

NO TO AMERICAN EXCEPTION

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

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

If one analyses it globally, this arsenal cannot be separated from the means the American have implemented in order to fight terrorism. American actions are aimed at giving 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.

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.
- 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 in negotiating « 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 preoccupying because it grants total and quasi unlimited immunity before the ICC to personals and officials of UN peace keeping operations, nationals of States non Party to the Statute, .
- American pressure is also held with states individually. 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.

I - 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 refuse any jurisdiction of the Court over their nationals”. In substance, 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, and 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. It includes a prohibition to transfer to the Court any person, an American citizen or a foreigner

inquiry of the Court on the US territory; 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 investigation 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 to 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 taking 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; national interest justifies such an operation.

5.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.

6.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*".

During the summer of 2001 and until the September 11th events, the Congressmen at the origin of 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 decides to give up opposing US payment of back dues and the Representatives accepted the payment without linking it to the endorsement of the Helms-DeLay act. But this is only a short break!

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

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

On November 28th, 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

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 Qaeda or of the Islamist Jihad. Between immunity for its nationals and fight against terrorism, “national interest” allows for all contradictions ...

On August 2nd 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 the negotiation of a resolution within the Security Council in order to limit 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.

II - 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. »¹

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 aimed 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 10th.

Although the vast majority of states had beforehand expressed itself against the American proposition and against the possibility for the Security Council to reopen negotiations on the Rome Statute, the States voted, on July 12th, a resolution which was supposed to be a compromise. It was qualified a “historical compromise” or a “victory” by some, but this resolution actually leads to common acceptance of justice “à la carte”. It 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.

But the United States went further still in their destructive enterprise in scheming around Article 98 of the Rome Statute.

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

1. 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.”²

The legal Mechanism of Article 98

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.

Pursuant to Article 98, 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. For example, the Court is barred from requiring a state to arrest and surrender a foreign diplomat of a state not party to the Statute for the alleged commission of crimes against humanity. In other cases, the Court may also be barred from requiring a state to deliver certain documents from the archives of any foreign embassy, even from embassies of States parties to the Statute.

But, 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 rule³.

“Obligations under International Law” and Article 98 (2)

²*Ibidem*

³ Steffen Wirth, “Immunities, Related problems, and Article 98 of the *Rome Statute*” *12 Criminal Law Forum* 2001

Immunity treaties

One cannot but question the issue of the compatibility of Article 98 and Article 27 (“Irrelevance of official capacity”), particularly given the fact that the latter provides that no immunity or specific rules of procedure, in accordance with domestic law as well as with international law, should prevent the Court from exercising its jurisdiction against the person who takes advantage of it. It is however very clear that the Court should have the last word and assess whether the immunity put forward by a state may constitute an obstacle to prosecution⁴.

Extradition treaties

Bilateral and multilateral extradition agreements usually provide that an extradited person may not be re-extradited to a third state.

Such agreements between the States Parties to the Rome Statute would not prevent the surrender to the Court of an extradited person. However, it seems that if a State Non Party extradites a person to a State Party, this cannot be understood as an implied agreement to re-surrender the extradited person to the Court⁵.

2. The US scheme around Article 98

Bilateral agreements: no transfer to the ICC

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. Small countries are thus torn by the disputes between the United States and the European Union over the ICC. Today, four countries have officially signed “Article 98” agreements with the United States: Israël, East Timor, Tadjikistan and Romania. It is extremely difficult to control such articles which are generally concluded silently.

Here are a few examples of States approached by the United States in order to sign an “Article 98” type agreement:

The following were among the *West European countries* approached: Great Britain, the Netherlands, Italy, Switzerland and Norway. The last two states refused to sign any agreement. The situation of Italy is far more preoccupying. Indeed, the Italian Prime Minister wishes to come closer to the United States. However, this would induce that the text is submitted to the Parliament’s accord, given the fact that Article 80 of the Constitution establishes that treaties implying a modification of domestic laws must be submitted to Parliament. This gives a little hope: domestic Parliaments are supposed to be less sensitive to American pressures than Foreign Ministries.

A common decision of European Union State members should be given on September 4th. Madrid has already indicated that Spain did not support derogations to ICC jurisdiction.

At least seven *Central or East European and Caucasian countries* were also subject to American pressures: Yugoslavia, Romania, Slovenia, Ukraine, Croatia and Bosnia-Herzegovina.

While Yugoslavia faces a growingly awkward situation, Romania signed an agreement with the United States on August 1st. This agreement is not reciprocal: it “only” exempts American citizens. However, in signing this agreement, whilst Romania accelerated its entrance procedure in NATO, it most probably delayed its date of integration in the European Union. The Romanian President declared that this signature represented “both an opportunity and a necessity for Romania”. The United States congratulated the country for this “act of courage” which makes of Romania “a strong candidate for integration in NATO”.

The United States approached Slovenia on August 13th. The Slovenian mediator was clearly and strongly opposed to the American proposal because such an agreement would be “contrary to the Universal Declaration of Human Rights”: the latter prohibits the fact that any individual or group of individuals have rights that others do not have, or, conversely, be deprived of rights the others have. But the Slovenian government indicated that it needed some time to think about the proposal before it takes its decision and wanted to consult the European Union as well as candidate countries to the EU and NATO.

Ukrainian and Croatian representatives declared they rejected any attempt to sign an agreement.

⁴ William Bourdon, Emmanuelle Duverger, *La Cour pénale internationale. Le statut de Rome introduit et commenté*

The government of Bosnia-Herzegovina has officially been handed a draft agreement on immunity of US citizens before the ICC, yet stated that they are under no ultimatum or deadline to respond. They also indicated they will decide on the issue in line with the EU position.

On August 27th, Tajikistan signed a derogation to ICC jurisdiction with the United States. Eventually, a meeting between Estonian and American officials should take place on September 2nd 2002. in order to discuss the American proposition. However, the *Baltic countries* already indicated they would follow the common EU position on this point.

The United States also approached *Latin American countries* on this proposal. Ecuadorian officials in particular contacted the International Coalition of NGOs (CICC) in order to know its position concerning article 98. It is therefore most truthful that they were subject to American pressures. As for Colombia, the Bush administration is demanding that new Colombian President Alvaro Uribe Velez sign a bilateral agreement that will grant US personnel immunity from International Criminal Court prosecution. If Uribe rejects the request, he risks losing vital US support. But if he signs the pact, he could lose critical political backing in Colombia and regionally, undermining his offensive against the FARC rebels.

On August 27th, *East Timor* signed an “Article 98” agreement, granting US soldiers immunity from ICC jurisdiction.

The *Australian opposition* to the government is against US derogation.

The Philippines considers a bilateral non-extradition agreement with the US, reportedly in exchange for increased military aid.

The Japanese Deputy Chief Cabinet Secretary announced that *Japan* will not consider the American request of granting US nationals immunity from the ICC, particularly while Japan is in the process of ratifying the Rome Statute for the ICC.

Finally, *Israel* signed a bilateral agreement with the United States on August 4th. Contrary to the one signed with Romania, this one is reciprocal.

Excerpts from the bilateral agreements:

“... 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”.

Agreements within NATO (NATO-type SOFAs, Status of Force Agreements): priority given to American tribunals

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.

IV – Conclusion and Recommendations

Article 98 of the Rome Statute should prevent the Court from a request of cooperation or surrender only in

destruction of the Rome Statute, after their attempts in Rome and in New York and their “victory” at the UN Security Council on July 10th.

All the governments, academics and NGO legal experts consulted by the International Coalition of NGOs for the ICC (CICG) 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 Statute⁶.

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.⁷

“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.

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.