, and Brussels has made it perfectly clear that all member states, and potential member states, will be expected to support its policy in favour of the court.

It is significant that the only western Balkan countries so far to have signed such agreements are those whose EU integration prospects have lagged compared with their neighbours – Albania and Bosnia-Herzegovina.

It is impossible to believe that the US would seriously withdraw all military aid from any of the Balkan states in whose stability it has already invested so much, and which are (hopefully) soon to join NATO and thus be freed of any obligation to sign a bilateral agreement. The western Balkan countries are in any case obvious candidates for waivers from ASPA on the grounds of national security. American threats to pull the plug on further military assistance to these states are empty, and verge on the irresponsible.

In Croatia and in Macedonia, US demands to sign an agreement have sparked bitter debate, with vulnerable coalition governments feeling forced to choose between the US and Europe. Yet the stated goal of American policy in the Balkans is to encourage the European integration of the region. By pressurising these small states to adopt bilateral treaties which they will be able to get out of without much difficulty when they join NATO, and which they will have to back out of when they join the EU, Washington is generating unnecessary instability and impeding its own long-term strategy.

American and European officials should address this issue at the forthcoming US-EU summit, scheduled for June 27. The US should declare that the countries of southeastern Europe will on request be issued with waivers from ASPA on the grounds of national security. And Brussels should declare that any bilateral deals that have been signed so far will not be held against those countries that are anyway several years from EU membership.

Both sides should pledge their determination to find a solution to this issue directly, rather than settling it by proxy in Zagreb or Skopje. History has shown that nothing drives instability in the region more than a lack of unity between the great powers. The differences between the EU and US on the ICC are real, but they should not be allowed to distract from the common purpose of stabilising the Balkans.

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