PROTECTING THE INTEGRITY OF THE ICC

- US opposition to the ICC and the American Servicemembers Protection Act (ASPA)
- UN Security Council Resolution 1422/ 1487
- Bilateral Non-Surrender Agreements
- The role of MPs

In addition to the various challenges involved in making the Court operational, the ICC has been confronted with efforts on the part of the United States government to limit its reach. Since assuming office, the Bush administration has opposed the territorial jurisdiction of the ICC, which has been attributed by each State Party in respect of serious international crimes committed after 1 July 2002 in their territories.

Despite the various safeguards in the Rome Statute to prevent frivolous or political trials, the U.S. government bases its opposition to the ICC on the prospect of "politically-motivated" investigations or prosecutions of American military and political officials. In May 2002, the Bush administration "unsigned" the Rome Statute – an unprecedented step that was widely criticized as unilateral. Shortly thereafter, President Bush signed into law the "American Servicemembers' Protection Act (ASPA)," which among other extreme measures, grants the President the authority "to use all means necessary and appropriate to bring about the release" of U.S. nationals before the ICC. International media labeled the ASPA as "The Hague Invasion Act", since it seems to allow the use of force to free individuals who could be detained by the Court. Based on this legislation, the Bush administration embarked on a multi-pronged offensive at the international level aimed at undermining the recently established court.

BILATERAL NON-SURRENDER AGREEMENTS

The first component of this offensive is the *bilateral "non-surrender" agreements*[1] sought by the U.S. The US government has exploited Article 98 of the Rome Statute to seek agreements that prohibit yielding states from surrendering to the ICC any U.S. citizen or foreign contractor suspected of committing genocide, war crimes or crimes against humanity. Legal scholars worldwide have declared that these agreements are contrary to international law and the Rome Statute, and have stressed that States parties, as well as signatories of the Rome Statute, have a legal obligation *not* to sign such an agreement. In particular, these Agreements violate article 98 itself, which was designed to maintain the primary (not exclusive) jurisdiction of national Courts of States that deploy troops abroad in accordance with a Status of Forces Agreements, such as the one binding NATO Member States. Moreover, the bilateral non-surrender agreements violate the no-impunity principle and the principle of equality of all before the law, which are the foundation of the ICC Statute and of contemporary international criminal law.

States' decisions to reject a bilateral non-surrender agreement have, in many cases, come at a high cost: With the exception of NATO and other major allies, the U.S. has withdrawn military assistance to approximately 35 ICC States Parties – including countries that have supported the war in Iraq – because those States refused to sign an agreement. While ASPA authorizes the

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[1] A bilateral non-surrender agreement, in its present form, is a treaty that modifies previous laws, including the law on territorial jurisdiction for penal matters and the ICC ratification bill.

President to exempt countries from these sanctions, President Bush has used this discretionary power narrowly. To date, 35 States Parties and approximately 55 non-States Parties have signed the requested agreements, but only a minority of ICC States Parties followed the constitutional procedures to ratify these bilateral treaties. In fact, a majority of States Parties appear to have treated them as executive agreements, thus not requiring parliamentary approval. But when the lack of parliamentary assent in the conclusion of a treaty may be in contravention to the fundamental law of a State (i.e., the Constitution). If such a situations occurs, a bilateral agreement may be deemed as invalid under international law.

Furthermore, the European Union has concluded that "Entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties." [2] To bring the US proposal back within the legal scope of Article 98(2), the EU would require four modifications:

- **No impunity**: A guarantee that the US would investigate and potentially prosecute the accused in its domestic courts.
- **No reciprocity:** Nationals of ICC States Parties must be excluded from coverage.
- **No universal scope:** These agreements can only cover persons officially **sent** on government business by a State.
- **Ratification:** The agreement must be approved according to the constitutional procedures of each individual state.

U.N. SECURITY COUNCIL RESOLUTION 1422/1487

The second component of the U.S. campaign against the Court has been the usage of the UN Security Council to obtain *de facto* immunity for its nationals in all U.N. established or authorized peacekeeping operations. While Article 16 of the Rome Statute permits the Security Council to request that the ICC defer a specific investigation or prosecution for a period of 12 months in the interest of peace and security, the United States tried to manipulate this provision to obtain special protection for its nationals.

On July 12, 2002, following weeks of divisive negotiations, the U.S. succeeded in obtaining UNSC resolution 1422, which allowed for a renewable 12-month period the suspension of ICC investigations or prosecutions of peacekeepers from non-States Parties. Unless it received the necessary Security Council support, the US threatened to veto future renewals by the Council of the mandates of all peace operations, just as it had done with the United Nations Mission in Bosnia and Herzegovina (UNMIBH) on June 30, 2002.

Though over 100 governments expressed their concern over this measure in an open debate, the Security Council deemed that this step was necessary to assuage the concerns of the U.S. *temporarily*, while the newly created Court established itself in The Hague and its Judges, Prosecutor and other high officials were elected. On 12 June 2003, the resolution was renewed for an additional 12-month period as UNSC Resolution 1487, but confronted a greater level of opposition. For instance, France, which had supported its adoption the previous year, abstained from the vote emphasizing that the resolution was a temporary measure. Germany and Syria also abstained. In addition, at an open Security Council meeting on the renewal, U.N. Secretary-General Kofi Annan made the following statement:

[2] Conclusions of the Council of the European Union on the ICC; Brussels, 30 September 2002.

> [A]llow me to express the hope that this does not become an annual routine. If it did so, I fear the world would interpret it as meaning that this Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes. And if that were to happen, *it would undermine not only the authority of the ICC but also the authority of this Council, and the legitimacy of United Nations peacekeeping.*

On June 23, 2004, in the aftermath of the disclosure of the torture cases in Iraq, the United States withdrew its request for renewal of UNSC Resolution 1487, realizing it would not be able to secure enough votes to ensure its renewal. While the US and its allies found support in the Council on the new Iraq resolution, opposition progressively emerged in response to its attempt to undermine the integrity the ICC. The US's decision not to pursue its bid for immunity therefore represented a victory for the ICC and for the principle of equality of all before the law.

The growing sentiment in the Security Council towards rejecting the renewal of UNSC Res 1487 was also stimulated by actions carried out by PGA Members at the domestic level, especially in Brazil, Chile and the UK {3 Security Council members), as well as in Argentina, Italy and Mexico. At the Secretariat in New York, the PGA team prepared a model text for parliamentarians to use to state their objections to the renewal of resolution 1422/1487, which inspired members to take action. In **Brazil**, Deputy **Orlando Fantazzini** made several declarations and a written intervention urging the Government of Brazil to oppose the resolution. The Brazilian government then reported to Congress that they would not support it at the Security Council. In **Chile**, Deputy **Gabriel Ascencio** and Senator **José Antonio Viera Gallo** requested their Government to change its voting record at the Council. During a debate of the Chamber of Deputies of Chile on May 17, 2004, Ascencio called the resolution "*politically unacceptable*," and said that "*our government must oppose it.*" The active involvement of the President of the Chamber of Deputies, **Isabel Allende** contributed to the decision of the Executive to abstain on the resolution.

In the **United Kingdom**, PGA members, including **Tony Worthington, MP** and **John Battle, MP** challenged the UK's support for the US-backed resolution several times over the course of the last two years. On 21 May, **Battle** formally questioned the Foreign Office on the negative implications of the resolution. The Minister of State for Foreign Affairs Bill Rammel wrote in his response that the UK did not agree with the US concerns relating the ICC, but that they would have voted in favour of the resolution and, at the same time, urged "*the US to recognise that a further resolution next year will not be necessary.*" On June 23, Prime Minister Tony Blair affirmed unconditional support for the ICC at the House of the Commons during the question time.

With the defeat of the attempt to renew resolution 1487, the conditions for a cooperative relationship between the Court and the Security Council have been restored, and the international community can finally re-direct its energies towards protecting victims and potential victims of genocide, crimes against humanity and war crimes, and provide full cooperation to the ICC in preventing and punishing such crimes.

THE ROLE OF MPS

Parliamentarians can bring a level of transparency and accountability to the negotiation process by ensuring that governments do not negotiate agreements behind closed doors.

In numerous declarations, resolutions and action plans, PGA Members have always stressed that the essential foundation of the ICC is the principle of equality of all before the law. Measures that attempt to place entire categories of persons above the law stand in stark contrast with this principle. Indeed, by taking such a clear stance *against* the Court and singling itself out for special treatment, the US has aligned itself with States that do not join the ICC because they fear external and independent scrutiny on their human rights record.

While recognizing the pressure resulting from U.S. requests on States to satisfy their demands for immunity, PGA Members agreed that parliamentarians should rebut such demands and support their respective governments in protecting the integrity of the ICC Statute and the rule of law. If a bilateral agreement appears imminent, parliamentarians can work to influence the content of the agreement in order to ensure that it is consistent with the Rome Statute.

Moreover, it is essential to remind parliamentarians of non-ICC States Parties that U.S. opposition to the Court is rooted in its desire to protect its nationals and *not in dissuading other states from their sovereign decisions to join the ICC*. For instance, a State Department Spokesperson has stated:

> "We are simply asking these countries to respect our decision not to become a part of that organization, just as we respect their decision to become a part of it and we've made quite clear that we are not trying to undermine the ICC as an institution." [3]

It would therefore be mistaken for representatives of Governments and Parliaments to believe that the U.S. is against the ratification or accession to the Rome Statute in their own countries.

SUGGESTED ACTION:

Raise the issue in parliamentary bodies

- Foster dialogue with legislators and officials from other countries that have not yet joined the ICC system.
- Support the consolidation of the national position safeguarding the ICC Statute's integrity and the sovereign right of the State to exercise its criminal jurisdiction, either utilising its national Courts or the ICC, to bring to justice any perpetrator of crimes under international law, regardless of nationality or official status.

Subject a proposed agreement to examination by a parliamentary committee

- *Before a bilateral agreement is signed:*
  Inquire with representatives at the executive level about the status of negotiations on a request for a bilateral non-surrender agreement. A committee could inquire into the legality of the proposed agreement, issuing a report containing

[3] Federal News Service: Philip Reeker, Deputy Department Spokesman, State Department Briefing, August 13, 2002. Available at http://www.amicc.org/docs/Reeker_Aug12-13_02.pdf

recommendations to the general parliamentary body, as well as the executive and foreign minister.

- *After a bilateral agreement is signed*:

  If the agreement requires parliamentary ratification, request that the legislature is seized with the matter of considering the agreement for ratification, without which the agreement[1] will not enter into force. If ratification appears imminent, the committee could recommend nullifying the agreement signed and consider domestic laws, its obligations under the Rome Treaty, and the "no impunity principle" of the Rome Statute.

- If a *bilateral non-surrender agreement has been signed* ***and*** *ratified*:

  Endeavour to enter into a constructive dialogue with all parties concerned and, if possible, facilitate a review of the agreement in compliance with the principle of "no-impunity."

Pass a parliamentary resolution rejecting bilateral agreements

- *Before a bilateral agreement is signed:*

  Introduce a resolution in parliament rejecting proposed agreements for immunity from the ICC and urging your government to refuse to conclude such an agreement. Once approved by the general parliamentary body it could be disseminated to the press to exert further pressure on the executive and foreign minister to reject the US requests.