

HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212 290-4700
Fax: 212 736-1300
Email: hrwnyc@hrw.org
Website: <http://www.hrw.org>

Kenneth Roth
Executive Director
Michele Alexander
Development and Outreach Director
Carroll Bogert
Communications Director
Steve Crawshaw
London Director
Barbara Guglielmo
Finance Director
Lotte Leicht
Brussels Office Director
Iain Levine
Program Director
Tom Malinowski
Washington Advocacy Director
Rory Mungoven
Advocacy Director
Maria Pignataro Nielsen
Human Resources Director
Dinah PoKempner
General Counsel
Wilder Tayler
Legal and Policy Director
Joanna Weschler
UN Representative

DIVISION DIRECTORS

Peter Takirambudde
Africa
José Miguel Vivanco
Americas
Brad Adams
Asia
Elizabeth Andersen
Europe and Central Asia
Hanny Megally
Middle East and North Africa
Steve Goose
Arms
Lois Whitman
Children's Rights
LaShawn Jefferson
Women's Rights

BOARD OF DIRECTORS

Jonathan Fanton
Chair
Khaled Abou El Fadl
Lisa Anderson
Lloyd Axworthy
David Brown
William Carmichael
Dorothy Cullman
Edith Everett
Michael Gellert
Vartan Gregorian
Alice H. Henkin
James F. Hoge, Jr.
Stephen L. Kass
Marina Pinto Kaufman
Wendy Keys
Robert Kissane
Bruce Klatsky
Joanne Leedom-Ackerman
Josh Mailman
Joel Motley
Samuel K. Murumba
Jane Olson
Peter Osnos
Kathleen Peratis
Catherine Powell
Bruce Rabb
Sigrid Rausing
Orville Schell
Sid Sheinberg
Gary G. Sick
Domna Stanton
John J. Studzinski
Shibley Telhami
Maureen White
Maya Wiley

Robert L. Bernstein
Founding Chair

December 9, 2003

The Honorable Colin L. Powell
Secretary of State
United States Department of State
2201 C Street, NW
Washington, DC 20520

Via facsimile: (202) 261-8577

Dear Secretary Powell:

Human Rights Watch is well aware of the Bush administration's profound opposition to the International Criminal Court (ICC). On previous occasions we have presented you with our views on the importance of the ICC and we will not reiterate those here. We write now, however, to convey our assessment of the impact of the U.S. government's policy against the court. The administration's approach has created the impression worldwide of an aggressive and highly objectionable effort to hold U.S. citizens – as well as foreign nationals working for the U.S. Government – above the law. The policy has been implemented with a “big stick” and little concern for potential damage to respect for the rule of law, national democratic processes, human rights standards and even the U.S. government's bilateral relations with its closest allies.

We certainly welcome the recent decision by President Bush to waive some sanctions imposed under the American Servicemembers Protection Act (ASPA) for six future NATO member states that refused to sign a bilateral immunity agreement – or a so-called Article 98 agreement. We urge that the national interest waiver be extended to a much larger group. States such as Mali (a fledgling democracy), Benin (a source of peacekeeping troops in Liberia) and Trinidad and Tobago (a partner in U.S. drug interdiction efforts) are still being penalized under the ASPA. A policy that sanctions small democratic states trying to uphold the rule of law while waiving sanctions for European states is indefensible. This inconsistency leaves the United States appearing as if it only values European military allies. We urge you to extend the waiver to all states, thereby putting an end to a policy whose costs have far outweighed any conceivable benefit.

The campaign to achieve exemption agreements with all ICC states parties has often generated intense resistance. Such resistance is rooted, not in anti-American sentiment, but rather in a deep commitment to the ICC treaty and the principle of the equal application of the law to all. It is undoubtedly in the interest of every member of the international community that states take seriously their obligations under international treaties. For the U.S. then to continue to penalize states for duly respecting international law is reprehensible.



Legal Misinterpretation

For non-surrender agreements with ICC states parties to have any legal validity, they must be consistent with the provisions of the ICC Treaty. United States officials have repeatedly insisted that the agreements they seek are consistent with Article 98 of the Rome Statute. However, Article 98's reference to "sending state" envisions Status of Forces Agreements (SOFAs). That the International Criminal Court Statute refers to non-surrender agreements in this context does not mean that any conceivable non-surrender agreement would be consistent with the treaty. Those proposed by U.S. officials go far beyond the terms of Article 98 by applying to *all* U.S. citizens and non- U.S. nationals working under a government contract, not just "sent" personnel. For U.S. diplomats to continue to insist otherwise has persuaded few. Indeed, many governments believe that, even under an Article 98 agreement, it is inconsistent with the purpose of the ICC treaty to surrender anyone suspected of committing an ICC crime on the territory of an ICC State Party to any government that does not recognize the duty of the ICC to ensure good-faith prosecutorial efforts.

The High Cost of the U.S. Policy

By attacking the International Criminal Court the administration risks weakening respect for the rule of law and human rights as well as international legal standards generally. If the United States government is unwilling to contribute to strengthening the rule of law through the ICC, it should certainly not be a counterweight to progress.

You should also consider the high cost the effort has had on your important bilateral relations worldwide, from Latin America to the Caribbean, to Africa and Asia. Some U.S. officials have touted "success" by citing the number of bilateral agreements signed. Reality, however, tells a different story; the United States has achieved far less than some of its officials would have the world believe. So far, after nearly one and a half years of extremely heavy pressure, only one third of ICC states parties have signed a bilateral immunity agreement, while another two-thirds have remained firm in not signing, many of them even after being sanctioned. In addition, of all the agreements signed with states parties and non-states parties less than 20 have actually entered into force and only nine ICC States Parties, out of 92, are legally bound by a non-surrender agreement with the U.S. government.

Moreover, boasting about the number of agreements signed ignores the enormous resentment the policy has engendered. Many states, including close U.S. allies, signed only after having been threatened and coerced. Officials from a number of governments have stated publicly that they believe the agreements violate their international treaty obligations, their domestic laws and in some cases even their constitutions. Several states have signed agreements only in the face of what their diplomats have labeled "unbearable" pressure, including threats to cut not only military aid, but humanitarian aid, and economic assistance as well.

When the United States threatens sanctions it will, of course, have some initial success even in compelling countries to violate their own laws and policies. But Washington is sending the message that it is an ally only so long as it is able to force strict compliance with its agenda. When national interests diverge, the United States does not respect other states' policies. Claiming as justification that the United States simply does not want to be bound by a treaty that it has not ratified is disingenuous, since the issue is not the ICC assuming jurisdiction over

crimes committed in the United States – a matter over which the U.S. government retains complete control – but whether other governments can determine who prosecutes crimes committed on their territory without regard to the power of the perpetrator’s government.

The course the administration has pursued comes with an extremely high price tag, including weakening the principle of the equal application of the law and respect for multilateral institutions. Moreover, it has been damaging to U.S. credibility worldwide. Now is the time to step back from an extremely costly approach and “cut your losses.” We urge you to reconsider the campaign against the ICC and certainly to extend national interest waivers to all ICC states parties that have not signed a so-called Article 98 agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth Roth". The signature is written in a cursive, somewhat stylized font.

Kenneth Roth
Executive Director
Human Rights Watch