

**AN ANALYSIS OF THE UNITED STATES POSITION ON THE  
INTERNATIONAL CRIMINAL COURT AND ITS EFFECT ON  
THE RATIFICATION PROCESS IN THE PHILIPPINES:  
SOME IMPLICATIONS FOR SOUTHEAST ASIA**

**EVELYN BALAIS-SERRANO**

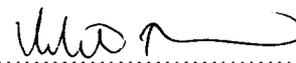
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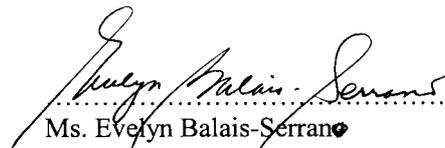
  
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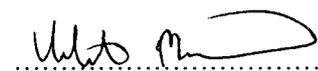
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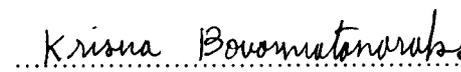
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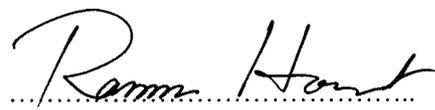
  
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Evelyn Balais-Serrano

**AN ANALYSIS OF THE UNITED STATES POSITION ON THE INTERNATIONAL CRIMINAL COURT AND ITS EFFECT ON THE RATIFICATION PROCESS IN THE PHILIPPINES: SOME IMPLICATIONS FOR SOUTHEAST ASIA****EVELYN BALAIS-SERRANO 4236014 GRHR/M****M.A. (HUMAN RIGHTS)****THESIS ADVISORS: MS. SRIPRAPHA PETCHARAMESREE, PH.D, PROF. VITIT MUNTARBHORN, M.A., B.C.L. (OXON); LIC. SPEC. EN DROIT EUROP. (BRUSSELS); OF THE MIDDLE TEMPLE, BARRISTER (LONDON), MR. TEODORO M. DE MESA, M.A. PHILOSOPHY****ABSTRACT**

The Rome Statute of the International Criminal Court, adopted in 1998 by 120 states and later signed by 139 states, entered into force on July 1, 2002, with the required minimum of 60 countries worldwide initially ratifying the treaty. The ICC is the first permanent and independent international criminal court that will prosecute the most serious crimes of international concern: genocide, war crimes, crimes against humanity and the crime of aggression, which has yet to be defined.

On 31 December 2000, the United States under President Clinton signed the Rome treaty creating the ICC. On May 2002, under the Bush administration, the US withdrew its signature from the Rome treaty, and worked for UN Security Council resolutions and bilateral immunity agreements—all intended to seek immunity for US nationals from any prosecution by the ICC. The US Congress also passed on August 2, 2002 the American Servicemembers' Protection Act which cuts military assistance to countries that become parties to the Rome treaty and gives authority to the President to waive this if the state enters into an immunity agreement with the US or if he decides that it is in the national interest of the US.

The study showed how the historical colonial experience of the Philippines and other forms of ties or relations with the US continues to play an important role in the decision making of whether to ratify or not the ICC and other issues related to the US. The study also showed how the US position of unsigned the Rome treaty, working on Security Council resolutions and getting countries to sign bilateral immunity agreements have seriously undermined the Court—resulting in non-ratification of the Rome treaty by most countries in the region. Such non-ratification has serious implications on both the negative and positive aspects of the human rights situation in the Southeast Asian region. While governments in the region succumb to US pressure and allow their people to be in more vulnerable situation, as an effect of non-ratification, more and more civil society groups realize they cannot depend on their governments to decide on the basis of principles like international justice and rule of law, which the ICC symbolizes and stands for. On the contrary, governments' decisions are based on their own political and economic interests, often at the expense of their people.

**KEYWORDS:** INTERNATIONAL CRIMINAL COURT/INTERNATIONAL JUSTICE/  
UNITED STATES/ HUMAN RIGHTS/ PHILIPPINES/SOUTHEAST ASIA

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## **CONTENTS**

	Page
<b>ACKNOWLEDGEMENTS</b>	iii
<b>ABSTRACT</b>	iv
<b>LIST OF ABBREVIATIONS USED</b>	vii
<b>CHAPTER 1 INTRODUCTION</b>	1
1. Statement of the Problem	2
2. Objectives of the Research	3
3. Research Methodology	4
4. Scope and Overview of the Study	5
<b>CHAPTER 2 THE INTERNATIONAL CRIMINAL COURT AND ITS HISTORICAL DEVELOPMENT</b>	
1. The ICC: Some Historical Background	6
2. The ICC: Some Background	11
3. Other Salient Features	18
<b>CHAPTER 3 THE US POSITION ON THE INTERNATIONAL CRIMINAL COURT</b>	
4. The United States Participation in the ICC Process	23
5. Grounds for US Opposition to the ICC	30
6. US position: The Unsigning	33
7. US Maneuvers at the Security Council Resolutions	39
8. The Bilateral Immunity Agreements	46
9. The American Servicemembers' Protection Act (ACSPA)	52

## **CONTENTS (continued)**

<b>CHAPTER 4 THE US POSITION: EFFECTS ON THE PHILIPPINE RATIFICATION PROCESS</b>	
10. Some Historical Background	55
11. The ICC Process	58
12. Civil Society and Other Responses/Arguments	63
<b>CHAPTER 5 THE US POSITION: SOME IMPLICATIONS TO RATIFICATION AND HUMAN RIGHTS IN SOUTHEAST ASIAN REGION</b>	
13. Ratified Countries	75
14. Signed But Not Ratified	78
15. Neither Signed Nor Acceded	80
16. Opposed	85
17. Signed the BIA	86
<b>CHAPTER 6 CONCLUSION</b>	94
<b>BIBLIOGRAPHY</b>	104
<b>APPENDICES</b>	
A - Rome Statute of the International Criminal Court—A Summary	114
B - States Parties to the Rome Statute of the ICC	119
C - Status of Bilateral Immunity Agreements	123
D - Philippines-United States Agreement on Non-Surrender	127
E - Chronology: Security Council Resolution 1422/1487	130
F - Chronology of U.S. Opposition to the International Criminal Court	140
G - List of ICC Judges with their Representation	146
H - Common Position on the International Criminal Court of the Council of the European Union	148
I - A Timeline Of the Establishment of the International Criminal Court	154
<b>BIOGRAPHY</b>	161

## **LIST OF ABBREVIATIONS USED**

<b>AFP</b>	Armed Forces of the Philippines
<b>AI</b>	Amnesty International
<b>ABA</b>	American Bar Association
<b>APA</b>	Asian Peace Alliance
<b>APIC</b>	Agreement on Privileges and Immunities of the Court
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>ASP</b>	Assembly of States Parties
<b>ASPA</b>	American Servicemembers' Protection Act
<b>BIA</b>	Bilateral Immunity Agreement
<b>CARICOM</b>	Caribbean Community
<b>CICC</b>	Coalition for the International Criminal Court
<b>CNN</b>	Cable News Network
<b>E.O.</b>	Executive Order
<b>EU</b>	European Union
<b>GAM</b>	Gerakin Aceh Merdeka (Free Aceh Movement)
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the Former Yugoslavia
<b>IPU</b>	Inter-Parliamentarian Union
<b>ILC</b>	International Law Commission
<b>MAA</b>	Military Assistance Agreement
<b>MBA</b>	Military Bases Agreement
<b>MDAA</b>	Mutual Defense Assistance Agreement
<b>MDT</b>	Mutual Defense Treaty
<b>MLSA</b>	Mutual Logistics Support Agreement
<b>MLSA</b>	Mutual Logistics Security Agreement
<b>MILF</b>	Moro Islamic Liberation Front
<b>NATO</b>	North Atlantic Treaty Organization

**LIST OF ABBREVIATIONS USED (Cont.)**

<b>PCICC</b>	Philippine Coalition for the International Criminal Court
<b>RP-US</b>	Republic of the Philippines-United States
<b>SC</b>	Security Council
<b>SOFA</b>	Status of Forces Agreement
<b>SOMA</b>	Status of Mission Agreement
<b>T.R.O.</b>	Temporary Restraining Order
<b>UN</b>	United Nations
<b>UNMIBH</b>	UN Mission in Bosnia –Herzegovina
<b>US</b>	United States
<b>VCLOT</b>	Vienna Convention on the Law of Treaties
<b>VFA</b>	Visiting Forces Agreement

*“Too much of history is the story of wars won and peace lost. Today peace has won and war has lost.”*

*William R. Pace, Convenor,  
NGO Coalition for the International  
Criminal Court, at the Closing Plenary  
of the Rome Diplomatic Conference,  
17 July, 1998.*

## **CHAPTER 1**

### **INTRODUCTION**

The Rome Statute creating the International Criminal Court (ICC) was adopted by 120 states on July 17, 1998, creating a milestone in the history of international law and international justice. The ICC is the first permanent independent judicial body created by the international community of states that will prosecute the most serious crimes of international concern: genocide, crimes against humanity, war crimes and the crime of aggression.<sup>1</sup>

On July 1, 2002, gaining the required 60 ratifications, the Rome Statute of the ICC came into force, becoming “the first important international institution established in the 21<sup>st</sup> century.”<sup>2</sup> It was described by the United Nations Secretary General Kofi Annan as a ‘gift of hope to future generations, a giant step forward in the march towards universal human rights and the rule of law.’<sup>3</sup>

On May 6, 2002, the US repudiated its signature of the Rome Statute and started a worldwide campaign to undermine the ability of the Court to exercise its jurisdiction over nationals of non-state parties accused of genocide, war crimes, crimes against humanity on the territory of state parties to the Rome Statute. This worldwide campaign has taken three major strategies. The first was the “unsigning” of the Rome

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<sup>1</sup> The crime of aggression is listed as one of the crimes in the Rome Statute but state parties still have to agree on its definition and its elements to make it enforceable.

<sup>2</sup> CICC Highlights Relevance of ICC, William Pace, The International Criminal Court Monitor, Issue 18, September 2001.

<sup>3</sup> The International Criminal Court Monitor, Coalition for the International Criminal Court, April 2002

treaty. The second was through obtaining resolutions from the United Nations Security Council which first took place on July 12, 2002 seeking to invoke Art. 16 of the Rome Statute deferring any investigation or prosecution by the ICC of nationals of non-state parties for acts of omission in connection with a UN established operation. Said Resolution was approved by the Security Council. Last year, the US proposed a renewal of Resolution 1422, with no change in the text, and again, it was carried, with notable abstentions this time by France, Germany and Syria. Last June 23, 2004, the resolution to renew for the third year of exemption was withdrawn by the US for failure to get sufficient number of votes.<sup>4</sup>

The third strategy has been to persuade states to enter into bilateral immunity agreements (BIAs), also known as bilateral impunity agreements or Article 98 agreements, which seek to prevent states from surrendering US nationals accused of crimes covered by the ICC, but do not provide for their investigation or prosecution by the US or by any other state.

The third strategy includes threats to cut off military and/or economic aid to any state party to the Rome Statute that does not enter into bilateral agreement with the US as provided for under the American Servicemembers' Protection Act (ASPA), which entered into force on August 2, 2002. The act allows the US President to waive this ban if the state enters into an impunity agreement with the US or if he decides that it is in the national interest of the US.<sup>5</sup>

## **1. Statement of the Research Problem**

The US policy to give priority to state security over other concerns by ensuring that all US nationals are exempt from any prosecution by any body, foremost of which is the newly established International Criminal Court that would prosecute crimes of a most serious nature: genocide, war crimes, crimes against humanity and once defined, the crimes of aggression.

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<sup>4</sup> See discussion in Chapter II.

<sup>5</sup> Sec. 2007 of ASPA prohibits US military assistance to states that ratify the Rome Statute, but that prohibition does not apply to NATO members and certain allies including Argentina, Australia, Egypt, Israel, Japan, Jordan, New Zealand and the Republic of Korea. This provision, however, can be waived by the President for other states if the state signs a US impunity agreement or the President determines that such a waiver is in the national interest of the US.

The US position of withdrawing its signature to the Rome Statute creating the ICC, working for Security Council resolutions and obtaining bilateral immunity agreements with as many countries as possible has had a serious effect on the future of the Court, particularly on the decision of the remaining countries that have not ratified and acceded yet to the Rome Statute of whether they would ratify or not. So far, 139 countries have signed and 94 have ratified the Rome Statute.<sup>6</sup> Of the 94 states parties, 36 have signed the bilateral immunity agreement.<sup>7</sup>

## 2. Objectives

The study seeks to understand what the ICC is, and its historical development. It analyzes the US position on the ICC, the bases for such a position, its strategies in carrying out this position and its effect on the process of ratification in the Philippines. It also explores some of the implications for the ratification process and human rights in the Southeast Asian region.

The study hopes to make the point that both governments and civil society have the moral obligation to help develop knowledge and form public opinion against all forms of injustice and work towards building the broadest possible constituency for peace. War is never a solution to any conflict and only serves to exacerbate violence. This study reinforces the values and principles of the use of the rule of law over terrorism, of peace over war, of human security over ‘state-centric security’ and of humanity over anything else. The reinforcement of this global moral consciousness is very powerful as it does not only condemn serious crimes as evil for which serious punishment may be imposed but it also empowers the many voices of conscience and legitimizes various demands for justice at different levels.

Above all, the study hopes to bring the issue of justice closer to where it belongs – the victims. Any study on mechanisms for justice should involve the victims and unless they become part of the process of attaining justice, they cannot fully appreciate its value. The study hopes to let the broadest possible number of individuals and groups understand the relevance of ICC in general and the role of the US in trying to undermine it. Thus, the study also aims to empower people to assert

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<sup>6</sup> See list as Appendix B.

<sup>7</sup> See list as Appendix C: Status of US Bilateral Immunity Agreements as of 15 June 2004

their rights through an international mechanism that hopes to bring justice when states are unable and unwilling to render such to victims.

## **2.1 Research Questions**

The study raises and tries to answer the following questions:

1. What is the ICC? What is its historical development?
2. What is the US position on the ICC? What are the bases for such position?
3. What is the effect of the US position on the ICC on the ratification process in the Philippines?
4. What are some of the implications for the ratification process and human rights in the Southeast Asian region?

## **3. Research Methodology**

Review of literature was the main methodology used. This included use of primary and secondary sources through the internet and library visits. UN documents and government sources were also accessed and monitoring and survey of media releases, journals and other publications were done. Proceedings of conferences, meetings and consultations on the subject attended personally by the author were also referred to.

A case study on the Philippines was done to show how the US position is affecting the process of ratification of the Rome Statute of the ICC in a particular country and what implications can said position have for the ratification process and human rights in the Southeast Asian region.

Meetings and interviews were also conducted among government delegates attending the UN Preparatory Committee meetings and Assembly of States Parties in New York and human rights figures from Southeast Asian countries.

## **4. Scope and Overview of the Study**

The study argues that the US position on the ICC undermines the Court and such position has positive and negative effects on the ratification process for countries in

the Southeast Asian region particularly the Philippines. Such argument is based on the degree of dependence of the Philippine government on the US, which directly influences the government's decision of whether to ratify or not the ICC, to vote for or against the Security Council resolutions and to sign or not the bilateral immunity agreement with the US. It argues further that economic and political considerations prevail in the decision-making, thus compromising and undermining justice and human rights of victims and peoples in the region in general.

The first chapter of this paper presents some background of what the International Criminal Court is and some of its salient features. It also traces its historical development from the time the idea began more than 50 years ago, to this date. It analyzes the US participation in the whole ICC process.

The second chapter examines the US position on the ICC, from the unsigned of the Rome treaty to obtaining of UN Security Council resolutions and securing Bilateral Immunity Agreements (BIAs) with countries worldwide.

The third chapter shows the effect of such position on the ratification process in the Philippines. It discusses the US-Philippine relations in the context of Philippines' decision whether to ratify or not the Rome treaty, to vote for or against the Security Council resolution and whether to sign or not the bilateral immunity agreement with the US.

The fourth chapter discusses the impact of the US position on the ratification process and human rights in the Southeast Asian region. It will focus mainly on the negative ones.

## **CHAPTER 2**

### **THE INTERNATIONAL CRIMINAL COURT AND ITS HISTORICAL DEVELOPMENT**

#### **1. The ICC: Some Historical background**

##### **1.1 Beginning**

In 1872, one of the founders of the International Committee of the Red Cross, Gustav Moynier, proposed the establishment of a permanent court in response to the crimes committed during the Franco-Prussian War. The next serious call came after World War I, with the 1919 Treaty of Versailles which called for an ad hoc international court to try the Kaiser and German war criminals. Then, after World War II, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals. The call for an international institution to try individuals for the most heinous crimes resonated throughout the world – and many thought the founding of the United Nations would bring the world closer to a permanent Court. Yet more than 50 years would pass before the world’s leaders would meet to prepare a treaty establishing a permanent International Criminal Court.<sup>8</sup>

##### **1.2 Pre-Rome**

On December 9, 1948, the UN General Assembly, approved Resolution 260, “Recognizing that all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required”, and adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of that convention characterizes genocide as “a crime under international law”, and Article VI provides that persons charged with genocide “shall be tried by a competent tribunal of the state in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction...” In the same

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<sup>8</sup> A Timeline of the Establishment of the ICC, CICC, 2002.

resolution, the General Assembly also invited the International Law Commission “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide...” Following the Commission’s conclusion that the establishment of an international criminal court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible, the General Assembly established a Committee with a mandate to prepare proposals relating to the establishment of such a court. In 1951, a draft statute was prepared and in 1953, a revised statute was submitted. The General Assembly however, decided to postpone consideration of said draft statute pending the adoption of a definition for aggression.

In December 1989, upon the request of Trinidad and Tobago, the General Assembly asked the ILC to resume work on the international criminal court. In 1993, the conflict in the former Yugoslavia erupted and war crimes, crimes against humanity and genocide, under the guise of “ethnic cleansing” caught the attention of the international community and in an effort to end the widespread human suffering, the UN Security Council established the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, to bring to account those held responsible for all the atrocities and by so doing, deter the occurrence of similar crimes in the future. The dramatic shift in worldwide opinion concerning criminal jurisprudence became evident with ICTY given the mandate to prosecute the crimes of genocide, crimes against humanity and war crimes. With the exception of “crimes against peace”, its mandate included all of the crimes that were identified by the Nuremberg Charter.<sup>9</sup>

The creation of the ICTY was soon followed by the creation of the International Criminal Tribunal for Rwanda (ICTR) in 1994. Both UN Security Council *ad hoc* tribunals contributed to the growing interest in the creation of a permanent ICC. These two tribunals provided the psychological, political and legal breakthrough for the establishment of the ICC and the concept of

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<sup>9</sup> Bassiouni, M, The Journey Toward the International Criminal Court. In No Peace Without Justice: Rome, 15 June-17 July Diplomatic Conference for the Establishment of an International Criminal Court.

international accountability of individuals for gross and massive crimes against all of humanity.<sup>10</sup>

Shortly thereafter in 1994, the ILC completed its draft statute for an international criminal court and in 1994 submitted the same to the General Assembly for consideration. The General Assembly established the Ad Hoc Committee on the Establishment of the ICC that met twice in 1995. After receiving the Committee's report, it created the Preparatory Committee on the Establishment of the ICC to prepare a draft text for submission to a diplomatic conference. The Preparatory Committee which met from 1996 to 1998 held its final session in March and April of 1998 and completed the draft text.

### **1.3 Rome: The Adoption**

At its 52<sup>nd</sup> Session, the General Assembly convened the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC in Rome, Italy from July 15-17, 1998.

The Rome Statute was adopted on July 17, 1998 with 120 in favor, 7 against and 21 abstentions. Among those who voted against were the United States, China, Israel, Iran, Iraq, Libya, Qatar and Yemen.

In accordance with Article 125, the Statute was opened for signature by all states in Rome at the headquarters of the Food and Agriculture Organization of the UN beginning July 17, 1998. Thereafter, it was opened for signature in Rome at the Ministry of Foreign Affairs of Italy until October 17, 1998, after which the Statute was opened for signature at the UN Headquarters in New York, USA until 31 December 2000. At the closing of signature period, a total of 139 states have signed the Rome Statute.

### **1.4 Post Rome: Coming into Force**

Last July 1, 2002, the first permanent international criminal court entered into force after reaching the required ratifications from 60 countries worldwide as provided for by the Rome Statute, the treaty creating the ICC.<sup>11</sup>

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<sup>10</sup> Veloso Lao, C, Safeguarding Sovereignty, Righting 'Human Wrongs': A Jurisprudential Justification for the Philippines' Ratification of the Rome Statute of the International Criminal

The establishment of this world first permanent court is considered “monumental” for the following reasons:

1. The Rome Statute recognizes the following international crimes: genocide, crimes against humanity, war crimes, and aggression. It provides that ICC may prosecute individuals who commit acts constituting such crimes;
2. The Statute makes individuals, and not states, accountable for crimes within the purview of the International Criminal Court. This implies that once an individual becomes an international criminal, he loses the protection of his own state;
3. The Statute provides that the Court may acquire jurisdiction over individuals of states who commit the international crimes enumerated therein, whether the reason arises from international or local conflicts; and
4. The Statute grants the ICC jurisdiction over individuals who are nationals of states who did not join the statute in certain situations. This makes all people from all states – whether or not a party to the Rome Statute – under the responsibility to uphold human rights.<sup>12</sup>

Although these four victories brought about the enforcement of international human rights obligations<sup>13</sup> to unprecedented levels, the ICC has been under attack, particularly by the United States which considers the Court’s functions unduly restricting state sovereignty. The international community’s reliance on the principle of state sovereignty precludes widespread implementation of human rights tribunals, generally under the precept of preserving law and order.<sup>14</sup>

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Court. Philippine Law Journal, Vol. 74, 1999.

<sup>11</sup> Art. 126 of the Rome Statute states: “This Statute shall enter into force on the first day of the month after the 60<sup>th</sup> day following the date of the deposit of the 60<sup>th</sup> instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.”

<sup>12</sup> Ballesteros, V. Milestones in 1998: The Year in Retrospect, 4 Human Rights Agenda (1998), 7.

<sup>13</sup> In particular, only the ‘most universal human rights – first generation human rights or civil and political human rights – such as those embodied in the four Geneva Conventions are aimed to be enforced by the ICC. This is due to the fact that only such rights are generally considered to be *jus cogens* norms or norms from which no derogation is permissible. See Gautam Rana, And Justice for All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators (1977), 349

<sup>14</sup> Besides the US, other countries that opposed the establishment of the ICC because of its alleged violation of the principle of sovereignty are China, Japan, India and Singapore. See Gautam, Rana,

Since its adoption in 1998, the Preparatory Commission, a body established by the UN General Assembly held ten sessions in New York UN Headquarters to finish the tasks preparatory to the setting up of the Court including the Relationship Agreement between the Court and the UN, the Elements of Crime, the Rules and Procedures, Agreement on Privileges and Immunities, Financial Rules and Regulations, Crime of Aggression and other documents.

On February 3-6, 2003, the First Assembly of States Parties (ASP) convened its first session in New York UN Headquarters and elected the first batch of judges comprising of 18 men and women representing all geographical regions and legal systems in the world.<sup>15</sup> As a result, 11 male and 7 women judges were elected representing all the regions and the two primary legal systems in the world.<sup>16</sup>

Thereafter on March 11, 2003, the 18 judges were sworn-in at a high level ceremony in the Hague witnessed by eminent persons and leaders including Queen Beatrix of The Netherlands, UN Secretary- General Kofi Annan and scores of heads of states, ministers, former ministers and ambassadors of various countries, including the United States.

On this occasion, the President and two vice-presidents of the Court were announced: Judge Philippe Kirsch of Canada was elected president and Judges Elizabeth Odio Benito of Costa Rica as first vice-president and Akua Kuenyehia of Ghana as second vice-president.

Kofi Annan said of this inaugural ceremony: 'It has taken mankind many years to reach this moment...these eleven men and seven women, representing all regions of the world and many different cultures and legal traditions, have made themselves the embodiment of our collective conscience. For centuries, and especially in the last century, that conscience has been shocked by

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And Justice for All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators, (1997) 349, 353

<sup>15</sup> Article 36,8(a) and (b) of the Rome Statute provides criteria for the election of judges: (i) representation of the principal legal systems of the world; (ii) equitable geographical representation and (iii) a fair representation of female and male judges; those with legal expertise on specific issues, including, but not limited to, violence against women or children.

<sup>16</sup> See list of judges and their representation as Appendix G.

unspeakable crimes: crimes whose victims were counted not in tens, but in tens of thousands – even in millions.’<sup>17</sup>

On April 21, 2003 during the resumed session of the Assembly of States Parties, the Prosecutor was unanimously elected according to the provisions of Article 42 of the Rome Statute. Luis Moreno Ocampo<sup>18</sup>, a well-known prosecutor from Argentina was unanimously voted by all members of the Assembly as the first prosecutor of the ICC. His term of office is 9 years without reelection. His office is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.

On June 16, 2003, in a solemn ceremony, Mr. Moreno was sworn-in in The Hague before the judges and other witnesses.

To date, the Court Registrar, a deputy prosecutor and some 300 complement staff had already been appointed, making the Court operational at this stage of its development.

The first case that has just been referred to the Court for investigation and prosecution is the case of the People’s Republic of Congo.<sup>19</sup>

## **2. The ICC: Some Background**

The International Criminal Court is the first permanent independent judicial body created by the international community of states, through the Rome Statute, to prosecute the gravest crimes under international law: genocide, other crimes against humanity, war crimes and the crime of aggression<sup>20</sup>. Unlike the ‘World Court’ or the International Court of Justice which deals with states, the ICC deals with and has the power to investigate, prosecute and convict individuals, whether as part of or in

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<sup>17</sup> Statement to the Inaugural Meeting of Judges of the International Criminal Court, The Hague, 11 March 2003

<sup>18</sup> He was reputed to have prosecuted the case against the military junta in Argentina in the 1980’s and those responsible in the Falklands war.

<sup>19</sup> DRC President Joseph Kabila sent a referral letter to the Office of the Prosecutor, as announced by his office on April 19, 2004.

<sup>20</sup> The crime of Aggression is listed as one of the crimes punishable under the Rome Statute, but States-Parties still have to define its elements in order to make it enforceable.

relation to government in power or of groups rebelling or aiming to change the government or the status quo.<sup>21</sup>

## **2.1 ICC as a permanent international court**

Unlike the Nuremberg and Tokyo tribunals established after World War II and the more recent *ad hoc* international tribunals for Rwanda and the Former Yugoslavia which have specific mandates and scope of jurisdiction, the ICC is a permanent body based in The Hague, Netherlands, with jurisdiction over criminals worldwide.

## **2.2 ICC as an independent international court**

Though it has relationship with the United Nations as defined in the Relationship Agreement between the UN and the Court, it is not an arm of the UN. It is also largely independent of the UN Security Council in contrast to the *ad hoc* international tribunals for the Former Yugoslavia and Rwanda which the Security Council created, the ICC derives its mandate, jurisdiction and authority from the Rome Statute that the 120 states adopted in 1998 and later signed by 139 states.

## **2.3 ICC and its jurisdiction**

2.3.1 Article 5 of the Rome Statute states: “The Jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

2.3.1.1 The crime of genocide;

2.3.1.2 Crimes against humanity;

2.3.1.3 War crimes

2.3.1.4 The crime of aggression.

Article 2 states: The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles

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<sup>21</sup> Primer on the International Criminal Court, Asian Forum for Human Rights and Development, 2000, p 4.

121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such provision shall be consistent with the relevant provisions of the Charter of the United Nations.

2.3.2 The Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute and has no retroactive effect. Only crimes committed after July 1, 2002, the date the Rome Statute came into force will be cognizable by the Court.

If a State becomes a Party to this Statute after its entry into force, the Court may exercise jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.<sup>22</sup>

2.3.3 In cases where the crime or complaint was referred by a State or initiated by the Prosecutor, the ICC may exercise its jurisdiction if one or more of the following states are parties to the Statute or have accepted the Court's jurisdiction:

2.3.3.1 A State on the territory which the alleged crime occurred;

2.3.3.2 A State of which the person accused of the crime is a national.

Those States which did not sign or ratify the Statute, although not under the Court's jurisdiction, may accept the jurisdiction of the Court and cooperate in the implementation of the Statute. Article 20 also provides that there can be no reservations to the treaty.

## 2.4 ICC: No immunities

The Rome Statute does not recognize immunities for crimes within the Court's jurisdiction, even if those crimes were deemed official acts or

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<sup>22</sup> Article 12, par. 2 states: If the acceptance of a State which is not a party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

committed by a head of state.<sup>23</sup> Under Article 27 of the Rome Statute, “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person.”

## **2.5 ICC: State Obligations**

Under the Rome Statute, States Parties have two basic obligations:

### **2.5.1 Complementarity.**

States have the primary responsibility of bringing those responsible for genocide, crimes against humanity and war crimes to justice and that it is the duty of every state to exercise criminal jurisdiction over those responsible for international crimes. Article 1 of the Statute states that the Court “shall be complementary to national criminal jurisdictions.” The ICC will only act when the State with responsibility over case, is unwilling or unable to prosecute the crime. States are therefore expected to enact and enforce national legislation to effectively implement the Rome Statute at the domestic level.

### **2.5.2 Cooperation.**

Under Article 86 of the Rome Statute, States Parties agree to cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court. Such cooperation may entail obtaining documents, locating and seizing assets of the accused, conducting searches and seizures of evidence, locating and protecting witnesses and arresting and surrendering persons accused of crimes in the Court. States should also cooperate with the Court in enforcing sentences by making detention facilities available to convicted persons.

## **2.6 ICC: No imposition of death penalty**

Under Article 77 of the Rome Statute, the Court may impose a maximum of 30 years imprisonment or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted

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<sup>23</sup> Rome Statute, Art. 27.

person. In addition to imprisonment, the Court may order a fine under the criteria provided for in the Rules of Procedure and Evidence and forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

## 2.7 ICC: Trigger Mechanisms

There are three ways by which an ICC investigation may be initiated or ‘triggered’:

2.7.1 A State Party may refer a ‘situation’ to the Prosecutor.

2.7.2 The Security Council may refer a ‘situation’ to the Prosecutor; Acting under Chapter VII of the UN Charter, the Security Council can refer cases to the Court when one or more of the crimes covered by the Statute appear to have been committed. In such cases, because the Council’s action under Chapter VII are of mandatory nature, the Court could exercise jurisdiction even when neither the State in whose territory the crimes have been committed nor the State of nationality of the accused is a Party.<sup>24</sup> This jurisdiction, resulting from a Security Council referral, enhances the role of the Court in enforcing international criminal law. At the same time, the Court’s jurisdiction is expanded to cover even non-party States.<sup>25</sup>

The Security Council, by adoption of a resolution under Chapter VII of the UN Charter may request that the Court defer an investigation or prosecution for a renewable period of 12 months. This deferral is to ensure that the Security Council’s peace-making efforts will not be hindered by the Court’s investigations or prosecutions.<sup>26</sup>

2.7.3 The Prosecutor may initiate investigation *moto proprio* or on his own, on the basis of information received from any reliable source as to the commission of crimes. This is where individuals or non-governmental organizations may file a ‘complaint’ with the Prosecutor

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<sup>24</sup> Setting the Record Straight: The International Criminal Court. United Nations Public Information, DPI/2012-October 1998

<sup>25</sup> Id.

<sup>26</sup> Questions and Answers on the International Criminal Court. CICC, July 30, 2002.

who in turn may conduct an investigation. The Prosecutor then applies for a warrant of arrest with the Court's Pre-Trial Chamber for the arrest and surrender of the suspect. If approved, a warrant of arrest shall be issued. The ICC recognizes and incorporates all the fundamental guarantees of the right to fair trial recognized in international law such as right against self incrimination, right to counsel, against coercion and duress and double jeopardy.

## **2.8 Composition and Administration**

Under Article 34, the Court shall be composed of the following organs:

### **2.8.1 Presidency;**

The President, together with the First and Second Presidents, shall constitute the Presidency, which shall be responsible for:

2.8.1.1 The proper administration of the Court, with exception of the Office of the Prosecutor;

2.8.1.2 The other functions conferred upon it in accordance with this Statute.

2.8.1.3 In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

### **2.8.2 Appeals Division, Trial Division and a Pre-Trial Division;**

The Appeals Division shall be composed of the President and four other judges. The Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges.

### **2.8.3 The Office of the Prosecutor**

Under Article 42, the Office of the Prosecutor shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. The office will be headed by a Prosecutor who shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. He/She shall be assisted by one or more deputy prosecutors.

#### **2.8.4 The Registry**

Under Article 43 of the Rome Statute, the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42. The office shall be headed by the Registrar who shall be elected by secret ballot by an absolute majority of the judges, taking into account any recommendation by the Assembly of States Parties.

#### **2.9 Judges**

There are 18 judges elected by the Assembly of States Parties according to the rules and procedures approved by the Assembly. Of the 18 judges elected, one third shall be selected by lot to serve for a term of three years, one third to serve for six years and the remainder to serve for a term of nine years.

Under Article 36(8)(a): “The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- 2.9.1 The representation of the principal legal systems of the world;
- 2.9.2 Equitable geographical representation; and
- 2.9.3 A fair representation of female and male judges.

States parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”

#### **2.10 Assembly of State Parties**

Under Article 112 of the Rome Statute, the Assembly of State Parties to this Statute, composed of one representative of each State Party, shall provide, among other things, management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court<sup>27</sup>.

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<sup>27</sup> Rome Statute, Art. 112

## **2.11 Budget**

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

2.11.1 Assessed contributions made by States Parties;

2.11.2 Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred to referrals by the Security Council.<sup>28</sup>

The Court may also receive and utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.<sup>29</sup>

## **3. Other Salient Features**

### **3.1 Crimes in internal armed conflict as War Crimes**

A tremendous achievement of the Rome Conference was to explicitly attach international criminal responsibility to certain war crimes committed in internal armed conflict. Given that most conflicts today are internal, the importance of this step cannot be overstated. Under the ICC statute, individual responsibility may arise as a result of serious violations of Common Article 3 to the 1949 Geneva Conventions. This article prohibits ‘violence to life or person,’ ‘outrages upon personal dignity.’ ‘taking of hostages’ or the denial of the right to fair trial to persons taking no active part in the hostilities that constitute a non-international armed conflict. The ICC Statute also categorizes twelve other acts as war crimes when committed in this type of conflict. Among them are ‘intentionally directing attacks against civilian population’ and intentionally directing attacks against personnel and materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission.<sup>30</sup>

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<sup>28</sup> Rome Statute, Art. 115

<sup>29</sup> Rome Statute, Art. 116

<sup>30</sup> Frequently Asked Questions About the International Criminal Court, Lawyers Committee for Human Rights, Washington D.C. 2002, p 4

### 3.2 Gender-based crimes as Crimes Against Humanity and War Crimes

The Rome Statute includes crimes of sexual violence such as rape, sexual slavery, enforced prostitution and forced pregnancy as crimes against humanity when they are committed as part of a widespread or systematic attack directed against a civilian population. They are also considered war crimes when committed in either international or internal armed conflict. The Rome Statute corrects some historic inadequacies with respect to accountability for violence against women during armed conflict as well as in times of peace. Whereas prior codifications of humanitarian law address sexual violence in terms of the need to protect honor or dignity and not as a grave breach under the Geneva Conventions, the Rome Statute explicitly concretizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and sexual violence as war crimes and crimes against humanity<sup>31</sup>. In addition, trafficking in ‘persons, in particular women and children’ and gender-based persecution are included as crimes against humanity.<sup>32</sup>

“The Rome Statute is the first international treaty to recognize a range of sexual and gender violence as among the most serious crimes under international law. The criminalization of violent sexual and gender-directed acts in the Statute as crimes against humanity and as war crimes, represents a significant step forward in the international community’s recognition of these crimes.”<sup>33</sup>

### 3.3 Victims’ Rights and Protection

The Rome Statute has also special provisions that pertain to victims’ rights and protection. “Victims before the ICC will have rights and assistance that have

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<sup>31</sup> Rome Statute, Art. 7(1)g & h, art. 8(2)(e)(vi). Compare Art. 46 of the Hague Convention (1907) referring to protection of ‘family honour’, which was intended to encompass rape, and Art. 27 of Geneva Convention IV which recognizes that women should be ‘protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.’

<sup>32</sup> Rome Statute, Art. 7. The list of crimes against humanity includes enslavement, defined as ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking of persons, in particular *women and children* and ‘persecution against any identifiable group or collectivity on...gender or other grounds...’

never before been incorporated into the mandate of an international court or tribunal.”<sup>34</sup> The Court has two units which deal primarily with victims’ rights: the Victims Participation and Reparations Unit and the Victims and Witnesses Unit. A Victims’ Trust Fund has also been established to gather funds that will be used to provide victims with reparations.

In the development of the framework for victims in the ICC, Carla Ferstman of REDRESS, an organization long engaged in the ICC process, particularly on victims’ rights, said: “When the time to draft the Statute came, a number of factors were in the minds of the drafters. First, they had in mind the *ad hoc* Tribunals for the former Yugoslavia and Rwanda. In these processes, many victims felt re-traumatized. There were few protections in place for victims in these jurisdictions. Victims were not given the opportunity to speak with an independent voice in these tribunals. They were a mere appendage to the Office of the Prosecutor bringing them forward as witnesses throughout the process. In the case of Rwanda, many of the victims were disillusioned and in a number of cases, they refused to participate further in the cases. From a theoretical standpoint, the drafters of the ICC Statute were also thinking of the many new developments among victims’ movements and national legal systems. At the international level, there was a desire to take into account the UN’s declaration which refers to the victims’ rights to protection, security and reparation. Furthermore, the experience of truth commissions in different parts of the world where victims have greater access to justice also played an important role in the drafting of the Statute and there was a desire to have a broader range of rights for victims.”<sup>35</sup>

She explained that in the Rome Statute, there are stronger provisions for victim protection. There is special mention of the need to take into account the particular needs of vulnerable groups such as children, disabled, elderly and the victims of sexual violence. In terms of victims’ participation, the new

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<sup>33</sup> Perez, L.G., Speech, Special NGO Convocation on the Occasion of the Inauguration of the Court, March 10, 2003.

<sup>34</sup> Kourula, E., Keynote Speech, First Asian Victims’ Forum on the International Criminal Court, 26-27 February 2004, Manila.

<sup>35</sup> Ferstman, C., Paper Presentation, First Asian Victims’ Forum on the ICC, February 26-27, 2004, Manila.

development is that victims and advocates have the right to submit information directly to the Office of the Prosecutor and victims can play a role other than prosecution witnesses throughout the process. This will have a tremendous effect over the proceedings. A balance was put in place between the participation rights of the victims, the rights of the defense and the right to a speedy and efficient trial. With the ICC, the victims have the right to be represented or to have a counsel and the various interests are balanced; i.e. when there is a large number of victims, a common legal representative or one lawyer to represent them may be possible. When there are conflicts between groups of victims, the court may develop procedures to make this an effective provision.

The Trust Fund for Victims was set up to raise funds for victims of cases before the ICC. It is “an essential part of the Court’s innovative mandate towards victims, and is an acknowledgement that justice for genocide, crimes against humanity and war crimes cannot be met by retribution alone.”<sup>36</sup>

The Trust Fund and the provisions in the Rome Statute relating to the victims are “series of unprecedented steps to fully acknowledge the rights and needs of victims.”<sup>37</sup>

### **3.4 Agreement on Privileges and Immunities of the Court (APIC)**

Since the ICC is independent from the United Nations, its personnel is not covered by the UN provisions for privileges and immunities when it goes out in the field to perform its function. There is a separate agreement that countries have to ratify to allow ICC personnel to function in the field. Adopted on September 9, 2002, APIC provides the same privileges and immunities afforded the UN and other international organizations personnel when doing their work in the field. Such privileges and agreements are crucial to the functioning of the ICC as they will protect officials and other persons involved in the Court like victims and witnesses from undue interferences by national authorities. APIC came into force last June 22, 2004 after the required 10 states have ratified.

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<sup>36</sup> Speech, His Eminence Archbishop Desmond Tutu, First Meeting of the Board of Directors, Victims Trust Fund, April 22, 2004, ICC, The Hague.

<sup>37</sup> Welcome remarks, Philippe Kirsch, First Meeting of the Board of Directors, Victims Trust Fund, April 22, 2004, ICC, The Hague.

In sum, the Rome Statute of the ICC is so far the most advanced instrument in international law. It is considered “monumental” in several aspects of international criminal law: the first permanent and independent international criminal court that would prosecute individuals who have committed crimes of most serious nature, a “milestone” in the struggle for women’s rights and a “breakthrough” in victims’ rights and protection. It is also considered as a “watershed” in the evolution of the conscience of humankind as it strives to manifest humankind’s collective effort to deter future crimes and put an end to impunity.

## CHAPTER 3

### THE UNITED STATES POSITION

### ON THE INTERNATIONAL CRIMINAL COURT

#### 1. The United States Participation in the ICC Process

Historically, the participation of the US in the whole process of the establishment of the ICC was meant to ensure immunity for its nationals from any prosecution by the Court.

“From 1995 through 2000, the US government supported the establishment of an ICC, yet one that could be controlled through the UN Security Council, or that provided exemption from prosecution for US officials and nationals”.<sup>38</sup>

From the words of the chief US negotiator to the ICC himself: “We have not achieved the silver bullet of guaranteed protection that many officials within the Clinton Administration had sought for so many years. But I argued that we had achieved the most that pragmatically could be achieved in light of all that we confronted, both internally and externally: a sophisticated matrix of safeguards that provided high degree of protection for US interests and, with the added leverage of signature and strong efforts in subsequent Preparatory Commission sessions, additional safeguards that would achieve the best possible relationship for the United States with the ICC.”<sup>39</sup>

He summed up the US achievements in the Rome negotiations as:

1. A strong regime of complementarity, or deferral to national jurisdiction that provides significant protection.

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<sup>38</sup> US Bilateral Immunity Agreement or So-Called “Article 98” Agreements: Questions & Answers, CICC, 2002.

<sup>39</sup> Scheffer, D. Staying the Course with the International Criminal Court, Cornell International Law Journal, November 2000-February 2001. David J. Scheffer was the head of the US delegations to the United Nations during negotiations for the ICC, formerly US Ambassador at Large for War Crimes Issues

2. A role preserved for the UN Security Council, including the affirmation of the Security Council's power to intervene to halt the ICC's work.
3. Sovereign protection of national security information that might be sought by the ICC.
4. Broad recognition of national judicial procedures as a predicate for cooperation with the ICC.
5. Coverage of internal conflicts and atrocities which comprise the vast majority of situations likely to confront the ICC.
6. Important due process protections, including the incorporation in the treaty regime of detailed rules of procedure and evidence.
7. Viable definitions of genocide, war crimes and crimes against humanity, including high thresholds for any investigation and prosecution and the incorporation in the treaty regime of elements of crimes.
8. Recognition of gender issues.
9. Acceptable provisions regarding command responsibility and superior orders.
10. Rigorous qualifications for judges.
11. Acceptance of the basic principle of State Party funding in relation to expenses incurred due to referrals by the Security Council, and voluntary contributions.
12. An Assembly of States Parties to oversee the management of the ICC and the Prosecutor's work.
13. Reasonable amendment procedures.
14. A sufficiently high number of ratifying states before the treaty can enter into force; namely, sixty governments have to ratify the treaty.
15. Explicit right to negotiate international agreements (bilateral or multilateral) to protect any US citizen from surrender to the ICC and, for example, to honor provisions of US Status of Forces Agreements.
16. Diplomatic immunity from surrender to the ICC pursuant to international law.

17. Defeat of proposal to include crimes of international terrorism and international drug trafficking in the ICC's jurisdiction.<sup>40</sup>

He argued for continued engagement of the US in the negotiations of the Preparatory Commission on the ICC, for non-opposition to the evolution and establishment of the ICC and for US initiatives that would make cooperation with the ICC desirable, protect US interests, and make US ratification more plausible in the future.”<sup>41</sup>

He also said that “The long war against terrorism will be incompatible with any American effort to oppose and dismantle the ICC. If only in its own self-interest, the United States will want to collaborate with its allies and friends around the world and explore the utility of the ICC as a potent judicial weapon in the war against terrorism.”<sup>42</sup>

A number of concessions were made, preventing the ICC from being as powerful and as encompassing as other states would have preferred, many of which were made in order to retain American involvement in the ICC. The dispute over the precise definition of the crime of aggression resulted in its watered-down recognition in the Rome Statute, with the proviso that the ICC would only exercise jurisdiction over this crime once a definition was adopted.<sup>43</sup> The scope of war crimes was allowed to cover internal armed conflicts but less restrictive than those provided in Additional Protocol II to the 1949 Geneva Conventions.

US also proposed to extend the privilege of a seven-year opt-out period under Article 124 of the Rome Statute to non-parties, but was rejected.<sup>44</sup> The US argued that the consent of the state of the accused's nationality should be an essential precondition to the ICC's exercise of jurisdiction. It proposed an amendment requiring both the consent of the territorial state and the state of nationality before the ICC could take

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<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Rome Statute, Art. 5(2) “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations..”

<sup>44</sup> Broomhall, B. *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, 2003.

cognizance of a situation. This proposal was rejected at the Rome Conference. The body adhered to the view that the consent of state of nationality was irrelevant, and thus nationals of third States could be tried by the ICC even without such third states having ratified the Statute.<sup>45</sup>

The US also attempted to include an ‘official acts of exemption’ wherein the ICC would not be able to assume jurisdiction over nationals of non-parties when the state of nationality acknowledges that the accused were acting under its ‘over-all direction,’ but was likewise rejected at Rome.<sup>46</sup>

In addition, the US proposed for the Rules and Procedure and Evidence in December 1999 to add three broad factors to be considered in determining admissibility under Article 17 of the Rome Statute: 1) independence of the country’s justice system; 2) past practice of that system and 3) whether the state in question has communicated to the ICC that the acts in question were performed in the course of official duties. Again, this was rejected.

Since all the attempts in December 1999 to weaken the jurisdiction of the Court failed, the US took a more direct approach in the March 2000 PrepCom. This time, the point of contention was the Relationship Agreement between the UN and the ICC. The US plan was to insert a proviso into the Relationship Agreement that would prevent its nationals from being surrendered to the ICC, thus resurrecting a proposal that has been previously rejected, that of the ‘official acts of exception’. It suggested a situation where the ICC could not proceed with a request for surrender where the national of non-state party is involved, and the state of nationality acknowledges that such individual was acting under its ‘over-all direction’, unless either the State of nationality consents, or the Security Council passes a Chapter VII resolution authorizing the continuation of the proceedings.<sup>47</sup> This provision was formally proposed in the June 2000 PrepCom session, where the US broadened the scope of international agreement to also cover the international obligations of the requested State. Despite the objectionable nature of this proposal, the Rule of Procedure was adopted, thus granting the US leeway to negotiate insertion of exemption provisions in the Relationship Agreement:

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<sup>45</sup> Id.

<sup>46</sup> Id.

The Court may not proceed with request for the surrender of a person without the consent of sending State, if under Article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.

However, a proviso was included in the PrepCom's Summary of Proceedings, to wit:

It is generally understood that Rule (195, sub-rule 2) should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State.<sup>48</sup>

There were other last minute amendments that the US tried to insert but the chair of the committee spearheaded a 'no action' vote on the proposals to prevent the collapse of the entire regime of negotiations.<sup>49</sup>

The concessions that US got were not enough to dispel its fears that if American troops commit war crimes in another country, that country could consent to their being tried in The Hague, unless the US agrees to investigate the case itself. And other veto powers could block a Security Council resolution to defer a case. In short, US control is less than fully assured. This pleased neither the Pentagon nor Senate Foreign Relations Committee Chair Jesse Helms who declared that any treaty to create a court that could conceivably prosecute Americans would be 'dead on arrival' on Capitol Hill.<sup>50</sup>

Even before formal negotiations commenced on the draft statute in 1996, the US attempted to thwart the process toward a permanent and independent court altogether. In his accounts of the early stages of the resurrection of the idea in the corridors of the United Nations, Prof. Michael Scharf describes his efforts as the State Department

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<sup>47</sup> Id.

<sup>48</sup> Harnoff, F. & Mochochoko, P., *International Cooperation and Judicial Assistance*, in *The International Criminal Court: Elements of Crimes and Rules of Procedures*, Lee, Roy, et al. eds., 2001.

<sup>49</sup> Bassiouni, *op.cit supra* note 39 at 630.

<sup>50</sup> Cassel, D. *Why We Need the International Criminal Court*, *The Christian Century*, May 12, 1999.

official assigned to the issue of a permanent international criminal court to make the initiative 'go away'.<sup>51</sup> To do so, the US pushed to have the issue diverted to the International Law Commission, which is well-known for its snail-like pace. But the eruption of violence in the Former Yugoslavia and later in Rwanda served to speed up the progress and intensify the demand for a permanent institution, despite US objections.

Through diplomatic channels, the US efforts in Rome were accompanied by an intensive Defense Department strategy of pressuring its counterparts in other countries to support US positions on the ICC. In a now famous exchange, William Cohen, then US Defense Secretary, was reported to have contacted his German counterpart to indicate that non-support of US position would have implications for US military support in Europe.

The German delegation at the time was arguing for the ICC to have universal jurisdiction. According to various reports, the US Secretary of Defense threatened that the US might 'retaliate by removing its overseas troops, including those in Europe' if Germany succeeded in its efforts to obtain universal jurisdiction.

In the post-Rome negotiations on the Rules of Procedure and Evidence and the Elements of Crimes Annex, the State Department commenced a formal demarche on other governments. A letter by Clinton's Secretary of State Madeline Albright again used the threat of future US opposition to the ICC, albeit more subtle than Cohen's, in the event US 'objectives' were not taken seriously in the talks. Throughout the negotiations, the US delegation and US State and Defense department officials repeatedly pointed out the enormous financial support and technical assistance the US provided to the existing tribunals to suggest that lack of US support for the Court would lead to its demise.

According to David Scheffer, Ambassador-at-large for War Crimes Issues and Head of the US Delegation to the Diplomatic Conference on the Establishment of the ICC, "No country has shown as much support for the international criminal tribunals for the Former Yugoslavia and Rwanda as the USA...We have been hoping, as a potential state party of an international criminal court, that the full weight of the

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<sup>51</sup> Scharf, M. The Politics Behind the US Opposition to the International Criminal Court, *New England International and Comparative Law Annual*, Vol 5, 1999.

United States could be used to support its critical investigations and prosecutions in the future.”<sup>52</sup>

Despite the US rejection of the statute at the Rome Conference, intensive diplomatic pressure tactics and efforts to alter the statute long after it had been adopted, President Clinton opted to sign the Rome Statute hours before the period for signature expired on December 31, 2000. In a treaty law, signature signifies an intent to ratify and not to engage in activities or enact laws that would go against the provisions of the treaty. In a last minute political maneuver, the outgoing President simultaneously backtracked from the prospect of US ratification at the same time that he authorized signature of the treaty.

In his statement made on the occasion of signature, Clinton stated, ‘I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.’ The fundamental concerns were of course the ‘significant flaws’ of the Statute which would mean that the Court, once it came into existence, ‘will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not.’<sup>53</sup>

In sum, it was clear that the only aim of the US in its participation in the ICC process was to ensure that it would have exclusive jurisdiction over its nationals who committed crimes cognizable by the ICC. Under President Clinton, US tried hard to maneuver to get as many concessions as possible that led it to sign on the last day of signature on December 31, 2000, but with a statement by the President himself that he would not endorse the Rome Statute for the Senate’s advice and consent “until our fundamental concerns are satisfied.” Subsequently, when President Bush took over, US withdrew its signature on May 6, 2002 as the administration claims the ICC could be used as a forum for politically motivated cases against the US. At this point, US must have realized it could not easily get its immunity agenda through this process, thus the decision to “unsign”.

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<sup>52</sup> Scheffer, D. Staying the Course with the International Criminal Court, Cornell International Law Journal, November 2001-February 2002.

<sup>53</sup> Id.

## 2. Grounds for US Opposition to the ICC

The US opposition to the ICC can be summed up as the following:

### 2.1 Limited Security Council Role

The US had long hoped and lobbied that the Court be made dependent on the UN Security Council for the case that could come before it.<sup>54</sup> However, the role of the Security Council was greatly circumscribed in the final text of the Rome Statute. It is in this aspect – the degree of independence of the Council – that led the US to oppose the permanent court at the same time that it fully supported the creation and maintenance of the *ad hoc* tribunals. Had the ICC been more dependent on the Security Council for the cases that could come before it, the US, as one of the five permanent members with veto power would have been situated nicely in terms of its ability to insulate its nationals from the jurisdiction of the Court. Unlike a permanent international criminal Court, there was no risk of American personnel being prosecuted before the *ad hoc* tribunals since their subject matter, territorial and temporal jurisdiction were determined by the Security Council, which the US could control with its veto.

### 2.2 The Superpower Complex

Once it became clear that the ICC would not be dependent on the Security Council, the US then pursued the possibility of explicit exceptions for nationals of non-states parties. In the quest for special treatment in the new scheme of international justice, US officials argued that, as the sole remaining superpower, the US was expected to deploy its military to ‘hot spots’ more often than other countries. That would make it more vulnerable to politically motivated accusations and negotiations. This concern was addressed by other delegations in the negotiations and was the reason for several articles in the Statute intended

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<sup>54</sup> See Scharf 1999. The author, who at one time was assigned as the US State Department official assigned to the ICC negotiations, states: “The Rome Diplomatic Conference represented a tension between the United States, which sought a Security Council-controlled Court, and most of the other countries of the world which felt no country’s citizens who are accused of war crimes or genocide should be exempt from the jurisdiction of a permanent international criminal court.”

to provide a series of checks and balances on the prosecutor's authority to self-start cases.<sup>55</sup>

As a result of this, the Prosecutor must obtain the authorization of the Pre-Trial Chamber prior to formally initiating an investigation.<sup>56</sup> In addition, the Security Council may elect to defer the investigation of a case for a period of 12 months.<sup>57</sup> While these mechanisms were added largely to accommodate the US concerns, it eventually became clear that none of the concessions would suffice unless the US got complete and explicit assurance that its nationals would never be subject to the Court's jurisdiction.

It is important to emphasize that the idea that a foreign court might have jurisdiction over persons who commit crimes on foreign territory is not a new concept nor unique to the ICC. Indeed, territorial jurisdiction, the ability of a state to prosecute crimes that occur in its territory is one of the oldest and most sound bases of jurisdiction.<sup>58</sup> Territorial jurisdiction is often only superceded by an express agreement. It is for this reason that countries and international organizations often pursue explicit language bestowing criminal jurisdiction on the state of nationality of an accused for acts committed on foreign territory in bilateral or multilateral treaties such as Status of Forces Agreements (SOFAs).<sup>59</sup>

The ICC is a variation on this principle. When the states join the Rome Statute, they extend jurisdiction over crimes of genocide, war crimes and crimes against humanity occurring on their territory to an international tribunal at the same time as confirming their own jurisdiction over such acts.

The irony is that had the US been successful in its attempts to correct the purported flaw in the treaty, i.e. had the flaw been fixed so that nationals of non-party states could never be brought before the ICC without consent of the state of nationality if they committed crimes on the territory of a state party, there

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<sup>55</sup> Scharf, M. *The Politics Behind the US Opposition to the International Criminal Court*, *New England International and Comparative Law Annual*, Vol. 5, 1999.

<sup>56</sup> Rome Statute, Art. 15.

<sup>57</sup> Rome Statute, Art. 16.

<sup>58</sup> See La Haye, E. *The Jurisdiction of the ICC: Controversies over the Preconditions for Exercising its Jurisdiction*, 46 *Netherlands International Law Review*, No. 1, 1999.

<sup>59</sup> Status of Forces Agreement, also known as SOFAs, are agreements governing the placement and conduct of military contingents in foreign territories.

would be every incentive for the United States and other countries to remain outside the Statute. According to Scharf, had the US amendment been adopted, the US could have declined to sign the Rome Statute, thereby ensuring its immunity from the second track of the court's jurisdiction, but at the same time permitting the US to take advantage of the first track of the Court's jurisdiction (Security Council referrals) when it was in America's interest to do so.

### **2.3 Invasion of National Sovereignty**

According to Senator Helms, "The International Criminal Court declares that the American People are under its jurisdiction – no matter what the US government says. The delegates in Rome included a form of 'universal jurisdiction' in the court statute, which means that even if the US never signs the treaty, or if the Senate refuses to ratify it, the countries participating in this court will still contend that American soldiers and citizens are within the jurisdiction of the court."<sup>60</sup>

Former US Secretary of State Henry A. Kissinger has also made similar mischaracterization of the ICC and has skipped over the nuances of its jurisdiction in complaining that because it has territorial jurisdiction, it had universal jurisdiction.<sup>61</sup>

Arguments such as these overlook the Rome Statute's carefully crafted complementary scheme which situates the ICC as a Court of last resort which would come into play only when the national system has been unwilling or unable to act and the pre-conditions of territoriality and nationality which were built into the statute as a curb on outright universal jurisdiction. Thus the Court is intended to complement national systems rather than infringe upon them while narrowing the jurisdictional gaps, practical and substantive, that have long allowed for impunity.<sup>62</sup>

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<sup>60</sup> Helms 1998.

<sup>61</sup> Kissinger, H. The Pitfalls of Universal Jurisdiction, Foreign Affairs. July-August 2001.

<sup>62</sup> Rome Statute, Art. 13.

## 2.4 Due Process

Another argument put forward by the US opponents was that the Rome Statute did not provide the level of due process protections required by the US Bill of Rights, such as presumption of innocence, right to remain silent, right to trial by jury, right to defense counsel of one's choosing, right to speedy and public trial and cross examination. This argument is also unsupportable as many US observers and legal experts have found the protections in the Rome Statute meet or exceed those of the US Constitution. In a report published in connection with a resolution calling for the US to accede to the Rome Statute, the American Bar Association observed:

“The due process provisions of the Rome Statute are somewhat more detailed and more comprehensive than those found in the Bill of Rights...They are derived almost verbatim from Article 14 of the International Covenant on Civil and Political Rights, which the US has ratified. These rights are also substantively similar to the rights protected by the European Convention on Human Rights. Both these post-World War II instruments were heavily influenced by the American Bill of Rights. It is safe to say that the list of due process protections contained in the Rome Statute is the most comprehensive which has so far been promulgated.<sup>63</sup>

The US position comprises three main actions that the Bush Administration is pushing aggressively to undermine the ICC. *First* is the unsigned of the Rome Statute; *second* is the use of UN Security Council to adopt resolutions to seek immunity for its peacekeepers and *third* is undertaking bilateral immunity agreements (BIA) with as many countries worldwide .

## 3. US Position: The Unsigned

When the Bush administration took over, it undertook a high-level policy review of the Statute. A decision about the Bush administration's strategy with respect to the ICC was expected in September 2001 but the discussions were eclipsed by the events of September 11, 2002. On May 6, 2002, US 'unsigned'. The Bush Administration claims that the ICC could be used as a forum for politically motivated prosecution

despite the ample measures and safeguards negotiated during the drafting process of the Rome Statute.

The United States government, in a number of statements and interviews tries to justify its position on unsigned and non-cooperation with the ICC. It made clear that it was embarking on a worldwide campaign to undermine the ability of the Court to exercise its power and jurisdiction over nationals of non-states parties accused of genocide, crimes against humanity and war crimes on the territory of states parties to the Rome Statute.<sup>64</sup>

Benjamin Ferencz, an American prosecutor at the Nuremberg war crimes trials after World War, in an open letter entitled “The Public is Being Misled About the ICC” insists that the US threat to withdraw its UN peacekeeping forces unless the newly created international criminal court is divested of any authority to try Americans “is the latest maneuver of political conservatives intent on destroying the court before it gets started. The main justification advanced for US intransigence is that US military personnel and peacekeepers may be subjected to politically motivated prosecutions by the new tribunal. There is no such danger.”<sup>65</sup>

He went on to support his point by citing eleven safeguards to ensure an independent, fair trial by the Court:

18. Only crimes committed after July 1, 2002 can be considered.
19. Jurisdiction of the ICC is limited to genocide, crimes against humanity and major war crimes of concern to the international community as a whole.
20. 18 highly qualified judges, male and female, sworn to uphold the law and justice, elected from those many nations that have ratified the treaty creating the court.
21. No investigation can be started by the Prosecutor without prior authorization by a three-judge panel.

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<sup>63</sup> American Bar Association Resolution 2001, p 8.

<sup>64</sup> A non-state party that incites another state to violate its obligations under international law as a state party or as a signatory to a treaty by entering into a new agreement itself violates international law and under the principle, *nullis commodum capere de sua injuria propria*, cannot claim any rights under that new agreement. See Bin Cheng, *Principles of International Law* 149-160 (London 1953).

<sup>65</sup> Open Letter, Ferencz, B. 8 July 2002.

22. The accused's country must be informed and the case transferred to them if they wish to try the suspect.
23. Only leaders responsible for planning or perpetrating the major crimes are the intended targets and only if their own country is unable or unwilling to give them a fair trial.
24. The prosecutor must prove that the defendant knew the act was criminal and intended the unlawful consequences that followed. Guilt must be established beyond reasonable doubt.
25. Proceedings must be transparent for all the world to see.
26. At any time, in order to prevent interference with pending peace negotiations, the Security Council can direct the ICC to cease and desist for 12 months. That period is renewable without limit.
27. The tribunal will have the entire Assembly of State Parties looking over its shoulders at all times. They control the budget and can fire anyone who might be tempted to politicize the office.
28. The ICC has no police force or enforcement mechanism. Its acceptance depends upon its reputation for integrity and competence. Politicization of the Court would amount to its suicide."<sup>66</sup>

He said that the US remained unsatisfied with these safeguards and seeks to paralyze the Court permanently. He also reiterates that: "The American Bar Association, the New York Bar Association and the leading international lawyers in the country, including every living former Nuremberg prosecutor, all agree that it is in the interest of the US and its military to support the ICC. I believe the majority of the American public, if they knew the truth, would also support that conclusion."<sup>67</sup>

"The US inspired the world at Nuremberg with our insistence that never again would crimes against humanity be allowed to go unpunished. We weaken our standing in the world when we insist that law applies to everyone else but not to the United

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<sup>66</sup> id. para 2-6

<sup>67</sup> id. para 7

States. No nation and no person has a sovereign right to commit crimes against humanity with impunity.”<sup>68</sup>

He further explained that arrogant unilateralism does not create world leaders nor does it encourage others to help the Americans in combating terrorism. “The best way to protect our military, and the peace of the world, is through universal and equal enforcement of the rule of law for everyone.”<sup>69</sup>

According to American experts, ‘The ICC Treaty embodies deeply held American values. The establishment of the Court responds to the moral imperative of halting crimes that are an offense to our common humanity. The ICC promises to promote respect for human rights; advance the rule of law around the world, both domestically and internationally; reinforce the independence and effectiveness of national courts; and uphold and strengthen international norms.’<sup>70</sup>

They state further: ‘Since World War II, the United States has been a leader in expressing these aspirations for justice. With these values as its foundation, the ICC was created to advance objectives that are quite consistent with the long-term US national interest in a peaceful, democratic and integrated global system. The Rome Treaty, promises to advance US interests in three important ways:

*First*, the ICC will help to deter future gross violations. It will not halt them completely, of course. But overtime, its proceedings are likely to cause prospective violators to consider the likelihood that they will face prosecution for their actions. The international tribunals for the Former Yugoslavia and Rwanda, backed in recent months by more vigorous enforcement actions and the active cooperation of other states, now have custody of dozens of former senior government officials, high ranking officers, death squad leaders and detention camp commanders.

Even in cases where indicted war criminals have eluded capture, the tribunal’s effect in curbing atrocities is already apparent in the Former Yugoslavia. Leading architects of ethnic cleansing, such as Radovan Karadzic and Ratko Mladic, have not

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<sup>68</sup> id. para 9

<sup>69</sup> id. para 10

<sup>70</sup> In The National Interest 2001 Human Rights Policies for the Bush Administration, Sarah B Sewall, Carl Kaysen and Michael Scharf in ‘The US and the ICC: An Overview and in Sewall and Kaysen, eds, ‘The United States and the International Criminal Court: National Security and International Law, Rowman & Littlefield, 2000

yet been brought to trial, but their indictment has limited their ability to act. They have been driven underground, which has allowed more moderate political forces to emerge and reduced the risk to US and other international peacekeepers in Bosnia. And by reaffirming the notion of individual rather than collective criminal responsibility, and establishing a process in which justice can be achieved without violence, the Yugoslav Tribunal can help short-circuit cycles of counter violence and retribution.

*Second*, by contributing in this way to a more stable and peaceful international order, the ICC can help promote US security interests. What is already true of the Yugoslav Tribunal will be much more true of the ICC, because of its broader jurisdiction, its ability to respond to Security Council referrals and the perception of its impartiality. The court will promote the US interest in deterring regional conflicts that sap diplomatic energies and drain resources in the form of humanitarian relief and peacekeeping operations. Massive human rights violations almost always have larger ramifications in terms of international security and stability. These include widening armed conflict, refugee flows, international arms and drug trafficking, and other forms of organized crime, all of which involve both direct and indirect costs for the United States.

*Third*, the ICC will reaffirm the view that international law matters, including those laws that protect Americans overseas. For many people in the US, 'international law' is seen either as an abstraction or an unwelcome intrusion into our sovereign affairs. But as Abram Chayes, former State Department legal adviser, wrote shortly before his recent death: "The United States has traditionally maintained the importance for its own national security of an international system governed by the rule of law. Skeptics have often dismissed this invocation of an international rule of law as the utopian rhetoric of a few internationalists. In the post-Cold War world, however, it is hardheaded realism. An increasingly interdependent world is bound together by law. Much of what the United States can and must do to enhance its own prosperity and well-being depends on reliably functioning legal frameworks.

The ICC should be an integral part of the effort by states to expand and strengthen cooperative arrangements and rules. These also include rules to stimulate and regulate the global economy, protect the environment, control the proliferation of

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weapons of mass destruction and curb international criminal activity. The United States has long been a leading exponent, and will be a prime beneficiary, of this growing international framework of cooperation.

If the US resorted to political means to evade the court's jurisdiction, this would of course have serious diplomatic costs as it would be an embarrassment and it would undermine the credibility that is the foundation of US global leadership. Yet ironically, these precisely are the kind of costs that the US has already incurred as a result of its pursuit of exemption. The current levels of disquiet among NATO allies about US unilateralism would only increase if the US were to move into a posture of open opposition to the ICC. Worse, this kind of antagonism might well produce the very outcome that critics of the ICC fear – namely a court with a more unfriendly attitude toward the US.

On the other hand, continued engagement with the ICC process, as a non-state party to the treaty, would reaffirm the standing US commitment to uphold international humanitarian law. The US could adopt such a posture secure in the knowledge that, in the unlikely event that an alleged crime by an American were brought to the court's attention, the ICC Statute would obligate it to defer to the US military justice system to carry out a good faith investigation. The marginal risk that is involved could then simply be treated as part of the ordinary calculus of conducting military operations, on a par with the risk of incurring casualties or the restraints imposed by the laws of war. The preparation and conduct of military action inherently involve risk assessment, and the marginal risk of exposure to ICC jurisdiction is far outweighed by the benefits of the court for US foreign policy.

Mary Robinson, in an interview with CNN on 22 July 2002, said: "I was extraordinarily pleased when the Statute of the International Criminal Court was adopted in Rome. ...And I felt this is the most important new institution for human rights in the new century...I have greatly regretted the unsigning of the United States, which was a very sad step in international relations, to unsign a serious international commitment. It also can generate an uncertainty about when countries ratify international instruments, can they rethink that? And even more so, the whole debate in the Security Council and the compromise that was reached. The compromise was better than some of the earlier thinking. But it's still very much a compromise, and is

not in full conformity with international law. And now we have to focus on strengthening the support for the Court and the integrity of the work of the Court.”<sup>71</sup>

The European Union, one of the most active proponents of the ICC, in a statement issued on 13 May 2002 states: “The decision by the administration of President George W. Bush could have negative consequences for the application of multilateral treaties and in a more general sense, for the rule of law in international relations.”<sup>72</sup> The (then) 15-member bloc maintains that “the US worries that the Court would be used against the United States for political reasons were unfounded”.<sup>73</sup> It also said “the US decision also jeopardized what it called the recent global trend in favor of holding individuals responsible for serious crimes that affect the international community, something to which the United States has firmly committed itself.”<sup>74</sup>

European Commissioner for External Affairs Chris Patten, in response to the US’ fears over the new Court, underlines the key concerns of the US saying that such fears were all taken up in the Rome treaty. He also argues that US opposition to the ICC threatens international stability because it poses practical problems for the renewal of UN peacekeeping mandates around the world.<sup>75</sup>

#### **4. US Maneuvers at the UN Security Council Resolutions**

Shortly following the announcement of ‘unsigned’ on May 6, 2002, the US, in its capacity as permanent member of the Security Council, announced that it would oppose the renewal of the UN Security Council mandates for all peacekeeping operations unless the Council granted immunity from prosecution by the International Criminal Court for all US peacekeeping personnel. Firing a salvo across the UN at the time of the renewal of the East Timor peacekeeping operation, the US threat escalated in June 2002 into an intense confrontation at the Security Council.

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<sup>71</sup> Interview, Mary Robinson, 22 July 2002

<sup>72</sup> Statement issued by the European Union, 13 May 2002

<sup>73</sup> Id. para 3

<sup>74</sup> Id. para 5

<sup>75</sup> Washington Post, Why Does America Fear This Court?, Chris Patten, 9 July 2002, p A21

On June 30, 2002, the US vetoed the renewal of the Bosnia and Herzegovina peacekeeping mission and further threatened to shut down all UN peacekeeping operations unless their demands for ICC immunity were met.<sup>76</sup>

Despite vocal opposition from representatives of over 50 governments, the Security Council adopted Resolution 1422 on July 12, 2002. Security Council Resolution 1422:

29. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former official 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;
30. 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;
31. Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations[.]”<sup>77</sup>

#### **4.1 Responses from the International Community**

With more than 120 nations attending the final ICC Preparatory Commission meetings at the UN headquarters, and the Rome Statute slated to enter into force only days later, the US encountered fierce opposition from many of its closest allies and scores of other nations. These countries were outraged that the US would pit international peacekeeping against international justice. They strenuously objected to the US effort to misuse the Security Council and UN Charter VII authority to amend a treaty that the US opposed.

European Commission’s Chris Patten said that the UN cannot intervene nor authorize military intervention in any specific situation just to end up by denying the very values upon which the Organization is founded. He

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<sup>76</sup> Fact Sheet: Chronology of the Adoption of Security Council Resolutions 1422/1487, CICC

<sup>77</sup> UN Security Council Resolution 1422, 12 July 2002

emphasized that the Security Council cannot alter international agreements that have been duly negotiated and freely entered into by States Parties. In conclusion, he said that “We believe that renewal of peacekeeping mandates should not be made hostage to any country’s individual perceptions and that a provisional ‘*modus operandi*’ should be established.”<sup>78</sup>

During the open meeting at the Security Council on the situation of the Bosnia Peacekeeping mission, thirty-two representatives of states took the floor to make statements in response to the US proposal to exclude peacekeepers from the jurisdiction of the ICC. The issue is being considered in the context of the UN Mission in Bosnia and Herzegovina.

Among them, Ambassador Gelson Fonseca, Jr. of Brazil: “In our view this predicament is based on a false dilemma. Maintenance of international peace and security and the repression of heinous crimes committed against humanity are not – and by all means cannot be viewed as if they were two conflicting objectives. Brazil has already taken its own decision with respect to the ICC and fully respects what others may decide in accordance with their own interest and perceptions. We were nevertheless struck by the very unusual decision to ‘unsign’ an international legal instrument negotiated in good faith.”<sup>79</sup>

Ambassador Paul Heinbecker of Canada states” “My government is deeply worried by discussions that have taken place in Security Council concerning sweeping exemptions for peacekeepers for the most serious crimes known to humanity. The current debate has been mischaracterized as a choice between peacekeeping and the ICC. In fact, the stakes are actually different and even higher. Fundamental principles of international law and the place of those principles in the conduct of global affairs are in question.”<sup>80</sup>

China, though not yet a state party expressed its support to the independence, impartiality and competence of the ICC that enjoys universality. It believes that a very important principle is complementarity. “If the country concerned has brought the person concerned to justice through national

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<sup>78</sup> Id. para 10

<sup>79</sup> Excerpts from the open meeting at the Security Council on the Situation of the Bosnia Peacekeeping Mission, CICC, 10 July 2002

<sup>80</sup> Id. para 11

jurisdiction, then the ICC jurisdiction does not exist. China does not want to see the peacekeeping operations affected in any negative way.”<sup>81</sup>

Malaysian Ambassador Hasmy Agam echoes the concern of his colleagues on the importance of upholding the fundamental principle of international law. “It is vitally important for the Council not to take a decision that would have the effect of changing or amending the terms of an international treaty, which the United States draft resolution sets out to do in respect of the Rome Statute... Malaysia believes that giving immunity to the peacekeepers would send the message that they are above the law – which is wrong and unacceptable. No category of persons serving in the UN peacekeeping operations should be above the law.”<sup>82</sup>

UN Secretary-General, Kofi Annan wrote a letter to US Secretary of State Colin Powell expressing his serious concern over the developments in the Security Council with respect to the extension of the UN Mission to Bosnia Herzegovina (UNMBH) and the issue that the US has raised in that connection following the July 1 2002 entry into force of the Rome Statute. He expressed the fear that the whole system of the UN peacekeeping operations is being put at risk if the US pursues its proposal invoking the procedure laid down in Article 16 of the Rome Statute which in effect allows the Security Council to intervene to prevent the Prosecutor of the ICC to proceed with a particular case. “The article, which is meant for a completely different situation, is now proposed to be used by the Security Council for a blanket resolution, preventing the Prosecutor from pursuing cases against personnel in peacekeeping missions.” He asserts that, “the establishment of the ICC is a major achievement in the efforts to address impunity, and reactions to any attempts to undermine the Rome Statute will be very strong”.<sup>83</sup>

Secondly, he asserts that the method suggested in the proposal “...flies in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty.”<sup>84</sup> He suggests that

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<sup>81</sup> Id. para 15

<sup>82</sup> Id. para 40

<sup>83</sup> Letter of Kofi Annan to Colin Powell, para 5, 3 July 2002

<sup>84</sup> Id. para 8

“the US at the present juncture relies on the fact that the jurisdiction of the ICC, as a matter of law, is overtaken by the jurisdiction of the International Tribunal for the former Yugoslavia. In reality, the situation with respect to international criminal jurisdiction in the territory of the former Socialist Federal Republic of Yugoslavia is the same after July 1 2002, as before that date.”<sup>85</sup>

As one possible solution, Mr. Annan proposed “for the Security Council to reconsider the extension of UNMIBH as proposed on June 30, adding this time a preambular paragraph, in which the Council notes that the International Tribunal for the Former Yugoslavia, which is established under Chapter VI of the Charter of the United Nations as a subsidiary organ of the Security Council, has primacy to exercise, on behalf of the international community, international jurisdiction over genocide, war crimes and crimes against humanity committed in the territory of the former Socialist Federal Republic of Yugoslavia.”<sup>86</sup>

He also suggested that “there might be other solutions to avoid that the Council is precipitated into adopting a resolution, the effects of which may soon be deeply regretted by all.”<sup>87</sup>

In June 2003, US proposed the renewal of Resolution 1422 without modifying its text. The Security Council heard statements on behalf of over 70 member states that voiced their support for the ICC and their opposition to the automatic renewal of said resolution. At the time of the vote, three Security Council members: France, Germany and Syria, abstained. The remaining votes were sufficient to renew the Resolution, which was adopted for an additional months as Resolution 1487.

Resolution 1487 continues to be a source of contention within the UN community. In a statement issued by UN Secretary General Kofi Annan, he said: “...But allow me to express the hope that this does not become an annual routine. [...] If that were to happen, it would undermine not only the authority of the ICC, but also the authority of the Council and the legitimacy of United Nations peacekeeping.”

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<sup>85</sup> Id. par. 11

<sup>86</sup> Id. par. 12

<sup>87</sup> Id. par. 13

On August 13, 2002, William R. Pace, convenor of the CICC declared that “the threat to cut off military aid and the coercive action undertaken recently in the Security Council to get exemption for peacekeepers, are part of multi-pronged effort of the US government to undermine international justice, international law and international peacekeeping.” He added, “US spokespeople say these agreements are allowed under the statute that creates the ICC, but legal experts from leading NGOs and from governments disagree. Now the US is trying to bully governments into signing these agreements, just as it coerced them to agree to exempt US peacekeepers from the ICC in the Security Council last month despite consensus that this would be in violation of international law, the UN Charter and the Rome Statute. International law cannot be subordinated to the will of one country.”<sup>88</sup>

Mr. Hans Corell, legal counsel of the UN since 1994 said: “In my view, the two resolutions deal with a non-issue. Many think that the resolutions damage the ICC. This may be so but this is not the main problem. From their august position, the ICC judges can look down upon these efforts with a melancholic smile; it is inconceivable to stop proceedings in the unlikely event that a peacekeeper is brought before the ICC is obvious: a new resolution under Article 16 that addresses the particular case.”<sup>89</sup>

He said further that the more serious issues are the following: “First, in order to achieve this meaningless resolution, the US uses threats and exerts tremendous pressure on the other members of the Council. Why embarrass them in this way? And what does this do to the credibility of the Council – an institution that the US often relies on when it comes to real issues like peace and security, the fight against terrorism, etc.? Second, the US insisted on the resolution although the administration knew it addresses a non-issue. Why? Because of its hostile position vis-à-vis the ICC? If so, then the question arises what this does to the administration’s credibility. If it is prepared to throw in

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<sup>88</sup> Coalition for the International Criminal Court, *Experts Available: US Threatening to Withhold Military Aid over ICC Experts Refute Legality of Immunity Agreements US is Seeking, 13 August 2002*. See also Coalition for the International Criminal Court, *Bilateral Agreements proposed by US government, 23 August 2002*

<sup>89</sup> Corell, H., *A Question of Credibility*, 2004

such weight behind a resolution with ulterior motives, what signal does it send? What should one think when they raise other issues? Is it serious this time – or? And he concluded by saying “It is time to stop this nonsense!”<sup>90</sup>

On June 23, 2004, after weeks of tense negotiations, US was forced to withdraw its proposal for renewal of Resolution 1487 for lack of votes to have it passed for another 12 months.

The mounting opposition to the US proposal has apparently been due to the cumulative effects of the US “arm-twisting” and “bullying” tactics in the past years in trying to pressure countries to vote in favor of the Security Council resolutions and in getting signatures for the bilateral immunity agreements. Moreover, the more recent scandal in Abu Ghraib Prison involving American troops and the influence of the UN Secretary General who made a strong appeal to all members of the Security Council stating that “extending the exemption once more would contradict the efforts of the United Nations – including the Council itself – to promote the rule of law in international affairs” really made the difference. It is also worth mentioning the efforts of the global civil society groups that put pressure on the governments to defend the integrity of the Court and not to buckle down to the pressures of the US in its desperate bid to exempt its citizens from any prosecution by the ICC.

With this, global support for the ICC was reaffirmed and the legitimacy of the Security Council was preserved.<sup>91</sup>

The reasons for US rejection of this historic development demonstrate with startling clarity the double standard unabashedly applied by the very country that gave the world the idea of the rule of law. At the end of the day, the US opposition boils down to one problem: US nationals would be subject –along with the rest of the world – to the jurisdiction of an international court.<sup>92</sup>

The current direction of the US policy is not only to keep US citizens out of the court’s jurisdiction but also to make it as difficult as possible for participating countries to cooperate with the court. The UN Security Council resolution is only part of the US’ current strategy. The UN Security Council

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<sup>90</sup> Id.

<sup>91</sup> Media Advisory, CICC, June 23, 2004, New York.

resolution only applies to US nationals serving as part of the UN organized or sponsored peace-keeping missions. In an attempt to ensure the broadest exemption of US nationals from being brought before the ICC, the US is vigorously pursuing governments around the world and asking them to enter into bilateral impunity agreements which provide that governments will not surrender or transfer US nationals to the ICC if requested by the Court.

## 5. The Bilateral Immunity Agreements

To pursue its position further, the US government embarked on a campaign to seek bilateral immunity agreements (BIAs) with countries. To date, US State Department claims it has already made agreements with 75 countries and continues to do so with as many countries possible. Of record, as of June 15, 2004, seventy-nine (79) countries have signed the BIA, 36 of which are states parties to the Rome Statute. Of the 36, only 14 have ratified. Forty-five countries have publicly refused to sign despite strong pressure from the US and 23 states parties have not signed despite loss of US aid.<sup>93</sup>

John R. Bolton, US Under-Secretary for Arms Control and International Security is leading the US effort, according to a US State Department spokesperson, Philip Recker, who said: “ We’ll be working with a number of countries to conclude similar agreements, a large number of countries”, where the ultimate goal is to have every single country in the world sign such agreement, and added that impunity agreements “give us the safeguards we were seeking”<sup>94</sup>

In a speech he delivered, he outlined the reasons why the US refuses to cooperate with the Court. He said: ICC had unacceptable consequences for our national sovereignty...its precepts go against fundamental American notion of sovereignty, checks and balances, and national independence. It is an agreement

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<sup>92</sup> Id.

<sup>93</sup> See list and summary as Appendix C.

<sup>94</sup> Christopher Marquis, US Seeking Pacts in a Bid to Shield its Peacekeepers, New York Times, 6 August 2002.

harmful to the national interests of the United States and harmful to our presence abroad.”<sup>95</sup>

In the same speech, he quoted what Colin Powell, US Foreign Minister had to say about the ICC: “We are the leader of the world with respect to bringing people to justice. We have supported a tribunal for Yugoslavia, the tribunal for Rwanda, trying to get the tribunal for Sierra Leone set up. We have the highest standards of accountability of any nation on the face of the earth. It is important to note that we are not seeking immunity for our citizens, but a simple non-surrender agreement as contemplated in the Rome Statute. We fully commit ourselves to, where appropriate, investigate and prosecute serious, credible allegations of war crimes, crimes against humanity and genocide that have been made against any of our people. We respect the decision of States Parties to join the ICC, but they in turn must respect our decision not to be bound by jurisdictional claims to which we have not consented.”<sup>96</sup>

He also quoted President George W. Bush in his speech on National Security Strategy: We will take actions necessary to ensure that our efforts meet our global commitments and protect Americans are not impaired by the potential for investigations, inquiry or prosecution by the International Criminal Court, whose jurisdiction does not extend to Americans and which we do not accept. Signatories of the Statute of Rome have created an ICC to their liking, and they have to live with it. The United States did not agree to be bound, and must not be held to its terms.”<sup>97</sup>

In the same speech, he specifically mentioned that the US government is focusing on countries in South Asia and Middle East. Since these remarks were made, we have become aware of bilateral agreements signed with India, Nepal and Djibouti.

In a press briefing he conducted later, he said “...we have gone to many many countries in the world...I think that when we originally announced the effort we gave you some indication of how broadly we sent the cable to. We’ve had our embassies contacting foreign governments and concentrated, I think, on the most likely places that US troops are going to be present or deployed or passing through. So certainly places where US personnel are not likely to ever be located in the foreseeable future

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<sup>95</sup> Speech delivered at the Convention of the International Federalist Society, Washington DC, USA, 14 November 2002. Similar speech was delivered in Berlin, Germany, 6 September 2002.

<sup>96</sup> Id.

<sup>97</sup> Id.

are not high on the list. ... 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.”<sup>98</sup>

Contrary to assurances from high level 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 UN Security Council in seeking exemption from ICC jurisdiction for peace keepers from non-ICC States Parties, US officials have publicly threatened economic sanctions, including but not limited to, the termination of military assistance if countries do not sign the immunity pacts. Furthermore, it has been reported on numerous occasions that when countries do sign a bilateral immunity agreement, the US has simultaneously announced the provision of large financial packages to those countries.<sup>99</sup>

Many legal experts from governments and non-government groups believe that the bilateral immunity agreements being sought by the US are contrary to international law and the Rome Statute.

*First*, 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 the conclusion of new agreements based on Article 98, but rather to prevent legal conflicts which might arise because of existing agreements, or new agreements based on existing precedent, such as new SOFAs (Status of Forces Agreements). Article 98 was not intended to allow agreements that would preclude the possibility of a trial by the ICC where the sending state did not exercise jurisdiction over its own nationals. Indeed, Article 98 of the Rome Statute provides that no one is immune from the crimes under its jurisdiction.

*Second*, The US bilateral immunity agreements are contrary to the language of Article 98 itself. The proposed agreement seek to amend the terms of the 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

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<sup>98</sup> Id.

<sup>99</sup> US Bilateral Immunity or So-Called “Article 98” Agreements, CICC Questions & Answers

reflect a division of responsibility for a limited class of persons deliberately sent from one country to another and carefully addresses how any crimes they may commit should be addressed.

By contrast, the US-proposed BIAs seek immunity for a wide-ranging 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 for 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.

And *third*, the US interpretation of Article 98 is contrary to the over-all 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/or war crimes be addressed either at the national level or by an international judicial body.

Amnesty International expressed its deep concern over the worldwide campaign by "one state, the United States of America, to persuade states to enter into impunity agreements which seek to prevent US nationals accused of genocide, crimes against humanity and war crimes from being surrendered to the International Criminal Court."<sup>100</sup> It expressed dismay over Romania's and Tajikistan's decision to enter such agreements. "Both state parties will violate their obligations under Article 86 of the Rome Statute to arrest and surrender persons accused of such crimes to the International Criminal Court if their parliaments ratify these agreements."<sup>101</sup> The document explains that moreover, not only will these states surrender their sovereign right to determine which courts exercise jurisdiction over persons accused of crimes in

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<sup>100</sup> International Criminal Court: US Efforts to obtain impunity for genocide, crimes against humanity and war crimes, Amnesty International, August 2002

<sup>101</sup> *Id.* para 1

their territory or found there, but they will also have to renegotiate all their existing extradition agreements.

The object and purpose of the Rome Statute is to end impunity for the worst possible crimes in the world in accordance with the principle of complementarity – which places the primary responsibility of investigation and prosecution of these crimes on states, but ensures that the ICC will be able to exercise jurisdiction when the states fail to fulfill these responsibilities.

The fundamental principle underlying the Rome Statute is that no one is above the law and immune for genocide, crimes against humanity or war crimes. Any possible exemptions in the Rome Statute to this principle must, therefore, be strictly construed in a manner consistent with the object and purpose of the Statute. As the language and drafting history of Article 98 demonstrate, it was introduced to ensure that existing Status of Forces Agreements (SOFAs) were not nullified by the latter in time of the Rome Statute.”<sup>102</sup> It was not designed as a license for impunity from the Court by letting states enter into subsequent bilateral agreements undermining the entire statutory scheme.

The drafting history of the Rome Statute confirms that Article 98 was not intended to include agreements such as the US impunity agreements. “Any interpretation that Article 98 did cover such agreements would lead to the manifestly absurd and unreasonable result that a non-state party could subvert the fundamental principle in 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 when states are unable or unwilling genuinely to investigate and if there is sufficient admissible evidence, to prosecute.”<sup>103</sup>

The typical US impunity agreement, “has no resemblance whatsoever to a SOFA and which comes in at least in three forms:

1. One that provides that both parties agree not to surrender a broad range of each other’s nationals and certain other associated nationals, not just

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<sup>103</sup> Id.

persons serving in a UN peace-keeping operation, to the ICC without the consent of the other party.<sup>104</sup>

2. One that does not prohibit the US from surrendering nationals and certain other associated nationals of the second state to the ICC.<sup>105</sup>
3. One that is intended for states that neither signed nor ratified the Rome Statute, which includes a paragraph requiring those states not to cooperate with efforts of third states to surrender persons to the ICC.<sup>106</sup>

The document gave an overview of the current status of response to the US threats namely those countries that have so far refused to enter into US impunity agreements: Canada, The Netherlands, Norway, Switzerland and Yugoslavia, all of which are states parties to the Rome Statute. Those countries that have caved in to US pressure so far: Romania, Israel, Tajikistan and East Timor. However, these agreements will have to be ratified by their respective national parliaments before they can be enforced. And some countries known to be under particular threat: European Union member states and states where US armed forces are stationed in peace-keeping operations such as Bosnia and Herzegovina, or in anti-terrorist operations including Afghanistan, Colombia and the Philippines. Other states known to have been approached by the US government include Argentina, Brazil, Ecuador, Australia and Chile.

Amnesty International reiterates that state parties to the Rome Statute should not sign or enter into impunity agreements with the US or refuse to arrest and surrender persons accused by the ICC because doing so would violate their obligations under the principle of complementarity, as reflected in the Preamble, Article 1 and Article 17, and their obligations to cooperate with the Court, as reflected in numerous articles, in particular, Articles 86, 87, 89, 90 as well as Article 27. Signatories and states that have not yet ratified the Rome Statute should also not sign or enter into impunity agreements because doing so will violate their obligations under international law to

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<sup>104</sup> See Impunity Agreement signed by Israel with the US, <http://www.cicc.org>

<sup>105</sup> See Impunity agreement signed by Romania and Tajikistan with the US, <http://www.cicc.org>

<sup>106</sup> See Impunity agreement signed by East Timor with the US. The additional paragraph reads: "Each Party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or a country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal Court."

bring justice those responsible for genocide, crimes against humanity and war crimes, particularly if they do not investigate and, if there is sufficient admissible evidence, prosecute such persons or extradite such persons to a state that will fulfill its international responsibilities.”<sup>107</sup>

On September 30, 2002, the European Union adopted a common position on the International Criminal Court which aims “to support the effective functioning of the Court and to advance universal support for it by promoting the widest possible participation in the Rome Statute.”<sup>108</sup> The European Union is considered one of the regional bodies that strongly support the ICC, with 100% of its members already having ratified the Rome Statute.

Human Rights Watch, an international human rights network also said: “The bilateral immunity agreement has been an instrument wielded by the United States to debilitate the prestige of the International Criminal Court and to limit the scope of seeking justice by human rights victims through the exemption sought by the United States for their nationals.”<sup>109</sup>

In sum, even when countries sign and ratify the so-called “Article 98” agreements, they continue to have all prior obligations related to the ICC. The conclusion of a BIA 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 US are valid and therefore truly create a conflict of obligations for States Parties. Even when countries that have signed and ratified BIAs that are not yet States Parties to the Rome Statute, they are encouraged to become States Parties to the Rome Statute of the ICC.

## **6. The American Servicemembers’ Protection Act (ASPA)**

On September 2001, the Bush Administration fully supported the adoption by Congress of the American Servicemembers’ Protection Act (ASPA). This Act, signed on August 2, 2002 provides:

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<sup>107</sup> Id.

<sup>108</sup> Common Position on the ICC, The Council of the European Union, 13 June 2003. See Appendix H.

<sup>109</sup> Commentary of Human Rights Watch on the BIA, June 2003. In particular, see sections that provide the different levels of agreements and their corresponding inconsistencies.

1. That the US shall not cooperate with the ICC in investigations and prosecutions of US citizens;
2. That the US will deny military aid to states that have ratified the Statute, except for NATO members and certain major allies, but this ban maybe waived if the state concerned enters into impunity agreement or the President certifies that the aid is in the national interest; and
3. That the US may use “all necessary means” (a term commonly associated with the use of force in US legislation) to return any persons detained by the ICC to the US.

Among US conservatives, US Senator Jesse Helms has been perhaps the most vocal opponent of the Court. He observed at one point: “The ICC is indeed a monster – and it is our responsibility to slay it before it grows to devour us.”<sup>110</sup>

July 1, 2003 marked the deadline set out in the American Servicemembers' Protection Act (ASPA) for the cut-off of US military assistance to ICC States Parties (countries to have ratified or acceded to the ICC Statute) that had not signed the BIAs. In accordance with ASPA, major allies were exempted. The ASPA also provided for Presidential waivers of 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 July ASPA deadline, which coincided with the one year anniversary of the entry into force of the Rome Statute of the ICC, resulted in the loss of US military assistance to 35 ICC States Parties<sup>111</sup> 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, Foreign Military Assistance and funding provided under the Arms Export Control Act. An additional 22 countries received temporary waivers, according to a July 1, 2003 memorandum to US

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<sup>110</sup> Benedetti & Washburn. *Drafting the International Criminal Court Treaty: Two Years at Rome and an Afterward on the Rome Diplomatic Conference*, Global Governance, Vol. 5 No 1, Jan-March 1999.

<sup>111</sup> These countries were reported as Antigua and Barbuda, Barbados, Balize, Benin, Brazil, Bulgaria, Central African Republic, Colombia, Costa Rica, Croatia, Dominica, Ecuador, Estonia, Fiji, Latvia, Lesotho, Lithuania, Malawi, Mali, Malta, Namibia, Niger, Paraguay, Peru, Samoa,

Secretary of State Colin Powell, US President Bush issued temporary waivers to 22 ICC States Parties<sup>112</sup>.

In sum, the use of US' political and economic superiority over mostly developing countries to vote for its proposals at the Security Council and to sign bilateral immunity agreements to secure immunity for its nationals- acts intended to undermine the ICC and the role of multilateralism only exposed further the US' unilateralist agenda, which at the end left them with the least support they needed to pursue their objective.

In the words of an American writer: "For the world's only democratic superpower to encourage other countries to reject law enforcement and to keep themselves outside the law is a disastrous policy that will boomerang, haunting us and our grandchildren grievously in the future, and on many more legal issues than the criminal court itself. In refusing to participate constructively in international law enforcement, US officials seem to confirm the claim by Milosevic, Hussein, Qaddafi and others that international trials are not impartial and are politically motivated, because the law does not apply equally to all."<sup>113</sup>

There is a fundamental internal shift at the apex of the world's hierarchy of power as the US moves to unilateralism, pre-emptive attack and contempt for international law.<sup>114</sup>

In the final analysis, it is only the ICC itself that will decide whether it may proceed with a request for surrender. A court has the inherent power to determine its own jurisdiction, as the Rome Statute itself explicitly provides that the ICC possesses the ability to determine its own jurisdiction.<sup>115</sup>

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Serbia and Montenegro, Slovakia, Slovenia, South Africa, St. Vincent and Grenadines, Tanzania, Trinidad and Tobago, Uruguay, Venezuela and Zambia.

<sup>112</sup> These countries were reported as Albania, Afghanistan, Bolivia, Bosnia, Botswana, Democratic Republic of Congo, Djibouti, East Timor, Gabon, Gambia, Ghana, Honduras, Macedonia, Mauritius, Mongolia, Nigeria, Panama, Romania, Senegal, Sierra Leone, Tajikistan and Uganda.

<sup>113</sup> The International Criminal Court, Sounding Board, Joaquin Bernas, SJ, TODAY, May 12, 2002

<sup>114</sup> Ichiyo, Muto, Resisting the Bush Administration's Militarist Crusade, in Gerson, J., Proceedings of the Asian Peace Assembly, Quezon City, Philippines, 2002.

<sup>115</sup> Rome Statute, Art. 19(1): "The Court shall satisfy itself that it has jurisdiction in any case brought before it..."

## **CHAPTER 4**

### **US POSITION ON THE ICC: EFFECTS ON THE PHILIPPINE RATIFICATION PROCESS**

This chapter assesses the impact of the US position on the ICC on the ratification process in the Philippines, in the context of the historical relationship of the two countries from the time of the occupation of the US in the 1900s to the present. It is important to view the effect of such position in this context as the issue on the Philippines' non-ratification of the Rome Statute of the ICC and the agreement it concluded with the US on the bilateral immunity agreement are but parts and parcel of a broader range of issues the two countries have been dealing with for more than a decade now – a continuing dynamics between a colony and its colonial master that has been characteristic of Philippine-US relations over these years.

#### **1. Some Historical Background**

As a former colony of the US, the Philippines has not totally cut off its umbilical cord that attaches it to its former master. A quick survey of agreements between the US and the Philippines<sup>116</sup> would show that the former made sure through these agreements the Philippines would continue to be dependent on the US despite its so-called independence in 1948.

Post independence security agreements like the 1947 Military Bases Agreement that allowed the US to use Philippine soil to establish its military bases, which was terminated in 1991, the Military Assistance Agreement of 1947, later amended as the Mutual Defense Assistance Agreement of 1953 and the 1951 Mutual Defense Treaty allowed the United States to control the external defenses of the country while leaving to the Philippine Army and the Philippine Constabulary the job of suppressing Filipino revolutionaries. These treaties never gave the AFP the chance to build up its

external capability as the US made sure that it would be totally dependent on the US. The more than 40 years of US military supremacy over the AFP through the above treaties from 1047 to the present have prevented the AFP from establishing its own self-reliant system. In fact it has only made the Philippine armed forces the weakest in Southeast Asia.<sup>117</sup>

Since the 1900s, the Philippines has been a colony of the United States. The bloody US conquest in 1899 caused the death of more than 600,000 Filipinos, mostly civilians, or one-sixth of the Philippine population during that time. Historians have called that era of the Philippine-American War as ‘America’s First Vietnam in Asia.’<sup>118</sup>

From the 1900s to 1991, the Philippines was the Pentagon’s military stronghold in its economic, political and military linchpin in Southeast Asia. US bases in the Philippines provided important logistical support to US wars in Korea and Vietnam, and later in the Gulf in the war against Iraq. The Philippines also served as a regional center for the CIA’s covert operations against Indonesia and against the national liberation movements in Indochina.<sup>119</sup>

In 1991, in a historic rejection of the US bases treaty by the Philippine Senate, US was forced to retreat its forces. The Visiting Forces Agreement (VFA) of 1991 restored US troops activities in the country in the forms of small and large-scale military exercises. The current large scale *Balikatan*<sup>120</sup> exercises in the Southern Philippine island of Mindanao were started in 1991, stopped temporarily after the Senate rejected the proposed bases treaty and resumed after the ratification of the 1999 Visiting Forces Agreement.

Since September 11, 2001, popularly known as 9/11, as part of its international campaign against terrorism, the United States has made the Philippines its ‘second front’ next to Afghanistan in its fight against perceived terrorists. In the history of the US bases in the Philippines, these military bases have been used as staging areas for

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<sup>116</sup> See Simbulan, R., US Policy in Asia and the State of Philippine-US Security Relations, Proceedings, Asian People’s Assembly August 29-September 2, 2002, Quezon City, Philippines.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Simbulan, R., The Secret History of the CIA in the Philippines, Manila: Popular Books, 2000.

military intervention, strikes and attacks against other Asian countries as in the cases of Korea, Vietnam and Indonesia. This is evidenced by US official documents that show the regional role of the Philippines in the fulcrum of US security interests in Asia and as far as the Middle East.<sup>121</sup>

The US considers the Philippines as a good location to restore its military forces in Southeast Asia in the light of serious threats from Islamic fundamentalist groups especially from Indonesia and Malaysia where the US finds it dangerous to deploy US forces. The Philippines is also the gateway of the Pacific to the Indian Ocean and Persian Gulf and is ideal for forward-deployed US forces in the Western Pacific.<sup>122</sup>

With this strategic role assigned to the Philippines by its former master, the Philippine government, since the so-called Philippine independence, has towed the US line and were it not for strong opposition posed by civil society, the Philippines would continue to be an appendage of the US, short of being the 59<sup>th</sup> state of the United States of America.

Like many other developing countries, the Philippines relies heavily on US aid for its survival. The US government promised to extend \$100 million worth of military assistance and another \$55 million in supplemental funds for the combat training of Filipino troops. The government reported that the US contributions to the country in forms of assistance and investments amounted to \$808.2 million ever since President Arroyo pledged total support to the US's war on terrorism. Of this huge amount, twelve percent or \$114.6 million, nearly 6 billion pesos was released to the Philippine government in military aid in the first 10 months of 2003. This military aid included \$19.87 million for the maintenance of the equipment of the Armed Forces of the Philippines, \$30 million for counter-terrorism training and equipment, \$25 million for combat engineering enhancement and support and \$10 million as part of US President Bush's drawdown authority for the maintenance of AFP equipment. The AFP also received 15,000 M11 rifles, 33 trucks, three UH-1H helicopters, and a Cyclone patrol vessel all amounting to \$25.69 million. \$47 million was devoted to the

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<sup>120</sup> The term used for the joint military exercises of Philippine and US troops in Mindanao, apparently to run after the *Abu Sayyaf* and other Muslim opposition forces. The term literally means "to shoulder together" or "to undertake together"

<sup>121</sup> Id.

<sup>122</sup> Id.

RP-US military *Balikatan* exercises in Basilan, with another \$6 million provided for humanitarian assistance and civic action. The \$114.6 million the Philippines received was markedly higher than the \$94.5 million the country received in 2002 and the \$38.03 million in 2001.<sup>123</sup>

## 2. The ICC Process

The Philippines was one of the 120 states that approved the creation of the ICC during the adoption of the Rome Statute in 1998. On December 28, 2000, a few days before the closing date for signatures, then President Joseph Estrada signed the treaty. But before the Senate could concur, a popular uprising known as People Power 2<sup>124</sup> in January 2001 ousted him from office.

Prior to this, shortly before his term ended, former President Fidel Ramos issued Administrative Order No. 387 on March 24, 1998, which provided for the creation of an International Criminal Court Task Force with the mandate to undertake studies and researches pertaining to the proposed establishment of the ICC and to formulate policy recommendations necessary in furtherance of the Philippine cooperation with other nations in the establishment of the ICC.<sup>125</sup>

The Preamble of the Administrative Order recognized the Philippines' commitment to finding viable means of "enhancing international justice enforcement":

Whereas the proposed establishment of the International Criminal Court has received strong support from the global community owing to the rising incidence of international crimes that has undermined international peace and stability;

Whereas the Philippines has signified its support for the establishment of the International Criminal Court as a legal mechanism that will enhance international criminal enforcement;

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<sup>123</sup> See US Military Aid at Highest Level, *The Philippine Star*, December 7, 2003, p. 5.

<sup>124</sup> A term used to signify mass protest, using mobilization in the streets of thousands, if not millions of people. People Power 1 was the mobilization that ousted former President Marcos.

<sup>125</sup> Adm. Ord. No. 387 (1998), sec. 3. The task force is composed of the following agencies: Department of Foreign Affairs, Department of Justice, Office of the Solicitor General, Office of the Executive Secretary or Office of the Presidential Legal Counsel, Department of Interior and Local Government, and the University of the Philippines College of Law.

Whereas, the recent resolve of the global community to establish a new international legal order predicted on consensus and collective action has brought forth a number of complex issues requiring serious consideration by a group of experts from the legal field in order for the involvement of the Philippines in the Preparatory Committee of the International Criminal Court to become more meaningful...<sup>126</sup>

The members of the task force have met and recommended to the Executive the Philippine ratification of the Rome Statute.<sup>127</sup>

It was quite clear that during the time of former President Ramos until the administration of then President Estrada that their governments had intention to ratify the Rome treaty.

On January 20, 2001, former Vice-President Gloria Macapagal-Arroyo took over the presidency after the ouster of then President Estrada. At first, her government appeared initially disposed to ratifying the Rome treaty. However, the events of 9/11, the government's full support of the US-led global war on terrorism, the war in Afghanistan and the invasion of Iraq, and the US campaign against the ICC have changed that.<sup>128</sup> The Arroyo government has since then relegated the treaty to the back burner in the Cabinet, facing strong opposition from defense and security officials in the Cabinet Oversight Committee for Internal Security<sup>129</sup>.

The Philippine Coalition for the ICC, campaigning consistently for the ratification of the Rome Statute of the ICC, was always referred to this oversight committee. "They always told us that "the bill is under study by the members of the committee and we could not go further than that"<sup>130</sup>."

President Arroyo has been one of the few leaders in the world, particularly in Asia to openly offer support to President Bush in the latter's campaign on 'war against

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<sup>126</sup> Adm. Order No. 387, Preamble.

<sup>127</sup> Interview with members of the task force by the representatives of the Philippine Coalition for the ICC.

<sup>128</sup> Bocar, B., Challenging the US Bilateral Immunity Agreement: The Philippine Experience, The ICC Monitor, Issue 26, February 2004, p 4.

<sup>129</sup> Id. The Cabinet Oversight Committee for Internal Security was on high profile after 9/11 to oversee government functions, structures and operations relating to potential threat to the country's security as a result of 9/11. Members of the committee include primarily the defense and security officials, including a host of security advisers.

terror' in the aftermath of 9/11. Despite the absence of Security Council authorization, President Arroyo campaigned around Asia on behalf of President Bush. As a token of gratitude, President Bush hosted a state dinner for President Arroyo in Washington on May 19, 2003. In addition, President Bush risked spending 8 full hours in Manila on October 18, 2003 despite numerous terrorist threats and in spite of recent events aimed at destabilizing the country's political and economic stability, during which he addressed a joint session of the Philippine Congress and stayed for a quick dinner at the Malacanang Palace.

Filipinos get "nervous" with such a show of special relations as secret deals are usually done during such meetings. The fact that President Bush took extra efforts to come personally to key cities in the region would usually mean he is expecting something big and urgent in return.

And indeed, the Philippines signed a bilateral immunity agreement with the United States on May 13, 2003, an act it tried to conceal from the public. It was only revealed on June 9, 2004 after a number of civil society groups and the Vice-President of the Philippines himself demanded for a disclosure of the contents of the agreement. Vice-President Teofisto Guingona, Jr. called the immunity pact with the US as "unfair and discriminatory" and called upon the administration to submit the agreement to the Senate for ratification. He also called the agreement "unconstitutional and contrary to the equal protection clause of the constitution."<sup>131</sup> He expressed that "it would appear that the executive agreement, reportedly embodied in an exchange of diplomatic notes, touches upon the aspect of criminal jurisdiction, and as such this would not be a matter for the Executive Department alone to decide on."<sup>132</sup> While the Department of Foreign Affairs that is tasked with the determination of whether an international agreement is an executive agreement, the courts are not precluded from determining whether such an agreement complies with the requirements of the Constitution.<sup>133</sup> There was a strong speculation that the agreement was signed in time for President

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<sup>130</sup> Interview, PCICC representatives.

<sup>131</sup> Agence France Presse, June 24, 2003: Immunity Pact with US unfair and discriminatory: Philippine VP

<sup>132</sup> Lacuarta, op .cit. supra note 18.

<sup>133</sup> Memorandum Circular No. 89, s. 1988, Providing for the Procedure for the Determination of International Agreements as Executive Agreements.

Arroyo's state visit to finally secure an initial \$30 million in military aid being dangled by the Bush government since last year.<sup>134</sup>

President Arroyo's signing on its own the bilateral immunity agreement undermines the Court and bypasses what would be the Senate's decision on the agreement as provided for by law.

US' upgrading the Philippines into a major non-NATO ally on October 7 raises concerns of the possibility that the Arroyo government has already clandestinely signed new security arrangements between the two countries such as the controversial proposal of the US Pacific Command Chief, Admiral Thomas Fargo to turn Philippine territories into critical mobility platforms because as a major non-NATO ally, the Philippines can stockpile US military hardware, among other eligibilities. Similar incidents of secret deals had happened in the past like the signing of the RP-US Mutual Logistics Support Agreement (MLSA) in November, 2002 and the RP-US Non Surrender Agreement on May 13, 2003.<sup>135</sup>

As the Philippines, along with many other states that have entered into similar agreements with the US signed the bilateral immunity agreement in large part due to the threat of withdrawal of economic aid from the US, the agreement is a result of economic coercion. This threat has become all the more imminent as the withdrawal of aid has become a statutory obligation on the part of the US government by virtue of the 2002 American Servicemembers' Protection Act (ASPA).<sup>136</sup>

Foreign Affairs Secretary Blas Ople said that he had concluded an executive agreement with the United States on the mutual non-surrender of nationals to third parties through an exchange of diplomatic notes on 13 May 2003."<sup>137</sup> Under this executive agreement, the Philippines and the United States agree not to surrender each other's nationals to third parties, without the consent of the other, if the purpose of the surrender is to subject that national to the jurisdiction of an international tribunal.

Secretary Ople further explained that he had signed the diplomatic note based on the decision that was carefully studied by the working group at the Cabinet level and

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<sup>134</sup> Agence France Presse, June 2, 2003.

<sup>135</sup> Id

<sup>136</sup> Sandoval, R.V. The US-Philippines Immunity Agreements: Violating International Law and Municipal Law with Impunity, *Philippine Law Journal*, Vol. 78, No. 3, March 2004.

<sup>137</sup> Press Release, Department of Foreign Affairs, June 2, 2003.

its legality was also passed upon the Department of Justice.” He said he had also consulted the Senate leadership, the treaty-concurring body under the Constitution and that the Senate leadership agreed that in form, nature and substance, the agreement is an executive agreement and is not a treaty.”<sup>138</sup> Ople cited that on the issue of whether this agreement is a treaty or an executive agreement, there is no fundamental change in policy, nor will there be a need for funding legislation for this agreement.<sup>139</sup>

He further said that the agreement does not modify any existing obligations, as there exists no obligation in international law for the surrender of such persons to an international tribunal. He said that the disposition of such a person is up to the will of the sovereign state where such person is found. “The non-surrender to third parties is a right that is even recognized by the Statute of the International Criminal Court.”<sup>140</sup>

This agreement was entered into without public disclosure causing much controversy.<sup>141</sup> The Vice-President who was the Foreign Minister prior to Ople, himself, was left uninformed about the government action. He called for a full disclosure of the contents of the bilateral agreement, given its serious implication.<sup>142</sup>

The issue of whether the bilateral immunity agreement signed by the US and the Philippines was just an executive agreement or treaty triggered strong debates as the government insisted that it was just an executive agreement that does not require concurrence of the Senate as required by the Constitution in order to be considered valid.

All the processes relating to the ratification of the Rome treaty were put on halt as the country went through with its general election on May 10, 2004. President Arroyo, prior to 9/11 declared that she would not run for presidency. After her meeting with President Bush in the aftermath of 9/11, she changed her mind and declared she would run for election. Strong speculation especially among her political opponents was that President Bush committed US support for Mrs. Arroyo’s bid for presidency. Amidst claims of massive electoral fraud by the opposition, Mrs. Arroyo

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<sup>138</sup> Id.

<sup>139</sup> Id.

<sup>140</sup> Id.

<sup>141</sup> See Gerald G. Lacuarta, VP Seeks Full Disclosure of RP-US Accord, *Philippine Daily Inquirer*, 18 June 2003.

<sup>142</sup> See Lacuarta, *op.cit*, *supra* note 18.

was declared winner by Congress and on June 30, 2004, she was sworn-in as the 14th President of the Republic of the Philippines.

### **3. Civil Society and Other Responses/Arguments**

Many observers, including the Vice-President himself and some members of the Constitutional Commission that drafted the 1987 Philippine Constitution assert that an agreement of such nature is only considered valid despite lack of Senate concurrence “if it is a properly constituted executive agreement. This is essentially an American practice that has been adopted in this jurisdiction. The Philippine Supreme Court has long affirmed the validity of international agreements in the form of executive agreements, if entered into for certain limited purposes. The legal minds as well as the human rights and peace advocates in the country are in unison in saying that this agreement is of serious implication to the nation and its people and should therefore be decided according to the rules provided for by the Constitution.

On September 2001, civil society groups active in human rights in the country organized themselves as the Philippine Coalition for the International Criminal Court (PCICC) with the objective of promoting the ICC among the different sectors in Philippine society and to campaign for the ratification of the Rome treaty by the Philippine government.<sup>143</sup>

The PCICC embarked on a campaign to pressure the Arroyo government to ratify the Rome Statute.

As part of the campaign, various government and non-government organizations were mobilized to raise their concerns about the non-ratification of the Rome Statute of the ICC and the government’s entry into a bilateral immunity agreement with the US.

On October 4, 2002, 21 members of the House of Representatives passed Resolution No. 800 during the Twelfth Congress, “urging President Gloria Macapagal Arroyo to immediately transmit to the Philippine Senate for ratification the 1998 Rome Statute creating the International Criminal Court for the prosecution of the gravest crimes under international law.”<sup>144</sup>

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<sup>143</sup> Statement, Launching of the Philippine Coalition for the ICC, September 2000.

<sup>144</sup> Resolution No. 800, House of Representatives, October 4, 2002

Similarly, a Senate resolution was passed sponsored by Senator Loren Legarda and statements made by Senate President Franklin Drilon that he approves of the ICC treaty and does not see any problem getting the Senate to ratify it.<sup>145</sup>

Senator Manuel Villar, Jr., chairman of the committee on foreign relations assailed Malacanang's practice of classifying international treaties as executive agreements to avoid Senate scrutiny. He has asked the executive department to furnish the Senate with copies of the agreements it entered into with foreign countries, including the BIA, to determine if they were treaties disguised as executive agreements.<sup>146</sup>

Strong reactions were registered from both government and civil society groups. Bayan Muna (People First), a party-list organization with three seats in Philippine Congress, came out with a statement accusing President Gloria Macapagal Arroyo of "entering into secret deals with the United States' President George Bush in her desperate bid to gain the much needed American support for her re-election candidacy in the 2004 polls."<sup>147</sup>

Representative Satur Ocampo said he can produce hard evidences against President Macapagal Arroyo and several of her cabinet officials of directly violating the 1987 Philippine Constitution – which includes Malacanang's usurpation of the powers of the Senate by railroading the approval of crucial US-Philippine military agreements on the level of mere executive pacts rather than as treaties ratified by the two countries' upper legislative houses. Ocampo charged Macapagal Arroyo of backstage deal-making with the US resulting in 'haphazard and blind commitment to America's global war on terror campaign at the cost of an all-out-sell-out of the country's sovereignty which only serves US interest and her own political survival."<sup>148</sup>

He questioned what the apparent secret trade-off consisted of between Malacanang and the White House in relation to Arroyo's Washington state visit last May 18-24 and this pertained to the May 13 signing of an 'executive agreement that granted American civilian officials, employees and soldiers immunity from any

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<sup>145</sup> Philippine Daily Inquirer, 20 August 2002.

<sup>146</sup> Manila Standard, July 10, 2003.

<sup>147</sup> Press Release, GMA into Secret Deals with US, Bayan Muna, October 14, 2003.

<sup>148</sup> Id.

prosecution before the ICC. "...That grant of immunity from prosecution is apparently in exchange for US military aid and the country's subsequent designation by the US as a 'major non-NATO ally.'"<sup>149</sup>

Ocampo, along with 19 other members of Congress signed House Resolution No. 1345 urging President Arroyo to make a firm stand for peace by disallowing the US from using any part of the Philippines as 'critical mobility platforms' in case of major military operation with regard the Philippine Constitutional ban on the existence of foreign military bases in the country. The resolution also calls on the President to refuse any agreement that would turn the country into a staging ground for any and all acts of US military interventionism in the region.

The Arroyo government has refused to transmit to the Senate for the latter's concurrence, the ratification bill for the Rome Statute to which the Philippines is already a signatory.

The Philippine Coalition for the ICC, in a press conference on June 6, 2006, deplored the BIA between the US and the Philippines as "violative of the intent and purpose of the ICC which provides no exemptions and no amnesties because of the severe nature of crimes. The impunity agreement breaches the Vienna Convention on the Law of Treaties and maybe even the Philippine extradition laws because it subverted the function of our local courts to first review cases relating to surrender of nationals charged with crimes."<sup>150</sup>

The coalition said President Arroyo waived an important international legal principle of equal application of law, as well as our national sovereignty."<sup>151</sup>

"The Philippines probably holds the dubious distinction of having a government that faces two lawsuits for its actions undermining the Rome Statute."<sup>152</sup> Two legal actions were filed separately before the Supreme Court, one by party-list representatives from Congress and the other one by the Philippine Coalition for the ICC.

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<sup>149</sup> Id.

<sup>150</sup> Press Release, Philippine Coalition for the ICC, June 6, 2003.

<sup>151</sup> Id.

<sup>152</sup> Bocar, B., Challenging the US Bilateral Immunity Agreement: The Philippine Experience. ICC Monitor, Issue 26, November 2003.

In September, 2003 Bayan Muna Party-list representatives filed a case before the Supreme Court for Certiorari (to review), Mandamus (to command) and Prohibition (to cease any action) with T.R.O. against the Arroyo Government asking that “a temporary restraining order be issued against the respondents from implementing the RP-US Non-Surrender Agreement by means of Exchange of Notes No. BFO-028-03 dated 13 May 2003 considering that its implementation during litigation would work injustice to the petitioner and the Filipino people and that the respondents are doing, threatening or attempting to implement the subject agreement and, after due hearing, the same be declared invalid and unenforceable *ab initio* and that respondents Alberto Romulo, in his capacity as Executive Secretary, and Blas Ople, in his capacity as Secretary of Foreign Affairs, be enjoined permanently from implementing the Agreement.”<sup>153</sup>

Among others, the petition argues that the BIA is an abdication of Philippine sovereignty because it bargains away the jurisdiction of the ICC and deprives the Filipino people of a legitimate recourse for redress against war crimes, crimes against humanity and genocide, crimes which are not defined and penalized as such under Philippine law. It is also a breach of the Rome Statute because Article 98 refers to existing agreements and not new ones and was in no way intended to lead to impunity from prosecution. Contrary to the government’s position that the BIA is merely an executive agreement, it involves changes in national policy and has permanent character. It therefore cannot be valid, binding and effective without approval of the Senate.”<sup>154</sup>

In March, 2003, the Philippine Coalition for the International Criminal Court brought a mandamus case before the Supreme Court to compel officials of the executive branch to transmit the ratification bill of the Rome Statute to the Senate for its concurrence in accordance with the Philippine Constitution. In addition, under Article 18 of the Vienna Convention on the Law of Treaties, the Philippines is obligated as a signatory to the Rome Statute ‘not to defeat the object and spirit of the treaty’ and the President should therefore take all steps necessary to procure the required ratification.

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<sup>153</sup> Petition for Certiorari, Mandamus and Prohibition, *Bayan Muna v. Romulo et.al.*

<sup>154</sup> *Id.*

The petitioners argue that after the Rome treaty was signed by former President Estrada, it became a “ministerial” duty of the Executive Branch to transmit the signed text of the treaty to the Senate for its concurrence. They based this argument on the provision of Executive Order No. 459 entitled “Guidelines in the Negotiation of International Agreements and its Ratification” which was promulgated on November 25, 1997 by then President Fidel Ramos. Under Sec. 7 of E.O. 459, it is the duty of the Executive Secretary to transmit the signed treaty to the Department of Foreign Affairs and the latter transmits the bill to the Senate for its concurrence.

In response to the mandamus case filed by the PCICC, the Supreme Court issued on June 26, 2003, an order asking Malacanang and the Department of Foreign Affairs to explain its refusal to transmit the bill of ratification to the Senate for its concurrence, two and a half years after the former President Joseph Estrada signed the treaty. In the 10-page suit, the petitioners said that the President’s act of signing the Rome Statute was an “expression of the Philippine decision and intention to be bound by the provisions of the treaty subject to the domestic requirements for its validity and enforceability. Under Sec. 21, Art. VII of the 1987 Constitution, for a treaty to be valid, the Senate must ratify the treaty by a vote of at least two-thirds of all its members.

United States Ambassador to the Philippines Francis Ricciardone, Jr., in response to allegations of US pressure on the Philippine government, has said that the US government is not exerting pressure on the Philippine government against ratification of the Rome Statute, but remarked that “the consequences though needed to be studied carefully.”<sup>155</sup> He assured Manila that it will remain a top beneficiary of US military aid in its continued fight against global terrorism “even if the Philippine Senate ratifies the 1998 Rome Statute that will create the International Criminal Court”<sup>156</sup>.

In an interview after a meeting with the Philippine Foreign Affairs Secretary Blas Ople, Ricciardone said the Philippines is still included in the list of countries to benefit from the US military aid. This, despite the move of President Bush to veto the \$30 million US military aid passed by Congress as part of the \$5.1 billion military

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<sup>155</sup> Business World, July 10, 2003

<sup>156</sup> RP Assured of US Military Aid. Nation Today. August 28, 2002.

assistance to seven poor countries joining the US government campaign against global terrorists. He reiterated that this is in light of the passage of the US law prohibiting military assistance to countries ratifying the 1998 Rome Statute.

In a separate interview with Secretary Blas Ople, he said that he had a discussion with Ambassador Ricciardone concerning the ICC. “The Philippine commitment to ratify the ICC is not connected to the issue of the US military aid.”<sup>157</sup>

Foreign Affairs Undersecretary Franklin Ebdalin, in an interview, said that owing to the threat of withdrawal of US military aid, the Philippines is now considering the option of not ratifying the Rome Statute. “...On the other hand, if we don’t ratify, how will we look in the international community? We still want to be part of the civilized community of nations.”<sup>158</sup>

House Committee Chairman on Foreign Affairs, Congressman Apolinario Lozada said that Philippines has always placed great faith and importance in the multilateral field of diplomacy. Being a career diplomat himself, he stressed the need for Philippines to ratify the Rome treaty. He pointed out that at the time that Vice-President Guingona was still the foreign minister, he endorsed the ratification and so with the Defense department and other concerned agencies. “So the question arises, what has happened in the space of a few months to change this attitude?...I think the answer is obvious and that is mainly due to the efforts and objections of one state – the United States – which has also been persuading other states party to the treaty to ‘unsign’ as members.”<sup>159</sup>

Obviously, the Philippine government is very defensive about its position of giving in to the pressure of the US government because it knew that the bilateral agreement it has concluded with the US is invalid under international law and violative of domestic jurisprudence, primarily the Philippine Constitution.

First and foremost, it should be emphasized that Article 98 must be read in the context of the entire treaty it is a part of, and thus should not defeat the object and purpose of the Rome Statute.<sup>160</sup> It is of particular significance that no reservations may

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<sup>157</sup> Id.

<sup>158</sup> RP’s Dilemma: US Military Aid or Respect from Europe?, TODAY, August 31, 2002.

<sup>159</sup> Lozada, A., ‘Who’s Afraid of the ICC?’ A Public Forum on the ICC, October 9, 2002

<sup>160</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter referred to as VCLT], art. 31(1): “A treaty shall be interpreted in good faith in accordance with the

be made to the Rome Statute, as provided for in Article 120 of the same. As such, any interpretation of Article 98 should not be read in any way so as to indirectly allow reservations.<sup>161</sup> The States Parties to the Rome Statute affirm that the most serious crimes of concern to the international community as a whole must not go unpunished and are determined to put an end to impunity for the perpetrators of these crimes.<sup>162</sup> Article 98(2) must be construed in such a way as to incorporate an implicit proviso wherein such international agreements will only be respected if the sending State ensures that the accused are brought to justice. Under the complementarity regime of the Rome Statute, the ICC may only exercise jurisdiction when the State in a position to exercise jurisdiction, normally the State where the crime was committed (territorial state) or the State of nationality of the accused or of the victim, is “unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>163</sup> It follows that Article 98 Agreements were never meant to be Immunity agreements but rather mere agreements that enable States to comply with their other international obligations. As the ICC itself will determine whether a genuine prosecution is being carried out by the concerned State,<sup>164</sup> such an agreement will not prevent it from taking cognizance of the case if it decides that no effective prosecutions are taking place. It is to be noted that the wording of Article 98(2) does not preclude the surrender of nationals to the ICC when an immunity agreement has been entered into, for it provides the possibility for the ICC to “obtain the cooperation of the sending State for the giving of consent to surrender.”

The language alone of Article 98(2) indicates that it is intended to encompass Status of Forces Agreements (SOFAs) and not the immunity agreements as presently worded.<sup>165</sup>

The provision particularly refers to the “sending State” which is a legal term found in SOFAs between host states and the state of origin of visiting forces.

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ordinary meaning to be given in terms of the treaty in their context and in the light of its object and purpose.”

<sup>161</sup> Id..

<sup>162</sup> Rome Statute, preamble.

<sup>163</sup> Rome Statute, Art. 17(1)(a).

<sup>164</sup> Rome Statute, Art. 17.

<sup>165</sup> International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes, Amnesty International, August 2002.

Hans Peter Kaul, now one of the ICC judges, and Claus Kress, members of the German delegation to the Preparatory Commission stress that: “The idea behind the provision [Article 98(2)] was to solve legal conflicts which might arise because of Status of Forces Agreements which are already in place. On the contrary, Article 98(2) was not designed to create an incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the Court.”<sup>166</sup>

It is a fundamental principle under the law of treaties that the preparatory work of a treaty and the circumstances of its inclusion provide supplementary means of interpretation.<sup>167</sup> Article 98(2) thus covers currently existing SOFAs, in line with the concern that the Rome Statute should not override pre-existing obligations of States parties to non-States parties under other treaties.<sup>168</sup>

As the immunity agreement deals with criminal jurisdiction, reference should be made to Article VII of the North Atlantic Treaty Organization (NATO) SOFA, upon which is modeled the criminal jurisdiction provisions of most contemporary SOFAs. The rules contained in the NATO SOFA, due to their “fairness and plausibility,” may already constitute customary law.<sup>169</sup> Indeed, the 1999 US-Philippines Visiting Forces Agreement entered into pursuant to the 1951 US-Philippines Mutual Defense Treaty, incorporates many of these NATO SOFA provisions. The purpose of such provisions in the NATO SOFA was to assure that only one jurisdiction had the right to proceed in any given case, according to a system of established priorities.<sup>170</sup> Under paragraphs 3 and 4 of Article VII, the sending state possesses primary jurisdiction in only two cases:

Where the offense was solely against the security or property of the sending state or the person or property of a member of the force or civilian component of that state (regardless of the nationality of the dependent) and

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<sup>166</sup> Amnesty International, quoting H.P. Kaul and C. Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. INT’L. HUM. L. 143,165 (1999).

<sup>167</sup> VCLLOT, Art. 32.

<sup>168</sup> VCLT, Art. 30(4)

<sup>169</sup> Fleck, D. Introduction, in *The Handbook of the Law of Visiting Forces* 6 (2001)

<sup>170</sup> Conderman, P., *Jurisdiction*, in *The Handbook of the Law of Visiting Forces* 111 (2001)

Where the offense arose out of an act done in the performance of official duty.<sup>171</sup>

As with the Rome Statute, the US attempted to obtain exclusive jurisdiction over its personnel during the negotiations leading to the NATO SOFA, but was forced to accept a compromise. The only instances where the US waived its right to exercise primary jurisdiction were when holding the trial in the courts of the receiving state would best serve the interests of justice and the accused's constitutional rights would be protected.<sup>172</sup>

Evident in the above discussion is that SOFAs are not intended to grant immunity to the troops stationed in a host state; rather, they simply allocate responsibility for investigating and prosecuting such crimes, allocating jurisdiction between the sending state and the receiving state. The Immunity agreements as presently worded clearly do not allocate jurisdiction but instead provide immunity to American "persons" with no guarantee of prosecution on US soil. Further, SOFAs generally do not cover individuals aside from troops and their dependents. The bilateral immunity agreements cover even contractors of the US, whether they be Americans or not. As such these Agreements cannot be considered SOFAs in the sense that the drafters of the Rome Statute understood such term *vis-à-vis* Article 98(2). Consequently, the bilateral immunity agreements should not be considered an obstacle to a request for surrender under Article 98(2).

Under domestic jurisprudence, the Philippine Constitution, under Article VII, Section 21 states that "no treaty or international agreement shall be valid and effective unless concurred by at least two-thirds of all the members of the Senate."

Article II, Section 7 of the Constitution also provides that: "The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination." Thus, the Bilateral Immunity Agreement cannot possibly be pursuant to any valid national policy, being contrary to the fundamental principle of state sovereignty explicitly laid down by the supreme law of the land.

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<sup>171</sup> *Id.*, at 110.

<sup>172</sup> *Id.*, at 139.

In sum, the US government need not pressure the Philippine government, President Arroyo particularly, to support its position on the ‘war against terror’ and other related critical issues including the ratification of the ICC and the signing of the BIA. The Philippine government, with its own interest attached to the US for the latter’s military and economic aid, has no political will to decide otherwise. Even on its own, it would pursue a policy supportive of the US position, even if such position is not sanctioned by the duly constituted community of nations and even if such position contradicts and violates its own constitution.

Positively, given civil society’s history of resisting any US’ attempt to re-impose its power and control over Philippine sovereignty, efforts to pressure the Arroyo government to ratify the Rome treaty by civil society groups are gaining support not only at the domestic front but also coming from the international community. These combined efforts should convince the Arroyo administration, as well as the US that the ICC will work for their best interest, that is, providing protection for their nationals at the same time enhancing worldwide respect for rule of law.

## **CHAPTER 5**

### **SOME IMPLICATIONS TO THE RATIFICATION PROCESS AND HUMAN RIGHTS IN SOUTHEAST ASIA**

This chapter assesses the status of countries vis-à-vis the Rome Statute process, including the BIAs and explores some of the implications of the US position to the ratification process and human rights in the Southeast Asian region. The assessment of status of countries will also take into consideration their ratification of other UN core treaties.

Table 1 is a matrix of countries that shows the status of Southeast Asian countries vis-à-vis the ICC process. Table 2 shows the categories of countries according to their status and Table 3, the record of countries in ratifying twelve UN core treaties.

Of the 11 countries in Southeast Asia, including Timor Leste, only 3 have signed the Rome Statute of the ICC namely, Cambodia, Philippines and Thailand; two have so far ratified – Cambodia and Timor Leste.<sup>173</sup> With the two ratifications, none has so far completed their implementing legislation and none among the 11 countries have ratified the Agreement on Privileges and Immunities of the Court (APIC).

Of the 11 countries, 5 have signed bilateral immunity agreements with the US, namely, Cambodia, Philippines, Timor Leste, Laos and Thailand<sup>174</sup>.

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<sup>173</sup> See list of States Parties and Signatories to the Rome Treaty as Appendix B.

<sup>174</sup> See list of States that have signed the Bilateral Immunity Agreement as Appendix C.

**Table 4.1 Matrix Showing the Status of Southeast Asian Countries and the ICC Process (As of 28 June 2004)**

State	Signature	Ratified/Acceded	Implementation	BIA	APIC
1. Brunei Darrusalam					
2. Burma					
3. Cambodia	*	11 April 2002	Process stalled; no government set up		*
4. Indonesia			HR law passed incorporating 3 ICC crimes		
5 Laos					*
6. Malaysia					
7. Philippines	*				*
8. Singapore					
9. Thailand	*				*
10. Timor Leste		6 September 2002	Process Starting		*
11. Vietnam					
	3 Signatures	2 Ratifications		5 BIAs	0 APICs

The status of countries will be analyzed according to the following categories of countries:

**Table 2: Categories of Countries According to ICC Status**

Status	Countries
1. Ratified Countries	Cambodia, Timor Leste
2. Signed but not Ratified	Thailand, Philippines
3. Neither Signed nor Ratified	Malaysia, Singapore, Laos, Brunei Darussalam, Burma
4. Opposed	Malaysia, Singapore
5. Signed the BIA	Cambodia, Timor Leste, Philippines, Thailand

It is also important to analyze the countries in the context of their record of ratification of other UN core treaties.

**Table 3: ASEAN Countries' Record of Ratification of UN Core Treaties**

	CESCR	CCPR	CCPR OP1	CCPR OP2	CERD	CEDAW	CEDAWOP	CAT	CRC	CRC OPAC	CRC OPSC	MWC
Brunei Darussalam									12/27/95			
Cambodia	5/26/92	5/26/92			11/28/83	10/15/92	11/11/01	10/15/92	10/15/92	1/2/02	1/2/02	
Indonesia					6/25/99	9/13/84	2/28/00	10/28/98	9/5/90	9/24/01	9/24/01	
Laos	12/7/00	12/7/00			2/22/74	8/14/81			5/8/91			
Malaysia						7/5/95			2/17/95			
Myanmar						7/22/97			7/15/91			
Philippines	6/7/74	10/23/86	8/22/89		9/15/67	8/5/81	3/21/00	6/18/86	8/21/90	9/8/00	9/8/00	7/5/95
Singapore						10/5/95			10/5/95	9/7/00		
Thailand	9/5/99	10/29/96				8/9/85	6/14/00		3/27/92			
Viet Nam	9/24/82	9/24/82			6/9/82	2/17/82			2/28/90	12/20/01	12/20/01	

Source: UNHCHR

In analyzing the status of each of the countries that belongs to each of the categories, it is important to note the major influences that led to where the countries are as far as their category here is concerned.

## 1. Ratified Countries

### 1.1 Cambodia

Cambodia was the first Southeast Asian country to ratify the Rome Statute of the ICC on April 11, 2001. A national workshop on the ICC was held in Phnom Penh on March 30, 2001 attended by key government officials and members of the civil society groups. As part of the program, a delegation composed of the foreign experts and local organizers, namely ADHOC and LICADHO met with Prime Minister Hun Sen and his key cabinet officials to lobby for ratification. Right then and there, he endorsed the ratification to the Parliament for the latter's consideration. Prior to the national workshop, preliminary meetings had been held by ADHOC and other NGO leaders with the advisers of Prime Minister Hun Sen and other key officials at the national level. Regional and international level lobby activities were also undertaken as part of the global campaign for ratification<sup>175</sup>. However, in June last year, Cambodia signed the BIA with the US. External forces like the US strongly influence

<sup>175</sup> Global campaign for ratification is coordinated by the NGO Coalition for the ICC and its networks worldwide. FORUM-ASIA serves as focal point for Asia.

decisions by the government especially if tied up with economic and other forms of assistance.

Cambodia, because of its long history of occupation and isolation, in its desire to be part of the international community has the tendency to sign most if not all international treaties. It is one country in the region that has signed the most number of treaties. For example, of the twelve core UN treaties, Cambodia has signed nine, one of the highest in the Southeast Asian region.<sup>176</sup> However, implementation of such treaties is another thing. It has not yet integrated any of the treaties it has signed into its domestic legislation and although there are initial efforts already started like in the areas of women and children, there is a long way to go in the actual implementation.

The focal point for the ICC campaign in Cambodia, ADHOC, is waiting for the government to be set up so it can continue its earlier efforts to work with the government in drafting the implementing legislation for the ICC.

## **1.2 Timor Leste**

Timor Leste, having just won their independence in 2000 deposited their bill of accession to the Rome Statute in UN New York on September 6, 2002.

Similarly, through joint initiatives of government and NGOs, a national workshop on the ICC was held in Dili on June 26-28, 2002, with key government officials in attendance, including Mr. Jose Ramos Horta, Timor Leste's senior foreign minister who gave the keynote speech. In the press conference following the meeting, he announced Timor Leste's intention to ratify the Rome Statute. In a statement he gave to the press after the workshop, he said: "East Timor, with its recent past, holds itself in high moral ground to ratify not only for the benefit of its own people in the present and in the future but for those who continue to live their lives in the crossfire in areas of conflict and where the most serious crimes are committed everyday...East Timor is committed to ratify the ICC soon and join the international community in

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<sup>176</sup> UNCHR Chart of Core International Treaties, 2003. The twelve treaties include: CESCR, CCPR, CCPR Optional Protocol 1, CCPR Optional Protocol 2, CERD, CEDAW, CEDAWOP, CAT, CRC, CRCOPAC, CRCOPSC and MWC.

ensuring the establishment of an independent, fair and effective international criminal court.”<sup>177</sup>

However, on August 23, 2002 East Timor was one of the countries that first signed bilateral agreement with the US. The agreement was signed by Foreign Minister Jose Ramos Horta. To date, said agreement is considered not binding as it has not been approved by the Council of Ministers and the Parliament as required by their new constitution.

“For it to be binding, it has to be approved by the Council of Ministers who then endorses it to the Parliament for final approval. The last stage of the process is the President’s signature and then it goes to the national gazette for publication as a valid law.”<sup>178</sup>

“The threat on the part of East Timor is very real. At stake in its case are some 200 American peacekeepers who were threatened to be pulled out if Timor Leste’s government would not sign the BIA.”<sup>179</sup>

The drafting of the implementing legislation of the Rome Statute of the ICC in Timor Leste is ongoing. As a result of a follow-up mission to Timor Leste held in May-June, 2004, a national working group among the NGOs that would join the government’s working group was formed to work on the process.

As a new nation, Timor Leste is very vulnerable to outside pressure as in the case of the US when the former was made to sign a bilateral immunity agreement with it. Similarly, as a new member of the international community, it is also open to be part of global efforts that “would promote international justice and rule of law.” It has so far ratified most of the major international treaties, “ a commitment we are deeply bound to honor as we take on our obligation as a member of the international community.”<sup>180</sup>

Timor Leste has ratified at least eight UN treaties including the Rome Statute of the ICC.

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<sup>177</sup> Horta, J.R., Statement on the ICC, 27 June 2002.

<sup>178</sup> Interview, Joao de Camara, head, Treaties Department, Ministry of Foreign Affairs, 2 June 2004.

<sup>179</sup> Interview, UNTAET official, Dili, 28 June, 2002.

<sup>180</sup> Interview, Jose Ramos Horta, June 29, 2002.

## 2. Signed But Not Ratified

### 2.1 Thailand

Thailand signed the Rome Statute on the ICC on October 2, 2000. There was much anticipation that Thailand would soon ratify. However, with the change of government thereafter, the positive prospects for ratification became uncertain. Despite opposition by many groups, both in the government and non-government, including leading legal and academic figures, Prime Minister Thaksin Shinawatra signed the deal on immunity agreement when he met with President Bush in Washington in June 2003.

The Senate, through the Committee on Foreign Affairs headed by Senator Kraisak Chunhawan, urged the Prime Minister not to sign any agreement as “...such agreement with the US, without parliamentary approval would violate the Constitution and harm the country’s democratic credentials.”<sup>181</sup>

Signing this agreement bypasses democratic processes and violates rules and regulations at the domestic level. As Thailand is a signatory to the Rome treaty, it also violated its obligation as a State Party to the ICC at the international level.

According to The Bangkok Post, Thaksin was offered positive incentives to come around, the chief one being likely US recognition of Thailand as a major non-NATO ally.<sup>182</sup>

Hitting back at the criticism of Surachai Sirikrai<sup>183</sup>, that the country has always yielded to US demands and cited the government’s decision not to back initiatives to try the US in the ICC for war crimes it has committed in Afghanistan and Iraq and its decision to allow US to use U-Tapao airbase, as examples of submission to US, the Prime Minister said that “as a US ally, Thailand has to treat US as a friend”.<sup>184</sup>

On June 13, 2004, Thaksin declared: “Dump ICC!”<sup>185</sup>

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<sup>181</sup> Bangkok Post, Rule of Law Should Apply to All, June 15, 2003.

<sup>182</sup> Id.

<sup>183</sup> A Thammasat University political science lecturer. Remarks made at a seminar on: The Unequal Bilateral Relationship between Thailand and the United States, June, 2003.

<sup>184</sup> The Nation, Thai Minister Hits Back at Critics of US Visit., June 15, 2003.

<sup>185</sup> Bangkok Post, Thailand will not ratify the ICC, June 2003.

Thailand is one country that had the most frequent lobby activities. Whenever there are regional and national meetings on the ICC in Bangkok, local and foreign delegations would meet with concerned government officials to urge for Thailand's ratification. Likewise, the European Union and its members' counterparts in Bangkok had been exerting efforts through diplomatic means to hold demarches with Thai officials towards ratification of the Rome treaty as part of EU's common position to support the ICC and specifically to promote ratification of the Rome treaty. In New York, the Thai delegation had also been regularly approached during the PrepComs and later during the Assembly of States Parties' sessions where the Thai delegation sit as observer. But despite all the efforts at the national, regional and international levels, the Thai leaders had refused to consider ratification and instead, signed an immunity agreement with the US, an act deemed contradictory to the purpose and intent, as well as integrity of the ICC.

Like the Philippines, Thai government considers its relations with the US as more important than any other consideration, like bypassing the country's legal processes and violating its own Constitution.

## **2.2 Philippines**

As expounded in the previous chapter, the Philippine Executive branch led by President Arroyo has refused to ratify the Rome treaty despite the fact that the ratification bill had been signed by the previous administration. As legal experts claim, it 'ministerial' on the part of President Arroyo to transmit said bill to the Senate for the latter's concurrence as required by Philippine law. Already, two legal suits had been filed against the office of the President to compel her to transmit said bill for the Senate's concurrence.

On 13 May 2003 the Philippine foreign minister, the late Blas Ople exchanged notes with US ambassador to the Philippines Francis Ricciardone, Jr. in what was later to be the bilateral immunity agreement. An act that was kept secret from the public until the Vice-President himself who was foreign minister prior to Mr. Ople, and members of the Philippine Coalition for the ICC, including members of the House of Representatives, demanded that said

agreement be disclosed fully to the public for proper scrutiny. It was only almost a month later that the Ministry of Foreign Affairs issued a media release announcing the BIA signed between the US and the Philippines.

Despite a Supreme Court decision issued on June 26, 2003 ordering Malacanang to transmit the bill to the Senate for its concurrence, President Arroyo has refused to comply until now.

Like the case of Thailand, the signing of the BIA bypassed the democratic processes and violated the basic laws of the land. As a signatory to the Rome treaty of the ICC, it also violated its obligation to respect the integrity of the Rome Statute. Further, it deliberately denied the people their right to information and participation in the process of negotiation as the government deliberately kept the agreement from the knowledge of the public.

### **3. Neither Signed Nor Acceded**

#### **3.1 Malaysia**

Though Malaysia attended the Rome Conference, it did not vote in favor of the Rome treaty when it was adopted in 1998. It has neither signed nor acceded till now.

According to Dato' Param Cumaraswamy, a Malaysian national and UN's former Special Rapporteur on the Independence of Judiciary, "It is Malaysia's reputation not signing international treaties. Even with other important international treaties, it is not very keen on signing. If at all, it is very slow."<sup>186</sup> Malaysia is among the Southeast Asian countries that have the least ratifications of international treaties. Of the twelve core UN treaties, it has only ratified two.

In a statement made by Malaysia's deputy permanent representative to the UN, he expressed Malaysia's support for the expeditious establishment of the International Criminal Court. He also said that there are certain issues of concern that the process of establishment need to address, namely, issues on the principle of complementarity, inherent jurisdiction, role of the Security Council and consent of States and the type of crimes. On the principle of complementarity, he said his delegation supports the view that the jurisdiction of

the States criminal justice system should be given precedence over that of the ICC especially so when the matter in question involves a national of that State.

On inherent jurisdiction as embodied in Article 21(1)(a), Malaysia seeks resolution on the issue of whether such article is consistent with the principle of national sovereignty as enshrined in Article 21 of the UN Charter; whether it conforms with the principle of complementarity and whether it is compatible with

The principle requiring the state consent to the jurisdiction of the ICC as embodied in Article 22.

Regarding the role of the Security Council, Malaysia supports the exclusion of the Security Council in Article 23 as its ‘politicised role is incompatible vis-à-vis that of a judicial institution like the ICC.’<sup>187</sup> In addition, the permanent members, through their veto powers can in any case render Article 23 ineffective by blocking the referral of any case to it.’<sup>188</sup>

On the types of crimes, he said that in Article 20, the constituent element of each crime should be specified to avoid any ambiguity and in regard to the crime of genocide, they support the definition as contained in the Genocide Convention. As to the precise definition and meaning of aggression, they want to limit this to the most serious crimes such as those that occurred in Bosnia and Rwanda.

Malaysia was approached by the US to sign the BIA but the former refused. “There is no way Malaysia will enter this deal. For whatever reason/s, it will not tow the US line.”<sup>189</sup>

In 2003, the Malaysian Bar Council submitted a resolution to the government, urging it to ratify the Rome treaty. In December, 2003, a workshop on the ICC was held in Kuala Lumpur, attended by representatives of the Malaysian Human Rights Commission, Bar Council, NGOs and media. It agreed

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<sup>186</sup> Interview, Dato’ Param Cumaraswamy, June 23, 2004.

<sup>187</sup> Statement, Thanarajasingam, S., Item 142, Establishment of the ICC, 6<sup>th</sup> Committee, 50<sup>th</sup> Session of the UN General Assembly, 1 November 1995.

<sup>188</sup> Id.

<sup>189</sup> Interview, Cumaraswamy, D.P., June 23, 2004.

to form a national working group on the ICC composed of Amnesty International-Malaysia, ERA Consumer and the Bar Council.

### 3.2 Indonesia

Indonesia took active part in the ICC process beginning from the first PrepCom in 1995, during the Rome Conference and until the last Assembly of States Parties, with an observer status as it neither signed nor acceded.

According to Indonesian ambassador to Timor Leste, the unresolved issue on the definition of aggression is the main reason why it has not signed yet the Rome treaty. “Generally, the Indonesian position is to continue following the evolution of ICC until its starting operation...As a non-state party, Indonesia will make special and planned policy to implement its international responsibility coming from the operation of ICC.”<sup>190</sup>

The last follow-up we made to the Ministry of Foreign Affairs, we were informed that the ratification of the Rome Statute had been incorporated in Indonesia’s 5-year national human rights plan and it is scheduled for ratification in 2008.

According to an Indonesian human rights lawyer, Indonesia will not ratify at this time because it is still committing the same atrocities that it committed against East Timorese, this time to the peoples of Aceh and West Papua and other parts of the country where the military has full control. “With the failure to bring to justice the perpetrators of crimes committed in East Timor, it is unthinkable to see the main perpetrator running for the top post in the country. This is an insult of highest degree to the victims of these crimes.”<sup>191</sup>

Indonesia is the only country in the region that has adopted a Human Rights Law that creates a Human Rights Court that has the mandate to prosecute cases, which include among others, three of the crimes covered by the Rome Statute of the International Criminal Court: genocide, crimes against humanity and war crimes.

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<sup>190</sup> Statement, Wahyiono, K. June 27, 2002

<sup>191</sup> Interview, Indonesian human rights lawyer, Jakarta, June 4, 2004.

“With the results of the trials and conviction of those responsible for the atrocities in East Timor, this court is clearly established to cover up the gravity of crimes committed by the military.”<sup>192</sup>

Like Thailand, Indonesia has organized a number of conferences dealing with ICC: an International Conference on Crimes Against Humanity held in 2002 and organized by the Ministries of Human Rights and Justice and supported by a number of European Union members.

The Center for Human Rights of the University of Indonesia also organized a national workshop on the ICC following this international workshop, attended by members of the Human Rights Commission and other key officials of the government. Academics and NGOs were also represented. Two other workshops and smaller consultations were held by concerned groups in Jakarta.

### **3.3 Singapore**

Like Malaysia, Singapore abstained during the Rome Conference. However, despite its non-accession, it has participated actively during the PrepComs and up to the Assembly of States Parties sessions. Singapore was one of the members of the Like-Minded Group, an informal group of 60 States that regularly met during the PrepComs, who committed to support the establishment of the ICC.

To date, the Singaporean government has not issued any formal statement as to its position on the ICC. At the initiative of an NGO in Singapore, the first Singaporean workshop on the ICC is scheduled on August 28, 2004. It will be participated by representatives of the academe, NGOs and officials in their individual capacity.

### **3.4 Brunei Darussalam**

While Brunei Darussalam attended the Rome Conference and was among the 21 who abstained during the voting, it did not pursue further its involvement

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<sup>192</sup> Id.

with the ICC. We observed that it was not sending representatives to the PrepComs, an indication of its non-interest and low priority on the ICC.

Of the twelve UN core treaties, it has only ratified one, the lowest record in the region.

### **3.5 Burma**

Like Brunei Darussalam, Burma was not involved in any way in any of the ICC-related meetings. Though the Burmese groups in Thailand are quite keen on learning about the ICC, attending seminars and workshops about the ICC, there has not been any effort to lobby the military junta to ratify the Rome treaty.

According to a Burmese lawyer, “For obvious reasons, we do not recognize the junta as a legitimate government and it has no moral or legal authority to be part of this noble institution like the ICC.”<sup>193</sup>

Of the twelve UN core treaties, Burma has ratified only two, one of the lowest in the region.

### **3.6 Vietnam**

Vietnam also attended the Rome Conference and has been sitting in some of the PrepCom sessions. But to date, it has not acceded the Rome treaty.

A workshop on the ICC was conducted in Hanoi, sponsored by the local university. We had the opportunity to meet with some key people in the government. As the topic is very new to them, they said they needed to study further the implications of the Court to their situation, Vietnam having a peculiar situation vis-à-vis the United States. True enough, there is a need to have a massive education campaign on the ICC and what it means to them to have adequate basis for discussion and decision as to whether they would want to be part of it.

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<sup>193</sup> Interview, Burmese lawyer, Bangkok, November 2003, February 2004.

### **3.6 Laos**

Laos was also represented during the Rome Conference and thereafter until the last Assembly of States Parties. Like Vietnam, they prefer “to wait and see”.

“We are a very small country. We want to see how the big countries will play their role. We consider it our learning process.”<sup>194</sup> A national workshop on the ICC had been held in Vientiane, attended by some of the key people from the various government ministries. Laos signed the BIA last year with the US. Said one diplomat in Bangkok, “It is quite understandable for Laos to sign the BIA as it has no power to resist the US.” What is not quite understandable is for countries like Thailand that has at least some leverage with the US and can assert itself not to sign.”<sup>195</sup>

Like other Southeast Asian countries, the level of understanding of basic laws and principles, issues and concerns even among professionals especially in the government need to be prioritized in such country as Laos where meeting basic needs remain to be a serious concern that should be addressed by the government. A noticeable feature in Laos is the absence of strong and independent civil society groups, an important component that needs to be developed in its democratization process.

Of the twelve UN core treaties, Laos has ratified five.

## **4. Opposed**

### **4.1 Malaysia**

Though Malaysia abstained in the voting during the Rome conference, it consistently participated and supported the process towards the establishment of the Court.<sup>196</sup>

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<sup>194</sup> Meeting with Laotian delegate to the PrepCom, April 11, 2002.

<sup>195</sup> Interview, UN diplomat, Bangkok, November 28, 2003.

<sup>196</sup> See previous discussion, p 89

## 4.2 Singapore

Like Malaysia, while Singapore did not vote during the Rome Conference, it consistently followed up the process and supported the Court's establishment<sup>197</sup> above.

## 5. Signed the BIA

Thailand, Philippines, Timor Leste, Laos and Cambodia all signed the BIA with the US. There was news that Indonesia was approached by the US but until now it has not signed the agreement.<sup>198</sup> Malaysia openly rejected to sign the BIA.<sup>199</sup>

To analyze the effect of the US position in Southeast Asia, it is crucial to take into account the timeframe and the circumstances that took place within this timeframe to be able to determine the context by which the US position was framed and to see the over-all effect of such circumstances surrounding the US position on the ratification process and human rights in the countries in the region.

The world has changed after the September 11, 2001 US tragedy. As the US started to aggressively assert itself, attacking Afghanistan and later Iraq, it completely disregarded multilateral relations, institutions and democratic processes. The climate of growing fear and insecurity prevailed and continues to create restlessness not only in Southeast Asia but throughout the region as the US pursues its hegemonic agenda. Governments in the region continue to take advantage of this situation as they pursue their own interests vis-à-vis their relationship with the US.

“In a world beset by internal armed conflicts, the impact has been no less devastating: more people demonize the enemy, divide the world into black and white, or, good and evil empires, readily label the other as terrorist or trigger-happy. The trend to military means is matched by the propensity to all-out war, the thresholds of violence raised, the habits of dialogue crushed by the flourish of rhetoric, the appeal to reason drowned out by loyalty to the flag.”<sup>200</sup>

It was clear that US, in its participation in the ICC process was trying hard to ‘dismantle’ the Court and when it could not, “to explore its utility as a potent judicial

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<sup>197</sup> See previous discussion, p 89

<sup>198</sup> Interview, Indonesian lawyer, June 4, 2004.

<sup>199</sup> Interview, Cumaraswamy, D.P., June 23, 2004

<sup>200</sup> Garcia, E., No Shortcuts to a Just Peace, Kalinaw, Vol. 1 No. 1, March 2004.

weapon in the war against terrorism.” Failing in both, it unsigned and embarked on a campaign to undermine it. From this period of unsigned to the present, almost all countries in the region had been approached by the US and as a concrete result, 5 have so far signed BIAs with it.

Around the October 2003 meeting of the APEC held in Thailand, President Bush and his State Department Secretary Colin Powell made a round of the key cities in the region campaigning for support for the war in Iraq as well as the US position on the ICC. It was around this period that some of the heads of states in the region, notably the prime minister of Thailand, the president of the Philippines and others had been invited to the US to meet with President Bush. Thereafter, it was observed that some countries in the region had bilateral immunity agreements signed and declaration of non-ratification of the Rome Statute made.

It is easy to conclude that for the second, third, fourth and fifth categories of countries enumerated above: countries that have signed but not yet ratified, namely Thailand and Philippines, countries that neither ratified nor acceded namely Malaysia, Singapore, Brunei Darussalam, Burma, Vietnam and Laos, and the countries initially opposed to the ICC and those that signed the BIAs with the US, the impact is clear: **Non-Ratification.**

It is argued here that non-ratification has serious and far-reaching implications for Southeast Asia. As US pursues further its war against terror, governments in the region will be emboldened to exercise their authoritarian rule and in the process violate the rights of their people. On the other hand, civil society groups, including victims and survivors’ groups, will be encouraged further to demand for ratification and/or seek redress at all levels: national, regional and international, including the ICC.

It is further argued that as the US pursues its unilateralist goal, countries that have worked hard to preserve the multilateral goals achieved over the years would try to strengthen themselves not to allow the US to get its way at the expense of the international community. As governments do not feel they are accountable, impunity will continue and the burden of struggling for justice for victims of human rights violations will be more on the shoulders of civil society groups in the region. And unless there is a counter pressure coming from one hand, the international community

that support the ICC through multilateral and bilateral efforts and on the other hand, the civil society groups especially victims groups, who stand to benefit most from the establishment of the Court, the region will be going towards the direction where US is trying hard to lead them-- a situation where there is an undermined Court and thus an undermined international justice, with US on top, exempted and immune from any prosecution by the ICC and by any state that signed bilateral immunity agreement with it.

Non-ratification does not only mean allowing governments not to be accountable for their actions and allowing them to escape their responsibility to protect and respect the rights of their people and when these rights are violated, to render justice for victims and their families. Non-ratification means foregoing Asia's chance to participate as members of the international community in the collective search for international justice through the ICC and losing all the opportunities that the ICC can contribute to the world: justice for victims and survivors, deterrence of crimes, diplomacy, raising global norms and sensitizing global consciousness, and ultimately, a more just and humane world.

Concretely, for Southeast Asia, as governments do not feel accountable, the impact of non-ratification of the Rome Statute of the ICC is evident in many ways:

**Reinforcement of governments' avoidance of human rights issues and concerns, including non-ratification and implementation of other human rights instruments.**

At the ASEAN level, governments would continue to ignore the cases of Burma, of Aceh and Maluku in Indonesia, of Mindanao in the Philippines and south of Thailand, reiterating their policy of "non-interference" and "respect for sovereignty" of each member country. Using these policies as pretext, the ASEAN governments would continue to be reluctant in addressing some of the abuses particularly those cases that are directly attributable to government forces.

At the national level, governments would maintain the *status quo* and continue to disregard demands for investigations and resolutions of human rights cases, as in the cases of the missing lawyer in Thailand, the arbitrary arrest, torture and detention

of human rights defenders in Indonesia and the killings of opposition leaders and members in the Philippines..

An Achenese leader said: “We do not think the military will allow Megawati to ratify the ICC. They know they are guilty of many crimes, especially against the people of Aceh. Unless they want to change for the better and allow us to determine our own future. But this is not the case. Our situation is getting worse everyday. Suspected leaders and members of GAM are summarily killed and arrested and tortured and thousands of people are displaced. Many have been forced to leave the country for fear of their life and safety. Our people constantly live in fear.”<sup>201</sup>

### **Reluctance of governments to act on human rights initiatives in the region, both at the national and regional level**

At the regional level, the proposed ASEAN regional human rights mechanism has long been overdue. According to Dato’ Param Cumaraswamy, the case of the ASEAN Regional Working Group that is working for the establishment of this regional human rights mechanism has taken them more than ten years convincing the ASEAN governments and the ASEAN body to consider their proposal.

Professor Vitit Muntarbhorn, one of the pioneers of this proposal for a regional human rights mechanism also states: “It has been a long and winding road...It is ten years on, since that seminal statement<sup>202</sup>. Yet no such mechanism has been established, and to date, ASEAN governments have not yet put forward ideas on the shape and substance of such a mechanism.”<sup>203</sup>

With this development with regards the ICC, ASEAN governments will be more reluctant to push for a regional mechanism. “Unless they would see this as an opportunity to have a mechanism that would have jurisdiction over cases in the region, rather than victims going to the ICC. They should take the ICC regime as an

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<sup>201</sup> Interview, Acehnese representative, First Asian Victims’ Forum on the ICC, February 25-27, 2004, Quezon City.

<sup>202</sup> In 1993, the foreign ministers of the ASEAN broached the possibility of establishing an inter-governmental mechanism on human rights for the region as follows: [The foreign ministers] in support of the Vienna Declaration and Programme of Action (of the World Conference on Human Rights) agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.

<sup>203</sup> Speech, Roadmap for an ASEAN Human Rights Mechanism, 3<sup>rd</sup> Workshop on the ASEAN Regional Mechanism on Human Rights, 27-29 May, 2003, Bangkok.

opportunity to improve their national judicial systems as they would have the primary jurisdiction over the cases as provided for under the complementary principle of the ICC. It is only when states are unable and unwilling that the ICC can have jurisdiction over a case at the national level.”<sup>204</sup>

At the national level, the lack of strong and independent mechanisms for justice remains a distant reality in the region.

“While there exists four national human rights institutions in the region,, it is still a long way to go in terms of realizing their full potentials as independent and effective bodies, responding to the demands for justice from the victims of human rights abuses.”<sup>205</sup> The judicial systems in all the countries in the region need to be strengthened and in so doing, it needs a very strong political will on the part of both the governments and civil societies to make them effective mechanisms for justice.

### **The enactment of anti-terrorism laws which in many cases violate human rights and existing laws of states.**

Fighting terrorism has taken precedence over protecting human rights and promoting the rule of law and democratic governance.

With internal security laws already in place in many countries in the region, the sweeping enactment of anti-terrorism laws may exacerbate the already serious effects of these internal security laws to the people in the countries in the region.

In response to the US campaign against terror and its position on the ICC, almost all the countries in the region adopted anti-terrorism laws which in many cases, were in violation of existing laws in the countries, including their constitutions.

Indonesia has two anti-terrorism laws passed, one specifically for Bali and one for the entire country. Philippines has eight pending in Congress and Thailand had passed one.

What is common to all these anti- terrorism laws is their effect on the fundamental civil and political rights as they:

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<sup>204</sup> Interview, Byron Bocar, legal counsel, Philippine Coalition for the ICC, First Asian Victims’ Forum on the ICC, February 25-27, 2004. Quezon City.

<sup>205</sup> Input, Chairperson Purificacion Quisumbing, First Asian Victims Forum on the ICC, February 25-27, 2004, Quezon City.

1. Infringe on the right to privacy as law enforcers are authorized to intercept communications and conduct surveillance which are susceptible to abuse and fabrication;
2. Encroach on the rights to free speech, assembly and association as they intend to outlaw terrorist organizations and ban what is deemed as 'political' and 'critical' statements.
3. Violate the most fundamental right – right to life – by imposing death penalty on terrorist acts that, as political offences, are not punishable by death; and the tendency to use this to eliminate political undesirables and/or opponents.
4. Violate the right of the accused to be presumed innocent until proven guilty by a court of law by pronouncing all members of "terrorist organizations" guilty of the 'crime of terrorism'
5. As a consequence of violating the presumption of innocence, deny rights to due process and equal protection before the law of persons accused of committing terrorist acts and those subjected to invasion of privacy.<sup>206</sup>

It should be noted that prior to the September 11, 2001 tragedy, the human rights situation in the region has not been that good<sup>207</sup>, with the long standing conflicts and issues prevailing in countries notably in Burma, Indonesia, Cambodia, Malaysia and Philippines. National security laws continue to be used in most countries and some basic rights i.e. freedom of expression, assembly, association, are restricted. The rights of women and children, minority groups and other vulnerable sectors are in many cases violated in many parts of the region. While many countries in the region have ratified a number of international human rights instruments, notably the women and children conventions, the level of implementation is very weak.<sup>208</sup>

In the aftermath of September 11, US took the center stage in world affairs as it embarked on its own war against terrorism. Presenting the world with crude choices of 'with us or with the terrorists', the US has escalated the so-called 'international

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<sup>206</sup> Diokno, Maria. Socorro, The Erosion of International Standards, paper presented at the Asian Peace Assembly, May 2003, Quezon City.

<sup>207</sup> ASEAN Human Rights Score Card, panel discussion, Asian People's Assembly, Mandaluyong City, Philippines, 2003.

<sup>208</sup> Id.

campaign against terrorism' into a full-blown war enlisting the support of most governments, including those in Asia and the tightening of controls over civil society through various so-called security measures and the introduction of anti-terrorism laws. As a result, democratic rights and civil liberties won through decades of people's efforts and struggle are in peril all over the world."<sup>209</sup>

"After the Bali bombing in 2003, an anti-terrorism law was passed to address the situation in Bali. Then came the Jakarta bombing. Another terrorism law covering the whole country was adopted. So it's like the whole country is under martial law, not to mention the heavy militarization in Aceh and West Papua."<sup>210</sup>

In Thailand, "...The spread of terrorism worldwide has been a key cause of the adoption of new anti-terrorist laws globally. The Thai authorities are no exception to the rule. In 2003, an executive decree was passed by the cabinet giving the authorities more powers to suppress terrorism. Both the form and content of this law were/are questionable. Precisely because the content of the decree was tantamount to creating criminal offences, the process of enacting a new law on this matter should have been by means of an act of parliament with full public debate – rather than by executive decree."<sup>211</sup>

Professor Muntarbhorn further states that "there are many ambiguities in the content of the new law...for example on the issue of complicity which gives the authorities too much power; this will affect the operations of many civil society actors who might be prosecuted for complicity."<sup>212</sup>

### **Undermining the work of human rights NGOs and human rights defenders in the region.**

This is one major setback in the region as a result of US' campaign against terrorists - the labeling of legitimate non-government organizations and human rights defenders as 'terrorists' and subjecting them to various forms of harassments and

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<sup>209</sup> Asian Peace Alliance, KALINAW Asian People Speak Up for Peace, Proceedings of the Asian Peace Alliance Inaugural Assembly, University of the Philippines, Diliman, Quezon City, August 29-September 1, 2002, p ii

<sup>210</sup> Interview, Indonesian human rights lawyer, June 4, 2004.

<sup>211</sup> Muntarbhorn, V., Free Polls Don't Equal Freedoms, The Bangkok Post, Vol. LVIII No. 135, May 14, 2004.

<sup>212</sup> Id.

intimidation. This has very serious consequence to the work of the NGOs in the region as they become the targets for arrest, detention, torture and even involuntary disappearance and summary killings as in the case of the missing lawyer in Thailand and the arrest and detention of human rights activists in Aceh and in the Philippines and the filing of charges against oppositionists as in the case of Singapore and Malaysia.

The experiences of human rights defenders in the region can be summed up “in a report published by the UN on the human rights defenders, identifying various government practices that are used to restrict the work of human rights defenders:

1. Damaging the public image of human rights defenders;
2. Attempting to control and restrict access to funds.
3. Imposing more requirements for international NGOs to register with authorities;
4. Scrutinizing and harassing NGOs on the basis of national security;
5. Using civil proceedings and criminal prosecutions vis-à-vis human rights defenders to curb their operations;
6. Restricting their right to protest, and using state violence; and
7. Colluding between local authorities and the private sector against human rights defenders.”<sup>213</sup>

With non-ratification, the human rights defenders and other members of civil society active in social movements will be in a more vulnerable situation as governments will not feel accountable for any of the violations they commit against these people.

**The restriction of the quality of justice or justice itself which becomes subject to threats and pressures using economic and other benefits.**

The vulnerability of third world countries, including most of Southeast Asian countries which are dependent for support from a superpower becomes a tool to deny justice to victims of most serious crimes.

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<sup>213</sup> Id.

The intent of the Court to prosecute and punish any individual who has committed serious crimes becomes subject to exemption by a certain nationality from any prosecution for the reason that the said national belongs to a superpower and the victim to a country dependent for its survival to the superpower. The terms are not even negotiable because the lesser party has no other option, unless there is very strong political will to defy and resist the superpower and face the consequence of such defiance and resistance.

US President Bush in his State of the Union address declared the second stage of the war, renouncing even its original logic of retaliation against September 11 attackers and in total disregard of the UN Charter and international laws. The US now claims its right to attack any countries it arbitrarily names: North Korea, Iraq and Iran, calling them as belonging to the 'axis of evil'. Following this came the expose of the Nuclear Position Review targeting China, Russia, Libya and Syria as 'possible nuclear targets in addition to the axis countries'. Already war is being brought to far-flung areas of the world, causing sufferings of vast numbers of people having nothing to do with terrorism, let alone the September 11 attacks on the US.

To pre-determine the fate of one nation, judge its people's moral integrity and act based on such unilateral judgment is against all established rules and principles in international law. To declare one a criminal on the basis of one's own perception without due process of law contradicts basic principles of criminal law.

**Targeting of Muslim nationals and communities, resulting to discrimination and other forms of abuse.**

Unfortunately, the US campaign on "war on terror" deliberately singled out Islam and the Islamic world as "Enemy", almost equating Muslim with 'terrorist'. The demonisation of Islam, and the whipping up of jingoistic hysteria, which has led to the introduction of unnecessary and dubious anti-terrorist laws, threatening to curtail basic rights and freedoms, make for a very dangerous combination situation in which there is, on the one hand, a recourse to the strengthening of national security laws and introduction of terrorism laws and on the other hand, a creation of an atmosphere of

paranoia and hate politics which political opportunists, communal forces of violence, and organized criminal elements take advantage of for their own ends.’<sup>214</sup>

In the Philippines, Muslim populations in South Mindanao have been subjected to various forms of harassments, threats and intimidations as they always fall suspects as being members of the most wanted *Abu Sayyaf* group. In many cases, such suspects have been arrested, tortured and detained without the benefit of trial and legal representation. There have also been a number of cases where suspects have been summarily killed and disappeared.<sup>215</sup>

Taking advantage of all-out US support, governments have hardened their positions against the just struggles of groups fighting for self-determination. The anti-terror alliance with the US, for example, has emboldened the Arroyo governments to drop all pretense of meeting the Moro people’s demands for the right to self-determination and economic justice in favor of a mailed fist policy that is converting the Southern Philippines into a zone of permanent war.

**The heightening of militarization and governments’ allotment of the bigger share of their budgets and national resources to defense e.g. the military, intelligence and other related security agencies, at the expense of much needed budgets for human rights education, sustainable development and peace efforts.**

Much of the Southeast Asian countries’ dependence to US is in the area of defense. Thailand, Philippines, Indonesia and other countries receive military aid from the US in forms of training, military equipment and hardware and other forms of assistance.

Beyond the erosion of civil liberties, the quality of democracy risks being diminished over the long term because governments spend the lion share of their budgets on security measures to the neglect of much needed social and economic programs that answer to people’s basic needs, as well as choices and opportunities to become active participants in the country’s decision-making. Unless we begin to address the root causes of poverty, marginalization and alienation, we will be forced to rely on our borders for peace and security

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<sup>214</sup> Id.p iii

In Thailand, “after World War II, the US became the main donor to Thailand’s development programs as part of its strategy to contain communism and improve the standard of living of ordinary Thai people. Up until the mid-1990s, Thailand remained a recipient of US economic and military assistance. Now, with communism defeated by capitalism, Thai-US relations have risen to a new plateau.”<sup>216</sup>

Recently in Thailand, US intelligence had been allowed by the Thai government to operate in the south to monitor the activities of the Muslims there for their alleged links with other fundamentalist Muslim groups in neighboring countries. There has been some tension because of the recent incidents of killings, the disappearance of a Muslim lawyer and other abuses.”<sup>217</sup>

Thailand was one of the first countries in the region that responded to the call of President Bush to send troops to Iraq. “In light of the recent prison scandal in Iraq and other reported regular massive killing incidents, the Thai people are concerned because we have troops there whose lives are at risk.”<sup>218</sup>

Despite the sizeable US military and economic aid to Southeast Asian countries, defense continues to eat up a big percentage of national budgets, usually bigger than other important items as health, employment, social welfare and education.

In Mindanao, south of Philippines, joint military operations are being conducted by the US and Philippine military forces in clear violation of Philippine national sovereignty, resulting in further instability in the country. The Philippines now hosts the largest contingent of US forces outside US next only to Afghanistan.”<sup>219</sup>

In Indonesia, there is no let-down in militarization, especially in hot areas like Aceh and Maluku. The military rules under the guise of a civilian leader.” This will continue because there is hardly any distinction in our history of civilian and military rule. Especially now if General Wiranto becomes our next president.”<sup>220</sup>

US backing has also enabled the Megawati government to move away from a peaceful and just resolution of conflicts in Aceh, Maluku and other parts of Indonesia.

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<sup>215</sup> Philippine Country Report, Asian Victims’ Forum on the ICC, Quezon City, Philippines, February 25-27, 2004.

<sup>216</sup> Thai-US Ties Reach a New Benchmark. Editorial, The Nation, October 19, 2004 .

<sup>217</sup> Interview, Sunai Phasuk, Human Rights Watch, 25 February 2004.

<sup>218</sup> Id.

<sup>219</sup> Id.

<sup>220</sup> Interview, Indonesian human rights lawyer, Dili, Timor Leste, May 26, 2004.

The repercussions of earlier acts of impunity of the US government and personnel have given blanket justification to similar impunities in the Asian region where many authoritarian regimes are known for their bad track record in human rights.<sup>221</sup>

In sum, while the US position directly results to non-ratification of the Rome treaty, thus, a regime of non-accountability and impunity among governments in the region, the impact on human rights is far-reaching and serious. On the positive side, civil society groups and the community of nations supporting the ICC are encouraged to collaborate to pursue further the campaign to strengthen support for the ICC, to protect its integrity and for international justice and rule of law to prevail over exceptionalism and rule of force.

The founders of the Asian Peace Alliance<sup>222</sup> have summed these up and declared: “The destruction of our rights is now being systematized and institutionalized in so-called anti-terrorist legislation that has either been signed or awaits passage by governments. Some of these regimes have given in to intimidation by Washington. Others,... have willingly betrayed their citizens in return for cold cash euphemistically labeled as ‘economic aid.’ Still others,...have taken advantage of the war against terror to push through repressive legislation they had wanted to pass even before September 11. The impact on human rights in the Asian region of the US position on the ICC as well as on war against terrorism is very serious. “It feeds on and further provokes communal tensions and internal conflicts, provides conditions ripe for all kinds of political opportunism and, stoking old tensions between rivals within the region, promotes jingoistic policies.”<sup>223</sup>

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<sup>221</sup> de Mesa, M., Human Rights in Asia: Pushed to the Brink. FORUM-ASIA 2003 Human Rights Report.

<sup>222</sup> Founded by more than a hundred groups and individuals in the Asia-Pacific as a response to the US actions after 9/11.

<sup>223</sup> Proceedings, Asian Peace Alliance Assembly, Quezon City, Philippines.

## CHAPTER 6

### CONCLUSION

The United States policy of ensuring immunity for all US nationals and its position of undermining the ICC should be seen in the context of broader processes unleashed in the Asian region by the US as part of its agenda of economic globalization. Starting from the Afghanistan campaign intended to crush opposition to a permanent US military presence in the Arabian peninsula to protect the interests of Big Oil, one of the prime beneficiaries of economic globalization. It is part and parcel of the US effort to gain access to Central Asia – a strategic move dictated by two imperatives: 1) achieving control over the region's vast energy reserves and 2) allowing the US to gain an advantage over its geopolitical rivals namely, Iran, China and Russia.

It is difficult to escape the conclusion that the direction of US policy is toward assertion of its dominance of the international system so as to ensure its security in the future. Going as far as legalizing its use of threats and coercion through the ASPA in getting countries to vote for its resolutions and to sign bilateral agreements to achieve its goal of granting immunity to all its nationals, knowing full well that these would undermine not only its immediate target, the ICC, but as UN Secretary General Kofi Annan warned, “undermining the Security Council and the whole institution of the United Nations”. The idea of international justice, of universal jurisdiction and other mechanisms that purport to serve justice for all - all symbolized and concretized with the establishment of the ICC must have driven the US leaders to a feeling of extreme insecurity, to the extent of paranoia that led them to disregard all rational and legal considerations in their foreign and national policies. In a rational world, in a sound legal system, rules apply equally to all - and the US can't just accept this. “...And that, for the most powerful and arrogant nation in the world, is simply inconceivable and unacceptable.”<sup>224</sup>

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<sup>224</sup> Crosette, B., The Wrong Kind of American Exceptionalism, UN wire.

The US' 'state-centric' security view completely disregards human security (read 'fundamental freedoms') and respect for human rights'<sup>225</sup> Over the last decade or so the definition of security has been broadened from its old focus of protecting the nation's territory from external aggression, where military forces and actions have traditionally proven the best form of protection, to cover the human aspects of 'freedom from fear' and 'freedom from want' – the security of people.<sup>226</sup> The momentum gained by this view over the years through the efforts of both the United Nations and civil society groups has not affected the US. The US government policy, as seen through the government's actions and pronouncements, has maintained and reinforced its priority on state –centric security, disregarding altogether alliances and international treaties and agreements.

It is easy to understand why the Philippines, despite its so-called adherence to democratic principles and international justice, would not ratify at this time the Rome Statute of the International Criminal Court. Historically, Philippine governments from the time of the American rule have been dependent on the US for most, if not all of their major decisions especially those pertaining to security, political and economic concerns. After the so-called Philippine independence in 1948, succeeding governments remained subservient to the US interests.

However, historically too, Filipinos have learned their lessons as victims from long years of oppression and exploitation by their colonial masters. They know that as victims, they have to struggle to be liberated. As victims they know they have to struggle to claim their rights as a people and as a nation, as they have shown when they revolted against their colonizers – the Spaniards, the Japanese and the Americans and as they have shown when they ousted their dictator Ferdinand Marcos and later the corrupt Joseph Estrada and as they dismantled the US military bases in Philippine soil.

While the Philippine as well as other Southeast Asian governments believe they ought to be on the side of the US on its war against terrorism, the Filipino people and

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<sup>225</sup> De Mesa, M., Human Rights and Human Security, paper presented at Third World Center, University of the Philippines, May 18, 2004.

<sup>226</sup> Richards, G., Globalization and Security: An Overview, a concept paper for the Summer Certificate Course on Globalization, Third World Studies Center, University of the Philippines, May 2004.

other peoples in the region believe otherwise. As governments tend to cooperate more to put forward their common interests vis-à-vis this perceived threat of terrorism presented to them by the US government, peoples in the region have no other choice but to raise their voice in unity in opposing the US position and strengthen their solidarity in articulating their concern over the grave impact of this position to the human rights situation in the region.

Despite the destructive attempts of the US government to undermine the ICC and by doing so effectively allowing them to commit crimes with impunity and to get all the benefits without accountability, there is a community of nations who believe in the cause for which the ICC was built on, and are willing to struggle along with the US to defend this cause. They believe it is for the best interest of the US to join this community of nations to make the ICC fulfill its mandate and achieve its full potential as an effective mechanism for international justice. The ICC is its best safeguard to protect its nationals on missions around the world. Rather than putting all their energy and resources in undermining such a newly born institution that has broad support of nearly a hundred states, it will do them well if they stop 'bullying' Security Council members to vote for their resolution and stop threatening countries to sign bilateral immunity agreements. More than ever, it is at this time that the Americans need all the support from the international community. It will do them best to continue engaging the ICC as a member state and not as an observer from the outside. In the same way, the ICC States Parties should continue to engage the US with the perspective of convincing its leaders to join and be part of the international community's efforts to make the ICC reach its full potentials as a court of justice for all.

The recent withdrawal by the US of its proposal at the Security Council seeking immunity of its peacekeepers should be a lesson for everyone. For the US, it should realize that international law applies to all and there is no way its nationals should be exempted from any prosecution, especially in the light of recent Abu Ghraib abuses. For the international community, it should realize all the more the need to subject even the most powerful country to international law, notwithstanding pressures from this country. It is also an important lesson to learn that if governments decide based on principles and go beyond powerplay in international relations, they can be in high moral ground to assert their unity despite strong pressures from the most powerful

nation. This is one important reason why the ICC is seen as very relevant. With the defeat of this resolution, the ICC and other related treaties, including the UN Charter and the UN itself as an institution had been strengthened and their legitimacy reinforced. Moreover, the existence of the ICC has already started to have a deterrent effect in conflict areas in Africa. “In a dangerous world where many global citizens still face great risk of being the victims of crimes against humanity, war crimes and genocide, such news is truly heartening and presents a ray of hope that the ICC will play a significant role in moving the world toward peace in the coming century.”<sup>227</sup>

## RECOMMENDATIONS

Capitalizing on this momentum over the past two years since coming into force, taking into account the negative impact of the US position in the region and the positive effects in civil society participation and cooperation with governments, the following recommendations are put forward:

At the ASEAN level:

1. Support the establishment of an ASEAN Regional Human Rights Mechanism that would promote human rights in the region, monitor human rights situations especially in conflict areas, investigate cases referred by States and other groups and coordinate human rights initiatives among governments and civil society groups.
2. Encourage member-states to ratify the Rome treaty and to adopt effective implementing legislations to ensure the region’s representation in this important international institution and its participation in the furtherance of international efforts towards strengthening the rule of law.
3. Adopt a common position to support and defend the integrity of the Court by revoking signatures to the bilateral immunity agreement and/or rendering them non-binding by not ratifying them. Encourage other countries that have not signed yet to resist signing BIAs that would grant immunity to US nationals.

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<sup>227</sup> Pace, W. Message, 2<sup>nd</sup> Anniversary of the Coming Into Force of the Rome Statute of the ICC, New York, July 1, 2004.

4. Cooperate on bilateral and multilateral basis in the strengthening of various mechanisms for justice: reforming judiciaries, creating and/or making more independent and effective national human rights institutions, law enforcement agencies and other related structures.
5. Create mechanisms that would respond to conflicts that have regional implications such as the cases of Burma, of Aceh and Maluku in Indonesia and the southern parts of Philippines and Thailand.

At the national level:

1. Review domestic legislations to ensure they meet international standards. Develop benchmarks to guide in planning, implementation and evaluation of national human rights programs. Repeal laws that violate human rights and democratic processes, including constitutions. These include laws on anti-terrorism and other internal security regulations. Revoke bilateral immunity agreements that bypassed legal and democratic processes and violated existing laws of countries, including the Constitution.
2. Review national budgets to ensure allocation of more resources to human rights education, sustainable development and peace efforts, over huge budgets for military and related security items.
3. Legitimize the status and strengthen the work of NGOs as partners in development and facilitate the role of human rights defenders in the protection and promotion of human rights.
4. Respect peoples' exercise of their civil and political rights as well as their economic, social and cultural rights and their right to sustainable development. No one should be discriminated on the basis of their political, religious and other beliefs, gender, nationality and race.

At the international level:

1. Countries that have already ratified the ICC should continue to provide support to countries that are still undecided especially those under pressure by the US not to ratify the Rome treaty and to sign bilateral immunity agreements.

2. Inter-governmental bodies like the European Union, ASEM, CARICOM and other groups should influence ASEAN and other inter-governmental bodies in the region to adopt common positions on the Rome Statute of the ICC, towards its promotion, ratification and effective implementation.
3. Other groupings like Inter-Parliamentarian Union, Forum of Asia-Pacific National Human Rights Institutions, Asia-Africa Consultative Group and others should be maximized towards continuous promotion of the Rome Statute of the ICC and their eventual ratification and implementation by governments in the Southeast Asian region.

Lastly, the ICC will be more strengthened if the people it purports to serve and the very reason for its existence – the victims – will themselves participate in the Court's process of fulfilling its mandate. The ICC advocates should build on the victims' capacities to defend the Court's integrity and to ensure it fulfills the purpose for which it was established. Governments and civil society groups in the region should continue their partnership and strengthen their capacities towards building broader and stronger constituencies that would ensure that justice is served wherever and whenever violations of human rights are committed and if and when justice is not possible at the national level, the victims would have access to other mechanisms at the regional level and the ICC as a last resort. In the final analysis, it will be the victims themselves who will have to reckon with their governments, in their search for justice for crimes committed against them and the rest of humanity.

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Carla Ferstman, REDRESS, Quezon City, Philippines, February 26, 2004

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- Tull Traisorat, Thai delegate to the PrepCom, New York, April 12, 2002, September 8, 2003
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**APPENDIX A**  
**ROME STATUTE OF THE INTERNATIONAL CRIMINAL**  
**COURT—A SUMMARY**

## **THE ROME STATUTE**

The ICC Statute agreed upon in Rome on July 17, 1998 is comprised of 13 sections and 128 articles. The following is a brief outline of the parts and subject matter of the Rome Statute. The full text of the Rome Statute is available on the CICC webpage at [www.iccnw.org](http://www.iccnw.org).

### **PART 1: Establishment of the Court**

Part 1 is comprised of articles 1 to 4. It concerns the establishment of the Court and its relationship with the United Nations.

The Court is to be established by treaty and based in The Hague, the Netherlands. The relationship of the Court to the UN will be determined by an agreement under negotiation at the Preparatory Commission.

### **PART 2: Jurisdiction, Admissibility, and Applicable Law**

Part 2 is comprised of articles 5 to 21. It concerns crimes within the Court's jurisdiction, the role of the Security Council, the admissibility of cases, and the law applicable to cases coming before the Court.

The Court initially will have jurisdiction over war crimes, genocide, and crimes against humanity. Additionally, the Court will exercise jurisdiction over the crime of aggression once agreement can be reached on a definition of this crime. It also establishes the principle of complementarity, by virtue of which the Court will only exercise its jurisdiction when the States that would normally have national jurisdiction are either unable or unwilling to exercise it.

### **PART 3: General Principles of Criminal Law**

Part 3 is comprised of articles 22 to 33. It concerns principles of criminal law drawn from different legal systems with the objective of providing all guarantees of due process.

This section includes the principle of non-retroactivity, whereby the Court will not have jurisdiction over acts committed prior to the Statute's entry into force. It recognizes the principle of individual criminal responsibility, which makes it possible

to prosecute individuals for serious violations of international law. This part also addresses the responsibility of leaders for actions of subordinates, the age of responsibility, the statute of limitations, and an individual's responsibility for both an act and an omission.

#### **PART 4: Composition and Administration of the Court**

Part 4 is comprised of articles 34 to 52. It details the structure of the Court and the qualification and independence of judges.

The Court will be comprised of the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor and the Registry. Eighteen judges will be elected by the Assembly of States Parties for nine year terms. They must have strong personal and professional qualifications in the fields of international and criminal law. The composition of the Court will reflect an adequate balance of the different legal systems of the world, geographic regions and gender equality.

#### **PART 5: Investigation and Prosecution**

Part 5 is comprised of articles 53 to 61. It addresses the investigation of alleged crimes and the process by which the Prosecutor can initiate and carry out investigations. It also defines the rights of individuals suspected of a crime.

#### **PART 6: The Trial**

Part 6 is comprised of articles 62 to 76. It deals with trial proceedings, the question of a trial in the absence of the accused or following an admission of guilt, and the rights and protection of the accused. The Statute states that "everyone shall be presumed innocent until proved guilty in accordance with law." This part also provides for the establishment of a Victims and Witnesses unit and the ability of the Court to determine the extent of damages and to order a guilty person to make reparation.

#### **PART 7: Penalties**

Part 7 is comprised of articles 77 to 80. It covers applicable penalties for persons convicted of a crime, which include: life imprisonment, imprisonment for a

designated number of years, and fines, among other sentences. The death penalty is not a sentence of the Court. This part of the statute also establishes a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of victims.

### **PART 8: Appeal and Review**

Part 8 is comprised of articles 81 to 85. It addresses appeals against judgment or sentence, appeal proceedings, the revision of a conviction or sentence, and the compensation to a suspect, accused, or convicted person. A convicted person, or the Prosecutor, may bring an appeal before the Court on the basis that the fairness of the proceedings was affected. The Statute states that anyone wrongfully arrested, detained, or convicted is entitled to compensation from the Court.

### **PART 9: International Cooperation and Judicial Assistance**

Part 9 is comprised of articles 86 to 102. It addresses international cooperation and judicial assistance between States and the Court. It involves the surrender of persons to the Court, the Court's ability to make provisional arrests, and State responsibility to cover costs associated with requests from the Court.

### **PART 10: Enforcement**

Part 10 is comprised of articles 103 to 111. It includes the recognition of judgments, the role of States in enforcement of sentences, the transfer of the person upon completion of a sentence, and parole and commutation of sentences.

### **PART 11: Assembly of States Parties**

Part 11 is comprised of article 112. It establishes an Assembly of States Parties, formed by one representative of each State Party, to oversee the various organs of the Court, its budget, and reports and activities of the Bureau of the Assembly. Representatives will have one vote and decisions will be reached either by consensus or some form of a majority vote. The Assembly of States Parties will also have the power to adopt or amend the draft texts of the Rules of Procedure and Evidence and Elements of Crimes.

**PART 12: Financing of the Court**

Part 12 is comprised of articles 113 to 118. It states that funding for the Court shall be provided by three sources: (a) assessed contributions from States Parties; (b) funds provided by the United Nations; and (c) voluntary contributions from governments, international organizations, individuals, corporations and other entities.

**PART 13: Final Clauses**

Part 13 is comprised of articles 119 to 128. It addresses the settlement of disputes, reservations and amendments of the Statute, and ratification. It states that no reservations may be made upon ratification of the treaty. However, seven years after the treaty has entered into force, any State Party may propose amendments to the Statute at a Review Conference. The final clauses called for the Statute to be open for signature from July 17, 1998 to December 31, 2000 by all States that attended the Rome Conference. The Statute allows for a State Party to withdraw from the Statute by notifying the Secretary-General of the United Nations, in writing.

**APPENDIX B**  
**STATES PARTIES TO THE ROME STATUTE OF THE ICC,**  
**ACCORDING TO UN GENERAL ASSEMBLY REGIONAL**  
**GROUPS**

**STATES PARTIES TO THE ROME STATUTE OF THE ICC,  
ACCORDING TO UN GENERAL ASSEMBLY REGIONAL  
GROUPS\***

**94 ratifications as of 3 May 2004**

**AFRICAN STATES (24 STATES PARTIES)**

Benin	22 January 2002	Malawi	19 September 2002
Botswana	8 September 2000	Mali	16 August 2000
Burkina Faso	16 April 2004	Mauritius	5 March 2002
Central African Rep.	3 October 2001	Namibia	25 June 2002
Congo (Brazzaville)	3 May 2004	Niger	11 April 2002
Dem. Rep. of Congo	11 April 2002	Nigeria	27 September 2001
Djibouti	5 November 2002	Senegal	2 February 1999
Gabon	20 September 2000	Sierra Leone	15 September 2000
Gambia	28 June 2002	South Africa	27 November 2000
Ghana	20 December 1999	Tanzania	20 August 2002
Guinea	14 July 2003	Uganda	14 June 2002
Lesotho	6 September 2000	Zambia	13 November 2002

**LATIN AMERICAN AND CARIBBEAN STATES (18 STATES PARTIES)**

Antigua & Barbuda	18 June 2001	Brazil	20 June 2002
Argentina	8 February 2001	Colombia	5 August 2002
Barbados	10 December 2002	Costa Rica	7 June 2001
Belize	5 April 2000	Dominica	12 February 2001
Bolivia	27 June 2002	Ecuador	5 February 2002

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\* Note: The regional groupings used in this document are based on the official regional groupings of the United Nations General Assembly

Honduras	1 July 2002	St. Vincent &	
Panama	21 March 2002	Grenadines	3 December 2002
Paraguay	14 May 2001	Trinidad & Tobago	6 April 1999
Peru	10 November 2001	Uruguay	28 June 2002
		Venezuela	7 June 2000

**ASIAN STATES (12 STATES PARTIES)**

Afghanistan	10 February 2003	Marshall Islands	7 December 2000
Cambodia	11 April 2002	Mongolia	11 April 2002
Cyprus	7 March 2002	Nauru	12 November 2001
East Timor	6 September 2002	Rep. of Korea	13 November 2002
Fiji	29 November 1999	Samoa	16 September 2002
Jordan	11 April 2002	Tajikistan	5 May 2000

**EASTERN EUROPEAN STATES (14 STATES PARTIES)**

Albania	31 January 2003	Lithuania	12 May 2003
Bosnia-Herzegovina	11 April 2002	Macedonia, FYR	6 March 2002
Bulgaria	11 April 2002	Poland	12 November 2001
Croatia	21 May 2001	Romania	11 April 2002
Georgia	5 September 2003	Slovakia	11 April 2002
Hungary	30 November 2001	Slovenia	31 December 2001
Latvia	28 June 2002	Yugoslavia	6 September 2001

**WESTERN EUROPEAN AND OTHER STATES (25 STATES PARTIES)**

Andorra	30 April 2001	Greece	15 May 2002
Australia	1 July 2002	Iceland	25 May 2000
Austria	28 December 2000	Ireland	11 April 2002
Belgium	28 June 2000	Italy	26 July 1999
Canada	7 July 2002	Liechtenstein	2 October 2001
Denmark	21 June 2001	Luxembourg	8 September 2000
Finland	29 December 2000	Malta	29 November 2002
France	9 June 2000	Netherlands	17 July 2001
Germany	11 December 2000	New Zealand	7 September 2000

Norway	16 February 2000
Portugal	5 February 2002
San Marino	13 May 1999
Spain	24 October 2000
Sweden	28 June 2001
Switzerland	12 October 2001
United Kingdom	4 October 2001

**STATES WITHOUT MEMBERSHIP (1 STATE PARTY)**

Estonia	30 January 2002
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**APPENDIX C**  
**STATUS OF BILATERAL IMMUNITY AGREEMENTS**  
**(AS OF 15 JULY 2004)**

## **STATUS OF US BILATERAL IMMUNITY AGREEMENTS (BIAS)<sup>1</sup>**

### **OVERVIEW**

- States Parties to have signed: 36; 45 countries have publicly refused signing
- States to receive permanent waivers: 27; 58 of 94 States Parties have not signed
- Ratifications of BIAs: 14; 23 States Parties have not signed despite loss of US aid

In capitals around the world, U.S. government representatives have been seeking bilateral non-surrender agreements, or so-called “Article 98” agreements, in an effort to shield U.S. citizens from the jurisdiction of the newly created International Criminal Court (ICC or Court). Dubbed bilateral immunity agreements (BIAs) by leading legal experts, the US-requested agreements provide that current or former US government officials, military and other personnel (regardless of whether or not they are nationals of the state concerned) or US nationals would not be transferred to the jurisdiction of the ICC.

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. 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.

### **AFRICA – 27 (16 States Parties)<sup>2</sup>**

Botswana +

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<sup>1</sup> As of July 15, 2004, the US State Department has reported over 80 agreements; 80 are listed here.

<sup>2</sup> \* indicates ratification of BIA and + indicates signature of executive agreement

Burkina Faso

Central African Republic

Chad

Congo-Brazzaville

Democratic Republic of the Congo +

Djibouti

Eritrea

Gabon

Gambia \*

Ghana \*

Guinea

Ivory Coast/Cote D'Ivoire

Liberia

Madagascar

Malawi +

Mauritania \*

Mauritius

Mozambique

Nigeria +

Rwanda

Senegal

Seychelles

Sierra Leone \*

Togo

Uganda +

Zambia

**ASIA – 16 (5 States Parties)**

Afghanistan +

Bangladesh

Bhutan

Cambodia

East Timor \*

Fiji

India +

Laos

Maldives

Mongolia

Nepal

Pakistan

Papua New Guinea

Philippines +

Sri Lanka

Thailand

**N. AFRICA/MIDDLE EAST – 7 (No States Parties)**

Bahrain

Brunei (unconfirmed)

Egypt (unconfirmed)

Israel +

Kuwait (unconfirmed)

Morocco (unconfirmed)

Tunisia (unconfirmed)

**AMERICAS – 12 (7 States Parties)**

Antigua and Barbuda +

Belize

Bolivia

Colombia +

Dominica

Dominican Republic

El Salvador \*

Guyana

Haiti

Honduras \*

Nicaragua \*

Panama \*

**EUROPE/CIS – 11 (6 States Parties)**

Albania \*

Azerbaijan

Bosnia-Herzegovina \*

Georgia \*

Kazakhstan

Kyrgyzstan

Macedonia, FYR \*

Romania

Tajikistan \*

Turkmenistan

Uzbekistan

**OCEANIA – 7 (2 States Parties)**

Marshall Islands

Micronesia

Nauru

Palau

Solomon Islands

Tuvalu

Tonga

**APPENDIX D**  
**PHILIPPINES-UNITED STATES AGREEMENT**  
**ON NON-SURRENDER**

Note No. BI-O-028-03

13 May 2003

Excellency:

I have the honor to acknowledge receipt of Your Excellency's Note No. -0470 of 9 May 2003, reading as follows:

"I have the honor to refer to recent discussions between representatives of the Government of the United States of America and the Government of the Republic of the Philippines regarding the surrender of persons to international tribunals.

"Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

"Considering that the Parties have each expressed their intention to, where appropriate, investigate and prosecute war crimes, crimes against humanity, and genocide alleged to have been committed by their respective officials, employees, military personnel, and nationals,

"I have the honor to propose the following agreement:

"1. For purposes of this Agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.

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

(a) be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council, 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 any international tribunal, unless such tribunal has been established by the UN Security Council.

His Excellency

FRANCIS J. RICCIARDONE, JR.

Ambassador Extraordinary and Plenipotentiary  
Embassy of the United States of America  
Manila

"3. When the United States extradites, surrenders, or otherwise transfers a person of the Philippines to a third country, the United States will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the Republic of the Philippines.

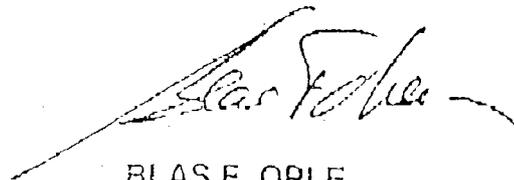
"4. When the Government of the Republic of the Philippines extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of the Republic of the Philippines will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the United States.

"5. This Agreement shall remain in force until one year after the date on which one party notifies the other of its intent to terminate the Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective ~~date~~ of termination.

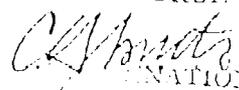
"If the proposal set forth herein is acceptable to the Government of the Republic of the Philippines, this note and Your Excellency's affirmative note in reply shall constitute an agreement between our two Governments which shall enter into force on the date of Your Excellency's note."

I am pleased to inform Your Excellency that the undertakings contained in the above-quoted note are acceptable to my Government, and that Your Excellency's note and this reply thereto constitute an Agreement between our two Governments effective immediately.

Accept, Excellency, the renewed assurances of my highest consideration.



BLAS F. OPLE  
Secretary of Foreign Affairs

CERTIFIED TRUE COPY  
BY   
OFFICE OF THE SECRETARY  
Date JUN 23 2003

**APPENDIX E**  
**CHRONOLOGY: SECURITY COUNCIL RESOLUTION 1422/1487**

## **CHRONOLOGY OF THE ADOPTION OF SECURITY COUNCIL RESOLUTIONS 1422/1487**

By the Coalition for the International Criminal Court

In May 2002, the United States government announced that it would oppose the renewal of UN Security Council mandates for all peacekeeping operations unless the Council granted immunity from prosecution by the International Criminal Court (ICC) for all US peacekeeping personnel. Firing a salvo across the UN bow at the time of the renewal of the East Timor peacekeeping operation, the US threats escalated in June into an intense confrontation at the Security Council.

On June 30, 2002, the US vetoed renewal of the Bosnia & Herzegovina peacekeeping mission and further threatened to shut down *all* UN peacekeeping operations unless their demands for ICC immunity were met. With more than 120 nations attending the final ICC Preparatory Commission meetings at UN headquarters, and the Rome Statute slated to enter into force only days later, the US encountered fierce opposition from many of its closest allies and scores of other nations. These countries were outraged that the US would pit international peacekeeping against international justice. They strenuously objected to the US effort to misuse the Security Council and UN Chapter VII authority to amend a treaty that the US opposed. Secretary-General Kofi Annan himself expressed concern, sending an extraordinary and angry letter to US Secretary of State Colin Powell, stating that the US proposal was a dangerous and irresponsible threat to peacekeeping, and would violate the Charter and international treaty law.

Special plenaries and open meetings in the Security Council were convened, and despite vocal opposition from representatives of over 50 governments, the Council unanimously adopted Resolution 1422 on July 12, 2002. Resolution 1422 purported to give the Security Council the right to defer the ICC's jurisdiction in cases against personnel of non-States Parties involved in operations established or authorized by the

UN. The adoption of Resolution 1422 allowed the UN Mission in Bosnia & Herzegovina to continue uninterrupted, and removed the immediate threat of the US veto of UN peacekeeping operations.

In June 2003, when Resolution 1422 came up for renewal, a public meeting of the Security Council heard statements on behalf of over 70 UN member states that voiced their support for the ICC, and their opposition to the automatic renewal of Resolution 1422. At the time of the vote, three Security Council members abstained, namely France, Germany and Syria. The remaining votes were sufficient to renew the Resolution, which was adopted for an additional 12 months as Resolution 1487.

The increasing opposition to the Resolution was demonstrated again in May 2004. On May 19, 2004, the US requested a vote within 48 hours to renew Resolution 1487. The vote was later postponed, reportedly due to US difficulties in obtaining the necessary support for renewal of the resolution amidst growing concerns about allegations of abuse at the Abu Ghraib prison in Iraq.

Reservations have also been expressed by Secretary-General Kofi Annan, who stated in June 2004, “I think it would be unfortunate for one to press for such an exemption, given the prisoner abuse in Iraq. I think in this circumstance it would be unwise to press for an exemption, and it would be even more unwise on the part of the Security Council to grant it. It would discredit the Council and the United Nations that stands for rule of law and the primacy of rule of law.”

The following timeline tracks the developments of the Security Council negotiations on this resolution:

- May 2002: At the time of the renewal of the UN Transitional Administration in East Timor (UNTAET) and one week before the independence ceremonies for East Timor, the United States threatened to oppose the mission’s renewal unless the Security Council agreed to provide immunity from domestic and international courts to US peacekeepers. Lacking enough support, the US relented and the Security Council voted unanimously to renew the peacekeeping mission. The US warned, however, that it would return to this issue, as officials noted that the effort to influence the East Timor mission was part of a broader

strategy designed to lock in similar exemptions for US nationals serving in more than a dozen other UN operations around the world.

- June 19, 2002: In relation to the renewal of the UN peacekeeping mission in Bosnia- Herzegovina (UNMIBH), the US presented two proposals in its efforts to obtain complete immunity for its peacekeepers: The insertion of a paragraph into the UNMIBH resolution that would exempt peacekeepers from being “transferred to an international tribunal”; and a general resolution to grant blanket immunity to all peacekeepers by giving all Member States’ “personnel participating in operations established or authorized by the UN Security Council [...] immunity from arrest, detention, and prosecution.”<sup>1</sup> According to reports, all other Members of the Security Council opposed the US proposal.
- June 27, 2002: A revised US proposal specifically referred to the Rome Statute for the first time and recognized that there were different legal obligations for States Parties and non-States Parties. Indeed, governments had pointed out that the previous resolution would have forced those states which had ratified the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to violate their treaty obligations by creating an exemption from all prosecutions. Though the revised US resolution restricted itself to non-States Parties, it continued to call for blanket immunity, stating that “personnel from a contributing State not party to the Rome Statute “[...] shall have, except in the territory of the contributing State, immunity from arrest, detention and prosecution.”<sup>2</sup>

French Ambassador to the UN Jean-David Levitte proposed an alternative to the US proposal, stating that the Security Council “expresses its readiness, pursuant to Article 16 of the ICC Statute, to consider on a *case by case* basis requesting the ICC to defer investigations or prosecutions.”<sup>iii</sup> Most experts felt that this proposal, the first to specifically refer to Article 16, was consistent with the UN Charter, international law, and the Rome Statute. US

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<sup>1</sup> Draft Resolution proposed by the US (June 19, 2002)

<sup>2</sup> Draft Resolution proposed by the US (June 27, 2002)

Ambassador to the UN John Negroponte expressed the US resolve to continue pursuing its goal of immunity by warning that “a veto is definitely an option.”<sup>3</sup>

- June 28, 2002: The US rejected the French proposal, renewed its threats to veto the extension, and, in addition, suggested that it would cease paying its 25% share of the UN peacekeeping operations budget.<sup>4</sup>
- June 30, 2002: Due to a lack of support for the US draft resolution among Security Council members, the US vetoed the renewal of the Bosnia mandate, 14-1, marking the United States’ isolation on the issue. Nevertheless, the US agreed to extend the Bosnia mandate through a technical extension until July 3 (Resolution 1420).
- July 3, 2002: UN Secretary General Kofi Annan sent an extraordinary letter to US Secretary of State Colin Powell, expressing his strong disapproval of US proposals in the Security Council. Secretary General Annan urged for a solution, stating that the US proposal “flies in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty.” He also warned that “the Council risks being discredited” if it were to extend its mandate by involving itself in treaty-making.<sup>5</sup> The ICC Preparatory Commission (PrepCom), meeting in its 10<sup>th</sup> session, convened an emergency plenary to discuss the anti-ICC US resolutions before the Security Council.

Government delegates at the PrepCom drafted a letter that was sent to the President of the Security Council, expressing the PrepCom’s common position on this issue. The letter stated that the PrepCom “is deeply concerned about the current developments in the Security Council regarding the International Criminal Court and international peacekeeping” and called on all states “to safeguard the independent and effective functioning of the ICC that is complementary to national jurisdiction” and “to ensure an outcome of those developments which fully respects the letter and spirit of the Rome Statute.”<sup>6</sup> A

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<sup>3</sup> Alternative proposal by France (June 27, 2002)

<sup>4</sup> Remarks by US Ambassador to the UN John D. Negroponte on the situation in Bosnia and Herzegovina at the Security Council ( June 27, 2002)

<sup>5</sup> Amnesty International, “The unlawful attempt by the Security Council to amend the Rome Statute

<sup>6</sup> Letter from UN Secretary General Kofi Annan to US Secretary of State Colin Powell (July 3, 2002)

revised resolution was presented at a 3 p.m. session of the Security Council. The first paragraph, widely attributed to a UK proposal, dropped the term “immunity” and instead requested that the “ICC for a twelve-month period shall not commence or proceed with any investigations or prosecutions.”<sup>7</sup> The second and third paragraphs, which attempt to automatically renew the immunity clause, were authored by the US. These provisions blatantly attempted to override the letter and spirit of Article 16 by requiring a formal, positive vote by the Security Council for a subsequent 12 month deferral. Members of the Security Council opposed this proposal due to its automatic renewal provision. As no compromise had been reached, the Security Council passed Resolution 1421 shortly thereafter, allowing for a further technical extension of the UNMIBH until July 15.

- July 10, 2002: In response to requests by the government of Canada, the Security Council convened a special open meeting on the situation in Bosnia-Herzegovina, in which delegations from all regions of the world voiced their views about the US proposals to the Security Council. Most governments opposed the US proposals as contrary to international law, the UN Charter, and the Rome Statute.<sup>8</sup>

The US proposed another draft resolution requesting, as in the previous proposal, that the “ICC for a twelve-month period shall not commence or proceed with any investigations or prosecutions,” but dropping the automatic renewal provision and replacing it with the expression of the Security Council’s “intention to renew the request [...] each July 1 for further 12 month periods for as long as may be necessary.”<sup>9</sup>

- July 11, 2002: France, a leading critic of the US proposal, floated its own draft, under which the ICC would have “to notify the Security Council before commencing or proceeding with any investigations or prosecutions involving current or former officials or personnel from a contributing State not Party to the Rome Statute for acts or omissions relating to UN established or authorized

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<sup>7</sup> Government Responses to US resolutions during Special ICC Preparatory Commission Plenary, as outlined in the CICC country chart (July 3, 2002)

<sup>8</sup> Letter from the ICC Preparatory Commission to the President of the Security Council (July 3, 2002)

<sup>9</sup> Draft resolution proposed by the US and UK (July 3, 2002)

operations, to all the Security Council to take a decision, as appropriate.”<sup>10</sup> The resolution would thus allow the Security Council to seek a delay before making a possible deferral request under Article 16. Some diplomats said, however, that the US would not accept the proposal. US officials, already under pressure from rightwing members of Congress for abandoning the demand for blanket immunity, said they had no room for flexibility.<sup>11</sup> A chart based on current UN data on troopcontributions to UN missions, distributed by the Coalition for the ICC and others, demonstrated that US peacekeepers have no exposure to the jurisdiction of the ICC under existing arrangements. The chart showed that, in every UN peacekeeping mission, the US either has no personnel in the mission, the host state is not party to the ICC, or the ICTY has primacy. Thus, total US exposure to the ICC is zero in every case.<sup>12</sup>

- July 12, 2002: Mauritius presented amendments, reportedly drafted in collaboration with the UK, to the second paragraph of the US proposal, expressing the Security Council’s “intention to renew such a request on a case-by-case basis for a further twelve month period for as long as may be necessary.”<sup>13</sup> In addition, the Permanent Representatives of Canada, Brazil, New Zealand and South Africa sent a letter to the President of the Security Council expressing their opposition of the current draft resolution.

After much debate, the Security Council unanimously passed Resolution 1422: it requests that the ICC “shall for a twelve-month period [...] not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise”<sup>14</sup> and expresses the intention to renew the request for as long as may be necessary. Extreme pressure had been brought to bear by the US and the United Kingdom in order to secure a unanimous decision on the temporary exemption of peacekeepers from the ICC’s reach. The Coalition was dismayed that a number of governments on the

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<sup>10</sup> Government Responses to US resolutions in the open meeting of the Security Council, as outlined in the CICC country chart (July 10, 2002)

<sup>11</sup> Draft resolution proposed by US (July 10, 2002)

<sup>12</sup> Alternative proposal by France (July 11, 2002)

<sup>13</sup> Proposed amendment by Mauritius (July 12, 2002)

<sup>14</sup> Text of Resolution 1422 (July 12, 2002)

Security Council agreed to vote in favor of the resolution. The Coalition, however, appreciated the courage shown by Mexico and Ireland, who were the last to succumb to the US and UK pressure.

Prior to adoption of Resolution 1422, the UN Legal Counsel reportedly met with government delegates in closed session concerning the draft resolution. As noted in the paper by Amnesty International:

“According to various accounts, the opinion emphasized that the Rome Statute would have to be construed by the ICC, not just the Security Council. It noted that this was the first time that the Security Council sought to invoke Article 16, which was more complex than many realized. The opinion stated that any request under this article had to be under Chapter VII, but it did not express any view whether that chapter had been properly invoked. It suggested that the situation envisaged in the draft resolution would almost certainly not happen and concluded that ‘in the present circumstances’ a resolution of the sort envisaged would be consistent with Article 16. The opinion also indicated that the draft resolution would give the Security Council ample time to be able to reconsider the question in less stressful circumstances when it expired in a year’s time. Nothing in the reports about the content of the opinion suggests that the Legal Counsel would necessarily conclude that a renewal of the request in the resolution as adopted would be consistent with Article 16.”<sup>15</sup>

- June 9, 2003: The US introduces Resolution 1422 for renewal without modifying its text.
- June 12, 2003: At a public meeting of the Security Council, statements were made on behalf of over 70 UN member states that voiced their support for the ICC, and their opposition to the automatic renewal of Resolution 1422. At the time of the Security Council vote on Resolution 1422, three Council members abstained: France, Germany and Syria. The remaining votes were sufficient to renew the Resolution, which was adopted for an additional 12 months as Resolution 1487.

During the 4772nd meeting of the Security Council on June 12, Secretary-General Kofi Annan expressed his grave concern about the Resolution, saying, “But allow me to express the hope that this does not become an annual routine. If it did, I fear the world would interpret it as meaning that the Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes. If that were to happen, it would undermine not only the authority of the ICC but also the authority of the Council and the legitimacy of United Nations peacekeeping. I am sure you understand [...] that such an outcome would cause me grave concern, and I would hope that this concern would be shared by all members of the Council.”

- May 19, 2004: The US introduced Resolution 1487 for renewal without modifying the text and requested a vote within 48 hours.
- May 20, 2004: In a letter addressed to the President of the Security Council (Pakistan), representatives of Canada, Ireland (on behalf of the European Union), Jordan (on behalf of the members of the Bureau of the Assembly of States Parties), Liechtenstein and Switzerland, requested the Council to convene a public meeting.
- May 21, 2004: The Security Council public meeting and vote on the renewal of the Resolution was postponed until Monday 24 May, reportedly due to China not having received instructions for the vote.
- May 24, 2004: The Security Council public meeting and vote were once again postponed. No alternative date was decided.
- June 17, 2004: Upon his arrival at UN Headquarters, UN Secretary-General Kofi Annan made a strong statement against the renewal, saying “I think it would be unfortunate for one to press for such an exemption, given the prisoner abuse in Iraq. I think in this circumstance it would be unwise to press for an exemption, and it would be even more unwise on the part of the Security Council to grant it. It would discredit the Council and the United Nations that stands for rule of law and the primacy of rule of law.”

- June 18, 2004: During his monthly lunch with the Security Council, UN Secretary-General Kofi Annan distributed an aide-memoire to Security Council members, emphasizing his belief that “extending the exemption once more would contradict the efforts of the United Nations –including the Council itself– to promote the rule of law in international affairs,” expressing his “serious doubts about the legal basis of the proposed exemption” and “strongly urging the Council ‘not to renew this measure.’” This paper had a strong influence on Security Council members.

It was also reported in the media that China was considering casting an abstention in the vote, joining Benin, Brazil, Chile, France, Germany, Romania and Spain in the list of reported abstentions.

- June 22, 2004: In an attempt to garner the necessary support, the US proposed a compromise text, whereby the resolution would be extended for a final 12 month period.
- June 23, 2004: During informal discussions, it became clear that the compromise text was still not acceptable to most Security Council members. The US decided to withdraw the resolution, announcing to the press: “The United States has decided not to proceed with further consideration and action on the draft at this time to avoid a prolonged and divisive debate.” Following the US announcement, UN Secretary-General Kofi Annan issued a statement expressing his belief that “the decision by the United States not to pursue a resolution on this matter will help maintain the unity of the Security Council at a time when it faces difficult challenges.”

**APPENDIX F**  
**CHRONOLOGY OF U.S. OPPOSITION TO THE**  
**INTERNATIONAL CRIMINAL COURT**

The American Non-Governmental Organizations Coalition for the International  
Criminal Court (AMICC)

**Chronology of U.S. Opposition to the International Criminal Court  
FROM 'UNSIGNING' TO IMMUNITY AGREEMENTS**

This fact sheet details United States government opposition to the International Criminal Court (ICC) because of its fear that the ICC will be used as a forum for politically motivated prosecutions. Beginning with its May 6, 2002 formal renunciation of support for the ICC – the U.S. had signed the Rome Statute of the ICC during the Clinton Administration – the U.S. has conducted a calculated campaign to undermine the Court despite its declaration that it would respect the Court and countries that choose to support it.

**May 6, 2002:**

Under Secretary John Bolton sends a letter to United Nations Secretary General Kofi Annan announcing the U.S. decision to nullify its signature of the Rome Statute, thereby making it unmistakably clear that the US does not intend to support the International Criminal Court (ICC).

Under Secretary for Political Affairs Marc Grossman explains the new U.S. policy toward the ICC and says that, “[n]otwithstanding our disagreement with the Rome Treaty, the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court.”

War Crimes Ambassador Pierre-Richard Prosper holds a press briefing and says, “The president has made clear that – what he wanted to do today was to make our intentions clear and to not take aggressive action or wage war, if you will, against the ICC or the supporters of the ICC.”

Secretary of Defense Donald Rumsfeld says that any attempt to turn a U.S. national over to the ICC would be “regarded as illegitimate by the U.S.” and that, “We must be ready to defend our people, our interests and our way of life.”

**May 9, 2002:** House Majority Whip, Tom DeLay (R-TX), offers the American Servicemembers’ Protection Act (ASPA) as an amendment to the Supplemental

Appropriations Act of 2002 (HR 4775). It is cleared by the Appropriations Committee by a vote of 38 to 18. Unlike the version of the ASPA circulated in 2001, this text contains broad presidential waiver authority that has been endorsed by the Administration.

**May 23, 2002:** The U.S. House of Representatives passes HR 4775, including the ASPA.

**June 6, 2002:** Senator Warner (R-VA) proposes the ASPA as an amendment (S.AMDT.3597) to the Senate version of the Supplemental Appropriations Act. The text is identical to the House version. By unanimous consent, a second-degree amendment (S.AMDT.3787) by Senator Dodd (D-CT) is incorporated into the ASPA text. It reads: "Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."

**June 30, 2002:** The U.S. is the sole member of the Security Council to veto the renewal of the UN peacekeeping mission in Bosnia-Herzegovina (UNMIBH) after failing to obtain support for its efforts to include language granting peacekeepers complete immunity from the jurisdiction of any international tribunal. The mission mandate is extended temporarily.

**July 3, 2002:** UN Secretary General Kofi Annan sends a letter to U.S. Secretary of State Colin Powell expressing his strong disapproval of the U.S. Security Council proposals to exempt U.S. personnel from the ICC. The UN Preparatory Commission for the ICC convenes in an emergency session to discuss the situation. Delegations strongly condemn the U.S. position.

**July 10, 2002:**

The Security Council convenes in a special open meeting on the situation in Bosnia-Herzegovina. Representatives from over 100 UN member states, including the Presidents of the European Union, Rio Group and Like-Minded Group, overwhelmingly oppose the U.S. proposals for immunity.

The U.S. offers a revised resolution that would prevent the ICC from commencing with an investigation or prosecution against nationals of non-States

Parties for a 12-month period and that expresses the Security Council's intention that it be automatically renewed on an annual basis.

**July 12, 2002:**

The Security Council unanimously (15 – 0) passes Resolution 1422 and expresses its intention to renew it annually. The resolution requests that "...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, [the ICC] 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."

Ambassador John D. Negroponte announces that the Security Council resolution is merely a first step in U.S. efforts to keep Americans out of the jurisdiction of the ICC.

**July 23-24, 2002:** Both houses of Congress pass conference report 107-593 on HR 4775 (including the ASPA 2002) with no changes to the Dodd amendment.

August 1, 2002: Romania becomes the first state to sign a bilateral non-surrender agreement (so-called Article 98[2] agreement) with the U.S., prohibiting the surrender of U.S. nationals. Philip T. Reeker, Deputy Spokesman for the Bush Administration, announces that, "...Romania has shown that it understands our position...we are not trying to weaken the ICC or undermine the integrity of international peacekeeping operations."

**August 2, 2002:**

President George W. Bush signs HR 4775, making the ASPA U.S. law.

Some U.S. officials begin warning that the administration will be obligated by the ASPA to withhold military aid from states that do not sign U.S.-proposed non-surrender agreements. Some NATO aspirants are threatened that failure to sign such an agreement could put their candidacy at risk. NATO members are told that without such agreements, the U.S. may have to reevaluate its relationship with the organization.

**August 12, 2002:** Deputy Department Spokesman Reeker acknowledges that the ASPA does not prevent the U.S. from providing military assistance to any country

when the president determines that such assistance is important to U.S. national interests.

**September 2002:** The Bush Administration releases its National Security Strategy Policy. In reference to the ICC, it says:

"We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept. We will work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms as multilateral and bilateral agreements that will protect US nationals from the ICC. We will implement fully the American Servicemembers Protection Act, whose provisions are intended to ensure and enhance the protection of US personnel and officials."

**September 30, 2002:** The European Union Council agrees that the U.S. non-surrender agreement does not fall under Article 98 of the Rome Statute and, as proposed, would be illegal for States Parties to the ICC to sign. It further adopts "guiding principles" that require any related agreement to (1) include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity, (2) cover only persons who are not nationals of an ICC State Party, and (3) cover only persons present on the territory of a requested State because they have been sent on official business by a sending state that is party to the agreement.

**June 12, 2003:** Prior to renewing Security Council Resolution 1422 for one more year (numbered Resolution 1487), UN Secretary General Kofi Annan and representatives of close to 60 countries speak out against the resolution and against renewal, arguing that it is unnecessary, inappropriate and illegal under the Rome Statute, the UN Charter, and general international law. Most explicitly reject any attempt to automatically renew this resolution in the future. Germany, France, and Syria abstain in the vote and express their support for the ICC and confidence in its work.

**July 1, 2003:** President Bush announces a suspension in military aid to 35 state parties to the ICC. Waivers for the ASPA prohibition on US military assistance are provided

to ICC parties that have concluded, or are in the process of concluding, BIA agreements.

**August 1, 2003:** The US threatens a veto of the peacekeeping operation in Liberia until it secures an exemption for personnel from non-state parties not only from the ICC, but also from ANY foreign jurisdiction. In addition to constricting ICC jurisdiction, Resolution 1497 infringes on the rights of states to prosecute those who commit atrocities against their citizens.

**August 26, 2003:** The US refuses to join a resolution protecting humanitarian aid workers — even after the bombing in Baghdad that killed 22 UN workers — because it refers to the fact that the ICC has explicitly criminalized attacks against aid workers as war crimes. The version that passes (Resolution 1502) instead refers indirectly to "existing prohibitions under international law."

**By October 1, 2003:**

Thirty-two U.S. allies and friends lose U.S. military assistance for fiscal year 2003 under the ASPA because President Bush refused to grant them national interest waivers. Affected countries include Bulgaria, Estonia, Latvia, Lithuania and Slovakia, all of which have sent troops to Iraq, as well as key partners in the war on terrorism and drug trafficking. The military assistance to be withheld under the same legislation for Fiscal Year 2004 could total an additional \$89.28 million.

More than 65 countries are reported to have signed the US-proposed non-surrender agreement. Many countries must still gain parliamentary approval of these agreements to become binding. Powerful states, including Canada and Germany, have publicly indicated that they are unlikely to sign. More vulnerable states such as Croatia and members of CARICOM have also refused. Undersecretary for Arms Control and International Security John Bolton's team at the State Department continues its worldwide efforts to obtain these agreements.

In spite of its expressed intent to respect the decisions of nations that have chosen to join the ICC, the US continues to make specific efforts to discourage governments from ratifying the Rome Statute and from participating constructively in the ICC, including the denial of grants to and other sanctions authorized (but not mandated) by the ASPA.

**APPENDIX G**  
**LIST OF ICC JUDGES WITH THEIR REPRESENTATION**

**ELECTED JUDGES OF THE INTERNATIONAL CRIMINAL  
COURT**

<b>NAME</b>	<b>Nationality</b>	<b>Gender</b>	<b>Term of Office</b>
BLATTMANN, Ren	Bolivia	Male	6 years
CLARK, Maureen Harding	Ireland	Female	9 years
DIARRA, Fatoumata Dembele	Mali	Female	9 years
FULFORD, Adrian	United Kingdom	Male	9 years
HUDSON-PHILLIPS, Karl T.	Trinidad and Tobago	Male	9 years
JORDA, Claude	France	Male	6 years
KAUL, Hans-Peter	Germany	Male	3 years
KIRSCH, Philippe	Canada	Male	6 years
KOURULA, Erkki	Finland	Male	3 years
KUENYEHIA, Akua	Ghana	Female	3 years
ODIO BENITO, Elizabeth	Costa Rica	Female	9 years
PIKIS, Gheorghios M.	Cyprus	Male	6 years
PILLAY, Navanethem	South Africa	Female	6 years
POLITI, Mauro	Italy	Male	6 years
SLADE, Tuiloma Neroni	Samoa	Male	3 years
SONG, Sang-hyun	Republic of Korea	Male	3 years
STEINER, Sylvia H. de Figueiredo	Brazil	Female	9 years
USACKA, Anita	Latvia	Female	3 years

**APPENDIX H**  
**COMMON POSITION ON THE INTERNATIONAL CRIMINAL**  
**COURT OF THE COUNCIL OF THE EUROPEAN UNION**

## **COUNCIL COMMON POSITION ON THE INTERNATIONAL CRIMINAL COURT**

THE COUNCIL OF THE EUROPEAN UNION:

Having regard to the Treaty on European Union, and in particular Article 15 thereof,

Whereas:

The consolidation of the rule of law and respect for human rights, as well as the preservation of peace and the strengthening of international security, in conformity with the Charter of the United Nations and as provided for in Article 11 of the Treaty on European Union, are of fundamental importance to, and a priority for the Union.

The Rome Statute of the International Criminal Court entered into force on 1 July 2002 and the Court is now fully functional.

All Member States of the European Union have ratified the Rome Statute.

The principles of the Rome Statute of the International Criminal Court, as well as those governing its functioning, are fully in line with the principles and objectives of the Union.

The serious crimes within the jurisdiction of the Court are of concern to all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof.

The principles and rules of international criminal law embodied in the Rome Statute should be taken into account in other international legal instruments.

The Union is convinced that universal accession to the Rome Statute is essential for the full effectiveness of the International Criminal Court and, to that end, considers that initiatives to enhance the acceptance of the Statute are to be encouraged, provided they are consistent with the letter and spirit of the Statute.

The implementation of the Rome Statute requires practical measures that the European Union and its Member States should fully support.

The Action Plan which was, inter alia, called for by a Resolution on the Court approved by the European Parliament on 28 February 2002 to follow up Common

Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court<sup>1</sup> was adopted on 15 May 2002 and may be adapted as appropriate.

It is eminently important that the integrity of the Rome Statute be preserved.

By its Conclusions of 30 September 2002 on the International Criminal Court the General Affairs and External Relations Council has developed a set of principles attached to those Conclusions to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in responding to proposals regarding the conditions to surrender persons to the International Criminal Court.

In the light of the above, Common Position 2001/443/CSFP should be updated and recast.

(13) This Common Position should be kept under review.

(14) The European Union considers the application of this Common Position by the acceding countries and the alignment with it by the associated countries Romania, Bulgaria and Turkey and by the EFTA countries important in order to maximise its impact,

HAS ADOPTED THIS COMMON POSITION:

#### Article 1

The International Criminal Court, for the purpose of preventing and curbing the commission of the serious crimes falling within its jurisdiction, is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations.

The objective of this Common Position is to support the effective functioning of the Court and to advance universal support for it by promoting the widest possible participation in the Rome Statute.

#### Article 2

In order to contribute to the objective of the widest possible participation in the Rome Statute, the European Union and its Member States shall make every effort to

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<sup>1</sup> OJ L 155, 12.6.2001, p. 19. Common Position as amended by Common Position 2002/474/CFSP (OJ L 164, 22.6.2002, p. 1).

further this process by raising the issue of the widest possible ratification, acceptance, approval or accession to the Statute and the implementation of the Statute in negotiations or political dialogues with third States, groups of States or relevant regional organisations, whenever appropriate.

The Union and its Member States shall contribute to the world-wide participation in and implementation of the Statute also by other means, such as by adopting initiatives to promote the dissemination of the values, principles and provisions of the Statute and related instruments. In furtherance of the objectives of this Common Position, the Union shall cooperate as necessary with other interested States, international institutions, non-governmental organisations and other representatives of civil society.

The Member States shall share with all interested States their own experiences on the issues related to the implementation of the Statute and, when appropriate, provide other forms of support to that objective. They shall contribute, when requested, with technical and, where appropriate, financial assistance to the legislative work needed for the participation in and implementation of the Statute by third countries. States considering to become party to the Statute or to cooperate with the Court shall be encouraged to inform the Union of difficulties encountered on that path.

In implementing this Article, the Union and its Member States shall coordinate political and technical support for the Court with regard to various States or groups of States. To that end, country-specific or region-specific strategies shall be developed and used where appropriate.

### Article 3

In order to support the independence of the Court, the Union and its Member States shall, in particular:

- encourage States Parties to transfer promptly and in full their assessed contributions in accordance with the decisions taken by the Assembly of States Parties;
- make every effort towards the signature and ratification by Member States of the Agreement on the Privileges and Immunities of the Court as soon as possible and promote such signature and ratification by other States; and

- endeavour to support as appropriate the development of training and assistance for judges, prosecutors, officials and counsel in work related to the Court.

Article 4

The Council shall, where appropriate, coordinate measures by the European Union and Member States for the implementation of Articles 2 and 3.

Article 5

The Union and its Member States shall follow closely developments concerning effective cooperation with the Court in accordance with the Rome Statute.

In this context, they shall continue, as appropriate, to draw the attention of third States to the Council Conclusions of 30 September 2002 on the International Criminal Court and to the EU Guiding Principles annexed thereto, with regard to proposals for agreements or arrangements concerning conditions for the surrender of persons to the Court.

Article 6

The Council notes that the Commission intends to direct its action towards achieving the objectives and priorities of this Common Position, where appropriate by pertinent Community measures.

Article 7

Member States shall cooperate to ensure the smooth functioning of the Assembly of States Parties in all respects.

During negotiations in the Special Working Group established by the Assembly of States Parties to deal with the crime of aggression, Member States shall contribute to the finalisation of the work under way and shall support solutions which are consistent with the letter and the spirit of the Rome Statute and of the United Nations Charter.

Article 8

The Council shall review this Common Position as appropriate.

Article 9

The Council notes that Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia intend to apply this Common Position as from the date of its adoption.

The Presidency will request the associated countries Romania, Bulgaria and Turkey as well as the EFTA countries to align with this Common Position.

Article 10

Common Position 2001/443/CSFP is hereby repealed and replaced by this Common Position. References to the repealed Common Position 2001/443/CSFP shall be construed as being made this Common Position.

Article 11

This Common Position shall take effect from the date of its adoption.

Article 12

This Common Position shall be published in the Official Journal of the European Union.

Done at

For the Council

The President

**APPENDIX I**  
**A TIMELINE OF THE ESTABLISHMENT OF THE**  
**INTERNATIONAL CRIMINAL COURT**

## **A TIMELINE OF THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT**

In July 1998 – at a United Nations conference in Rome, Italy – governments overwhelmingly approved a statute to establish a permanent and independent International Criminal Court (“ICC” or “Court”). Four years later, during a UN treaty event on April 11, 2002, the Rome Statute of the ICC received the 60<sup>th</sup> ratification required to trigger its entry into force. On July 1, 2002, the ICC began its jurisdiction over genocide, crimes against humanity and war crimes.

The “road to Rome” was a long and often contentious one. While efforts to create a global criminal court can be traced back to the early 19<sup>th</sup> century, the story began in earnest in 1872 with Gustav Moynier – one of the founders of the International Committee of the Red Cross – who proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call for an internationalized system of justice came from the drafters of the 1919 Treaty of Versailles, who envisaged an *ad hoc* international court to try the Kaiser and German war criminals of World War I.

Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals. The world, reflecting on the Holocaust, cried “Never again!” The call for an international institution to try individuals responsible for the most heinous crimes resonated throughout the world, and many thought the founding of the United Nations would bring the world closer to a permanent Court. Yet more than 50 years would pass before the world’s leaders would meet to prepare a treaty establishing a permanent International Criminal Court.

Here are some highlights from the road to Rome ... and the establishment of the ICC.

- October 1946 Soon after the Nuremberg Judgment, an international congress meets in Paris and calls for the adoption of an international criminal code prohibiting crimes against humanity, and for the prompt establishment of an international criminal court (ICC).

- December 9, 1948 The United Nations General Assembly (UN GA) adopts the *Convention on the Prevention and Punishment of the Crime of Genocide*. It calls for criminals to be tried “by such international penal tribunals as may have jurisdiction.” Separately, members ask the International Law Commission (ILC) to study the possibility of establishing an ICC.
- December 10, 1948 The UN GA adopts the Universal Declaration of Human Rights, detailing human rights and fundamental freedoms.
- 1949 – 1954 The ILC drafts statutes for an ICC, but opposition from powerful states on both sides of the Cold War stymies the effort and the UN GA effectively abandons the effort pending agreement on a definition of the crime of aggression and an international Code of Crimes.
- 1974 The UN GA agrees on a definition of aggression.
- 1989 The end of the Cold War brings a dramatic increase in the number of UN peace-keeping operations in the world, lending an increased viability to the notion of establishing an ICC.
- June 1989 Motivated in part by an effort to combat drug trafficking, Trinidad and Tobago resurrects a pre-existing proposal for the establishment of an ICC. The UN GA asks the ILC to prepare a draft statute.
- 1991-1992 Wars in Bosnia-Herzegovina and Croatia, including clear violations of the Genocide and Geneva Conventions, lead the UN Security Council to establish a temporary ad hoc tribunal for the former Yugoslavia (in 1993) and strengthen discussions for a permanent ICC.
- 1994 The ILC submits a draft statute for an ICC to the UN GA.
- The war in Rwanda leads the UN Security Council to establish a second ad hoc UN war crimes tribunal for Rwanda. The ILC presents a final draft statute on an ICC to the UN GA and recommends that a conference of plenipotentiaries be convened to negotiate a treaty to enact the Statute. The UN GA establishes an ad hoc committee on an ICC to review the draft statute.
- 1995 The NGO Coalition for the ICC is formed to coordinate the efforts of human rights organizations such as Amnesty International, Asociación Pro Derechos Humanos, Fédération Internationale des Ligues des Droits de

l'Homme, Human Rights Watch, Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, Rights & Democracy and the Women's Caucus for Gender Justice. Mr. William Pace, Executive Director of the World Federalist Movement-Institute for Global Policy, is appointed Convenor.

- The ad hoc committee holds two 2-week meetings at UN headquarters. In December 1995, the UN GA establishes a three year Preparatory Committee (PrepCom) from March 1996 until April 1998, to finalize a text to be presented at a conference of plenipotentiaries.
- June 15 – July 17, 1998 160 countries participate in the UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court in Rome, Italy.
- *July 17, 1998* Member states overwhelmingly vote in favor of the Rome Statute of the ICC, creating the treaty establishing the first permanent international court capable of trying individuals accused of genocide, war crimes and crimes against humanity.
- February 2, 1999 Senegal becomes the first State Party to ratify the Rome Statute.
- *May 13, 1999* The Coalition for the ICC launches a campaign from The Hague calling for the world-wide ratification of the ICC Statute.
- June 30, 2000 The Preparatory Commission adopts draft texts for the Rules of Procedure and Evidence and the Elements of Crimes, as mandated by the Final Act of the Rome Conference.
- September 2000 During the Millennium Summit, UN Secretary General Kofi Annan calls on all member states of the United Nations to ratify the Rome Statute as quickly as possible.
- December 31, 2000 Deadline for signature of the Rome Statute. The United States of America joins Iran and Israel as the last states to sign the treaty, bringing the total number of signatures to 139.
- April 30, 2001 Half-way mark toward the 60 ratifications or accessions required to trigger entry into force of the Rome Statute reached when Andorra becomes the 30th state to ratify the Rome Statute.

- *April 11, 2002* The 60th ratification necessary to trigger the entry into force of the Rome Statute is deposited during a special ceremony at UN headquarters. Countries to deposit their treaty instruments during this ceremony are: Bosnia & Herzegovina, Bulgaria, Cambodia, Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania and Slovakia.
- *May 6, 2002* The US government under the Bush Administration formally announces to the United Nations its intention not to ratify the Rome Statute, and its view that it is no longer bound by the terms of the treaty, implied by its signature under the Clinton Administration in December 2001.
- *July 1, 2002* Following the formula set out in the Rome Statute, the treaty enters into force, becoming binding for all countries that have ratified or acceded to the Statute and for which it had entered into force by that date.
- *July 12, 2002* On this day, after intense US pressure and threats to shut down the UN peacekeeping mission in Bosnia-Herzegovina, the UN Security Council adopted Resolution 1422, granting UN peacekeepers immunity from the jurisdiction of the ICC, retroactively effective as of July 1, 2002 for a renewable one-year period.
- *September 3-10, 2002* The historic first meeting of the Assembly of States Parties (ASP), the body composed of ratifying countries that provides administrative and other support to the Court, is held at UN headquarters in New York. The ASP adopts the five years of work of the Preparatory Commission as well as procedures to facilitate the election of qualified and representative judges to the Court.
- *September 9, 2002* The nomination period for the judges and Prosecutor of the Court is officially opened, with a closing date of November 30, 2002.
- *September 16, 2002* Samoa becomes the 80th State Party to the Rome Statute.
- *November 30, 2002* Deadline for the nomination of candidates for the posts of 18 judges and the Prosecutor to the ICC is reached. Only countries to have deposited their instrument of ratification of or accession to the Rome Statute by this date are eligible to nominate an official or vote during the election of judges. Forty-five nominations were received by the established deadline,

although two countries withdrew their candidates, leaving 43 candidates at election time. No candidate for Prosecutor was announced.

- February 3 – 7, 2003 The first resumed session of the Assembly of States Parties (ASP) convenes at UN headquarters in New York to elect the first 18 judges to the Court. The President of the Assembly of States Parties, Jordanian Ambassador Prince Zeid Ra'ad Zeid Al-Husseini, announces that the nomination period for the position of Prosecutor will be re-opened from March 24 – April 4, 2003.
- *March 11, 2003* The first 18 judges of the ICC are sworn-in during a high-level ceremony in The Hague, the Netherlands.
- April 21-23, 2003 The Second resumed session of the Assembly of States Parties elects Mr. Luis Moreno Ocampo of Argentina as the first chief Prosecutor of the ICC.
- May 12, 2003 Lithuania becomes the 90th State Party to the Rome Statute of the ICC.
- *June 16, 2003* Mr. Luis Moreno Ocampo is sworn in as Prosecutor in a ceremony held in The Hague, the Netherlands.
- *July 3, 2003* Mr. Bruno Cathala from France is sworn in as Registrar of the Court, after being elected by the Judges to the ICC (in June). This marks the final appointment of the senior officials of the Court.
- July 16, 2003 ICC Prosecutor Moreno Ocampo holds his first press briefing to discuss the nearly 500 communications to have been received by the Court. He names the situation in the Democratic Republic of Congo as the most urgent situation that his office will “follow closely.”
- *September 12, 2003* A meeting of the 92-member Assembly of States Parties at the UN in New York elects a Board of Directors to the Victims Trust Fund of the ICC, which will administer reparations to victims. The Directors come from each of the five UN regional groups and are: Her Majesty Queen Rania Al-Abdullah of Jordan; His Excellency Mr. Oscar Arias Sanchez, former President of Costa Rica and Nobel Peace Laureate; His Excellency Mr. Tadeusz Mazowiecki, former Prime Minister of Poland and former Special Rapporteur on the United Nations Commission on Human Rights on the Territory of the

former Yugoslavia; Mme. Simone Veil, former Minister of Health of France and former President of the European Parliament; and Archbishop Desmond Tutu, former Chairman of the Truth and Reconciliation Commission of South Africa and Nobel Peace Laureate.

- November 3, 2003 Deputy Prosecutor (Investigations) Serge Brammertz of Belgium is sworn in to office.
- *January 29, 2004* The Office of the Prosecutor announces that Uganda (an ICC State Party) has referred the situation in Northern Uganda to the Court. The Prosecutor announces that there is “sufficient basis” to start planning for the launch of a formal investigation.
- *April 19, 2004* The Office of the Prosecutor announces that the Democratic Republic of Congo (DRC), also a State Party to the Rome Statute, has referred the situation of crimes allegedly committed in DRC since entry into force of the Statute. The Prosecutor will now proceed to determine whether there is reasonable basis to initiate an investigation in the coming months.

## **BIOGRAPHY**

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