

**THE IMPACT ON LATIN AMERICA OF THE  
AMERICAN SERVICEMEMBERS' PROTECTION ACT**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON WESTERN HEMISPHERE,  
PEACE CORPS AND NARCOTICS AFFAIRS

OF THE

COMMITTEE ON FOREIGN RELATIONS  
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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**WEDNESDAY, MARCH 8, 2006**

U.S. SENATE,  
SUBCOMMITTEE ON WESTERN HEMISPHERE,  
PEACE CORPS AND NARCOTICS AFFAIRS,  
COMMITTEE ON FOREIGN RELATIONS,  
*Washington DC.*

The committee met, pursuant to notice, at 2:30 p.m., in room SD-419, Dirksen Senate Office Building, Hon. Norm Coleman (chairman of the subcommittee) presiding.

Present: Senator Coleman.

**OPENING STATEMENT OF HON. NORM COLEMAN, U.S.  
SENATOR FROM MINNESOTA**

Senator COLEMAN. This hearing of the Senate Foreign Relations Subcommittee on Western Hemisphere, Peace Corps and Narcotics Affairs will come to order. The International Criminal Court is the first permanent criminal court established to judge such crimes as genocide, crimes against humanity and war crimes. While still a new entity, the ICC issued its first arrest warrants against five leaders of armed groups in Uganda in October. The United States, due to legitimate concerns, has not ratified the Rome Statute, and therefore, is neither a member of the International Criminal Court nor under its jurisdiction. However, over 100 countries have ratified and are members of the court. This situation could leave U.S. soldiers vulnerable to being unjustly charged with war crimes regardless of the fact that the United States is not party to the ICC.

The United States Congress and the President have agreed that this potential exposure for American troops is undesirable and have sought legal mechanisms to protect American citizens from ill-founded or politically-motivated charges. Legislatively, these mechanisms include the American Servicemembers' Protection Act of 2003, ASPA, and the Nethercutt amendment. In general terms, ASPA prohibits U.S. Government cooperation with the ICC, restricts the participation of U.S. troops in U.N. peacekeeping operations unless the President certifies they will not risk prosecution at the ICC. And the focus for today's hearing prohibits U.S. military assistance for any country that is a member of the ICC and does not conclude an Article 98 agreement with the United States guaranteeing that it will not surrender citizens of the other country to the ICC unless both parties agree in advance.

(1)

In the same way, the Nethercutt amendment cuts Economic Support Funds, ESF, for countries that back the court. I fully support the intent of these laws. I also applaud the work of the State Department in securing over 100 Article 98 agreements to date. These agreements have been somewhat controversial. While the State Department insists that they simply reinforce the ICC's own concept of complementarity, others believe they undermine the court itself. This concern, coupled with global anti-American sentiments, has led to some reluctance to sign them. The European Union, for instance, is opposed to Article 98 agreements. It expressly cautions prospective European Union members against signing them. In other cases, governments that have signed Article 98 agreements have been unable to achieve ratification by their legislatures.

This is a global issue, and I would note that Senator Voinovich has raised many concerns relative to eastern Europe. However, today's hearing will focus exclusively on the consequences of ASPA in Latin America. In this region, 13 countries have signed and ratified Article 98 agreements with the United States and continue to receive military and economic assistance from the United States. Similarly, nine countries in this hemisphere are not members of the ICC and face no restrictions. Argentina is a major non-NATO ally and is not subject to any restrictions. However, in this region, 12 countries which are parties to the ICC have not signed Article 98 agreements, and most have shown little inclination to do so in the future. Among these are such key partners as Mexico, Brazil, Ecuador, Bolivia, Peru, Uruguay, and Paraguay. The direct consequence has been a reduction in U.S. assistance to and cooperation with the region. Cuts have affected foreign military financing, International Military Education and Training, IMET, excess defense articles and economic support funds. Counter narcotics and humanitarian aid are exempted. Of course, the consequences of this policy extend beyond foreign aid numbers. Militarily, there can be little doubt that the United States is missing key opportunities to engage officers, noncommissioned officers, and high-ranking civilians from the sanction countries. Moreover, we know that military-to-military engagement can help to underscore the importance of democracy, stability and professionalism. This is especially significant in a region where not so long ago, the military establishment was complicit in decades of undemocratic rule. General Bantz Craddock, Commander of the United States Southern Command, has been forthright with his concerns about the effects of ASPA in the region—particularly, its impact on IMET. In his 2005 Posture Statement, he said, and I quote, "While the American Service Members' Protection Act, ASPA, provides welcome support in our efforts to seek safeguards for our servicemembers from prosecution under the International Criminal Court, in my judgment, it has the unintended consequence of restricting our access to and interaction with many important partner nations. Of the 22 nations worldwide affected by these sanctions, 11 of them are in Latin America, hampering the engagement and professional contact that is an essential element of our regional security cooperation strategy." I would inject that since the statement was made, Mexico became part of the ICC, increasing the number of affected countries to 12. General Craddock also stated the IMET program provides partner-nation

students with the opportunity to attend U.S. military training, get a first-hand view of life in the United States and develop long-lasting friendships with U.S. military and other partner-nation's classmates. Finally, General Craddock warned extra-hemispheric actors are filling the void left by restricted U.S. military engagement with partner nations. We now risk losing contact and interoperability with a generation of military classmates and many nations of the region, including several leading countries. In a broader sense, restrictions in military aid could also result in the loss of U.S. diplomatic influence in the region. This occurs at a time when populism and anti-Americanism are rampant. Charges of U.S. "neglect" are commonplace, and humanitarian aid for the region is seeing reductions. And any real or perceived vacuum created by the United States could be filled by worrisome actors in the region or even elements outside the region such as China, which is already scaling up its military and diplomatic engagement in Latin America. A couple of case studies further illustrate the consequences of ASPA. In 2002, Bolivia ratified the Rome Statute and then signed an Article 98 agreement, but the Bolivian Congress has not ratified the agreement. And given the current political dynamics in Bolivia, it seems highly unlikely to do so. As a consequence, our 2007 budget will cut military aid to Bolivia by 96 percent. I worry that this drastic cut could be counterproductive to our goal of a Bolivia that is a democratic partner in the region and could erode U.S. efforts to engage early with the Morales government. Ecuador ratified the Rome Statute in 2002 and has not signed an Article 98 agreement. As a consequence, aid for Ecuador has fallen by some \$1.2 million dollars in Economic Support Funds and \$1.3 million in military aid. This sends a difficult message as we seek to extend the agreement which allows the United States the use of the Manta Base for counter-narcotics operations. Mexico just became a member of the International Criminal Court in October 2005. Cutting off military training with our NAFTA-partner neighbor will be particularly damaging to our national security interest, particularly as Mexico enters an election cycle and we seek cooperation to address challenges along our shared border. Brazil ratified the ICC in 2002. During my trip to Brazil with Senator Martinez and Congressman Jeff Miller in August, reductions in military exchanges were among the top concerns I heard. Brazil is the largest country in Latin America, and these reductions are having a real impact. It is the opinion of this Senate that it is up to Congress to find ways to mitigate the negative consequences of ASPA without undermining the law or the protection it offers for our troops. We need to continue pressing for Article 98 agreements in ways that do not undermine our own policy goals, particularly as they relate to IMET. Several possible solutions exist. First, ASPA already includes a waiver authority, and some have suggested that the administration start using it more liberally. The downside of this approach is that it could undermine continuing efforts to reach Article 98 agreements. I would also add my strong view that the negative consequences of ASPA are a result of the law itself, not the administration's reluctance to waive it. A second possible solution would be to delink all or part of IMET from the law while retaining restrictions related to FMS and ESF. This approach has a certain appeal, but it might

result in a decrease in the pressure on the countries to conclude Article 98 agreements. A third approach would be to replace all or part of the IMET provisions with another form of leverage that would offer some positive incentive to countries that do sign and ratify Article 98 agreements. I hope our witnesses can offer some suggestions in this vein. Alternatively, Congress could add specific flexibility to the waiver authority to take into account other positive measures such as status of forces agreements or other indicators of cooperation.

In conclusion, I support the American Servicemembers' Protection Act, but I believe it carries some unintended consequences that are felt acutely in the region. I look forward to hearing the views of the witnesses about how we can fix it, how we can improve it and to work with my colleagues and the Congress to achieve this goal. I would also note my extreme disappointment that neither the State Department or the Defense Department have cooperated with my request to send witnesses to testify today. It has been my clear intention to work with the administration to find mutually acceptable solutions to this problem, and the failure to testify this subcommittee is truly regrettable. And I'm not sure if this is a product of divisions within the administration, which I've heard some conflicting views, and they haven't settled on consensus policy. I hope it's not a head-in-the-sand approach to a status quo, which really is not acceptable. We need to figure out a way to improve the environment in Latin America. And today, clearly, there are issues, and they have to be addressed in this hearing. Hopefully, we'll shed some light. But again, my extreme disappointment with both State and Defense. They need to step up to the table on this issue. With that, I will yield. I was going to yield to my distinguished ranking member who is not here. If he comes, we'll give him that opportunity, but why don't I just move forward with introducing the witnesses. I should note that a number of my colleagues, Senator Martinez, Senator Nelson, have raised this, and there are a number of things going on right now, but this issue clearly has the interest of many of us who are concerned about the United States and Latin America. The committee is pleased to have three witnesses speak about the consequences of the American Servicemembers' Protection Act. Dr. Peter DeShazo is the director of the Americas Program at the Center for Strategic and International Studies since September 2004. Prior to this position, he was deputy assistant secretary of state for Western Hemisphere affairs. During his career in the U.S. foreign service, Dr. DeShazo also served as deputy U.S. representative to the OAS, director of the Office of Public Diplomacy and Public Affairs at the Bureau of Western Hemisphere Affairs and served at U.S. embassies and consulates in Bolivia, Columbia, Chile, Panama, Venezuela, and Israel. Dr. DeShazo received his B.A. from Dartmouth College and Ph.D. in Latin American history from the University of Wisconsin at Madison and did his postgraduate work at the Universidad Catolica in Chile. Mr. Adam Isacson is the director of demilitarization of Latin American Program Center for International Policy. Mr. Isacson has worked on Latin American security issues at the Center for International Policy since 1995. He is the primary author of a 1997 CIP areas foundation book on security and militarism in Central Amer-



ica and coauthor of "Just The Facts," a study of U.S. military assistance to the Western Hemisphere. Mr. Isacson holds an M.A. in international relations from Yale University. To offer insight about the ICC and International Law, the committee is pleased to welcome Dr. Ruth Wedgwood. Dr. Wedgwood is the Edward B. Burling Professor of International Law and Diplomacy and the director of International Law and Organization Program at the Paul H. Nitze School of Advanced International Studies at Johns Hopkins University. She's been a United States member of the United Nations Human Rights Committee, a member of the United States Secretary of State's Advisory Committee for International Law, an independent expert for the International Criminal Tribunal for the former Yugoslavia. She was formerly professor at Yale University—a lot of Yale ties today, and director of the studies of the Hague Academy for International Law. Dr. Wedgwood is a graduate of Harvard University and Yale Law School.

And with that, I think we will start with Ambassador DeShazo. I will go to Mr. Isacson and then conclude with Dr. Wedgwood. So Ambassador, please begin.

**STATEMENT OF DR. PETER DESHAZO, DIRECTOR, AMERICAS PROGRAM, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, WASHINGTON, DC**

Ambassador DESHAZO. Thank you very much, Mr. Chairman. Thank you very much for your invitation. It's a pleasure to speak on this important topic. Although the goal of the American Servicemembers' Protection Act and the subsequent Nethercutt amendment to the 2005 Foreign Operations Appropriations Act has been to encourage countries to sign bilateral immunity agreements, Article 98 agreements, with the United States, unintended consequences arising from the cutoff of military and economic assistance to now 12 countries in the Americas as a result of ASPA and Nethercutt are affecting U.S. national interest in the region.

On the military side, the loss of IMET has been especially significant. IMET is a key, cost-effective vehicle for military-to-military engagement with future leaders of security institutions in the hemisphere. Although the rescissions in dollar terms are not dramatic, hundreds of Latin American military officers from the countries not ratifying Article 98 agreements will not receive U.S. training in 2006 as a result of the IMET suspension. This suspension affects U.S. security by weakening current and potential cooperation with key militaries such as the army and navy of Mexico, which have a direct effect on our border security. It affects efforts to combat regional threats such as trafficking in persons and arms trafficking where military-to-military cooperation with the United States is an important component. It also affects the promotion of international security and peacekeeping efforts. IMET provides foreign military leaders with access to U.S. doctrine and tactics that are important in peacekeeping and coalition building. Countries in the region such as Brazil and Chile are increasingly involved in such international efforts. It affects the image of the United States. Abrogation of IMET and other forms of U.S. military assistance plays into the hands of anti-United States ultranationalists on the left and right. It affects long-term training relationships. Nations

whose training with the United States is cut off will look elsewhere—Europe perhaps—but China, Russia, Cuba, and Venezuela are other possibilities. It affects linkage to the U.S. model of civilian control of the military in a democratic environment. IMET also includes an important human rights component in all training, which is lost to those who don't participate. Chile may well become a showcase of the unintended but negative aspects of ASPA. Although it is Latin America's greatest success story in terms of its high-quality democratic governance, respect for human rights, prosperous economy based on free market policies and a free trade agreement with the United States and its success in reducing poverty, Chile will fall under ASPA and Nethercutt sanctions when, as it is almost certain to do, its Congress ratifies the Rome Statute of the ICC within a few months. The imposition of sanctions would set back what has become an excellent military-to-military relationship with the United States and would cause public opinion in Chile to question why the United States would sanction a friendly country. The loss of Economic Support Funds, ESF, under the terms of Nethercutt also has an unintended but negative impact on U.S. interests in the region. ESF is the lifeblood of U.S. funding for structural reform in Latin America, for encouraging improved governance, strengthening the rule of law, fighting corruption and promoting sound economic policies. It is a precious resource in short supply. While Nethercutt does not eliminate ESF spending in countries not ratifying Article 98 agreements, it does deny ESF funds for the benefit of governments, a broadly-applied definition.

In Andean countries like Bolivia, Peru, and Ecuador that cry out for reforms in governance, ESF cannot be used to fight corruption, strengthen justice systems, or improve governance if the state is the beneficiary of such funds, which is the purpose of such reforms. ESF may go to NGOs and others who will make good use of it, but not necessarily to the best advantage of the United States. Regional efforts may also be affected, such as the United States' interest in promoting trade capacity building in Central America in the wake of the CAFTA/DR approval. ESF expenditures for regional projects cannot be made if Costa Rica, which has not signed an Article 98 agreement, is a beneficiary. As in the case of IMET, the amounts of ESF involved are not large, but are significant in terms of their impact. Over time, ESF now being reprogrammed within countries to comply with Nethercutt regulations will be redistributed to other countries in other regions. Nethercutt sanctions limit the flexibility of U.S. policymakers and strengthen the hand of those in the region who oppose reform. The well-intentioned, but nonetheless, negative results arising from ASPA and the Nethercutt sanctions set back United States policy objectives in Latin America. The challenge is to find means to protect American servicemembers and citizens without recurring to this sanction's regime, and several potential solutions may be possible: Status of forces agreements and exchanges of diplomatic notes, waivers, or other measures. Whatever steps taken, however, should be consistent with our overall interests in the region. Thank you, Mr. Chairman.

[The prepared statement of Dr. DeShazo follows:]

PREPARED STATEMENT OF PETER DESHAZO, DIRECTOR, AMERICAS PROGRAM CENTER  
FOR STRATEGIC AND INTERNATIONAL STUDIES

The American Servicemembers' Protection Act (ASPA) that came into effect on July 1, 2003 and the subsequent "Nethercutt amendment" to the 2005 Foreign Operations Appropriations Act, respectively, call for the suspension of military and economic aid to countries that are parties to the Rome Statute establishing an International Criminal Court (ICC) but that have not signed a bilateral immunity agreement (Article 98 agreement) pledging not to seek the prosecution of U.S. citizens in the ICC. Currently, 12 countries in the western hemisphere (Barbados, Bolivia, Brazil, Costa Rica, Ecuador, Mexico, Paraguay, Peru, St. Vincent and the Grenadines, Trinidad and Tobago, Uruguay, Venezuela) are subject to the sanctions established by ASPA and the Nethercutt amendment, with Chile on the verge of ratifying the Rome Statute, which would make that country also subject to sanctions. The assistance suspended by ASPA includes International Military Education and Training (IMET), Foreign Military Financing (FMF), and Excess Defense Articles (EDA). The Nethercutt amendment prohibits making available Economic Support Funds (ESF) to provide assistance to states party to the ICC and that have not signed an Article 98 agreement. Canada, as a member of NATO, and Argentina, as a major non-NATO ally, are not subject to these sanctions.

Although the goal of ASPA and Nethercutt Amendment has been to encourage countries to sign Article 98 agreements, unintended consequences arising from the sanctions imposed by ASPA/Nethercutt are affecting U.S. national interest in the region. On the military side, loss of IMET has been especially significant. IMET is a key, cost-effective vehicle for military-to-military engagement with future leaders of security institutions in the hemisphere. Hundreds of Latin American military officers will not receive United States training in 2006 because of recession of IMET in the 12 countries not ratifying Article 98 agreements. The dollar amount of these losses is difficult to calculate and in any case is not dramatic, but the effect in terms of U.S. interest is substantial and will be multiplied every year that IMET is suspended:

- The transition from authoritarian military regimes to democratic government which took place throughout the region during the 1980s and 1990s was marked by steadily improving civil-military relations. This process was encouraged by the training received by Latin American military officers through IMET. Civilian control over the military in Latin America, with broad respect for human rights, is now the norm and the threat to democracy in the region comes not from potential military coups but from authoritarian populism. Exposure to the U.S. example through IMET training aided this process and loss of IMET would sever an important linkage between future military leaders and the U.S. model of civilian control over the military.
- Military-to-military engagement with the Americas strengthens U.S. security. Mexico is the most obvious example of the importance of improved security cooperation. The Mexican army and navy are undergoing a dynamic process of change, evolving into more professional and transparent institutions under increased civilian control. The loss of IMET for Mexico at this important moment is especially inopportune, closing the door on potentially improved relations with institutions that have a direct effect on our borders and our security. In the Andean countries of Peru, Bolivia, and Ecuador—all of which have been cut off from IMET—the United States has a vital interest in preserving democracy, respect for human rights, and combating international security threats, such as drug trafficking, trafficking in persons, and arms smuggling—all areas where military-to-military cooperation with the United States is a key component.
- Efforts to promote regional and international security may be adversely affected by ASPA sanctions. The militaries of Brazil, Chile, and Peru are increasingly involved in international peacekeeping and coalition efforts. The ability of military officers from these nations to more closely integrate with United States and coalition units would be adversely affected by loss of IMET, which provides them access to U.S. doctrine and tactics. Regional security efforts, such as those undertaken with the countries of the Organization of Eastern Caribbean States under the Regional Security System (RSS), could be hampered by ASPA sanctions imposed on Barbados, the key participant in that regional group. With Trinidad and Tobago, another key Caribbean nation, also under ASPA sanctions, effective cooperation with the defense and security forces making up the so-called "Third Border" of the United States is more difficult.
- Abrogation of IMET and other forms of United States military assistance plays into the hands of anti-United States ultranationalists on the left and right in Latin America. While in many of the countries of the region there may be broad

support for the ICC or for not signing an Article 98 agreement with the United States, the ultranationalists achieve an important goal when relations between their own militaries and the United States are severed. In Ecuador, the United States must renegotiate the bilateral agreement due to expire in 2009, allowing for use of the Ecuadorian air base at Manta as a Forward Operating Location in tracking drug flights in the region. Extension of this agreement could be negatively affected by weakened military-to-military relations.

- Nations whose training options with the United States are cut off will look elsewhere: Europe perhaps, but China, Russia, Cuba, and Venezuela are other possibilities. Young officers gain much more than martial knowledge from their military training. Like their civilian counterparts who study at foreign universities or technical schools, they acquire a cultural experience that may stay with them a lifetime. Just as the several generations of Latin American politicians and economists who carried out the transition to democracy and free-market economies in the region benefited from their training in the United States thanks to a wide assortment of exchanges programs, so did their fellow citizens in the military learn from the U.S. example. One military colleague compared IMET to U.S. savings bonds—the payoff is years away—when the lieutenant commanders and majors become admirals and generals. If IMET is eliminated, that payoff will never come.
- As in the case of IMET, the figures for potential losses of Foreign Military Financing (FMF) in the Americas are not particularly significant in dollar terms but do play a part in establishing linkages to the United States, especially for smaller countries. Loss of FMF and access to possible Excess Defense Articles turns countries away from reliance on the United States and toward closer relationships elsewhere.
- Chile is likely to become a prime showcase of the negative effects of ASPA. No country in the hemisphere has been more successful in consolidating democratic governance, in establishing an environment conducive to entrepreneurial competitiveness, and in improving the lives of its citizens by shrinking poverty and unemployment. Chile signed a free trade agreement with the United States and plays a positive, visible role in international peacekeeping and in support of regional security. Civil-military relations in Chile have vastly improved since the dark days of the Pinochet dictatorship and the United States-Chilean military-to-military relationship has never been better. If the Chilean congress ratifies adherence to the Rome Statute, which it is likely to do in the near future, and when ASPA sanctions kick in, this relationship will be set back. The imposition of sanctions will send a negative message to the Chilean military and civilian elites regarding the reliability of the United States as a partner, and public opinion will question why the United States would take such steps against a friendly country.

The unintended effects of the Nethercutt amendment prohibiting Economic Support Funds (ESF) from benefiting governments that have not signed Article 98 agreements are similar to those resulting from loss of IMET in terms of their negative impact on U.S. policy interest. ESF is the lifeblood of United States funding for structural reform in Latin America, for encouraging improved governance, strengthening the rule of law, fighting corruption, and promoting sound economic policies, including the enforcement of labor laws. It is a precious resource for U.S. policymakers—one which over the years has been in increasingly short supply. While Nethercutt does not eliminate ESF spending in countries not ratifying Article 98 agreements, it does deny ESF funds for the benefit of governments, a definition that is broadly applied.

In Andean countries like Bolivia, Peru, and Ecuador that cry out for reforms in governance, ESF cannot be used to fight corruption, strengthen justice systems, or improve governance if the state is a beneficiary of these funds—the purpose, in fact, of such reforms. ESF may go to NGOs and other good use may be made of it, but not necessarily to the best advantage of the United States or the host country. Regional efforts may also be hamstrung by limitations on ESF spending. For example, the United States is redoubling its efforts to promote trade capacity building in Central America in the wake of the Central American Free Trade Agreement (CAFTA/DR) but ESF expenditures for regional projects cannot be made if Costa Rica, which has not signed an Article 98 agreement, is deemed to be a beneficiary. Likewise, the United States cannot support regional anticorruption efforts promoted by the Organization of American States if funding goes to nations under ASPA sanctions. Projects under the State Department's "Third Border Initiative" with the Caribbean funded by ESF must exclude the key states of Barbados and Trinidad and Tobago.

The effect of the Nethercutt amendment in dollar terms may not seem dramatic. But over time, ESF now being reprogrammed within countries to comply with

Nethercutt regulations is likely to be redistributed to other countries or regions. Nethercutt limitations on ESF spending also limit the flexibility of U.S. policymakers who seek to encourage stronger governance and economic development in the region. In a subtle way, this process, like the loss of IMET, strengthens the hand of the ultranationalists who resent calls by the United States and the international community for structural reform. Those in governments who promote reform and seek to work with the United States to bring it about are in turn cut off from support.

The well-intentioned, but nonetheless negative, results arising from ASPA sanctions beg the question of other possible options available to the United States. Traditional means of providing U.S. servicemembers with needed legal protection, such as status of forces agreements (SOFAs) or by providing them with temporary administrative/technical (A&T) status in country via the exchange of diplomatic notes, are options—but only for military personnel and not for all U.S. citizens. The challenge to lawyers and policymakers alike will be to find a means to protect American citizens without recurring to a sanctions regime that undercuts, however unintentionally, U.S. national interest in key countries of the Americas.

[Note.—CSIS does not take specific policy positions. Accordingly, all views, positions, and conclusions expressed in this testimony should be understood to be solely those of the author.]

Senator COLEMAN. Thank you. By the way, am I pronouncing—Ambassador, is it DeShazo or DeShazo?

Ambassador DESHAZO. DeShazo.

Senator COLEMAN. Thank you very very much, Ambassador. I appreciate it.

Mr. Isacson.

**STATEMENT OF MR. ADAM ISACSON, PROGRAM DIRECTOR,  
CENTER FOR INTERNATIONAL POLICY, WASHINGTON, DC**

Mr. ISACSON. Senator Coleman, I want to thank you for holding this hearing and for inviting me to participate. My name again is Adam Isacson. For 10 years, I have managed a program at CIP that monitors United States security relations with Latin America and the Caribbean.

2006 marks the first time in my 10 years that I am seeing actual reductions in military assistance region wide, and the reason for this is the American Servicemembers' Protection Act.

When the ASPA was first enacted, I admit that we didn't make it a priority for our work. The sanctions in section 2007 of the law cut military aid only, and CIP was already advocating reduced military aid to ease many countries' transitions away from military rule at the time. Besides, we saw that the law had a national interest waiver allowing the President to lift sanctions at will. Whenever a waiver like that gets attached to laws cutting military aid for human rights reasons, we know that any administration, Democrat or Republican, will activate that waiver without a second thought, and the military aid will flow as always. We thought—why would it be different in the case of the ASPA—nobody's really going to cut FMF and IMET, are they? We also noted that military aid would continue to flow through several other programs untouched by the ASPA sanctions. The State and Defense Departments both have large and growing counterdrug and counterterror aid programs outside the ASPA's purview, and these, plus joint exercises in deployments, already make up most military aid to Latin America. Since the aid cutoff was so partial, we, in fact, wondered how exactly the ASPA was going to achieve its own stated objective of protecting U.S. personnel. At the outset, our main concern at the

beginning was that if civilian government leaders chose not to sign Article 98 agreements, the sanctions didn't punish them, it punished their militaries. We saw that as provoking friction in Latin America's fragile civil military relations, but it soon became clear that there were more reasons to be concerned. As punishments were handed out to a dozen countries throughout Latin America, including some of our closest friends, we saw it doing serious damage to the United States' standing in the region. The message received in Latin America across the political spectrum in the mainstream media was very negative. After years of scolding on human rights through statements like the annual reports that have been released today, many Latin Americans now perceive the United States as hypocritically trying to protect its own soldiers from what they saw as an international human rights tribunal. It didn't help that the diplomatic offensive to sign Article 98 agreements was happening in 2004 just as revelations began to surface about Abu Ghraib and Guantanamo. The message was pretty bad. Many democratically elected Latin American leaders in countries we considered to be close to the United States, wore their refusal to sign Article 98 agreements almost as a badge of honor. It gave them a low-cost opportunity to make a public display of standing up to the big bully to the north. The impact on relations worsened in late 2004 when the Nethercutt provision extended the sanctions beyond military aid to include ESF. Suddenly, badly needed development programs were in play, and ESF to the sanctioned Latin American countries has been cut by more than 55 percent between 2003 and this year.

So, what can we do about this? The simplest answer is just to repeal section 2007 and the Nethercutt provision. There is no shame in recognizing that these sanctions have proven to be too blunt an instrument.

Repealing the sanctions would send a message to Latin America and the rest of the world that we get it, that we want our relations with the region's democracies to be based on mutual respect. It would also send the message that we trust our own diplomats to decide whether or not a country poses a risk of sending U.S. personnel to the ICC for spurious reasons. But if it proves too difficult to repeal section 2007, the law still gives the executive branch a good deal of flexibility, if it's willing to be flexible and if it gets a message from the U.S. Congress that flexibility will be tolerated.

As I've noted, section 2007 already includes the national interest waiver. This can be invoked much more often than it has been. Section 2007 also exempts countries designated as major non-NATO allies. Until now, this label has been largely symbolic. It doesn't imply mutual defense, and it doesn't carry a lot of significant advantages for military assistance. But right now, Argentina is our only major non-NATO ally in Latin America. Granting this status to a few more countries in the region with whom we have very good relations would stop the sanctions and symbolically improve relations with our democratic neighbors. These measures—in addition, I heard Senator Coleman mention in his opening statement the idea of positive reinforcement, which actually hadn't even occurred to me, thinking that it just simply wasn't in the U.S. budget, but it would be great. These measures offer easy ways to extract us

from the blind alley that the ASPA sanctions have proven to be. The additional risk to U.S. personnel in the region will be zero since so many personnel are already there carrying out programs funded through other accounts; International Narcotics Control, the Andean Counter-Drug Initiative, the DOD Counter-Narcotics budget, the DOD Counter-Terror Fellowship Program, JCET deployments, joint exercises. They're already there, and they're already, I suppose, at risk, but nobody seems too concerned.

We must remember that Latin America is in a critical period of political upheaval. Citizens are showing more frustration with poverty, inequality, and corruption, and they're taking it out on their leaders. They're losing faith in the democratic process, and they're electing leaders who deeply mistrust the United States. This is a time when we must be a generous partner and a positive force in the region, not a scold seeking new reasons to distrust and disengage. This is no time to punish our friends. Thank you very much. I look forward to your questions.

[The prepared statement of Mr. Isacson follows:]

PREPARED STATEMENT OF ADAM ISACSON, DIRECTOR OF PROGRAMS, CENTER FOR INTERNATIONAL POLICY

Senator Coleman, Senator Dodd, members of the subcommittee, I want to thank you for holding this hearing, and for inviting me to participate. My name again is Adam Isacson; for 10 years I have managed a program at the Center for International Policy that monitors and studies United States security relations with Latin America and the Caribbean.

2006 marks the first time in my 10 years that I am seeing even slight reductions in military assistance to the Western Hemisphere. This owes in no small part to the American Servicemembers' Protection Act (ASPA), which cuts some military aid to countries that do not exempt U.S. personnel from the International Criminal Court (ICC).

WHY WE OPPOSE THE ASPA

When the ASPA was enacted in 2002, my organization did not have a strong position on the law. While we supported the International Criminal Court, we also favored giving less military aid to Latin America.

Excesses committed during the cold war made military aid unpopular throughout the human rights community, both here and in the region. We preferred a greater emphasis on civilian institutions in countries where transitions from military dictatorships to civilian democracies were still fragile.

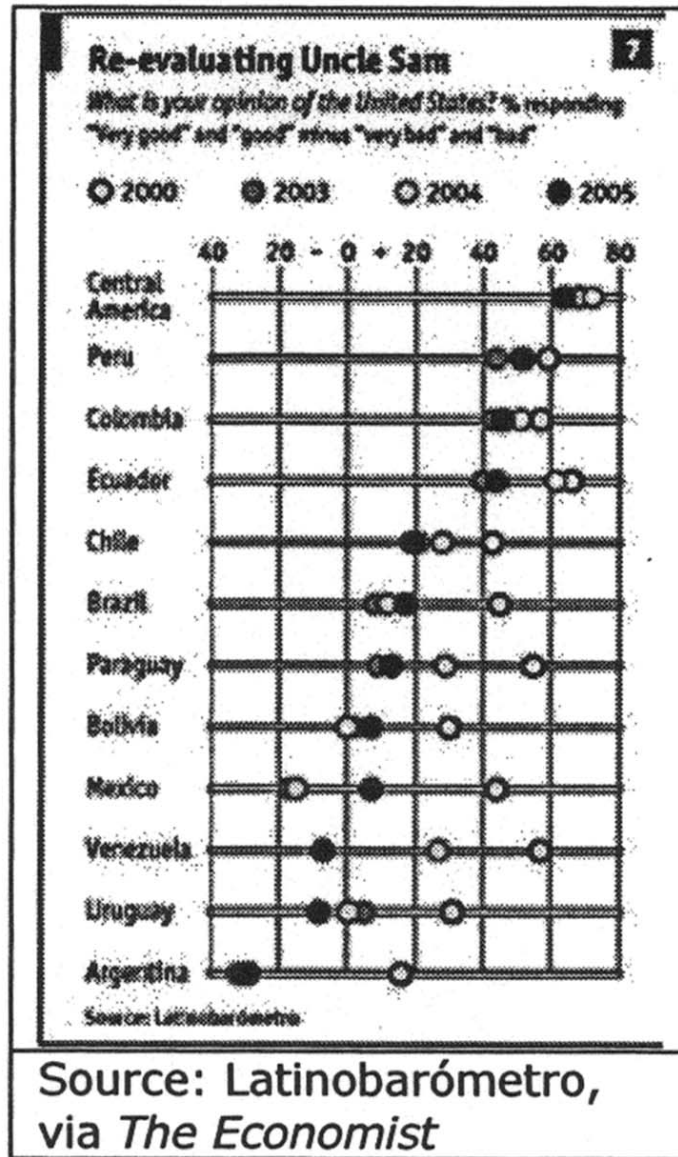
Because it cut off only military assistance, section 2007 of the ASPA did not pose a major concern for us at first, even as the list of Latin American militaries getting no FMF or IMET began to grow. We were not about to advocate a restoration of weapons and lethal training, and we noted that many of the strongest critics of the ICC were also some of the strongest proponents of military assistance to Latin America. It seemed to us as though we did not have a dog in this fight.

We did have concerns, though, about the impact on regional civil-military relations that the military aid cutoff might have. Whether or not to sign an Article 98 agreement is a choice that civilian leaders must make, but section 2007 was punishing Latin America's militaries if civilian governments chose not to sign. We saw that as provoking friction between civilian and military leaders in an unhelpful way.

Our concerns about ASPA increased as we saw how the law's implementation was damaging the United States' standing in Latin America. The effort to punish countries that don't sign Article 98 agreements has been perceived, including in the region's mainstream media, as bullying or arm-twisting, the opposite of a "good neighbor" policy.

As aid cutoffs proceeded, two very negative messages were received throughout Latin America, whether fairly or not. The first was, "The U.S. Government, which often scolds us about our human rights records, is now trying to protect its soldiers from an international human rights body." (This message was especially poorly timed, coming just as revelations of abuses at Abu Ghraib and Guantanamo began

to surface.) The second message was, "The U.S. Government doesn't trust us not to extradite its military personnel to the Hague for frivolous reasons."



The ASPA became one of several reasons why the United States' approval ratings in most Latin American countries have dropped sharply since 2000 (see box). In this context, we were treated to the spectacle of democratically-elected Latin American leaders, most of them from countries that maintain good relations with Washington, wearing their refusal to sign Article 98 agreements as a badge of honor.



- “Absolutely no one is going to make me cower. Neither the government, nor Alfredo Palacio nor the Ecuadorian people need to be afraid.”—Ecuadorian President Alfredo Palacio, June 2005.
- “[Signing an Article 98 agreement] would go against the multilateral order and against the principles of defense of human rights. . . . We may be poor, but we have our dignity.”—Costa Rican Foreign Minister Roberto Tovar, September 2005.
- “We will not change our principles for any amount of money. We’re not going to [go] belly up for \$300,000 in training funds.”—Barbadian Ambassador to the Organization of American States Michael I. King, August 2005.
- “We will assume any consequences that might result from our signature [of the Rome Statute]. It is a signature that comes from our principles and this government’s political convictions. Whether or not their will be a reduction in U.S. aid is not relevant to us, what is relevant is that our convictions and principles mean something.”—Mexican Presidency spokesman Ruben Aguilar, February 2006.
- “Peru will not sign any agreement that impedes it from submitting any country’s citizens to the jurisdiction of the International Criminal Court. Peru rejects pressure from any other country on its foreign policy.”—Peruvian Foreign Minister Manuel Rodriguez, August 2004.

It is a great shame that, for the region’s elected leaders, these defiant statements against U.S. policy were an easy way to gain domestic political support. This speaks volumes about the damage that the ASPA sanctions are doing to Latin Americans’ attitudes toward us.

By 2005, 11 Latin American countries had their FMF and IMET military assistance cut down to nothing. That number grew to 12 late last year when Mexico ratified the Rome Statute and refused to sign an Article 98 agreement. Chile too may be close to ratifying the International Criminal Court, and may soon be added to the list of sanctioned countries.

The damage was worsened by the so-called “Nethercutt provision” added in December 2004 to the Foreign Operations Appropriations bill. For the first time, the sanctions went beyond military aid to include Economic Support Funds, one of USAID’s core economic-aid programs.

Suddenly, badly needed development and democracy programs were in play, and even more resources were taken from the most potentially pro-U.S. governments in the region. Though an exception has been made for democracy and rule of law programs, Economic Support Funds to sanctioned Latin American countries will decline by more than 55 percent from 2003 to 2006, from \$52 million to \$23 million.

#### POLICY ALTERNATIVES

What can be done about the harm that ASPA is doing to United States’ relations with our friends in Latin America? The simplest answer would be to repeal section 2007 of the American Servicemembers’ Protection Act, and to omit the Nethercutt provision from the 2007 Foreign Operations Appropriations law.

There is no shame in recognizing that these sanctions have proven to be too blunt an instrument, that they have hurt relations with our friends in a region where the United States’ image is already suffering, and that they have provided grist for regional leaders, like Venezuela’s Hugo Chavez, who have gained adherents by portraying the United States as a unilateralist bully.

Repealing the ASPA sanctions would send a message to Latin America and the rest of the world that we “get it,” that we understand the importance of multilateralism and mutual respect as a way to resolve such concerns as the possibility of U.S. personnel being unjustly extradited to the Hague.

It would also send a message that we trust our own diplomatic corps to determine which countries pose any threat of detaining and extraditing U.S. personnel for spurious reasons. If our Department of State believes such a danger exists, it should impose its own sanctions and pull out personnel as necessary. It does not need a legal provision to inflexibly trigger a blanket punishment.

I strongly doubt that revoking the sanctions would increase the threat of U.S. personnel being sent to the ICC for politically motivated reasons. After all, the sanctions have frozen only a portion of U.S. military assistance. With the likely exception of Venezuela, the security forces of the 12 sanctioned Latin American countries can still get aid through State Department programs outside the ASPA’s jurisdiction, such as International Narcotics Control and anti-terror, border security and small-arms programs. Aid also flows from the Defense Department, through its large counternarcotics aid program, the fast-growing Counterterrorism Fellowship

Program, and the Southern Command's many joint exercises and training deployments.

None of these activities has been curtailed by the ASPA, and as a result, the countries being sanctioned have experienced only modest reductions in overall aid and training levels. For instance, all continue to send students to the Western Hemisphere Institute for Security Cooperation at Fort Benning, GA. Yet, I have heard no expressions of concern about the legal status of the dozens of U.S. personnel who, right now, are present in sanctioned countries to carry out these programs.

I understand that it may prove politically difficult to repeal section 2007, though I hope at least that the Nethercutt provision, which is perceived in the region as particularly mean-spirited, may cease to appear in the foreign operations bill. If a legislative fix proves to be impossible, though, all is not lost. The law gives the executive branch a good deal of flexibility in its application. It is up to the executive to take advantage of this flexibility.

First, section 2007 includes a "national interest waiver." According to subsection (b) of that section, aid to a sanctioned country may flow freely if the President tells Congress that doing so "is important to the national interest of the United States."

Those of us who have worked on human rights over the years have come to view such waivers as a bit of a joke, because they are usually invoked without a second thought. In past foreign aid legislation, the addition of a "national interest waiver" has taken the teeth out of attempts to stop assistance to foreign militaries with poor human-rights records. Whether run by a Democrat or a Republican, the administration in power can be expected to exercise that waiver at the first opportunity, and aid to the abusive military will begin to flow.

When the ASPA was enacted, I expected the Bush administration to grant waivers in the majority of cases, especially when it came to countries that were considered good friends and top aid recipients, like Mexico, Peru, or Ecuador. Instead, the waiver power has been used quite sparingly, and even some of our closest allies in Latin America have been stung by the sanctions. Clearly, a greater willingness to issue national interest waivers—as happens routinely when enforcing human rights conditions—would undo much of the damage the ASPA has inflicted on U.S. relations with the region.

Second, in the cases of countries with which the United States has a history of close relations, the law offers another way to avoid sanctions: Declare those countries to be major non-NATO allies. Section 517 of the Foreign Assistance Act, enacted in 1996, allows the president to grant this status to a foreign country.

This is a largely symbolic label, since major non-NATO allies do not enjoy the mutual defense and security guarantees given to members of the North Atlantic Treaty Organization. It merely implies that a close working relationship exists with a country's defense forces. Other benefits are very small: They include priority access to excess defense articles, stockpiling of U.S. arms and equipment, participation in cooperative research and development programs—and now, exemption from the sanctions in section 2007 of the ASPA.

Argentina, named in 1998, is the United States' only major non-NATO ally in Latin America. Granting this status to a few more U.S. friends in the region would undo the ASPA sanctions while having little or no impact on the flow of U.S. military aid.

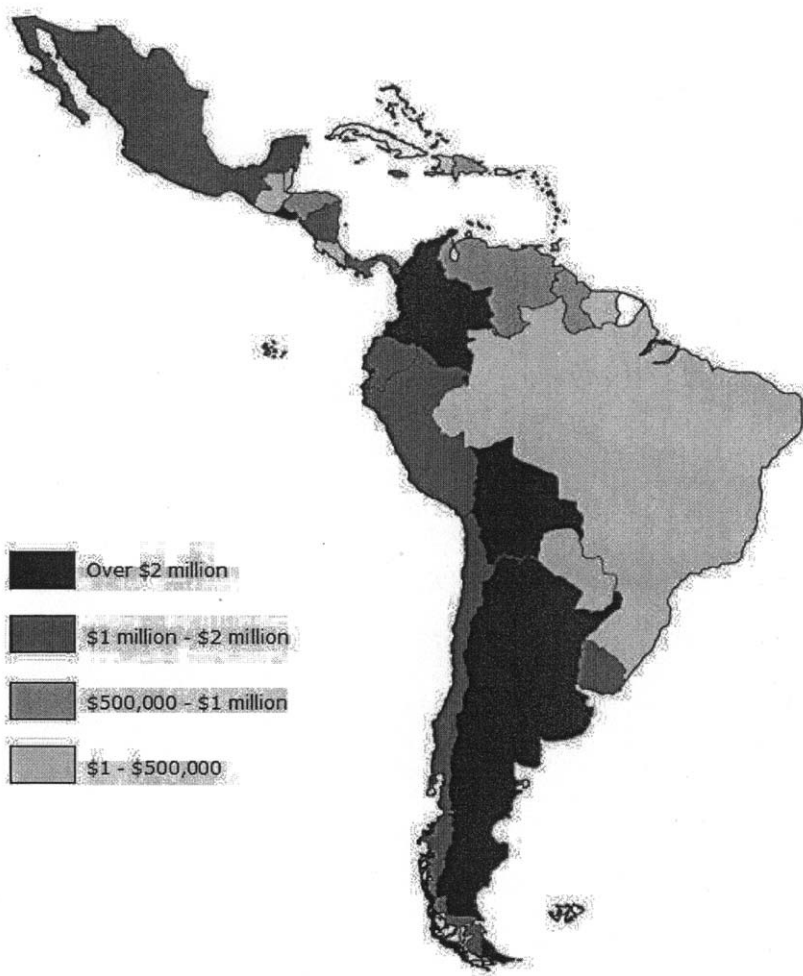
Whether through abolition of section 2007 of the ASPA, or through a mix of waivers and major non-NATO ally determinations, it should be relatively easy to extract us from the blind alley that the ASPA sanctions have proven to be in Latin America. The additional risk to U.S. personnel in the region will be zero, since many are already there, carrying out programs funded through other means.

Latin America is in a critical period of political upheaval, in which citizens are showing more frustration with poverty, inequality, and corruption, and losing faith in the democratic process. This is a time when the United States must be a generous partner and a positive force in the region—not a scold seeking new reasons to distrust and disengage. This is no time to levy sanctions against our friends.

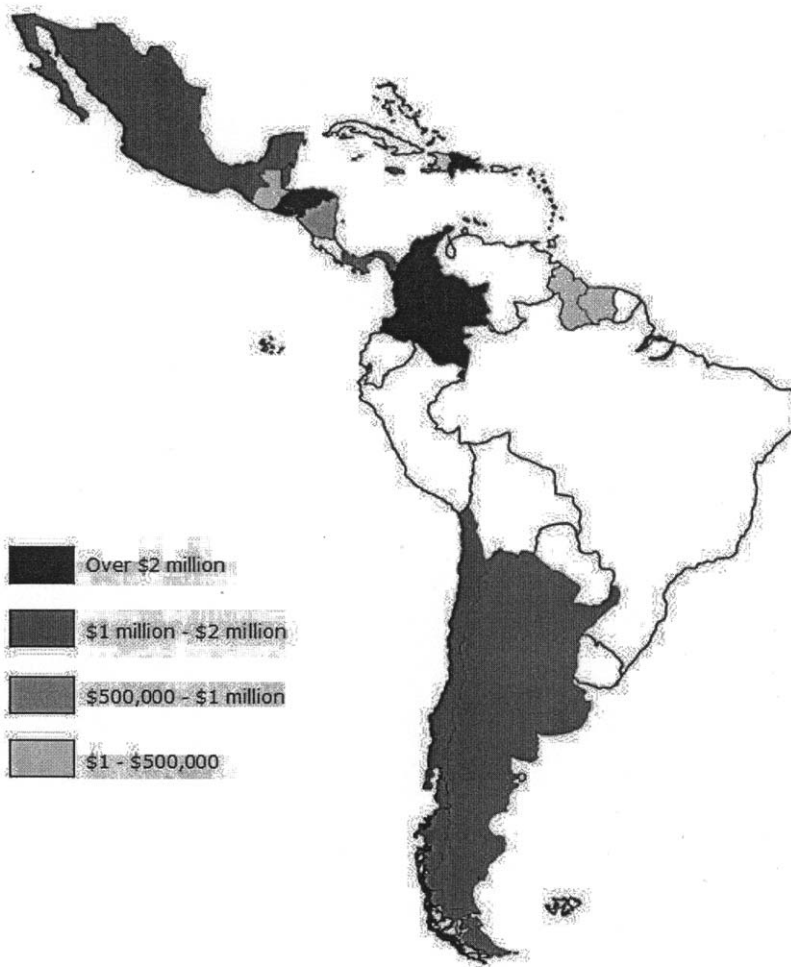
### ASPA Sanctions in Latin America, March 2006



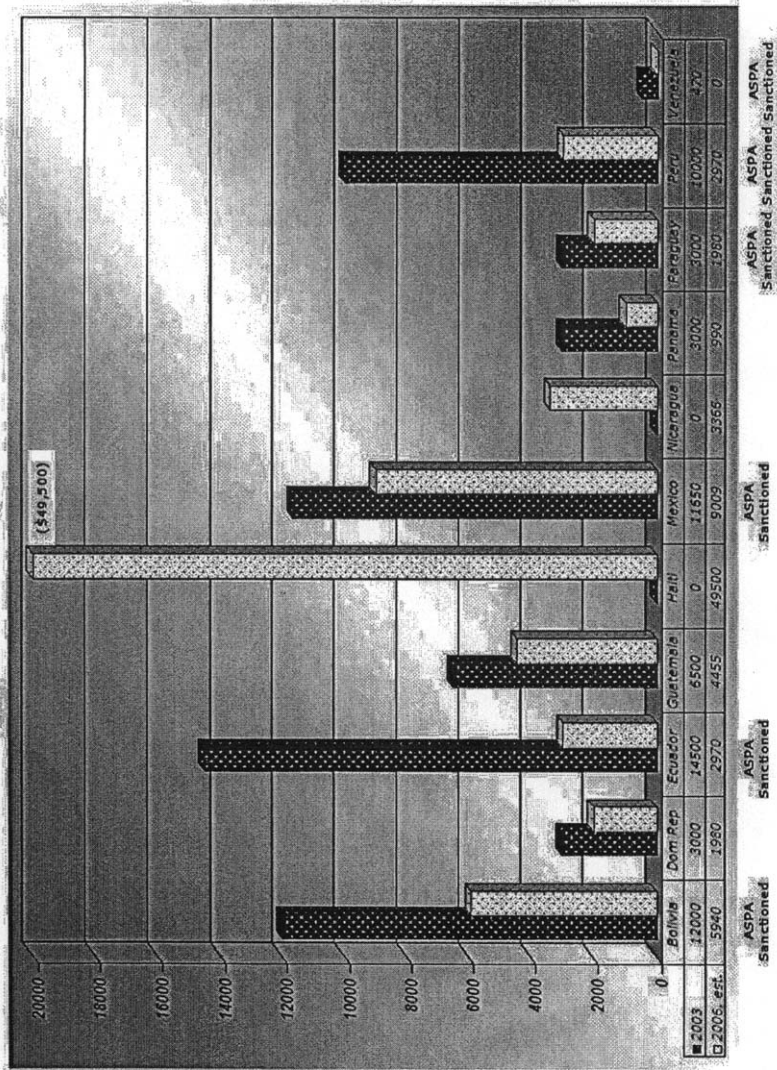
### FMF and IMET combined, 2003



### FMF and IMET combined, 2005



**Economic Support Funds, 2003 and 2006 (est.)**



Senator COLEMAN. Thank you, Mr. Isacson. Now, Dr. Wedgwood.

**STATEMENT OF DR. RUTH WEDGWOOD, DIRECTOR OF THE INTERNATIONAL LAW AND ORGANIZATION PROGRAM, THE PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES (SAIS), THE JOHNS HOPKINS UNIVERSITY, WASHINGTON, DC**

Dr. WEDGWOOD. Thank you very much for having me, Senator Coleman, and it's a pleasure to be here. I'll open by saying that I spent one very happy year up at the U.S. Naval War College where IMET activities were much of the centerpiece of the curriculum of

having visiting foreign officers in for war games and doctrine training, and I certainly can see the importance of that program. You are familiar, and therefore, I will not rehearse at the moment the problem of the third-party state coverage under the ICC. I recently did a panel with my good friend, David Scheffer, over at GW discussing what had happened, and even Ambassador Scheffer acknowledges it would have been a good thing if Phillippe Kirsch and company had granted our request for adjournment of the ICC negotiations in 1998 to a second session so that it wouldn't have been such a hurried, fevered atmosphere. And I spent a good deal of time taking Christian Maquiera, the deputy permanent representative from Chile, to lunch, hoping to look for a way in which we could insert some language that would shelter American servicemen abroad. But at the same time, although I am fervently committed to the doctrine of war crimes enforcement—I've spent much of my professional life doing that—what it has left me with is the reluctant realization that people do differ in their understanding of what the standard rules of Hague Law mean on the battlefield, proportionality, what is a military target, how do you conduct an air war. We saw this even in Kosovo and with a potential liability in the Yugoslav tribunal, that how we conducted our air war over Kosovo was disputed by many parties, many NGOs, some countries. Fifteen thousand feet altitude they said was too high, we said it was better. So, though the fundamental principles of the law of war are clear and undisputed, nonetheless, when it comes to those mixed questions of fact and law, you do get real-life disputes. And that's what one worries about in any criminal court, particularly in criminal law as opposed to civil law. So, I was sorry to see that the earnest attempts of the United States to have some kind of accommodation at Rome were not met, that in the long, long post-Rome preparatory sessions, nobody was willing to go so far as to think about it seriously. So, we're stuck in a dilemma, but it's not entirely of our own creation. And I was noting down your list of alternatives. I'm not intimately involved in the government's own Article 98 process, I just watch it from the outside, but the one reason I can see to be given against flexibility is a kind of most-favored nation problem. If you've already gotten 100 countries signed up to a standard-form contract, which is available on the Web—you insert the name of the country, and then you go on the State Department Web site—folks who have already signed up to the full monty are going to feel a bit abandoned. And in any kind of negotiation, whether it is with a credit card company or your rental landlord, a standard-form contract has this virtue of creating stable expectations. But I can see, just running down logical policy options, the thought that, as you suggest, the Executive Branch could consider granting waivers in the national interest with more flexibility. I take it that currently they're granted largely, perhaps only, when a country is about to ratify an Article 98 agreement, to get them a safe zone so they have time to work it through their congress.

So, one could say that, and certainly express the view of Congress, they should be granted with more flexibility on more occasions. National interest is a category in which the Congress certainly has a right to a point of view. Second, just as a logical law professor-type thought, one could think about scaled waivers, per-

haps this is the suggestion about going program by program, that instead of having to cut 100 percent, you could cut off 90 percent or 40 percent, but something that would both send the message that you want to send and yet also indicate that you're not entirely happy with the arrangement. I also worry about, because I used to work over at Justice, what can be called a paperwork tax, the view of the stolid interagency process, how hard it is to work any piece of paper that requires a Presidential signature through the deputies' committee and up to the President. And so, I could imagine a kind of executive fast track, that somehow the executive would undertake to have a decision process that would allow these things to be considered with expedition. Fourth, just another logical law professor-type suggestion, and I don't like my own suggestion, is confidential understandings. Woodrow Wilson didn't like secret treaties, and the Case amendment says you have to report all of your treaties to the Congress.

But I do suppose that there are countries that would be willing to undertake on the QT that they would not surrender our people and yet, would not want to have the diplomatic burden of justifying themselves to Europe or the European Union or other members of the ICC. I would worry about the status of those confidential understandings if anybody was ever presented to the ICC. Was it really enforceable? But it's true that much of life in diplomacy occurs *sotto voce*.

I would beware of the suggestion about simply exchanging notes on SOFAS. Those are no different than Article 98 agreements. In fact, Article 98 was aimed at SOFAS. So, insofar as the European Union objects entirely to our conclusion of SOFA agreements or Article 98 agreements, they would predictably object as well to a standard status of forces agreement or a note exchange.

On the court's side, and I have spent part of my cocktail hours trying to push these ideas gently when I meet people in Europe, they could do some things that would be helpful. I am a great fan of Moreno-Ocampo, the prosecutor. I think he's done the adult thing in focusing the court on massacre law, as I will call it, undisputed doctrines of law with the most horrendous kinds of crimes, and I think it was really a very sound and sage judgment to focus on Africa, Uganda, Congo, Central African Republic. And certainly, if the Yugoslav tribunal is any case in point, one discovers that these investigations and trials are far more complicated than you ever expect.

So, I think the court actually already has a very full workload for quite some time to come, and they will discover, as the Yugoslav tribunal discovered, that you ultimately can't be effective without the support of major powers. So, I think part of the issue has been mooted for a while by a workload. But the court has, within its own power, the capacity to help solve the problem. It could be a declaration of prosecutorial policy that will not take defendants from countries that are not themselves parties to the ICC statute, that it will not use the mere existence of territoriality as a sufficient predicate, it will want the permission of the state of nationality. The prosecutor could do that as a matter of office policy if he chose, and I think that would be a wise and sage thing to do. I've also been urging on them a little-known Italian legal idea, of "dou-



ble complementarity.” It’s used in different senses, so one has to be careful, but double complementarity says that in the court’s duty to make sure that the national legal system has first been given a chance to address a problem, that not only the case, but the person comes home. So, if I get arrested in Italy for having sat on the defense policy board, I would first be sent home and dispatched to the Department of Justice. And only then, could the ICC ask to see me. And that, in some degree, converts it from the kind of hostage taking that we fear to a legal political confrontation with the United States as a whole, which is where the issue should lie. But I still do worry that that’s not a widely-accepted idea. It’s just my idiosyncratic suggestion.

And then, we have coming up the 2009 ICC Review Conference. And here, we may have considerable trouble. There are a number of issues that are pending on the treaty—the implementation of the category of aggression—which is going to cover a whole lot of things according to different people. But every time that we act beyond a narrow construction of the article 51 of the United Nations charter—which only allows, some say, self defense when there’s an armed attack, actual received armed attack, or with a security council resolution, which is often very difficult to get—somebody somewhere may say it’s not only illegal, it’s aggression. We just saw that in the Iraq war, and that definition is going to be actualized most likely at the 2009 Review Conference. Second, I’ve heard telltales that there may be a challenge to the legality of our Article 98 agreements. So, one thing you have to bear in mind is what effect it may have on the upcoming agenda at the 2009 Review Conference.

So, I think it’s unfortunate that we’re in this situation. I take the point that it is at times awkward for our diplomacy and our foreign policy and good projects that we want to do jointly. I don’t see any easy solutions. I think the first step probably would be for the Congress or this committee to express its view to the State Department and the Defense Department and the President that they think that the statute is plenty commodious to accept a broad definition of national interest in regard to waivers and see what then eventuates. Thank you very much, Mr. Chair.

[The prepared statement of Dr. Wedgwood follows:]

PREPARED STATEMENT OF DR. RUTH WEDGWOOD, EDWARD B. BURLING PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY AND DIRECTOR OF THE INTERNATIONAL LAW AND ORGANIZATIONS PROGRAM, PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES, JOHNS HOPKINS UNIVERSITY, WASHINGTON, DC

Mr. Chairman, I appreciate the opportunity to discuss the situation of the United States in regard to the International Criminal Court (ICC) and the role of so-called “Article 98” agreements in protecting American personnel from the unwarranted exercise of third-party jurisdiction by the ICC.

The United States plays a unique role in international security affairs. We serve as an anchor of regional security in conflict-prone areas around the globe. We have unique capabilities in lift, logistics, and intelligence, and are frequently called upon to support the efforts of the international community in peacekeeping and other emergencies. The United States maintains the overseas deployment of more than 200,000 soldiers, sailors, airmen, and marines.

Our armed services are trained to obey the law, including the law of armed conflict. The United States deploys military lawyers with its forces in the field, in an effort to assure that the conduct of the American military conforms to the ideals of

the law. Maintaining the standards of military law involves important components of planning, training, and advice, as well as discipline against any willful violations.

The responsibility for assuring the lawful conduct of military forces in the discharge of their duties is a solemn one. In peacetime, it is a duty exercised by the "sending" country that deploys its armed forces abroad. It is helpful to recall that in the model "status of forces agreements" used by NATO and by the United Nations in peacekeeping, jurisdiction for the investigation and prosecution of any crimes committed in the course of official duties belongs primarily to the state deploying the forces overseas.<sup>1</sup> This responsibility of the sending state also has been a long-standing feature of bilateral "status of forces agreements" (SOFAS).

The U.S. Government has had significant reservations about some aspects of the Treaty of Rome that created the International Criminal Court in 2002. This stems both from a sense of fairness toward our Armed Forces and a concern about the efficacy of American military operations. To be sure, in any military action, we abide by the principles of battlefield law, including the duty of proportionality that seeks to avoid unnecessary collateral damage, and the duty of confining military targeting to permissible military objects. But as we saw in the Kosovo campaign in 1999, there are many difficult and unsettled problems in the practical application of the law of war, both in air and ground campaigns. One might hesitate to give an international judge the effective power to rewrite our rules of engagement.

So, too, the jurisdiction of the International Criminal Court may extend after a treaty review conference in 2009 to the prosecution of the crime of "aggression." This is an offense with unsettled parameters. The chief American prosecutor at Nuremberg, United States Supreme Court Justice Robert H. Jackson, observed in 1946 that it is difficult to define aggression, although we knew the Nazis had committed it.<sup>2</sup>

In the present day, the United States may find circumstances where we must decide whether to use military force, without an authorizing vote of the United Nations Security Council. The willingness of the Security Council to take action against a threat to international peace and security is sometimes hard to predict. It may be influenced by the particular membership of the Council, their national ambitions, and even their energy politics.

Thus, the United States may face situations where it must decide to act alone or with coalitions of the willing, and without the aegis of a Council resolution. Article 51 of the U.N. Charter recognizes the inherent right of self-defense in case of an armed attack. But in a world of weapons of mass destruction and catastrophic terrorism, the United States may have to respond before an attack is actually launched against our shores. There are also situations of genocidal violence against a vulnerable population, in which we may wish to consider intervention as part of a moral duty to protect the innocent. These very acts of selflessness may be styled by others as an illegal use of force or even "aggression."

Thus, in my view, there is still a potential hazard to American security interests from an irresponsible exercise of the jurisdiction of the International Criminal Court. These hazards are made more acute by the claim under the Rome treaty that an American national could be subjected to the Court's jurisdiction, even though the United States has not become a party to the treaty.

I am pleased to note that the first prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has wisely chosen to exercise the jurisdiction of the ICC in cases where the treaty court was invited to intervene by a war-torn country, or where the Security Council has made a referral under its Chapter VII powers.<sup>3</sup> Mr. Moreno-Ocampo has not sought to inject the court into the decision-making processes of NATO, or to target the nationals of third-party states that have declined to join the court, unless there is Security Council approval.

Nonetheless, the potential is still present under the Rome statute for such an event to occur. Both at the Rome treaty conference in 1998 and at the preparatory commissions working on court rules thereafter, the United States asked for a provision to make clear that any third-party nationals would not be subjected to the new court's jurisdiction, unless a case was referred by the Security Council. This was founded on a fundamental principle that a treaty does not bind nonparties.

<sup>1</sup> See generally, Dieter Fleck, ed., *The Handbook of the Law of Visiting Forces*, Oxford University Press 2001.

<sup>2</sup> See Foreword by Justice Robert H. Jackson, in Sheldon Glueck, *The Nuremberg Trials and Aggressive War* (1946) ("There are many theoretical difficulties which cause violent debate but which do not plague us practically in the Nurnberg case at all. What is aggression and what is self-defense? These questions might cause considerable trouble in other circumstances. . . . The Nurnberg trial . . . has avoided wrangles over definitions.")

<sup>3</sup> See Security Council resolution 1593, March 31, 2005 (resolution concerning Darfur).

The United States has sought such a guarantee against unwarranted jurisdiction from the ICC preparatory commissions on repeated occasions.<sup>4</sup> I testified before the Senate Foreign Relations Committee in the year 2000, to ask that the Congress allow more time to permit the American ambassador at post-Rome conferences to obtain the necessary guarantees. But it became apparent thereafter that the claim of a right to assert prosecutorial power over third-party nationals has become an article of faith for some ICC supporters, including some leaders of the preparatory conferences.

Hence, the decision was reached by the Congress to protect U.S. personnel who serve their country overseas through the modality of bilateral state-to-state agreements. It is well to note that such agreements are actually anticipated by Article 98(2) of the Rome treaty. Article 98(2) states that the International Criminal 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.”

If the conference leadership at Rome had acted on the request of the United States to exclude the exercise of the court’s jurisdiction over third-party nationals—citizens of states that have not joined the International Criminal Court—then bilateral agreements would not be needed.

But this was rebuffed, and Washington logically turned to its friends and allies around the globe, and asked each for a bilateral agreement that would preserve the long-standing arrangements for overseas deployments. We have sought, reasonably, to prevent the surrender of Americans to an international court that we have not joined.

Under these agreements, the United States, as the so-called “sending state,” would generally retain primary jurisdiction for the investigation and prosecution of any alleged offenses arising in the discharge of official duties. The “receiving state,” i.e., the foreign country where American troops have been stationed or deployed, would frequently retain jurisdiction to investigate and prosecute any offenses committed in a private capacity. But no personnel would be surrendered by the receiving state to the ICC without the consent of the United States as sending state.

I do not agree with the critics who claim that Article 98(2) is limited to the particular Status of Forces Agreements that happened to be in force at the time of the conclusion of the Rome treaty. That would make little sense, since we may enter into an agreement with a new country to help meet a new threat, or modify a Status of Forces Agreement to support a new effort.

Nor should Article 98(2) be read to exclude bilateral agreements that protect non-military U.S. personnel and other U.S. persons, or informal bilateral arrangements. The protection of U.S. persons abroad has long been a part of consular conventions as well as the old-fashioned friendship, commerce, and navigation treaties. In a world of global commerce, thousands of American civilians and tourists, as well as government contract personnel, will travel abroad. They deserve protection from the jurisdiction of an international body that we have not joined.

To suppose that the use of the word “sending State” in Article 98(2) of the Rome treaty is limited to people who were officially dispatched by a government would be an unduly narrow reading of a text hurried to completion in five weeks under pressure cooker conditions. The text was so quickly rendered that the United Nations has offered repeated “*corrigenda*” and technical corrections.

The exclusion of jurisdiction over all U.S. persons may be necessary to protect individual military personnel on a visit away from their primary overseas base, as well as military personnel deployed in situations where there is sometimes no formal status of forces agreement. It may be needed to protect intelligence personnel, American relief and aid workers, and private contractors, not to mention a bewildered tourist.

We are here this afternoon, of course, to discuss the issue of how the United States enters into such bilateral agreements for the protection of its personnel, and what inducements it may provide to other countries to conclude such agreements.

In the framework legislation known as the “American Servicemembers Protection Act” (APSA), the United States Congress has served notice on other countries that we wish to have a firm and binding assurance that the accountability for the actions of our personnel abroad will remain the shared responsibility of the United States

<sup>4</sup> See, e.g., Ruth Wedgwood, *The Irresolution of Rome*, 64 *Journal of Law and Contemporary Problems* 193 (2001), also available at <https://www.law.duke.edu/journals/lcp/articles/lcp64dWinter2001p193.htm>.

and the country visited, as appropriate. Americans should not be dispatched to an international treaty-based court when we have not joined the treaty.

Many foreign partners have agreed to preserve this shared jurisdiction between the two countries. After all, good relations with the United States still carry a high mark. But some states have been pressured to overturn the traditional arrangement. The European Union has reportedly threatened to exclude candidate countries from joining the European Union if they have entered into Article 98(2) agreements. Other states may fail to complete Article 98(2) agreements because they have higher priorities in their domestic politics and lawmaking.

Hence, the Congress has provided an incentive for reaching agreement, by stating that a Rome treaty party will not be eligible for American military assistance if it should refuse an Article 98 agreement. Section 2007 of ASPA provides for a potential cut-off or delay of programs for foreign military financing (FMF), international military education and training (IMET), excess defense articles (EDA), and economic support funds (ESF).

However, section 2007(b) also provides the President with clear authority to waive any restriction on the extension of such aid, whenever the President determines that a waiver is "important to the national interest of the United States." Such waivers have to be reported to the Congress after the fact.

Thus, if a foreign government that has been a good partner to the United States is unable to secure conclusion of an Article 98 agreement because of the vagaries of domestic politics, still there is a provision in the law for presidential waiver of the requirement.

It is possible that in some circumstances, a President would wish to continue assistance under the FMF, IMET, EDA, or ESF programs, even though the country in question is not willing at the time to complete an Article 98 agreement. The American Servicemembers Protection Act permits the President to accommodate such programs by the waiver provision of section 2007(b). As noted, the President must find that it is "important to the national interest of the United States to waive such prohibition."

There are a number of countries in Latin America and the Caribbean that have not yet entered into Article 98 agreements with the United States. Nonsignatory countries appear to include Barbados, Bolivia, Brazil, Costa Rica, Ecuador, Mexico, Paraguay, Peru, St. Vincent and the Grenadines, Trinidad and Tobago, Uruguay, and Venezuela. In addition, Argentina is not subject to aid conditions because it is a classified under the Act as a "major non-NATO ally."

One can appreciate that the United States may share important interests with these countries. We seek partners in our efforts to deter narcotics trafficking. We wish to stabilize new democracies. We need to take joint action against any threats involving international terrorism.

But there is nothing in the operative language of the APSA that discourages or restricts the President of the United States in the use of waiver provisions to accommodate a situation of acute and compelling, or indeed, even an "important" interest.

The Congress may choose to provide the President with its views on circumstances that warrant accommodation of non-Article 98 states, through the exercise of the waiver power. But this involves communication and persuasion, and does not require any change in the statute.

Any broad attempt to exempt particular states through legislation could present the difficulties of fast-changing situations. Similar problems might attend any legislative attempt to exempt particular programs or program amounts. Certainly any attempt to accommodate a particular country must conform to the rule against legislative vetoes and the requirements of the presentment clause of the Constitution, as set forth by the United States Supreme Court in the *Chadha* case.<sup>5</sup>

In the attempt to negotiate with foreign states for appropriate protections for Americans, the President may need all the tools that he has at his disposal, and the Congress would surely support this effort. But the Congress has an important role in its capacity to highlight and focus national attention upon those situations where it believes that the President would advance America's interests by the exercise of the ASPA waiver provisions.

One hopes, as well, that the member states of the Rome treaty will come to the view that an international court has sufficient work to do through criminal referrals by the United Nations Security Council and by consent of states of nationality. Any maximalist extension of ICC jurisdiction, to sweep up the citizens of states that have not joined the treaty, will test the limits of international law and undermine the durability of the court.

<sup>5</sup> See *INS v. Chadha*, 462 U.S. 919 (1983).

Senator COLEMAN. Thank you very much, Dr. Wedgwood. Does anyone—kind of step back. I take it from you, Dr. Wedgwood, in your written testimony that you're not looking at—from your perspective, it's not about statute modifications, you'd try to work with the national interest and then work on it in a more informal way than actually changing the statute. I noticed when I talked about changing the statute, I thought I saw a reaction from you when I talked about that. Is that a fair reading of—in terms, at least the first steps that you'd approach—that you'd try here? Not change the statute?

Dr. WEDGWOOD. I'm just a normal incremental-type case lawyer, so I'd like to try golden means, moderate middles. I'm not in a position to really, again, have a, you know, deeply-founded view of the relative burden to Latin diplomacy. But certainly, if I was President, I'd take that onboard.

Senator COLEMAN. Well, let me just step back and get to that issue of—I just want to make sure that there's a common understanding that, in fact, this has been a burden on Latin policy. One of the concerns that I have is when I look at the role that China is playing, very active, very aggressive, it's their right to do so. Certainly, increasing trade opportunities, I think, you know, China sees Latin America as resource rich, and they have a huge desire for resources. But I mean, from my perspective, I'd much rather have folks trained by military officers with a democratic tradition, clear civilian control, folks who we're going to, you know, be working with down the road, then, you know, not having access to that. And clearly, what we're seeing is that being hindered. Is there any question from any of you about the deleterious impacts it has on United States-Latin relations, or is it just a matter of degree?

Mr. ISACSON. It's a brick in the larger wall. I mean, there have been several wedges driven between the United States and Latin America lately in our relationship, but this is certainly one of them. And the fact that, you know, I—we believe that every institution between the United States and Latin America, military or civilian, should be engaging pretty regularly. And if the United States is unilaterally withdrawing at this time, it's really poorly timed. In dollar amounts, it doesn't look like a lot right now, but in symbolism and in the number of interactions, whether military or civilian, it does have a strong impact, and we should be engaging more.

Senator COLEMAN. Dr. DeShazo and I'll add to that. One of the things that I've noticed, and we see it in the case particularly of Venezuela, but the United States—having the United States as kind of the whipping boy, having that as the force to kind of say here's the bad guy, it does have political impact, does apparently move people, and do you see that concern? Do you just see this, the—both the IMET and the ESF funding, whether it's large dollars or not, do you think it's serving the purpose of allowing the United States to be the, you know, kind of the whipping boy, the bad guy for some Latin leaders?

Ambassador DESHAZO. Mr. Chairman, I think that it does allow that image to be strengthened as the United States is seen as taking some sort of unilateral action to sanction countries. The effects of IMET are both short- and long-term. Every year that goes by without IMET is another step in the direction of alienating the

Latin American military from the United States, which after a period of time, will have a generational effect and will affect our long-term possibilities 10–15 years down the road and not just our short-term situation.

So, it has a difficult effect, both long- and short-term.

Senator COLEMAN. Should we be—and anyone can answer this, or you all can answer, do you believe that we should—that the Nethercutt amendment limiting Economic Support Funds, should that be viewed in a different light than IMET, or are they all lumped together?

Mr. ISACSON. I would put it in a different light. Mainly, there was a more of a direct relationship with the military assistance and the ASPA sanctions because the concern was about American servicemembers. All of a sudden, with the Nethercutt provision, you've crossed over to civilian economic aid and often, aid for the very poorest, and it actually looks much more mean spirited in the region when you're cutting aid for the poor as opposed to aid for the military.

Senator COLEMAN. Any other perspectives on that, Dr. DeShazo?

Ambassador DESHAZO. I think in terms of our national interests, the effects of IMET and of Nethercutt are quite similar. They affect different areas, but areas that are vitally important to us, and in the long run, affect our security and our national interest.

Senator COLEMAN. Dr. Wedgwood, you want to weigh in on that at all? Because there are those, by the way, who have said that we have—these are fungible dollars here and if we cut them with ESF, we can put them somewhere else. I'm just wondering whether the folks on the ground see that, or whether this is kind of—is, you know, just political fodder that which has some impact. Would you want to respond?

Dr. WEDGWOOD. I take your point. We may, in fact, be doing things for some of these countries through the World Bank and our political influence there that counterbalance what we fail to do bilaterally, but I do take your point that one good kind of scaled waiver or scaled penalty sends a mixed message.

Senator COLEMAN. Yeah, I'm wondering if can get an assessment of some of the current situations. I mentioned in my opening statement late October, we had Mexico ratify the statute of Rome. Chile is likely to follow, again, the leadership in Chile. I'd be interested in your perspective as whether there's any likelihood that any of these countries will sign Article 98s in the near future, and is there a—we don't have the State Department. One of the questions I'd be asking the State Department is what's our strategy, what's on the negotiations strategy. I'm wondering if one, you could give me—a two-part question here, a reflection on what you think will happen with these countries in terms of Article 98s and what strategy and negotiations—what should the State Department be doing in dealing with these countries with the likelihood that, you know, Article 98s are not going to be concluded? Dr. Wedgwood.

Dr. WEDGWOOD. If I could just make a general comment on that, I think at times we've lost the rhetorical battle. I mean, one thing that's always startled me about the ICC debate is that people didn't see what to me was plain as day, which is that third-party coverage under the ICC potentially reversed the utterly traditional

architecture for troops deployed in peacetime, whether it's NATO standing, Status of Forces Agreements—model NATO SOFA agreement—or the model U.N. SOFA agreement. It's the sending country—the sending country that always is the one that has at least primary responsibility for the disciplining or investigation and trial of its own troops. So, when ICC supporters have taken it for granted that, gee, the country of the place of deployment is the one that ought to have the right to delegate its authority to a new international body, that just seemed to me astonishingly oblivious to the long-standing arrangement.

Senator COLEMAN. I appreciate, by the way—

Dr. WEDGWOOD. Yes.

Senator COLEMAN [continuing]. That point being stressed. I think we sometimes forget that in this discussion. But again, to the question, if you'd give me—I'd love some insight on where you—what you think happens with Mexico. I mean, these are critical allies, and they—a NAFTA partner and probably—and the paradigm of success and by the way, the model we use in terms of trade agreements in Latin America, Chile, two key partners in the region. Some of the strong—Chile being one of the strongest governments and economies in the area. I'm interested in your perspective of how this plays out and whether it has any impact on United States-Chile relations and United States-Mexico relations.

Dr. WEDGWOOD. If I could just add one more comment, I think some of this may get better over time. And again, third-party coverage was just the sine qua non at Rome itself. Now, as the ICC has become more engaged, I think even the anti-98 forces have quieted to some degree. There are ways now in which the court knows that it needs us, both for abstentions at the security council as we did on the Darfur Resolution. One thing that I think has not been looked at is section 2003C in the American Servicemembers' Protection Act. We're allowed to offer—the President can offer assistance to the court with a waiver in its investigations and prosecutions once there's a named individual, but not earlier. So, that could present some practical difficulties for the court. They might want some American logistical support or intelligence sharing, whatever, before they really know who their single targets are in Darfur or elsewhere. So, I can imagine the President enjoying and preferring a broader waiver authority, which in turn would bring home the message to the court that they need us, at least as a friendly neighbor. I worry about the role of Europe. I mean, I think some of the countries in Latin America that have very close ties to Europe will feel the drum beating because the European Union has taken such a harsh stand toward this, and I would be doing a lot of diplomacy in Europe to mitigate that.

Senator COLEMAN. Mr. Isacson.

Mr. ISACSON. I can't give you any reason for optimism that there will be Article 98 agreements with either Mexico or Chile. And Mexico, in February, the spokesman for the presidency said whether or not there will be a reduction in United States aid is not relevant to us—what is relevant is that our convictions and principles mean something. That sounds pretty clear. And right now, the frontrunner in the Mexican elections, of course, Manuel Lopez Obrador is unlikely to sign one either. In Chile, the new govern-

ment, which is still dominated by the socialist-led coalition would be probably unlikely to ratify an Article 98 agreement. I know less about it, but we do know Mexico this year was supposed to get FMF for the first time. It's not going to. Chile, usually one of the highest numbers of United States trainees, one of the largest IMET recipients, one of the largest feeders of schools to the Western Hemisphere Institute for Security Cooperation would suffer a deep, deep cut in its military assistance.

Senator COLEMAN. Ambassador DeShazo.

Ambassador DESHAZO. I don't think that—well, it's hard to say if there are other possibilities for other Article 98 agreements to be signed in the region. Right now, that doesn't look particularly promising. And the case of Mexico is an interesting one because the Mexican military had been traditionally quite hermetic, and the IMET had been a major resource used to extend contact with—between the United States and Mexican military that had not been there before. There has been a sort of a destigmatization of military-to-military contact in Mexico that's been very helpful. The Mexican military would have a pivotal role if there were a major security threat in-country that would affect United States security at the same time. And so, the loss of IMET really hurts. On the ESF side, support for judicial reform, anti-corruption measures, other such things that as well affect border security and other matters, if they were to benefit the Mexican government, will be curtailed, and that's also a matter of concern.

Senator COLEMAN. If I can, Ambassador, you've served embassies in Medellin and Columbia and in Brazil and Chile—I think with Panama and Venezuela. I just—perhaps personal reflections on your experiences that relate to IMET Article 98 agreements, can you—I'm very interested. Could I have your view from having been on the ground there?

Ambassador DESHAZO. Thank you, Mr. Chairman. I think IMET has played a role, an important role, in helping promote the transition of democracy. There are many factors involved in the United States relations with Latin America, but I think that the—that IMET did play a role in helping strengthen the concept of civilian control over the military that's been very successful in Latin America. It's very interesting that Bolivia, which has not had a military government since 1982, which is an unusual matter in Bolivian history, went through a period of great civil upheaval in 2003–2004–2005, and the military played a traditional, nonpolitical role, stayed out of the political situation. And again, I think the very strong contact between the United States and Bolivian military through IMET helped play a role in reinforcing that model. These are the kinds of long-term benefits that accrue from a program such as IMET and that also accrue on the ESF side from strengthening democracy and governance.

Senator COLEMAN. And it's—you've kind of summarized—I mean, one of the forces that are driving me in terms of having this hearing. What I'm looking for, then, are ways to recognize the goal of what ASPA is trying to do, but without suffering the negative consequences. I mean, my—I think it's very fair to say that though the dollars may not be great, the impact, long-term impact as well as some short-term impact, but clearly, long-term is pretty serious.



And we—as policymakers, we have to figure out a way to again understand the legitimate policy concerns, understanding, you know, what third-party coverage means and, you know, what the history was. So, there are legitimate reasons for concern, but is there a way to reflect those concerns? Are there other aspects of our relationship with Chile and with Bolivia and with Mexico that can be impacted in the absence of Article 98 agreements without cutting off IMET? Is that the only path? But anyone can respond to that. I mentioned in my opening statement, I talked about there are some positive things that we can do, and I do think we have tools available in spite of some of the budget issues that we're facing, tools available through things like Millennium Challenge accounts in some areas, tools available in terms of working with the Interdevelopment Bank and just kind of a number of vehicles that say hey, there is some pain to be suffered if you're not going to do this because it is important to us, but this strategic—and I think it was a very good example, Ambassador, when you talked about Bolivia and the armed forces in spite of great upheaval, standing on the sidelines on this, very important.

And sometimes, we can't underestimate the impact of, I think, these relationships and how they then will have some impact on the, you know, events today. Can we talk about other—we talked a little bit how some have already, but I—one, if there are other positive things that could be done, or if there are other ways in which we can impact a relationship, express the concern about Article 98s, but not get rid of the IMET relationships. Anybody want to respond to that? Mr. Isacson and just kind of go across.

Mr. ISACSON. One trial balloon worth floating here is distinguish between IMET and expanded IMET. About 25 or 30 percent of IMET is in this expanded category, which is for nonlethal courses, courses in things like human rights, military and democracy, defense resource management. It's not going off and learning how to shoot better or how to do ambushes or small-unit tactics and things like that, most of it's classroom training, but it would fulfill the goals of maintaining contact with key officers. But because you don't get to go out and do the fun and lethal stuff, you still sent the message to those militaries—or those countries—that it's not a full partnership because of the ASPA.

Senator COLEMAN. Ambassador DeShazo, any thoughts about other approaches that we take—and I threw out this concept of, you know, positive—there's a positive—any—again, just a concept. I'm looking for ideas here. I'm searching for things that I can put on the table for my colleagues.

Ambassador DESHAZO. I'm not sure to what extent the sanctions make much of a difference to some of the countries. That's part of the problem that the pain really—the effect, I would say, is often more on us than it is—than it may be on them in terms of their interests, although they certainly have a strong interest in maintaining good military-to-military relations and ESF. There may be other mechanisms.

I'm not by any means a lawyer nor expert in this. I've seen many individual exercises carried out on the basis of exchanges of diplomatic notes, relatively low-key and quiet mechanisms to protect American servicemembers while they are participating in such

events or for longer-term events. Again, perhaps status of forces, but I'm not sure what in the end all of the ramifications would be. Granting so-called A&T, Administrative and Technical, status to the military gives them the kind of immunities they need in-country, something that could be quieter, more flexible and that the countries in the region would be, I think, open to giving us.

Senator COLEMAN. And then, Dr. Wedgwood, and I thought I heard you say that you didn't think using the status of forces agreements—was that in your testimony, that that would, you know, provide—that would be helpful here?

Dr. WEDGWOOD. You get two arguments from ICC folks. One is that what's wrong with our Article 98 agreements is they're too broad because they include more than current serving soldiers. They include former officials. They include U.S. nationals. They would include contractors, and any U.S. national is covered in the standard-form Article 98 agreement.

So, one argument from ICC advocates is just they're too broad, but that perhaps a standard SOFA would do. Other arguments are more radical, though, and say that this would shelter only existing freeze-frame Article 98 agreements, but no new SOFA agreements, no modified SOFAs. So, it's a moving target.

The suggestion I also wanted to throw out was a little bit like the Ambassador's. There's a category in the law called unilateral declarations. It's taught as *recherche* stuff in an international law course, but there is a—when the French said they were no longer going to test in the South Pacific, the ICJ, the International Court of Justice, said hey, that's a unilateral declaration binding on France. So, in fact, if some of this is about honor and who's on top, and worries about north-south relationships, some countries, I just venture to suppose, might be willing to, in their own voice, make a solemn unilateral declaration that they will not turn over the nationals of any of their neighbors, including us, to any other organ or body.

And if we can just deracinate this and not make this a United States versus Latin American confrontation, I think one could perhaps get some of the same legal effect and yet not have to plow one's way through the problems of national egos.

Senator COLEMAN. And then, you know, the question that would be raised is then who are we doing this for. If the sanctions aren't—if the impact of the sanctions aren't that horrendous on the country—like they'll do without, and they'll do without IMET, we're the ones who may be hurt. I mean, part of this, part of the message, is for me and my colleagues and for the American public and our folks that we're saying this is for us, that we need to have these guarantees, we need to—we're not going to—and I understand that we're not going to put our fighting—our forces in some part of legal harm's way without some kind of strong guarantees.

And so, there would need to be something, need to be something in a question of whether something like unilateral declaration would work. I have two other areas of inquiry, just a—if I can with you, Mr. Isacson, I saw in a recent comment you had in the New York Times about Bolivia and cutting the aid—military aid would antagonize the Bolivian military. I may be wandering a little afield here, but do you—are you—is it your sense that the consequence

of that may be a strengthening of Venezuelan-Bolivian military? What do you see as the offshoot of that?

Mr. ISACSON. It could go one of two ways. I mean, Bolivia, as Ambassador DeShazo mentioned, is a country that's had a lot of military coups. It continues to have a very independent military and also a very factionalized military, which is why it could go either way. You've got a left-wing elected President. The right-wing factions in the military, which may be feeling quite resentful of having this President here, will be provoked, indeed, by a cutoff of relations with the United States. If they can send less students to the former school of the Americas and other things, they will—that will be a grievance.

The left sectors of the military may see this as an opportunity to do—move more in a Hugo Chavez sort of direction. So, you could see both, and it depends on which factions end up on top.

Senator COLEMAN. If I can perhaps end on this, I—the optimist that I am, and I talked about some positives, but even perhaps going a little beyond IMET, there is concern today as we look at the political situation in Latin America and we look at the elections. In Bolivia, we look at the continuing strife we have with Chavez, with some of the concerns that that ruler has faced with corruption. People are kind of looking out, looking at Central America, what's happened in Nicaragua, some, you know, great concerns there. This thing about things that can strengthen the United States-Latin relationship, I mean, IMET should be a tool that is a positive, something that—it's building a connection, it's strengthening the relationship, it's serving, as the Ambassador has talked about, a long-term United States security interest. If I'd give you the opportunity, if there are two or three things that we could be doing in the region, and with IMET being one of them, if there are some other things that you think, as policymakers, we should be looking at to strengthen the image of America, the reality of us as being a strong partner in the region, I'd love to hear that before we've concluded this hearing if you'd want to venture forth. Mr. Isacson.

Mr. ISACSON. Well, I think the first thing would be simply to restore the cuts that the 2007 budget request anticipates in core economic aid programs for Latin America. They're deep, and they are going to be felt throughout the region. That's one. The second was if you restore IMET, fine, but let's—if we're restoring economic aid, some of that should pay for—why is there no IMET for Latin American judges, for Latin American legislators, for Latin American investigative journalists, mayors, governors. It would be great to have an overall effort to try to improve governance at a time when people are really losing confidence in governance.

Senator COLEMAN. An IMET for rule of law?

Mr. ISACSON. Absolutely.

Senator COLEMAN. Ambassador.

Ambassador DESHAZO. I would second that idea. I think that what is most needed in Latin America is a second generation of structural reforms to make democracy work better and to help economies grow in a sustained way that results in job creation and poverty reduction, which is what the people of the Americas are crying out for.

And what we need is more ESF—and more flexibility for our policymakers to be able to support efforts, not just by ourselves, but by others in the region to bring about that kind of structural reform. We have to be seen as a country that is really concerned about poverty, about empowering people in the hemisphere to be able to help themselves to improve their lives.

I would also add that we need to greatly improve our public diplomacy efforts in the hemisphere, which have suffered cuts for many years and now put us at a disadvantage in getting out our message to the people of the Americas.

Senator COLEMAN. Dr. Wedgwood, you want to venture into this broader policy discussion?

Dr. WEDGWOOD. Beyond my pay scale, but I would take the point that people in the administration are well aware of the problems of the rising ambitions of China. I think DOD spends some part of its time thinking about that, and the new QDR shows that. So, the problem of China—and the radicalism of some regimes now, is not lost on people. Forgive me, I'm a hectoring type by nature, but beware, unraveling the Article 98 agreements that already exist. I mean, if you put it in terms of traditional sovereignty, I think most countries would agree that, in general, treaty law should not bind third parties, that abstract proposition is not one that is lost on other regimes.

I think with some Latin countries, you can salute their own considerable heroism in confronting their own pasts, whether it's Chile or it's Argentina, which proves again that the ICC is not the only modality for having accountability for war crimes. But clearly, the object of the exercise is to get the kind of coverage that we need for former and current soldiers, diplomats, officials, light cover intelligence folks who otherwise are not going to have a SOFA, get that kind of really secure coverage. And at the same time, do it in a way that doesn't offend the pride of our interlocutors. Thank you.

Senator COLEMAN. This panel has been very helpful. I will make sure that your entire statements will be entered into the record, and I will continue to work on this issue, and you certainly have provided some very excellent guidance, and I appreciate that. With that, this hearing is now adjourned.

[Whereupon, at 3:30 p.m., the hearing was adjourned.]

#### ADDITIONAL PREPARED STATEMENT AND QUESTIONS AND ANSWERS SUBMITTED FOR THE RECORD

##### PREPARED STATEMENT OF HON. MEL MARTINEZ, U.S. SENATOR FROM FLORIDA

I appreciate Chairman Norm Coleman's initiative calling this hearing on this important topic. This is a fine panel of respected specialists and the testimony will certainly inform this debate.

I do think that at some point we will need to hear from the executive branch. Senior leaders from DOD and State should be called to testify on the impact of the ASPA in Latin America and the Caribbean.

I am generally concerned that we are not investing enough in Foreign Military Financing (FMF) and International Military Education and Training (IMET) to begin with. These relatively low-cost programs have a big impact for several of our allies in Latin America and the Caribbean, particularly those facing tough economic and social challenges.

I believe that we need to explore ways to maintain—or in some important cases—restart the flow of IMET money for selected countries that have not agreed to Arti-

cle 98 provisions of the ICC Treaty. There are currently 12 countries that are affected and we can expect that a 13th nation—Chile—will be added shortly when they ratify the ICC Treaty (expected this year).

In my talks with U.S. Ambassadors in the region as well as the Southern Command Regional Commander in Miami, GEN Banz Craddock—I have been persuaded that restricting IMET (the way American Service Members Protection Act does) is an unintended consequence and is now becoming counterproductive to U.S. policy.

At the outset—I want to make it clear that I fully support the U.S. position on the ICC and the intent of the American Service Members Protection Act. I do not think that relaxing this discrete prohibition of IMET will have any appreciable impact on either our ICC policy or the ASPA.

My concern for now is only with the restriction on IMET. I am not yet ready to look at lifting prohibitions on FMF or Excess Defense Article (EDA) transfers.

When we restrict IMET, we leave an engagement vacuum that other nations will likely fill. IMET allows the U.S. military to bring foreign military and civilian officials to the United States and not only teach technical skills—but perhaps just as importantly—see U.S. democracy in action. This restriction on IMET weakens our ability to offer training to allies that otherwise would not be able to afford the training, and limits our ability to build military-to-military relationships. IMET is an important tool and our Ambassadors in the region should have the full power of the IMET program.

Besides the technical and military training they get—they also get professional development and leadership training, instruction in defense planning and resource management. All courses taught at our Spanish language school, the Western Hemisphere Institute for Security Cooperation (WHINSEC), include human rights training. Each IMET program is tailored annually and can be shaped, limited, or stopped altogether virtually immediately—at the discretion of the U.S. Chief of Mission.

I do not think we can afford to stop the limited engagement that IMET allows—at a time when U.S. commitment to the region is being challenged. Having students from Bolivia, Peru, Brazil, Mexico, and even Venezuela studying next to our officers helps build cooperation and helps advance United States interests. Many of these students return to visit the United States as Chiefs of Defense 10 years later.

Under ASPA, the President also has several waiver authorities, including those under section 2007(b) of the ASPA. To date, as I understand it—the President has not yet exercised this national interest waiver authority for ICC signatory counties that are not Article 98 partners.

#### RESPONSES OF ADAM ISACSON TO QUESTIONS SUBMITTED BY SENATOR MEL MARTINEZ

*Question.* Recognizing that the United States now has 100 Article 98 agreements worldwide to date, it appears that the outlook for our ability to get additional Article 98 agreements is not good. Is there a realistic prospect that additional Article 98 agreements might be possible in Latin America or the Caribbean in the foreseeable future? Do you think it is likely that the United States will be able to get an Article 98 agreement with Brazil, Mexico, or Chile (Chile is expected to ratify ICC Treaty this year)?

*Answer.* A general rule of thumb is that the larger the country, the less painful the U.S. sanctions, and the less likely the signing of an Article 98 agreement will be.

In 2003, the year before the sanctions were imposed, affected military aid to Brazil totaled only \$480,000 (about 1/27900th of Brazil's defense expenditure). In 2005, the year before Mexico's cutoff, affected aid to that country totaled \$1.25 million (about 1/3200th of Mexico's defense expenditure). In 2006, possibly affected aid to Chile is to total \$1.24 million (about 1/2016th of Chile's defense expenditure).

Even if Felipe Calderon, a strongly pro-United States candidate, wins Mexico's July 2006 elections, I see little possibility that Mexico or any of the other larger countries in the region will sign Article 98 agreements. The most likely signers, if any, will be small Caribbean states like Barbados, St. Vincent, and the Grenadines, or possibly Trinidad and Tobago.

*Question.* I would like to ask each of the witnesses about the President's waiver authority. Is the President's waiver authority under section 2007(b) a viable path to delinking IMET from Article 98 prohibitions? Should the executive branch consider using the President's ASPA authority to allow IMET money for countries that are ICC signatories—but do not have Article 98 agreements?

*Answer.* If a legislative fix to the section 2007 sanctions proves to be impossible, the executive branch must take greater advantage of the flexibility afforded it with the waiver authority in section 2007(b). We strongly recommend using the waiver

authority to free up not just IMET but Economic Support Funds currently frozen by the so-called Nethercutt provision.

*Question.* I recognize that some countries that accepted some domestic political and diplomatic risk by entering into Article 98 agreements with the United States. Could you assess the possible reaction of those nations currently in Article 98 agreements with the United States if the President approved waivers for selected countries?

*Answer.* Some of those nations might protest, though relations would not be fundamentally affected. Their outrage could be calmed by (a) making the waiver subject to only one or two programs, such as IMET and ESF, while leaving others, like FMF and EDA, frozen; (b) reminding these countries that non-signatory countries waivers are year-to-year and not permanent; and/or (c) providing "positive reinforcement" to countries that do sign Article 98 agreements, such as additional economic assistance or small trade concessions.

*Question.* Do you agree that the sanctions that cut the flow of IMET money can create a vacuum that other nations might fill and limit our contact?

*Answer.* This is a distinct possibility, especially for small countries whose militaries cannot provide a full range of training on their own.

I note, though, that United States training with these countries does continue to this day, through a host of other programs. These include State Department International Narcotics Control funds; Defense Department counter-drug activities funds (often known as "section 1004"); Nonproliferation, Antiterrorism, Demining and Related Activities (NADR); the Defense Department's Counter-Terrorism Fellowship Program (CTFP); Joint Combined Exchange Training (JCET) deployments; bilateral and multilateral military exercises; International Criminal Investigations Training Assistance Program (ICITAP); and attendance at the Defense Department's regional security-studies institutions.

*Question.* Should Congress consider a legislative fix to delink IMET?

*Answer.* A legislative fix is necessary to delink IMET as well as Economic Support Funds. This would be the cleanest and most effective way to undo the damage that the ASPA sanctions are doing to the United States' standing in Latin America. The effort to punish countries that don't sign Article 98 agreements has been perceived, including in the region's mainstream media, as bullying or arm-twisting, the opposite of a "good neighbor" policy.

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RESPONSES OF DR. PETER DESHAZO TO QUESTIONS SUBMITTED BY SENATOR MEL MARTINEZ

*Question.* Is there a realistic prospect that additional Article 98 agreements might be possible in Latin America or the Caribbean in the foreseeable future?

*Answer.* It may be possible, but probably unlikely, in the case of two smaller countries in the region.

*Question.* Will the United States get an Article 98 agreement with Brazil, Mexico or Chile?

*Answer.* No.

*Question.* Chile is expected to ratify ICC Treaty this year?

*Answer.* Yes.

*Question.* Is the President's waiver authority under section 2007(b) a viable path to delinking IMET from Article 98 prohibitions? Should the Executive Branch consider using the President's ASPA authority to allow IMET money for countries that are ICC signatories—but do not have Article 98 agreements?

*Answer.* A Presidential waiver is a viable mechanism for overcoming the negative effects of IMET sanctions. It could be combined with an agreement by countries receiving the waiver to work with the USG to grant administrative and technical (A&T) status to U.S. servicemembers while in country or through some other mechanism to provide protection.

*Question.* Could you assess the possible reaction of those nations currently in Article 98 agreements with the United States if the President approved waivers for selected countries?

*Answer.* While there may be a negative reaction from some countries already signing Article 98 agreements, the U.S. Government should make its decision based on

overall U.S. national interest, which is negatively affected by loss of IMET and Economic Support Funds (ESF) to key countries in the region.

*Question.* Do you agree that the sanctions that cut the flow of IMET money can create a vacuum that other nations might fill and limit our contact?

*Answer.* Yes. If training opportunities with the United States are restricted because of ASPA sanctions, affected countries in the region may well look elsewhere for military training, including to countries that do not share U.S. views on democracy or on key security matters.

*Question.* Should Congress consider a legislative fix to delink IMET?

*Answer.* Congress should examine whatever potential means it has at its disposal to alleviate the negative consequences of cutting off IMET, ESF, and other key assistance programs as a result of ASPA and the Nethercutt amendment.

