



Fédération Internationale des Ligues des Droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNI
ET DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEU

INTERNATIONAL FEDERATION
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FEDERACION INTERNACIONAL
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الفدرالية الدولية لحقوق الإنسان

NO to AMERICAN EXCEPTIONALISM

Under Cover of the War Against Terrorism, a destructive offensive against the ICC

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Since July 17th 1998, the date on which the United States voted against the Rome Statute creating the first permanent International Criminal Court (ICC), the US managed to build up a complex legal and political arsenal aimed at guaranteeing that the ICC will never prosecute or judge their nationals.

I.The American government fears unfounded and politically motivated complaints directed against its nationals

1.Shall we recall that the ICC does not provide for retroactive jurisdiction and will only judge crimes committed after its entry into force, on 1 July 2002?

How cannot one consider the American demarches as attempts to give “carte blanche” to American military and civilian leaders involved in counter terrorism and other military operations abroad, in granting them a guarantee beforehand that any "overflowing" or "collateral damage" will be covered by absolute immunity, thus preventing criminal prosecution by any jurisdiction but American?

2.Shall we also recall that the ICC will be governed by the complementary principle which provides national jurisdiction with the primacy of prosecution and judgment of crimes within the jurisdiction of the Court, ie genocide, crimes against humanity and war crimes?

The principle of complementary of the ICC with national jurisdictions shelters the United States from trying American criminals by the ICC. The Court is only competent when States refuse or are unable to try criminals, when the judiciary is failing. Actually, under Article 17 regarding admissibility, a case is considered inadmissible by the Court when “*the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*”, or if “*the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute*”.

Therefore it is not necessary for the State which wants to exclude its nationals from the jurisdiction of the Court to enter into bilateral agreements on the basis on Article 98 of the Statute. It is sufficient, each time that one of its nationals is the subject of such a complaint, to try him before its own judicial system, and the ICC, establishing either that an investigation or a prosecution is been carried out, or that after the investigation, a decision not to prosecute had been taken or finally that a judgment had already been delivered, will declare, by applying the complementary principle, that the case is not admissible.

Moreover, the Statute precisely provides for efficient guarantees against improper complaints. It concerns notably:

- the Pre-Trial Chamber which is competent to control the acts of the Prosecutor as early as the investigation stage. The Pre-

Trial Chamber must give its preliminary authorization for any investigation the Prosecutor may initiate, it controls the collection of evidence by the Prosecutor and it controls the respect of the guarantees provided for by the Statute to arrested persons;

- the measures of protection of information regarding the national security of States;
- the general measures of protection of witnesses aiming notably at ensuring the confidentiality of some witness statements and which can apply to specific witnesses who are the personnel of peace keeping operations missions;
- judicial guarantees benefiting to the suspected persons and to the accused at all stages of the proceedings;
- the proceedings provided for the analysis of the admissibility of the complaints by the Court.

In this context, how cannot we doubt the American will of trying in all cases American nationals before their own tribunals?

3. Shall we recall that the Rome Statute aims at applying to all in a equal manner, without any distinction based on official capacity?

Article 27 of the Statute provides that no immunity will be given, even for States or government leaders. Consequently, any exemption to the jurisdiction of the Court appears to be in complete contradiction with the text and spirit of the Statute.

II – A complex juridical machinery aiming at the impunity of American nationals

If one analyses it globally, this arsenal cannot be separated from the means the American have implemented in order to fight terrorism. These actions are undertaken simultaneously at the domestic political, international and bilateral diplomatic levels:

- "The ASPA, initiated under the Clinton administration by Conservatives in the American Senate, draws the frame of this objective in claiming the US refusal to cooperate with the ICC. The law criticizes the legal grounds of the Court, despises international law and accounts for American unilateralism on the international scene in trying to impose its opinion of the Court to other states, by using means of pressure deriving from US economic, political and military superiority (A).
- On the brim of their position at the domestic political level, the United States continue to undermine the jurisdiction of the Court in the context of international diplomacy. Having failed in their attempt to negotiate "acceptable " international criminal justice during the sessions of the Preparatory Commission for the ICC, the United States use the UN Security Council in order to ensure a political control over the jurisdiction of the Court. Despite the strong mobilisation of States and NGOs against

American positions, the content of Resolution 1422 remains worrisome because it grants total and quasi unlimited immunity before the ICC to persons and officials of UN peace-keeping operations, nationals of States non Party to the Statute (B).

- American pressure is also placed on states. The United States try to manoeuvre, through SOFAs, extradition conventions and judiciary cooperation, conventions in order to prevent any surrender of an American national to the Court (C)

A - The American Service Members' Protection Act (ASPA): the US doctrine against the ICC

The American Service Members' Protection Act (ASPA) represents the US public doctrine on the ICC. It recalls in its preamble the reasons for their opposition to the Court and wrongly insists on the fact that "an international treaty cannot create obligations towards a State Non Party" and that, consequently, "the United States refuses any jurisdiction of the Court over their nationals". This law, presented the first time on May 8th and 9th 2001 respectively before the House of Representatives and the Senate by Republicans M. Delay and M. Helms, was signed by President Bush on August 2nd 2002:

1. Prohibits any American cooperation with the ICC:

This general prohibition applies to American tribunals, local governments and federal government. The law prohibits to transfer to the Court any person -an American citizen or a foreigner permanently living in the United States to the ICC- present on US territory; it prohibits funds any inquiry of the Court on the US territory; there is also a prohibition to use the funds of the US government in order to help the inquiry, the arrest, the detention, the extradition or the prosecution of an American citizen or of a foreigner permanently living in the United States by the Court; a prohibition to process on the territory of the United States to any investigative measure linked to a primary demand, an inquiry, a prosecution or any other procedure by the Court.

2. Prevents the transfer of documents of national security concern to the Court (Section 2006)

3. Prohibits any military assistance with most of the States having ratified the Rome Statute (Section 2007):

The general principle of this article provides that, one year after the entry into force of the Court, no military assistance could be given to a State Party to the ICC. However, the law provides that certain states may be exempted, according to American national interest. Hence, the non-assistance clause cannot be applied to NATO-state members, to essential allies although not NATO members (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, New Zealand) as well as Taiwan. In the same way, the President may revise the prohibition if the state has passed an agreement with the United States in accordance with article 98 of the Statute which would

explicitly prohibit the surrender of an American to the ICC.

4.Restricts American participation in certain UN peace keeping operations (Section 2005):

It is established that the President will use the American voice and vote at the Security Council in order to guarantee that all resolutions taken within chapters VI and VII of the United Nations Charter respectively authorising the implementation of peace-keeping operations and of peace-making operations provide for a permanent exemption for all American members of the armed forces from criminal prosecution before the ICC for acts committed in link with the operation. The participation of American armed forces will be authorised only if it takes place on the territory of a State Non Party to the Statute. The President of the United States may authorise the participation of American troops to such operations if one the three following conditions is respected: the Security Council guarantees the immunity of US armed forces; the ICC cannot exercise its jurisdiction on the territory of military operations or, if there is an "Article 98" type agreement between the United States and the country in which the military operations take place or if national interest justifies such an operation.

5.Submission of reports to the Congress

The President should hand a report to the Congress detailing each military alliance which the United States is part of and specifying to what extent the members of American armed forces could, in the context of a military operation supervised by this alliance, be placed under the operational control of foreign officers submitted to ICC jurisdiction as nationals of a State Party to the Statute and evaluate the risk for American armed forces (Section 2009).

6.ASPA or “Hague Invasion Act”

Authorises the President to make use of "all means necessary and appropriate" to free an American citizen detained by the ICC, hence the law was dubbed "Hague Invasion Act" (Section 2008).

During the summer of 2001 and until the events of September 11, the Congressmen who drafted the law decided to link the Senate's authorisation on the payment of back dues to the UN to the anti-ICC law. On September 13th, two days after the terrorist attack on New York and Washington, Representative Tom DeLay eventually decided to stop opposing US payment of back dues and the Representatives accepted the payment without linking it to the endorsement of the Helms-DeLay act.

On September 10, 2001, the anti-ICC law is amended in order to include presidential prerogatives allowing the lifting of some of the prohibitions of ASPA.

On September 25, 2001, a letter by the Department of State informed Jesse Helms of government support to the amended law.

On November 28, 2001, Republican Senator Henry Hyde slipped in a last minute amendment to the Financial Year 2002 Department of Defense Appropriations Act that would prohibit any cooperation with the ICC. After numerous amendments, the final version includes broad waiver authority for the President, strengthened by a stipulation that no part of the bill may interfere with the President's constitutional authority to make foreign policy.

Eventually, a final amendment (the "Dodd amendment", Section 2015) allows the US to cooperate with international efforts, including with the ICC, in order to bring to justice foreign nationals accused of genocide, war crimes or crimes against humanity such as Saddam Hussein, Slobodan Milosevic, Bin Laden and other members of Al Queda or of the Islamist Jihad. Between immunity for its nationals and fight against terrorism, "national interest" allows for all contradictions ...

On August 2, 2002, George W. Bush signed the body of laws concerning ASPA. The latter became US law.

American doctrine on the Court is thus inscribed in domestic law. But the United States must also make sure that none of their nationals, civilian, diplomat or military, located outside American territory, may be "annoyed" by the Court. This is why both the negotiation of a resolution, within the Security Council in order to lift ICC jurisdiction over them and the conclusion of bilateral agreements to prevent any surrender to the Court of American nationals complement the ASPA at the international level.

B - UN Security Council Resolution 1422: a US victory over the ICC

Resolution 1422 (2002) adopted by the Security Council at its 4572nd meeting, on July 12th 2002:

*"The Security Council,
Taking note of the entry into force on 1 July 2002, of the Statute of the International Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute),
Emphasizing the importance to international peace and security of United Nations operations,
Noting that not all States are parties to the Rome Statute,
Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,
Noting that States Parties to the Rome Statute will continue to fulfil their responsibilities in their national jurisdiction in relation to international crimes,
Determining that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security,
Determining further that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or*

*authorized by the United Nations Security Council,
Acting under Chapter VII of the Charter of the United Nations,*

- 1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve- month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;*
- 2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;*
- 3. Decides that Member states shall take no action inconsistent with paragraph 1 and with their international obligations;*
- 4. Decides to remain seized of the matter. "*

US war on the ICC within the Security Council:

Since the middle of June 2002, Washington tried to introduce language at the UN Security Council aiming at excluding from the jurisdiction of the ICC any national of a State non Party to the Rome Statute involved in UN peace-keeping operations and, first of all, American nationals. In order to face the opaqueness of Security Council procedures, Canada asked three times for an open session. After two refusals, this session eventually took place on July 10, 2002.

Although the vast majority of states had spoken out beforehand against the American proposition and against the possibility for the Security Council to reopen negotiations on the Rome Statute, the States voted, on July 12, a resolution which was supposed to be a compromise. Resolution 1422 was qualified as a "historical compromise" or a "victory" by some, this resolution actually leads to common acceptance of justice "à la carte". The resolution also grants absolute immunity for nationals of States non Party to the Statute for a one year period in the context of peace keeping-operations. Moreover, this decision may be renewed every year on July 1st, the anniversary date of the entry into force of the ICC.

Hence, Resolution 1422 alters the jurisdiction of the Court in violating Article 16 of the Rome Statute which enables the Security Council to suspend an inquiry or the prosecution of a person but only on a case by case basis and in a limited way. Also, this resolution dangerously opens the way to other modifications of international conventions through a political decision of the Security Council.

Reactions from the institutions about Resolution 1422

Resolution 1422 of the Security Council has been commented and condemned by several institutions, at the international and European level.

Thus, the Sub-Commission on the Promotion and Protection of Human Rights of the UN adopted Resolution 2002/4 on 13 August 2002, in which it declared “*deeply [deploring] the immunity automatically allowed to nationals of States parties or not parties to the Rome Statute who participate in operations decided and authorized by the United Nations Security Council for the maintenance or restoration of international peace and security, under the terms of resolution 1422 (2002) of the United Nations Security Council of 12 July 2002.*”

Furthermore, Resolution 1422 was condemned by the European Parliament in a resolution dated of 26 September 2002 (Resolution (2002)0449):

“The European Parliament, [...]

C. Regretting UN Security Council Resolution 1422 adopted on 12 July 2002 on operations established or authorised by the United Nations, whereby the ICC shall not commence or proceed with investigation or prosecution of any case of acts or omissions by current or former officials or personnel from a contributing State not a party to the Rome Statute for a twelve-month period starting on 1 July 2002, with the possibility of renewal each 1 July for a further twelve-month period [...]

1. Underlines that no immunity agreement should ever afford the possibility of impunity for any individual accused of war crimes, crimes against humanity or genocide...”

Even though, the United States went further still in its destructive enterprise in scheming around Article 98 of the Rome Statute.

C -The United States scheme around Article 98 of the Rome Statute

1. The legal mechanism of Article 98

Article 98 of the Rome Statute

"1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The 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."

Article 98 of the Rome Statute governs conflicts of obligations with regard to the cooperation regime of the Statute. Clashes may arise, for example, where a State party to the Statute is bound by a request of the Court, to arrest a person, but cannot comply with its obligation to cooperate without violating another obligation under international law. for example. to respect the

immunity of this person. Once it has been established that a norm exists under international law making it illegal for a state to comply with a request from the Court, the Court, in general, may not issue the request.

However, if a State waives its immunities, a request from the Court for cooperation would no longer imply that the requested state would be acting illegally to comply with the request. Indeed, Article 98 (1) provides that the Court has the authority to enter into negotiations with third states to obtain a waiver of their rights. Whether the compliance of a state with a request for cooperation amounts to a violation of another norm of international law is not to be decided by the requested state but by the Court. However, in accordance with Rule 195 (1) of the Draft Rules of Procedure and Evidence, a state may inform the Court that it sees a difficulty with respect to Article 98 and submit necessary information. Any third states involved may also submit information. Thus, the Court will have an appropriate factual basis on which to rule .

Where foreign forces are present with the consent of the receiving state, their status is usually regulated by SOFAs, the most famous example being that of NATO SOFAs. NATO-type SOFAs do not contain immunities in the strict sense, but establish a concurrent jurisdiction which gives the sending or the receiving state a primary right to exercise its jurisdiction over certain crimes. In other words, when a State Party could have the obligation to surrender an American national to the Court, the latter will be transferred, on the grounds of these agreements, to American jurisdictions. These agreements therefore alter the jurisdiction of the Court.

Article 98 of the Rome Statute shall not refrain the ICC from requiring the cooperation or the transfer in rare and limited circumstances.

2. The US scheme around Article 98

Since the end of July 2002, the United States have approached a great number of European, Latin American, South-East Asian and Oceanian countries, as well as Israel, in order to sign bilateral agreements with these states guaranteeing that American nationals will not be transferred to the ICC, considering that they may be the target of politically motivated trials claimed by "hostile" countries. There is said to be about 180 on going processes.

In this context, the American Secretary of State Colin Powell personally wrote to European governments on 16 August 2002 in order to pressure them to sign such agreements "the earliest possible" without waiting for the European Union to finalize its official position. Washington also complained that the European Commission asked to countries which are candidates to the membership of the EU not to sign those agreements while the States Members have not finalized their position.

To date, ten States, Uzbekistan, the Dominican Republic, Mauritania, East Timor, Israel, the Marshall Islands, Romania, Tadjikistan and Honduras have officially signed agreements with the United States under Article 98. It is

extremely difficult to control such articles which are generally concluded silently.

Excerpts from the bilateral agreements

"2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,

a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or

b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the United States extradites, surrenders or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.

4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States."

An additional paragraph intended for countries that are not parties or signatories to the Rome Statute, is included in agreements:

"Each Party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal Court".

All the governments, academics and NGO legal experts consulted by the International Coalition of NGOs for the ICC (CICC) to date believe that the bilateral agreements being sought, specifically exempting US nationals from the jurisdiction of the Court on the basis of Article 98 (2) of the Rome Statute, are not permitted by that article.

Ratifying such an agreement would put countries in violation of international law and States Parties in contravention of their obligations under the Rome Statute .

According to Article 32 of the Vienna Convention on the Law of Treaties, application of the negotiating history of the treaty is relevant where a particular interpretation of a treaty would "[lead] to a result which is manifestly absurd or unreasonable". Clearly, agreements concluded in line with the US interpretation of article 98 (2) would lead to such an absurd or unreasonable result, by allowing non-State parties to subvert the fundamental principle of the Rome Statute that anyone - regardless of nationality - committing genocide, crimes against humanity, or war crimes on the territory of a State Party is subject to the jurisdiction of the International Criminal Court. The

overall object and purpose of the Rome Statute is to ensure that those responsible for the worse possible crimes are brought to justice in all cases, primarily by States, but as a last resort, by the ICC. Thus, any agreement that precludes the ICC from exercising its complementary function of acting when a State is unable or unwilling to do so, defeats the object and purpose of the Statute. The Vienna Convention on the Law of Treaties reinforces the conclusion that the US approach to Article 98 is unreasonable, noting that "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose*" (Vienna Convention on the Law of Treaties, Article 31 (1), our emphasis).

In addition, the language of Article 98 (2) clearly does not allow the kind of agreements the US is lobbying for around the world. The US-proposed "Article 98" agreements seek to prevent surrender to the ICC rather than seeking the return of persons to the US. In fact, the US-proposed agreements seek to amend the terms of the treaty by effectively deleting the critical concept of the "sending State" from Article 98 (2). Moreover, the US draft agreement purports to deny the original extraditing country its power of consent.

States that may be considering concluding so-called "Article 98" agreements that would effectively exempt only US nationals and not their own nationals, as Romania has done, would still be in breach of their international obligations.

"Article 98" agreements have a detrimental effect both on the global ratification process of the Rome Statute and on international law as a whole. They are in total contradiction with it.

Reactions from European institutions to the US scheme around Article 98

The US scheme around Article 98 has been denounced by several institutions at the European level.

On September 25, 2002, the Parliamentary Assembly of the Council of Europe expressed its concern regarding the US immunity agreements:

"9. Moreover, the Assembly is greatly concerned by the efforts of some States to undermine the integrity of the ICC Treaty and especially to conclude bilateral agreements aiming at exempting their officials, military personnel and nationals from the jurisdiction of the Court ("exemption agreements").

10. The Assembly considers that these "exemption agreements" are not admissible under the international law governing treaties, in particular the Vienna Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and the purpose of a treaty.

11. The Assembly recalls that States Parties to the ICC Treaty have the general obligation to cooperate fully with the Court in its investigation and prosecution of

crimes within its jurisdiction (Article 86) and that the Treaty applies equally to all persons without any distinction based on official capacity (Article 27). It considers that the “exemption agreements” are not consistent with these provisions.”

By condemning the immunity agreements concluded with the United States, the Assembly called members and observer States of the Council of Europe not to ratify bilateral agreements:

“14. Accordingly, the Assembly calls: [...]

iii. on all member and observer States of the Council of Europe:

c. not to enter into any bilateral “exemption agreements” which would compromise or limit in any manner their cooperation with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court...”

On September 26, 2002, the European Parliament also condemned the agreements concluded with the United States:

“The European Parliament, [...]

3. Firmly believes that the ICC States Parties and Signatory States are obliged under international law not to defeat the object and purpose of the Rome Statute, under which, according to its Preamble, ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ and that States Parties are obliged to cooperate fully with the Court, in accordance with Article 86 of the Rome Statute, thus preventing them from entering into immunity agreements which remove certain citizens from the States’ or the International Criminal Court’s jurisdictions, undermining the full effectiveness of the ICC and jeopardising its role as a complementary jurisdiction to the State jurisdictions and a building block in collective global security...”

However, on September 30, 2002, the Council of the European Union adopted a common position on this matter and did not firmly reject such agreements. Actually, the Council defined some guiding principles “concerning arrangements between a State Party to the Rome Statute of the ICC and the United States regarding the conditions to surrender of persons to the Court”. Instead of condemning such agreements, the guiding principles of the EU, which are supposed to preserve the integrity of the Statute and ensure respect for the obligations of States Parties, established the legality of the immunity agreements.

III - Conclusion and Recommendations

For this reason, FIDH asks the states:

- Not to conclude "Article 98" agreements with the United States, which would aim at excluding American nationals from the jurisdiction of the ICC, even if these agreements are not reciprocal;**
- To refuse the scheming of the fight against terrorism into a pretext for the conclusion of such agreements;**
- To follow their process of full membership to the ICC and to thus consolidate its independence and its efficiency;**
- To most vigorously oppose the "American exception" to ICC jurisdiction which the Bush administration is presently trying to impose.**

FIDH asks Member States of the European Union to take a decision on US propositions in accordance with the line it has followed concerning the Statute since the negotiations in Rome and New York. The FIDH reminds EU Member States that their common decision will determine that of the many states candidates to integration in the EU.

Also, FIDH solemnly appeals to NATO Member States to resist American pressures and reminds them that their opposition to these propositions will determine that of many states candidates to the entrance in the alliance.