Questions & Answers

US BILATERAL IMMUNITY AGREEMENTS OR SO-CALLED "ARTICLE 98" AGREEMENTS

In capitals around the world, US government representatives have been seeking bilateral non-surrender agreements, or so-called "Article 98" agreements, in an effort to shield US citizens from the jurisdiction of the newly created International Criminal Court (ICC or Court). Many government, NGO and other international law experts argue that the US is misusing Article 98 of the Rome Statute, the provision of the ICC's governing treaty that the US is using to justify seeking these agreements. Legal experts furthermore contend that such agreements constitute a breach of international law if signed by ICC States Parties (countries to have ratified or acceded to the ICC treaty). ICC advocates condemn the US BIAs as an inexcusable attempt to gain impunity from the crimes defined in the Rome Statute of the ICC, namely: genocide, crimes against humanity and war crimes.

What are bilateral immunity agreements?

Dubbed bilateral immunity agreements (BIAs) by leading legal experts, the US-requested agreements provide that current or former government officials, military and other personnel (regardless of whether or not they are nationals of the state concerned) or nationals are not transferred to the jurisdiction of the ICC.

To date, several versions of these bilateral agreements have been proposed: those that are reciprocal, providing that neither of the two parties to the accord would surrender the other's "persons" without first gaining consent from the other; those that are non-reciprocal, providing only for the non-surrender to the ICC of US "persons;" and those that are intended for states that have neither signed nor ratified the Rome Statute, providing that those states not cooperate with efforts of third-party states to surrender US "persons" to the ICC. These agreements go beyond the scope of Article 98 of the Rome Statute, which intended to address conflicts with *existing* international agreements and was not intended to place any one country's citizens, military or employees above the reach of international law.

What is Article 98 of the Rome Statute?

The nations that negotiated the drafting of the Statute did so with extensive reference to international law and with care to address potential conflicts between the Rome Statute and existing international obligations. The drafters recognized that some nations had previously existing agreements, such as Status of Forces Agreements (SOFAs), which obliged them to return home the nationals of another country (the "sending state") when a crime had allegedly been committed. Thus Article 98(2) was designed to address any potential discrepancies that may arise as a result of these existing agreements and to permit cooperation with the ICC. The article also gives the "sending state" priority to pursue an investigation of crimes allegedly committed by its nationals. This provision is consistent with the Statute's complementarity principle, which gives the country of the nationality of the accused the primary duty to investigate and, if necessary, prosecute an alleged case of genocide, war crimes, or crimes against humanity.

Why do experts believe bilateral immunity agreements violate international law?

Many governmental, legal and non-governmental experts have concluded that the bilateral agreements being sought by the US government are contrary to international law and the Rome Statute for the following reasons:

- *The US bilateral immunity agreements are contrary to the intention of the Rome Statute's drafters*. Delegates involved in the negotiation of Article 98 of the Statute indicate that this article was not intended to allow for *new* agreements based on Article 98. Rather, Article 98 was designed to prevent legal conflicts which might arise because of *existing* agreements or renewals of previous agreements, such as Status of Forces Agreements (SOFAs). Article 98 was not

intended to allow agreements that would preclude the possibility of a trial by the ICC when the "sending state" did not exercise jurisdiction over its own nationals. Indeed, Article 27 of the Rome Statute provides that no one is immune from the crimes under the Court's jurisdiction.

- *The US bilateral immunity agreements are contrary to the language of Article 98 itself*. The proposed agreements seek to amend the terms of the ICC treaty by effectively deleting the concept of the "sending state" from Article 98(2); this term indicates that the language of Article 98(2) is intended to cover only SOFAs, Status of Mission Agreements (SOMAs) and other similar agreements. SOFAs and SOMAs reflect a division of responsibility for a limited class of persons deliberately sent from one country to another and carefully outline how any crimes they may commit should be addressed.

  In contrast, the US-proposed bilateral immunity agreements seek immunity for a broad class of persons, without any reference to the traditional sending state-receiving state relationship of SOFA and SOMA agreements. This wide class of persons would include anyone found on the territory of the state concluding the agreement with the US who works or has worked for the US government. Government legal experts have stated that this could easily include non-Americans and could include citizens of the state in which they are found, effectively preventing that state from taking responsibility for its own citizens.

- *The US interpretation of Article 98 is contrary to the overall purpose of the ICC*. The US government's so-called "Article 98" agreements have been constituted solely for the purpose of providing individuals or groups of individuals with immunity from the ICC. Furthermore, the agreements do not ensure that the US will investigate and, if necessary, prosecute alleged crimes. Therefore, the intent of these US bilateral immunity agreements is contrary to the overall purpose of the ICC, which is to ensure that genocide, crimes against humanity and war crimes be addressed either at the national level or by an international judicial body.

What are the possible ramifications of signature of a bilateral immunity agreement?

States that sign these agreements would breach their obligations under the Rome Statute, the Vienna Convention on the Law of Treaties and possibly their own extradition laws. In particular, States Parties to the Rome Statute that sign these agreements will breach Articles 27, 86, 87, 89 and 90 of the Statute, which require states to cooperate with and provide assistance to the Court. These states will also violate Article 18 of the Vienna Convention on the Law of Treaties, which obliges them to refrain from acts that would defeat the object and purpose of a treaty. Finally, many states will likely violate their own extradition laws in signing such agreements, as states generally have much wider power to approve extraditions and surrenders of persons than the US-proposed bilateral immunity agreements would allow.

Does a State that signs or ratifies a so-called "Article 98" agreement still have obligations to the ICC?

Yes. States Parties to the Rome Statute continue to have all prior obligations related to the ICC. The conclusion of a bilateral immunity agreement simply creates an apparent conflict of obligations for that State which must be resolved. It will be up to the ICC to decide whether or not the so-called Article 98 Agreements proposed by the United States are valid and therefore truly create a conflict of obligations for States Parties. Signatories to US BIAs that are not yet States Parties to the Rome Statute may still become States Parties to the Rome Statute of the ICC.

What is the US government's position on the ICC?

From 1995 through 2000, the US government supported the establishment of an ICC, although they sought—unsuccessfully—to engineer a court that could be controlled through the Security Council or that could provide exemption from prosecution for US officials and nationals. On 31 December 2000, US Ambassador David Scheffer signed the Rome Statute on behalf of the US government during the Clinton administration. In 2001, the Bush administration discontinued participation in ICC meetings and, on 6 May 2002, officially revoked the US signature of the Rome Statute. Since then, the US has engaged in a multi-prong attack against the ICC through BIAs, US legislation sanctioning allies who support the ICC and efforts at the UN Security Council to exempt US peacekeepers from the ICC's jurisdiction. The Bush administration claims that the ICC could be used as a forum for politically motivated prosecutions, despite the ample safeguards of the ICC treaty and highly qualified ICC officials that protect against such an event.

Which countries are being targeted for bilateral immunity agreements?

Reports indicate that many countries from around the world, including close allies of the US government, those seeking membership in NATO, and those in the Middle East, the Caribbean and South Asia, have been targeted and continue to face extreme pressure to sign BIAs. In the words of John Bolton, US Undersecretary for Arms Control and International Security, "Our ultimate goal is to conclude Article 98 agreements with every country in the world, regardless of whether they have signed or ratified the ICC, regardless of whether they intend to in the future."

What is the status of this US government campaign?

Contrary to assurances from high-level US officials that the US would respect the right of other countries to support the ICC, the Bush administration has used coercive bottom line tactics in an effort to secure immunity from the ICC. As it did in the Security Council in seeking exemption from ICC jurisdiction for US peacekeepers, US officials have publicly threatened economic sanctions under the American Servicemembers Protection Act and the Nethercutt Amendment, including, but not limited to, the termination of military and economic assistance if countries do not sign the immunity pacts. Furthermore, it has been reported on numerous occasions that when countries have signed a bilateral immunity agreement, the US has simultaneously announced the provision of large financial packages to those countries.

As of 1 August 2004, the United States State Department reported over 80 BIAs. Nevertheless, roughly two-thirds of the States Parties to the ICC still have not signed BIAs, and 45 states have publicly refused to sign these agreements on the basis of their obligations under international law and the Rome Statute and their commitment to ending impunity.

What is the American Servicemembers Protection Act?

Dubbed "The Hague Invasion Act" for its provision that the US could invade the Court to seize US soldiers, the American Servicemembers Protection Act (ASPA) was adopted on 2 August 2002 and provides that, among other consequences, US military assistance to ICC States Parties will be withheld unless they have signed bilateral immunity agreements. In accordance with ASPA, major US allies including the 19 members of NATO and nine other "major non-NATO allies" were exempted. Furthermore, ASPA provides for presidential waivers on the withdrawal of US military assistance that could be granted on the basis of national security interests or because a country had signed an immunity agreement.

The ASPA deadline, which coincided with the one year anniversary of the entry into force of the Rome Statute of the ICC on 1 July 2003, resulted in the loss of US military assistance to 35 ICC States Parties, in a combined total withdrawal of $46 million in military assistance. Major programs affected by cuts in US military assistance are International Military Education and Training (IMET), Foreign Military Assistance (FMF), and funding provided under the Arms Export Control Act. Countries which had previously denounced the BIAs as unnecessary entered into an immunity agreement under threat of loss of significant financial aid.

What is the Nethercutt Amendment?

The US made an even stronger statement against the ICC on 13 July 2004 when Congressman Nethercutt introduced to the US House of Representatives an amendment to the Foreign Operations Appropriation Bill. In December 2004, Congress adopted the Nethercutt Amendment. This legislation is far more wide-reaching than ASPA and authorizes the loss of Economic Support Funds to all countries, including many key US allies, which have ratified the ICC treaty but have not signed a bilateral immunity agreement with the US. While the President has the authority to waive the provisions of the Amendment, it poses the threat of broad cuts in foreign assistance, including funds for cooperation in international security and terrorism, economic and democratic development, human rights, and promoting peace processes. The Nethercutt provision was again debated in 2005, and was adopted in the joint Appropriations Bill for 2006.

Numerous resources on the subject of the so-called "Article 98," or bilateral immunity agreements, can be found on the web site of the Coalition for the ICC at www.iccnow.org/documents/usandtheicc.html.