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INTERNATIONAL CRIMINAL COURT

**The need for the European Union
to take more effective steps to
prevent members from signing
US impunity agreements**



1 October 2002
AI Index: IOR 40/030/2002

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

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International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements

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Summary

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On 30 September 2002, the European Union (EU) foreign ministers met in Brussels where they adopted their decision on requests by the United States (USA) for them to enter into agreements (impunity agreements) not to surrender US nationals accused of genocide, crimes against humanity and war crimes to the new International Criminal Court.

In recent months the USA has approached governments all over the world requesting them to enter into such agreements. To date, 13 states have reportedly entered into such agreements. The EU position has become of increasing importance on the issue as many governments in all regions have been waiting for the EU to decide its position.

Amnesty International in August published a study of US impunity agreements in the light of the Rome Statute of the International Criminal Court (Rome Statute).¹ The study concludes that such agreements would violate the Rome Statute and international law by permitting impunity for the worst crimes known to humanity. Amnesty International is calling on all states not to enter into such agreements and has launched a worldwide petition on its website calling on all states not to do so: www.amnesty.org.

This legal memorandum for ministers of foreign affairs in EU and other states analyses the EU decision adopted by the foreign ministers. The memorandum welcomes some positive commitments by the EU, including its commitment to the integrity of the Rome Statute and the intention to renew dialogue with the USA to re-engage in the process of establishing the International Criminal Court. It is important to note that the EU decision concludes that the agreements as proposed by the US are contrary to the Rome Statute and the treaty commitments of the EU member states. The decision also recognizes that there must be no impunity for US nationals accused of genocide, crimes against humanity. Indeed, if states follow the letter and the spirit of the EU decision, it will be difficult for any state to enter into an impunity agreement with the USA.

¹ Amnesty International, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, AI Index: IOR 40/025/2002, August 2002.

However, the EU decision unfortunately envisages the possibility of member states entering into agreements with the USA subject to certain conditions. Amnesty International explains in this legal memorandum why such new agreements prohibiting the surrender of persons to the International Criminal Court would violate the Rome Statute. It also demonstrates that the EU foreign ministers have misinterpreted a provision in the Rome Statute which recognizes that the Statute does not override existing agreements (Status of Forces Agreements or SOFAs) between states assigning jurisdiction over certain nationals sent to another state. That provision, however, was not intended to permit states to enter into new agreements to exempt persons from the jurisdiction of the International Criminal Court.

Furthermore, Amnesty International is very concerned by some of the detail and omissions included in the decision's conditions. Amnesty International believes that these weaknesses could, in effect, lead to agreements that provide impunity for US nationals accused of these crimes. For example, the commentary on the no impunity conditions provides that such agreements must include a requirement that the US will investigate and prosecute people accused of the crimes, but only "where appropriate." As US national law does not include many of the crimes listed in the Rome Statute this may be interpreted as a situation where investigation and prosecution is not appropriate. Furthermore, the EU have failed to include any obligation on the US to surrender such a person to the International Criminal Court if US national courts are unable or unwilling genuinely to investigate and prosecute, or to return them to the state that transferred them to the USA. These issues and others are discussed in more detail below.

The decision also fails to establish an effective enforcement mechanism to prevent EU member states or associated states entering into agreements that would permit such impunity. Indeed, some states are rushing to sign such impunity agreements with the USA, citing the EU decision as a green light to do so.² Thus, despite a number of important positive elements in the decision, the use of vague and ambiguous language is a major disappointment. The decision of the EU foreign ministers is not as strong a position on the US impunity agreements as recently adopted by the European Parliament or the Council of Europe's Parliamentary Assembly.

Given the potential impact that the EU decision could have on states around the world which are under pressure to sign agreements, Amnesty International calls on the EU to revise its principles so that they are consistent with the Rome Statute and international law. It also renews its call for all governments not to enter into impunity agreements with the US.

This report summarizes a 28-page document (11,570 words): *International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements* (AI Index: IOR 40/030/2002) issued by Amnesty International in October. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at <http://www.amnesty.org> and Amnesty International news releases can be received by email: <http://www.web.amnesty.org/web/news.nsf/thisweek?openview>

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² According to a report on the Bulgarian news agency BTA web site, Sofia, 2 October 2002, Bulgaria welcomed the EU decision. Foreign Ministry Spokesman Lyubomir Todorov reportedly said on 2 October 2002, that, based on the decision, it would sign an agreement with the USA. Romania has indicated that it will revise the impunity agreement that it signed with the USA in line with the EU Guiding Principles and then submit it to Parliament. Senior officials in the United Kingdom have indicated that it is seeking to negotiate an impunity agreement with the USA based on the EU decision.

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INTERNATIONAL CRIMINAL COURT

The need for the European Union to take more effective steps to prevent members from signing US impunity agreements

On 30 September 2002, the European Union (EU) foreign ministers met in Brussels where they adopted their decision on requests by the United States (USA) for them to enter into agreements (impunity agreements) not to surrender US nationals accused of genocide, crimes against humanity and war crimes to the new International Criminal Court.

In recent months the USA has approached governments all over the world requesting them to enter into such agreements. To date, 13 states have reportedly entered into such agreements. The EU position has become of increasing importance on the issue as many governments in all regions have been waiting for the EU to decide its position.

Amnesty International in August published a study of US impunity agreements in the light of the Rome Statute of the International Criminal Court (Rome Statute).¹ The study concludes that such agreements would violate the Rome Statute and international law by permitting impunity for the worst crimes known to humanity. Amnesty International is calling on all states not to enter into such agreements and has launched a worldwide petition on its website calling on all states not to do so: www.amnesty.org.

This legal memorandum for ministers of foreign affairs in EU and other states analyses below the EU decision adopted by the foreign ministers. The memorandum welcomes some positive commitments by the EU, including its commitment to the integrity of the Rome Statute and the intention to renew dialogue with the USA to re-engage in the process of establishing the International Criminal Court. It is important to note that the EU decision concludes that the agreements as proposed by the US are contrary to the Rome Statute and the treaty commitments of the EU member states. The decision also recognizes that there must be no impunity for US nationals accused of genocide, crimes against humanity. Indeed, if states follow the letter and the spirit of the EU decision, it will be difficult for any state to enter into an impunity agreement with the USA.

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However, the EU decision unfortunately envisages the possibility of member states entering into agreements with the USA subject to certain conditions. Amnesty International explains in this legal memorandum why such new agreements prohibiting the surrender of persons to the International Criminal Court would violate the Rome Statute. It also demonstrates that the EU foreign ministers have misinterpreted a provision in the Rome Statute which recognizes that the Statute does not override existing agreements (Status of Forces Agreements or SOFAs) between states assigning jurisdiction over certain nationals sent to another state. That provision, however, was not intended to permit states to enter into new agreements to exempt persons from the jurisdiction of the International Criminal Court.

Furthermore, Amnesty International is very concerned by some of the detail and omissions included in the decision's conditions. Amnesty International believes that these weaknesses could, in effect, lead to agreements that provide impunity for US nationals accused of these crimes. For example, the commentary on the no impunity conditions provides that such agreements must include a requirement that the US will investigate and prosecute people accused of the crimes, but only "where appropriate." As US national law does not include many of the crimes listed in the Rome Statute this may be interpreted as a situation where investigation and prosecution is not appropriate. Furthermore, the EU have failed to include any obligation on the US to surrender such a person to the International Criminal Court if US national courts are unable or unwilling genuinely to investigate and prosecute, or to return them to the state that transferred them to the USA. These issues and others are discussed in more detail below.

The decision also fails to establish an effective enforcement mechanism to prevent EU member states or associated states entering into agreements that would permit such impunity. Indeed, some states are rushing to sign such impunity agreements with the USA, citing the EU decision as a green light to do so.² Thus, despite a number of important positive elements in the decision, the use of vague and ambiguous language is a major disappointment. The decision of the EU foreign ministers is not as strong a position on the US impunity agreements as recently adopted by the European Parliament or the Council of Europe's Parliamentary Assembly.

Given the potential impact that the EU decision could have on states around the world which are under pressure to sign agreements, Amnesty International calls on the EU to revise

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its principles so that they are consistent with the Rome Statute and international law. It also renews its call for all governments not to enter into impunity agreements with the US.

I. BACKGROUND TO THE EU'S DECISION

The Rome Statute of the International Criminal Court (Rome Statute), adopted by the international community on 17 July 1998, provides the establishment of a permanent International Criminal Court to prosecute people accused of the worst crimes known to humanity – genocide, crimes against humanity and war crimes.

Notably, the USA was one of only seven states to vote against the adoption of the Rome Statute. This vote was a reaction to the international community's rejection of US demands that the work of the International Criminal Court should be controlled by the UN Security Council, of which it is a permanent veto holding member. It also followed the rejection of the US proposal to exempt nationals of non-states parties where the crimes had been committed when carrying out official acts acknowledged as such by the accused person's own state.

Since the Rome Statute was adopted, the USA has been seeking an exemption of all US nationals from the jurisdiction of the Court, claiming that the Court could be used to bring politically motivated prosecutions against US nationals. Amnesty International and governments around the world, including the EU member states which have all ratified the Rome Statute, have repeatedly shown that such fears are unfounded as the Rome Statute contains extensive safeguards, including strict fair trial guarantees, to ensure against improper prosecutions, most of which were included either at the initiative of the USA or with its strong support.

Despite US concerns, on 31 December 2000, President Bill Clinton authorized the US signature of the Rome Statute. However, the George W. Bush administration has taken a more aggressive opposition to the International Criminal Court, by supporting the enactment of the American Servicemembers Protection Act (ASPA) in 2001 restricting US cooperation with the Court and providing for the ability to impose sanctions for states that do ratify the Rome Statute.

On 6 May 2002, the USA took the unprecedented step of repudiating its signature of the Rome Statute and launched an intensive worldwide campaign against the International Criminal Court.

In June 2002, the USA demanded that the UN Security Council adopt a resolution that would exempt the nationals of non-states parties, such as US nationals, taking part in UN established or authorized operations from the jurisdiction of the International Criminal Court. When these demands were initially rejected by all other Security Council members, the US vetoed the extension of the UN peace-keeping operation in Bosnia and Herzegovina and threatened to veto extensions of the mandates of all UN peace-keeping missions and to withdraw personnel and support for them while their mandates continued. Following two weeks of intense negotiations, in which over 130 UN member states of the UN called on the Security Council not to undermine the integrity of the Rome Statute, which provides that no one accused of genocide, crimes against humanity and war crimes should be exempt from the jurisdiction of the Court, the UN Security Council adopted Resolution 1422. The resolution provides the automatic deferral of all cases against persons involved in UN established or authorized operations from states that have not ratified the Rome Statute. Regrettably, the EU members adopted a noticeably weak opposition to the resolution and Ireland and United Kingdom, as members of the UN Security Council voted in favour of the resolution.

Following the adoption of Resolution 1422, the US has approached almost all governments all over the world requesting, and in many cases demanding, that states sign impunity agreements providing that if the International Criminal Court requests the surrender of a US national on their territory, the state will return the US national to the USA and not comply with the Court's request. These demands are often accompanied by explicit or implicit threats to withdraw military and economic assistance, in some cases contending incorrectly that termination of such assistance is required by US law.³ The agreements do not contain any undertaking that the USA will investigate and, if there is sufficient admissible evidence, prosecute persons accused by the International Criminal Court in US courts or that if the USA were unable were unable or unwilling to investigate or prosecute that it would surrender such persons to the International Criminal Court or return the person to the state where they had been found.

The USA asserts that the agreements are provided for under Article 98 (2) of the Rome Statute, which provides:

³ ASPA, § 2007 (b). This provision of US law expressly provides that “[t]he President may, without prior notice to Congress, waive the prohibition of subsection (a) [barring US military assistance to the government of a state party to the Rome Statute] with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.” Of course, it goes without saying, the USA does not provide military assistance to states unless it has determined that such assistance is in the national interest.

“The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”

Amnesty International published a comprehensive legal study of US impunity agreements in August 2002.⁴ The analysis concludes that any state which enters into such agreements would violate their obligations under the Rome Statute, the Geneva Conventions and international law. Numerous other legal analyses have reached the same conclusion.⁵ In particular, states cannot provide impunity for these crimes which are the most serious under international law.

The members of the EU, following approaches from the USA, organized a meeting of their legal experts to consider the content of the US impunity agreements in the light of its Common Position on the International Criminal Court, which calls for protection of the integrity of the Rome Statute.⁶ The legal experts concluded that the agreements as drafted were inconsistent with the Rome Statute and set out three main concerns:

- The agreements provided for impunity for genocide, crimes against humanity and war crimes;
- Some agreements were reciprocal, providing that the US would not surrender the nationals of the other state to the International Criminal Court if it was requested to do so;
- The scope of persons covered by the agreements was too broad, the US wants the agreements to provide for all US nationals and it should only apply to those persons “sent” by the US.

The issue was then transferred to the EU political bodies to discuss the issue with a view to making a decision at a meeting of the EU Ministers of Foreign Affairs on 30 September. The decision is analysed in detail in this document.

⁴ International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes, AI Index: IOR 40/025/2002, August 2002.

⁵ See, for example, Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98 (2) Agreements*, 9 July 2002.

⁶ Council Common Position amending Common Position 2001/443/CFSP on the International Criminal Court, 9836/02, 11 June 2002.

At the beginning of October 2002, 13 states had signed impunity agreements with the US, but not a single parliament has ratified one. Six are states parties to the Rome Statute: East Timor, Gambia, Honduras, the Marshall Islands, Romania (an applicant for membership in NATO and in the EU) and Tajikistan. Three states have signed the Statute: the Dominican Republic, Israel and Uzbekistan. The remaining four have neither signed nor ratified the Statute: Afghanistan, the Federal States of Micronesia, Mauritania and Palau. Many other states are observing the EU's action before they decide whether to sign or not. The impact of the decision by EU members states, therefore, extends much further than the 15 member states.

Many of the states that have already signed US impunity agreements were put under severe pressure by the USA, including threats that the USA would withdraw military and other assistance from them if they refused to sign. For example, East Timor, in its statement to the first meeting of the Assembly of States Parties to the Rome Statute indirectly indicated the intense pressure it had received to sign the impunity agreement with the USA, noting that it was "a country which is barely three months old", that it was "entering into a fragile state of existence", that it "owes a debt of gratitude to the United States, which took a leading part in assisting East Timor on the road to independence, and in ensuring that United Nations peacekeeping forces were deployed in an attempt to protect the people of East Timor in 1999" and that the tiny half-island was "uniquely vulnerable" and "trying to protect its interests and people in the new world in which it has found itself since May 2002".⁷ However, he noted that "the process has not reached any conclusion" and the agreement required both parliamentary approval and presidential proclamation.⁸ He predicted that the impunity agreement "will be the subject of considerable discussion in the East Timorese Legislative Assembly".⁹

⁷ Statement by Mr Joao Camara, Director of Legal and Treaties Division, Ministry of Foreign Affairs, First Assembly of States Parties, New York, 9 September 2002.

⁸ *Ibid.*

⁹ *Ibid.* His prediction has proved accurate. Leandro Isaac, a leader of the opposition Social Democratic Party, recently stated: "A week after we subscribed to the Rome Treaty for the International Criminal Court, the government granted immunity from prosecution by the court for American soldiers based here." He declared that the signature of the impunity agreement with the USA undermined East Timor's opposition to immunity from prosecution for Indonesian soldiers accused of crimes in the territory in 1999. "We are arguing that they should be tried by an international court, but this reduces our credibility," he said. He also declared that a recently signed SOFA regulating conditions for US troops in the territory as "an affront to East Timorese sovereignty". He said he would demand that Foreign Minister Jose Ramos Horta justify the signature of the SOFA to Parliament. Under the agreement, US soldiers are exempt from prosecution by Timorese courts. Jill Jolliffe, *Timor Opposition Angry At US Troop Agreement*, *The Age* (Melbourne), 8 October 2002.

The EU decision (the text of which is attached to this paper as Annex I) is in two parts.¹⁰ The first part, the Council Conclusions on the ICC, confirms that the Council is “firmly committed by the EU Common Position to support the early establishment and effective functioning of the International Criminal Court and to preserve the full integrity of the Rome Statute”. The second part of the decision, the EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court (EU Guiding Principles), reiterates that entering into US impunity agreements as presently drafted – and as signed by 13 states that are not EU members – “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”. It also states in general terms that member states may not enter into bilateral agreements with the USA where such agreements would lead to impunity, where they include nationals of EU member states or where they cover persons other than those sent by the USA to the member state signing the agreement. Of course, no state should enter into a bilateral agreement that would violate these principles, but Amnesty International believes that no state should enter into *any* agreement that will prevent the International Criminal Court from exercising its jurisdiction over any person suspected of the horrific crimes in the Rome Statute.

Strong stand by the Parliamentary Assembly and the European Parliament. In late September 2002, shortly before the adoption of the decision by the EU foreign ministers, both the Parliamentary Assembly of the Council of Europe and the European Parliament adopted strong resolutions opposing any agreements with the USA that would lead to impunity.

On 25 September 2002, the Parliamentary Assembly of the Council of Europe adopted a resolution (selected excerpts from the resolution are included as Annex II to this paper). The Parliamentary Assembly stated that it was “greatly concerned by the efforts of some States to undermine the integrity of the ICC Treaty and especially to conclude bilateral agreements aiming at exempting their officials, military personnel and nationals from the jurisdiction of the Court” and that it considered that these “exemption agreements” [were] not admissible under the international law governing treaties, in particular the Vienna Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and the purpose of a treaty”.¹¹ It recalled that states parties to the Rome Statute “have the general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction (Article 86) and that the Treaty

¹⁰ EU Council, Draft Council Conclusions on the International Criminal Court, 12386/02 COJUR 9 USA 35 PESC 369, 30 September 2002. All citations to the Council Conclusions and the Guiding Principles are to this document; the official copy in the Journal was not available at the time of writing.

¹¹ Council of Europe, Parl. Ass. Res. 1300 (2002) [1] (Risks for the integrity of the Statute of the International Criminal Court), 25 September 2002, para. 9.

applies equally to all persons without any distinction based on official capacity (Article 27)” and stated that it considered that these “‘exemption agreements’ are not consistent with these provisions”¹². The Parliamentary Assembly also reiterated its previous recommendation in 1999 in which it asked the Committee of Ministers of the Council of Europe to invite member and observer states to “refuse to enter into agreements with States which are not parties to the statute in order to prevent nationals of their country who are accused of crimes against humanity from being handed over to the Court”¹³.

On 26 September 2002, the European Parliament adopted a resolution (selected excerpts from the resolution are included as Annex III to this paper) declaring that

“the current worldwide political pressure being exerted by the government of the United States of America to persuade States Parties and Signatory States of the Rome Statute, as well as non-signatory states, to enter into bilateral impunity agreements which seek, through misuse of its Article 98, to prevent US government officials, employees, military personnel or nationals from being surrendered to the International Criminal Court should not succeed with any country”¹⁴

The European Parliament insisted that EU Guiding Principles to be adopted “should not represent any step backward in EU support for the full effectiveness of the ICC and should respect the letter and spirit of the EU common position”, underscored that “no immunity agreement should ever afford the possibility of impunity for any individual accused of war crimes, crimes against humanity or genocide”, emphasized that states parties and signatories of the Rome Statute “are obliged under international law not to defeat the object and purpose of the Rome Statute” and declared that it expected EU member states, associated states and other states “to refrain from adopting any agreement which undermines the effective implementation of the Rome Statute”, a step that would be “incompatible with membership of the EU”¹⁵.

Flawed political assumptions of the Council and disregard for legal analysis. The EU decision is based on flawed political assumptions and it simply ignores solid legal opinions by its own and other legal experts concluding that Article 98 (2) does not permit

¹² *Ibid.*, para. 10.

¹³ *Ibid.*, para. 11 (citing Recommendation 1408 (1999)).

¹⁴ Eur. Parl. Res., P5_TA-PROV(2002)0449, 26 September 2002 (*obtainable from*: <http://www3.europarl.eu.int/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=p0020926EN.pdf&LANGUE=EN>><http://www3.europarl.eu.int/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=p0020926EN.pdf&LANGUE=EN>).

¹⁵ *Ibid.*

states parties to enter into new agreements designed to prevent the International Criminal Court from exercising its jurisdiction over any person regardless of nationality accused of genocide, crimes against humanity or war crimes on the territory of a state party. The Foreign Minister of Denmark, which holds the EU Presidency until 31 December 2002, Per Stig Møller, justified the trade-off by saying that “our political objective” was to “preserve the integrity of the International Criminal Court and at the same time . . . settle our differences with the United States with respect to the ICC”.¹⁶ Although he did not refer to the views of the United Kingdom opposing a stronger EU position or to US threats directly, he contended that,

“[c]onsidering the alternatives, the outcome we have achieved was the best way to defend the court. Any other solution would have resulted in a split and a weakening of the strong EU position to support the International Criminal Court. A flat no to the United States proposal for bilateral agreements, on the other hand, would have had a very damaging effect on trans-Atlantic relations. Furthermore, it would endanger the vital American engagement in peacekeeping operations around the world. The EU approach needs to recognize the special responsibility the United States carries on its shoulders and the great role that country plays on today’s international scene. The European Union attaches great importance to the continued and major contributions of the United States to peacekeeping missions around the world. In fulfilling this task, the United States pursues objectives and values fully shared with the European Union.”¹⁷

“Therefore”, he concluded, “turning down the United States would not have been an acceptable way forward”, and “[h]aving no common EU position would have been even worse” since “[t]he damage to the ICC would have been irreparable”.¹⁸ He noted that 12 countries had already signed impunity agreements with the USA without having had the benefit of an EU position and asserted that “[l]eaving EU member states and others to bilateral negotiations with the United States without strong EU unity and clear benchmarks establishing a high threshold for those not covered by the bilateral agreements would result in a variety of bilateral agreements that would surely have undermined the court.”¹⁹

This attempt to defend the EU decision ignores principled alternatives and cites erroneous and irrelevant political considerations. For example, one of the alternatives would have been for the EU member states to seek a definitive judicial determination by the International Criminal Court, when the Court becomes operational early next year, pursuant to

¹⁶ Per Stig Møller, *A Good Decision on the ICC*, *Wall Street Journal*, 2 October 2002.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Article 119 (1) of the Rome Statute on the scope of agreements envisaged by the drafters of Article 98 (2) before determining the EU position on the US impunity agreements. There was no need to rush to judgment since the judges of the Court will be elected in February 2003, just over four months after the decision. The premature adoption of a position that has no basis under the Statute will inevitably lead to a judicial challenge of any agreements reached with the USA to prevent the International Criminal Court from exercising its jurisdiction and an embarrassing reversal of the EU.

The contention that the EU is now more united than it was before the decision, does not bear close examination. Three EU member states – Italy, Spain and the United Kingdom - are reportedly now negotiating with the USA, citing the EU Guiding Principles, to enter into agreements giving US citizens and others impunity from prosecution in the International Criminal Court and associated states, such as Bulgaria and Poland, may do the same. Given the intense US pressure on states and its apparent rejection of the EU Guiding Principles, these states will be urged to act inconsistently with the guidelines. If they yield to such pressure, the current disunity will be further aggravated. Had the EU member states instead all agreed, together with the Like-Minded Group of states that have supported the Court to seek a judicial determination by the International Criminal Court on the scope of Article 98 (2) before adopting the decision, they would have avoided the disunity among both member states and associated states and prevented further impunity agreements.

The reference to the US role in peace-keeping ignores the previous decision with the USA when the Security Council adopted Resolution 1422 on 12 July 2002. It is clear that states that thought that their acceptance of this resolution would resolve the US concerns and preserve peace-keeping from further US threats will now be disabused of this notion. The Danish Foreign Minister implicitly recognizes that such threats have not gone away.²⁰

²⁰ Moreover, the reference to peace-keeping missions is simply irrelevant, because there are no peace-keeping missions on the territory of EU member states, unless the intention was to give a safe haven to US peace-keepers in other countries (as discussed below, there is a danger that some states could misuse the wording of the principles to achieve just that result). The primary concern of the USA is not, of course, about its nationals participating in UN peace-keeping missions, but about US nationals, including military and civilian leaders involved in the variety of other multilateral operations it has conducted in recent years, such as in Kosovo and Afghanistan. It has only a relatively small number of nationals participating in UN peace-keeping operations. As of 30 June 2002, a small number of US personnel served in eight of the 15 UN peace-keeping operations (excluding non-UN operations such as KFOR in Kosovo (run by NATO) and the International Security Assistance Force (ISAF) in Afghanistan, as well as UN peace-building missions, such as MINUGUA in Guatemala and UNAMA in Afghanistan), with over three-quarters of them in Kosovo. As of the same date, 87 states were contributing 45,319 personnel to these UN operations (this figure excludes UN employees), only 680 (1.5 percent) of whom were US personnel. Future of Peace Operations Project, Henry L. Stimson

In fact, the decision will in no way lead to the solution of this issue that the EU is seeking. Following the submission of the EU decision to the USA, Richard Boucher, spokesman for the State Department, is reported to have declared that the USA would continue to put the pressure on in their bilateral contacts with EU Member States and third countries for more concessions.²¹ In addition, a senior US official recently stated with regard to the EU decision, "We think that was a step forward but these were just guidelines," and added, "Those governments are still sovereign nations and we expect they will take into account that there is no reason not to exempt all Americans."²² Indeed, US Under Secretary of State for Arms Control and International Security John R. Bolton visited Paris and London during the first week in October to press France and the United Kingdom to enter into impunity agreements and the following week Ambassador Marissa Lino began a visit to London, Paris, Madrid and Rome to renew this request.²³ There are, therefore, real concerns that the unacceptable decision will not even achieve the solution that the EU is seeking, but instead represents a lack of EU political will to defend the integrity of the International Criminal Court that will no doubt be used by the USA to demand from EU states and states all over the world even more concessions.

The following discussion analyzes the strengths and weaknesses of the Council Conclusions and the EU Guiding Principles with a view to ensuring that EU member states preserve the integrity of the Rome Statute by not seeking to deprive the International Criminal Court of its complementary role in investigating and prosecuting persons who commit genocide, crimes against humanity and war crimes on the territory of states parties when states are unable or unwilling to do so.

II. COUNCIL CONCLUSIONS ON THE ICC

The Council Conclusions contain a number of positive elements with respect to the US impunity agreements, as well as some problematic aspects.

Center, U.S. Personnel Contributions to U.N. Peacekeeping Operations as of 30 June 2002 (Peace Operations Factsheet Series) (*obtainable from: <http://www.stimson.org>*).

²¹ Richard Boucher, US State Department Press Briefing, 1 October 2002; Agence Europe, *US judges European position "constructive" but want more concessions*, 3 October 2002.

²² Elizabeth Becker, *U.S. Presses for Total Exemption From War Crimes Court*, *New York Times*, 8 October 2002.

²³ *Ibid.*

A. Positive elements in the Conclusions

Commitment to integrity of the Rome Statute. The Council confirms that the EU “is firmly committed by the EU Common Position to support the early establishment and effective functioning of the International Criminal Court and to preserve the full integrity of the Rome Statute”. Thus, the EU Guiding Principles must be interpreted consistently with both the Rome Statute and the EU Common Position. To the extent that they could undermine the effective functioning of the International Criminal Court or the full integrity of the Rome Statute, they cannot serve as a guide to EU member states.

Proposal for renewed dialogue between the EU and the USA. The Council also “proposes to develop a broader dialogue between the European Union and the United States on all matters relating to the ICC, including further relations between the United States and the Court” and singles out three issues in particular.

First, it notes “[t]he desirability of the United States re-engaging in the ICC process” and that “the United States is entitled to be an observer to the Assembly of States Parties”. A return of the USA, which after the new Administration took office in 2001 boycotted the final sessions of the Preparatory Commission of the International Criminal Court and the first part of the first session of the Assembly of States Parties (3 to 10 September 2002), would be a welcome development. It would ensure that the USA was exposed on a regular basis to the views of the rest of the international community, which overwhelmingly supports the International Criminal Court, and would allow it to see the Court in action, thus demonstrating that its fears have no basis in fact.²⁴ Amnesty International has repeatedly called upon the USA to reconsider its opposition to the International Criminal Court and to engage positively in its establishment. The organization welcomes any initiatives undertaken by the EU member states and all other states to encourage positive US engagement in the work of the Court, providing that such measures do not undermine the integrity of the Rome Statute or of the Court. Whether the USA will take up this invitation under the current Administration remains to be seen.

Second, the Council states that the dialogue should address “[t]he development of a relationship entailing practical cooperation between the United States and the Court in specific cases”. Such a dialogue would be extremely valuable, given the extensive experience that US citizens have developed over the past decade in working for or with the International Criminal Tribunals for the former Yugoslavia and for Rwanda, as well as with the Sierra

²⁴ As of 1 October 2002, 139 states had signed the Rome Statute (one of which, the USA, has repudiated its signature) and 81 states, almost half the membership of the United Nations, had ratified it.

Leone Special Court. The enormous intelligence resources of the USA and the likelihood that the USA will be seen by many persons suspected of crimes under international law as a safe haven or a safe place to place their assets means that US cooperation could benefit the work of the Court in a number of important ways. Indeed, in the American Servicemembers Protection Act (ASPA), Congress squarely rejected attempts to prohibit all cooperation by the USA with the International Criminal Court and, instead, expressly authorized such cooperation with respect to non-US nationals suspected or accused of crimes by the Court, notwithstanding any other provision in the legislation.²⁵

Third, the Council indicated that discussion with the USA should include “[t]he application of presidential waivers of the ASPA legislation to the main provisions of this legislation, in particular vis-à-vis Member States and their associated countries.” This point recognizes that the provisions of the ASPA restricting military or other assistance to states that ratify the Rome Statute can be waived by the President in the national interest without any requirement that a state enter into an impunity agreement with the USA.²⁶ Given that the USA does not provide military or other assistance to other states unless it is in the national interest, it is clear that the threats to cut such assistance are not that credible.

Reporting of developments to the Council. The Council notes that the “Member States will keep the Council informed about any new developments”. It would have been better had member states been expressly required to do so, instead of merely noting that member states will do so, which could be misinterpreted as not requiring member states to supply such information. It would also have been better if the range of developments covered had been spelled out. It would also have been better if associated states had been requested to

²⁵ Section 2015 of the American Service Members Protection Act expressly provides:

“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 Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”

ASPA, § 2015. (*obtainable from:* <http://www.wfa.org/issues/wicc/ASPA4775Dodd.html>). As the sponsor of this provision explained:

“Sec. 2015 makes clear that regardless of the other sections contained in Title II, the President is not prohibited from rendering assistance to any such international efforts, including to the International Criminal Court. An amendment to exclude cooperation with the ICC was proposed during the conference on H.R. 4775, but was rejected by the conferees. Therefore, as the language now stands the President has the discretion to cooperate with any and all international efforts to bring such criminals to justice.”

Statement by Senator Dodd, July 24, 2002, Congressional Record, Senate - Page S7266 (*obtainable from:* <http://www.wfa.org/issues/wicc/ASPA-HR4775.html#doddamendment>).

²⁶ ASPA, Section 2003 (Waiver and termination of prohibitions of this title).

do so as well. However, it seems clear that if the EU member states follow this advice in good faith they will:

immediately inform the Council of any approaches by the USA seeking to have the state sign an impunity agreement;

provide the text of the proposed agreement to the Council, as well as any legal opinion on the conformity of the proposed impunity agreement with the Rome Statute and the EU Guiding Principles;

indicate what procedural steps, such as parliamentary approval or amendment of implementing legislation for the Rome Statute, are required for the agreement to enter into force; and

make all of the above information public when informing the Council.

Amnesty International members in each EU member state and associated state will be pressing for governments to keep the EU Council, as well as parliaments and the electorates, promptly and fully informed of all such developments.

Duty of the Presidency to inform the USA of the unified response of the EU. The Council states that “[t]he Presidency will convey these conclusions to the United States, noting that they represent the EU position in response to the United States’ concerns”. Thus, no member state may engage in negotiations with the USA that would undermine the Rome Statute or the EU Common Position.

B. Problems with the Conclusions

However, there are a number of serious problems with the Council’s Conclusions.

Failure to state that Article 98 (2) was intended to apply only to existing SOFAs. Amnesty International’s recent study demonstrates that Article 98(2) of the Rome Statute was included in the Rome Statute in response to concerns by the USA and other states about how to address requests for surrender by the International Criminal Court under the Rome Statute

when the state requested had entered into an existing Status of Forces Agreement (SOFA) with the USA.²⁷ SOFAs assign jurisdiction of nationals sent by one state pursuant to the SOFAs to another accused of committing crimes in the state to which they are sent. These SOFAs set out which courts shall investigate and prosecute these persons depending on the type of the crime, they do not provide for impunity of the persons sent by the sending state.

The Council in its Conclusions misconstrues the scope of agreements that are permissible under Article 98 (2) of the Rome Statute. It claims that “a number of bilateral and multilateral treaties between individual Member States and the United States already exist, as well as treaties with third states, which are of relevance in this context and on which an inventory has been established” and notes that a number of “Member States are ready to engage with the United States in a review of these arrangements which may fall into the category of agreements defined in Article 98, paragraph 2 of the Rome Statute”. The failure of the Council to make clear that Article 98 (2) was intended to cover only existing SOFAs is deeply regrettable and reflects the fundamental flaw in the decision in the face of the USA demands. It is to be hoped that member states will fulfill the intent of the drafters of the Rome Statute by confining their review of existing agreements with the USA to a determination which bilateral and multilateral treaties between the USA and member states are existing SOFAs. There is no need to go any further; indeed, to go further would violate the Rome Statute and be contrary to the EU Common Position.

Article 98 (2) of the Rome Statute covers only existing SOFAs (extradition agreements are governed by another article).²⁸ By extending the scope of agreements covered beyond existing SOFAs – and beyond SOFAs entirely, the decision is inconsistent with the Rome Statute because it is contrary to the intent of the drafters of Article 98 (2) of the Statute.²⁹ Amnesty International is not aware of any convincing legal argument to the contrary. Indeed, it is not aware of *any* legal argument that has been advanced that the proposed US impunity agreements are compatible with the Rome Statute. The EU’s own legal experts have agreed.³⁰

²⁷ *US efforts to obtain impunity, supra*, n. 1, Section II.

²⁸ Rome Statute, Art. 90. Paragraph 6 of that article makes clear that a state party may give priority to a competing extradition from a court of a non-state party only if it considers factors that will ensure that compliance with that extradition request will not lead to impunity. *See US efforts to obtain impunity, supra*, n. 1, Section II.

²⁹ Amnesty International, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, AI Index: IOR 40/025/2002, Section II.

³⁰ Elizabeth Becker, *U.S. Issues Warning to Europeans in Dispute Over New Court*, 25 August 2002 (citing conclusions by EU legal experts that “the bilateral agreements proposed by the U.S. are not covered by Article 98. A contracting party to the Statute concluding such an agreement with the U.S. acts against the object and purpose of the Statute.”).

The EU decision – unless it is interpreted consistently with the Rome Statute and the EU Common Position – would permit such new agreements and, to that extent alone, is contrary to the Rome Statute. Moreover, the decision could be misinterpreted to apply to a range of agreements, such as those relating to special missions and extradition, that are not within Article 98 (2). There is also another, potentially very embarrassing result, namely, that the decision might encourage other countries, particularly ones with poor human rights records, to seek similar agreements with the EU. Any such bilateral agreements are likely to be invalidated by the International Criminal Court, either when a state party that has entered into such an agreement refuses to arrest and surrender a person indicted by the International Criminal Court or when the Prosecutor or a state challenges the legality of such an agreement pursuant to Article 119 (1) (Settlement of disputes) of the Rome Statute.³¹

III. EU GUIDING PRINCIPLES

As with the Council's Conclusions, there are a number of positive components of the EU Guiding Principles and, if they were used in good faith, would ensure that no member state could ever enter into an agreement with the United States or any other state giving its nationals impunity from prosecution for genocide, crimes against humanity or war crimes.³² However, it is deeply disturbing that the commentary on the principles could easily be misused by member states to achieve the opposite end and give US nationals impunity for the worst possible crimes in the world. The EU Council must put effective pressure on any member state seeking to enter into such an agreement not to do so.

A. Positive elements in the principles

On the positive side, the introduction to the EU Guiding Principles claims the principles “will preserve the integrity of the Rome Statute” and, in accordance with the EU Common Position,

³¹ Article 119 (1) of the Rome Statute states: “Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.” The leading commentary on this provision indicates that such disputes would include “questions concerning cooperation and judicial assistance to the Court”. Roger S. Clark, *Article 119 (Settlement of disputes)*, Otto Triffterer, ed., *The Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft 1999) 1245.

³² Indeed, the German Foreign Minister, Joschka Fischer, is reported as saying on 30 September 2002, after the decision was agreed, “We would have wished a clear rejection of the agreements. Because of the Principles we are very close to such a position.”

will “ensure respect for the obligations of States Parties under the Statute, including the obligation of States Parties under Part 9 of the Rome Statute to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes falling within the jurisdiction of the Court”.

US impunity agreements are contrary to the Rome Statute and treaty commitments of EU member states. The EU Guiding Principles also declare that “[e]ntering 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”. This principle is a welcome confirmation of the legal analyses that the EU’s own legal experts, the European Parliament, the Parliamentary Assembly of the Council of Europe, Amnesty International, the Coalition for an International Criminal Court and its members, including Human Rights Watch, the Lawyers Committee for Human Rights, Parliamentarians for Global Action, the Women’s Caucus for Gender Justice and many others, have issued concluding that the US impunity agreements violate the Rome Statute and obligations of states under treaties.³³ These treaties include the four 1949 Geneva Conventions and their First Additional Protocol, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture).³⁴ Indeed, states entering into such agreements will not only face judicial challenges in their national courts, but also could face the prospect of challenges both in the International Criminal Court and, under the Genocide Convention and the Convention against Torture, in the International Court of Justice.³⁵ It also means that the 13 states that have succumbed to US threats and signed such impunity agreements will be likely to repudiate their signatures. Indeed, Romania, the only associated state to have signed an impunity agreement with the USA, has already stated that it will not present the agreement it signed to its parliament.³⁶

No impunity. Of course, this is the most important principle. Any agreement that could lead to impunity would certainly violate the Rome Statute and be contrary to the EU

³³ These publications and statements are available on the Coalition for the International Criminal Court website: <http://www.iccnw.org>.

³⁴ First Geneva Convention, Art. 49, Second Geneva Convention, Art. 50, Third Geneva Convention, Art. 129, Fourth Geneva Convention, Art. 146 (duty to search for and bring to justice persons suspected of grave breaches); Genocide Convention, Art. VI (duty of state where the act of genocide occurred to punish perpetrator or to surrender the person to an international criminal court with jurisdiction); Convention against Torture, Art. 7 (1) (duty to extradite or to submit the case to prosecutor for the purpose of prosecution).

³⁵ Genocide Convention, Art. IX; Convention against Torture, Art. 30.

³⁶ Global News Wire - Asia Africa Intelligence Wire, Romania wants to amend court agreement with US to suit EU, 2 October 2002.

Common Position. If the principle went no further, it would be almost impossible for states to enter into agreements with the USA preventing the International Criminal Court from exercising jurisdiction. However, as noted below, the commentary to this principle contains major loopholes that could lead to just such impunity.

Exclusion of persons in transit to the Court. The principle concerning the scope of persons covered by impunity agreements provides that “[s]urrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute”.³⁷ This principle will at least ensure that persons arrested in one state that treats its responsibilities under the Rome Statute seriously will not gain impunity because of transit on the way to the International Criminal Court through a state that has entered into an impunity agreement with the USA. However, it will be an anomaly if one accused person in transit to the Court through a state that entered into an impunity agreement is brought to justice while another person accused in the same incident found in that state finds a safe haven.

Sunset clause. The EU Guiding Principles state that any “arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force”. However, this principle is simply a suggestion, rather than a principle, as it does not even suggest a time limit, so its inclusion is of little value in limiting the damage that an impunity agreement would attempt to do to international justice.

³⁷ Article 89 (3) of the Rome Statute provides:

- (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.
- (b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:
 - (i) A description of the person being transported;
 - (ii) A brief statement of the facts of the case and their legal characterization; and
 - (iii) The warrant for arrest and surrender;
- (c) A person being transported shall be detained in custody during the period of transit;
- (d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;
- (e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

Ratification. The EU Guiding Principles state that “[t]he approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state.” This principle also is not a real principle, but simply a statement of the obvious. Of course, it is self-evident that any EU member state would only enter into an impunity agreement if it were approved in accordance with its national constitutional procedures. However, it is a useful reminder that ministers of foreign affairs generally do not have a free hand enter into bilateral treaties without parliamentary approval, particularly when such treaties would undermine solemn multilateral treaty obligations to bring to justice those responsible for the worst possible crimes. So far, parliaments have generally reacted with hostility to impunity agreements signed by ministers of foreign affairs and to reports that those ministers were even considering signature of such agreements. In this connection, it is also useful to remember that EU member states that have already enacted implementing legislation for the Rome Statute, such as the United Kingdom, would have to amend such recently enacted legislation to prevent their authorities from complying with a request by the International Criminal Court to arrest and surrender a person accused of genocide, crimes against humanity or war crimes, were they to enter into an impunity agreement.

Exclusion of nationals of states parties. The principle that nationals of non-states parties should not benefit from an impunity agreement with the USA is a welcome, but expected, provision, since it was never envisaged that even the three EU member states that might be tempted to sign such agreements, all of whom are states parties to the Rome Statute, would seek to protect their nationals from surrender to the International Criminal Court. However, it will be a useful reminder to those states parties, such as Israel and East Timor, which have signed agreements protecting their nationals from surrender to the Court that such impunity is unacceptable. It is also unfortunate that the principle does not apply to states that have signed the Rome Statute, since these states are obliged not to defeat the object and purpose of the Statute pending a decision on ratification.³⁸

B. Weaknesses in the principles

Despite the positive elements in the principles noted above, Amnesty International is concerned because the decision does not have sufficient safeguards to ensure that US citizens and others covered by such agreements crimes cannot benefit from impunity.

Weak wording in the commentary to the “no impunity” principle. The commentary to the emphatic, two-word principle of “no impunity” is weak and ignores the reality of the

³⁸ Vienna Convention on the Law of Treaties, Art. 18

inability of the USA to guarantee that its citizens and others it seeks to protect will not obtain impunity. The commentary provides that

“any solution should include *appropriate* operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure *appropriate* investigation and – where there is sufficient evidence – prosecution by national jurisdictions concerning persons requested by the ICC.”

The highlighted word, “appropriate”, indicates the scope for mischief. The USA pressed hard in the drafting of Security Council Resolution 1422 to describe the obligations of states to investigate and prosecute persons suspected of genocide, crimes against humanity and war crimes as applying only “where appropriate”.³⁹ This word would have left the USA with complete political discretion whether to investigate or prosecute the worst possible crimes in the world regardless of the strength of the case. It is essential for the EU to ensure that this term is not interpreted by any member state as permitting any such discretion with regard to crimes under the Rome Statute. If this commentary is not to become a huge loophole, it means that any agreement that fails to require prompt, thorough, independent and impartial investigations in all cases of crimes under the Rome Statute and prosecutions where sufficient admissible evidence exists, whether in the USA or abroad, violates the Rome Statute and is contrary to the EU Common Position and Guiding Principles.

Inability of the USA to investigate and prosecute all the crimes in the Rome Statute.

The decision does not require that the USA have defined the all of the crimes in the Rome Statute consistently with the Statute or to have incorporated principles of criminal responsibility and defences consistently with customary international law. The USA cannot satisfy such a requirement. As indicated in Amnesty International’s recent study of US impunity agreements, the USA does not define all the crimes in the Rome Statute when committed abroad by US citizens or others it seeks to immunize as crimes under its national law over which civilian courts have jurisdiction.⁴⁰ This conclusion is reinforced by an earlier

³⁹ Operative paragraph A of OPTION ONE: GENERIC TEXT, the initial US proposal, a copy of which was obtained by Amnesty International, read as follows:

“The Security Council,

A. Decides that Member States contributing personnel participating in operations established or authorized by the UN Security Council to promote the pacific settlement of disputes or to maintain or restore international peace and security shall have the responsibility, as appropriate, to investigate crimes with respect to which they have jurisdiction and prosecute offences alleged to have been committed by the nationals in connection with such operations[.]”

⁴⁰ See Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002 - 018/2001, September 2001.

study by a distinguished US scholar, who concluded that “United States courts have only incomplete and uneven jurisdiction, most acquired piecemeal and only in recent years, to prosecute genocide, war crimes and crimes against humanity committed outside our borders.”⁴¹ It even has made reservations to the Genocide Convention, reflected in its national law, that restrict the scope of this horrific crime. The substantial deficiencies in US legislation with respect to genocide, crimes against humanity and war crimes have been summarized as follows:

“- Genocide is codified by U.S. law, but may be prosecuted by U.S. courts only if the crime is committed in the U.S. or the offender is a U.S. national.

- Crimes against humanity are not codified as such in the United States. However, if committed in the United States or by members of the U.S. military, most such crimes would violate domestic criminal laws or military laws against murder, aggravated assault, or the like. If committed outside the United States, crimes against humanity may be prosecuted in U.S. civil courts only if they involve torture or attempted torture, or certain forms of international terrorism.

- War crimes: Under current law some but not all war crimes may be prosecuted by U.S. civil courts, regardless of whether committed within or outside the United States, but only when the perpetrator or victim is a U.S. national or member of the U.S. armed forces, or when the perpetrator is a former service member or a civilian accompanying the military overseas.

- In addition, military courts appear to have universal jurisdiction over war crimes to the extent permitted by international law, with the possible exception of certain cases involving civilians. Military courts seem to clearly have jurisdiction over war crimes committed by members of the U.S. military; by persons, including civilians, "in an area of actual fighting" or in occupied enemy territory; by enemy belligerents, whether military or civilian, even if they are U.S. citizens; and by citizens of third countries not at war with the United States, at least for 'grave breaches' of the Geneva Conventions. Their jurisdiction is less clear over war crimes by U.S. civilians who are not enemy belligerents, committed outside zones in which U.S. forces are in battle or occupy enemy territory.”⁴²

The USA fought to weaken the principle of superior responsibility in the Rome Statute, which led to weaker principles of criminal responsibility for civilian leaders than for military ones, and it lobbied for inclusion of the defence of superior orders for war crimes in the Statute, which is inconsistent with customary and conventional international law.

⁴¹ Douglass Cassel, *Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court*, 35 New Eng. L. Rev. 421 (2001).

⁴² *Ibid.*, 429- 431 (footnotes omitted).

The absence of vertical or horizontal complementarity. Moreover, there is no requirement that the fundamental principle of complementarity, reflected in the Preamble, Article 1 and Article 17 of the Rome Statute, be included. This principle permits the ICC to exercise jurisdiction when states are unable or unwilling to investigate or prosecute. Thus, if US prosecutors were to fail to investigate or prosecute in good faith in a particular case or US courts were to impose a derisory sentence, not only would the ICC not be able to exercise its complementary role, but also the state that surrendered the suspect to the USA would be unable to remedy the situation. The principle of complementarity, strongly supported by the USA during the drafting of the Rome Statute, recognizes that, whatever the record may be of a national criminal justice system in the past, in a particular case or in a particular period its courts may be unable or unwilling to investigate or prosecute genuinely crimes under international law in other cases. The EU Guiding Principles do not require that any agreement permit the state surrendering the US accused to the USA instead of to the International Criminal Court to have that person returned for a proper investigation in a particular case and trial if the USA fails to fulfill its responsibilities under international law. Of course, if the USA were to fail to conduct a proper investigation and, if there was sufficient admissible evidence, a proper prosecution, the agreement could be denounced with immediate effect, but then it would be too late to prevent impunity.

Failure to limit the scope of the agreements to existing SOFAs. The principles state that “[e]xisting agreements, in particular between an ICC State Party and the United States, should be taken into account, such as Status of Forces Agreements and agreements on criminal matters, including extradition.” Although the reference to existing SOFAs is welcome, the principle is contrary to the intent of the drafters, as noted above, to limit the scope of Article 98 (2) to existing SOFAs. Other agreements are simply irrelevant. Agreements on extradition are governed by an entirely different article that envisages states parties giving priority to requests by the International Criminal Court over competing requests by non-states parties for extradition, particularly when the Court could not exercise its complementary role if that non-state party was unable or unwilling genuinely to investigate and prosecute.⁴³

Reference to state and diplomatic immunity. The principles state that “[a]ny solution should take into account that some persons enjoy State or diplomatic immunity under international law, cf. Article 98, paragraph 1 of the Rome Statute.” This reference is irrelevant, inaccurate and incomplete. First of all, Article 98 (1), which provides “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity” has no relevance to

⁴³ Rome Statute, Art. 90 (6).

the question of impunity agreements. Second, the reference to state immunity presumably is a reference to official immunity. Third, Article 98 (1) must be read together with Article 27.⁴⁴

Persons sent by a sending state. The principles state that “[a]ny solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cr. Article 98, paragraph 2 of the Rome Statute.” This principle unfortunately is so imprecise that it is misleading and could be misused to cover persons who were not intended to be covered by the Rome Statute. As Amnesty International’s study demonstrates, Article 98 (2) was designed to address the question of which state had priority of jurisdiction over persons accused of crimes in a foreign state where they had been sent pursuant to a SOFA by a sending state when the crimes were committed during the period they were present in the foreign state pursuant to the SOFA.⁴⁵ Although the current wording would ordinarily exclude mercenaries, tourists and private citizens, including retired military, intelligence or civilian officials, there is a danger that a state could try to give impunity to any person (including persons in the above categories) sent temporarily by the USA to the EU member state independently of the agreement, including persons accused by the International Criminal Court of genocide, crimes against humanity or war crimes elsewhere. It is entirely possible, given the nature of the concerns expressed by certain US officials, that the USA would simply state that any official or retired official going to visit an EU member state was being “sent” to that state in order for it to obtain impunity for such persons.⁴⁶

The worldwide campaign to stop US impunity agreements. Amnesty International’s one million members around the world, along with the more than one thousand members of

⁴⁴ Article 27 (Irrelevance of official capacity) provides:

- “1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. 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 a person.”

⁴⁵ *US efforts to obtain impunity, supra*, n. 1, Section II.

⁴⁶ The real nature of US concerns appears to have more to do with senior military, intelligence and civilian leaders than with ordinary foot soldiers. As a senior US official recently explained:

“The reach of the Rome Statute [which established the court] is to anybody who might be involved, all the way up the chain of command and in fact we think one of the principal dangers of a politicized ICC is that senior American decision-makers would be hauled before the court in an effort to second-guess their national security decision. So whether we have troops in a particular country is really not affected by the Article 98 campaign.”

Carola Hoyos, *The Americas: US ups states in war court fight*, *Financial Times*, 22 August 2002.

the Coalition for the International Criminal Court (CICC), are now campaigning to prevent all states from signing any bilateral agreement with the USA seeking to prevent the arrest and the surrender to the International Criminal Court of persons suspected of genocide, crimes against humanity or war crimes. If states do sign such impunity agreements, Amnesty International's members will call on national parliaments to refuse to ratify them. They will remind EU member states, associated states and other states that any such agreements would be inconsistent with the requirement in the EU Guiding Principles that such agreements not lead to impunity. Amnesty International also intends to request the International Criminal Court at the earliest possible opportunity to declare the US impunity agreements void.

RECOMMENDATIONS

No EU member state, associated state or any other state, regardless whether it has signed or ratified the Rome Statute, should enter into an agreement with the USA prohibiting the arrest and surrender of anyone to the International Criminal Court under any circumstances whatsoever.

The EU Council should amend its Conclusions and the Guiding Principles to prohibit any member state from entering into any agreement with the USA prohibiting the arrest and surrender of anyone to the International Criminal Court.

Pending amendment of its Conclusions and the Guiding Principles, the EU should ensure that members states

immediately inform the Council of any approaches by the USA seeking to have the state sign an impunity agreement;

provide the text of the proposed agreement to the Council, as well as any legal opinion on the conformity of the proposed impunity agreement with the Rome Statute and the EU Guiding Principles;

indicate what procedural steps, such as parliamentary approval or amendment of implementing legislation for the Rome Statute, are required for the agreement to enter into force;

make all of the above information public when it is provided to the Council; and

seek an opinion of the International Criminal Court pursuant to Article 119 (1) of the Rome Statute on the compatibility of any agreement with its obligations under the Statute before entering into the agreement.

The EU should encourage associated states to take the same steps listed above.

ANNEX I: EU COUNCIL DECISION ON THE ICC, 30 SEPTEMBER 2002

"The Council confirms that the European Union is firmly committed by the EU Common Position to support the early establishment and effective functioning of the International Criminal Court and to preserve the full integrity of the Rome Statute. The European Union reaffirms its determination to encourage the widest possible international support for the ICC through ratification or accession to the Rome Statute and its commitment to support the ICC as a valuable instrument of the world community to combat impunity for the most serious international crimes.

The International Criminal Court will be an effective tool of the international community to buttress the rule of law and combat impunity for the gravest crimes. The Rome Statute provides all necessary safeguards against the use of the Court for politically motivated purposes. It should be recalled that the jurisdiction of the Court is complementary to national criminal jurisdictions and is limited to the most serious crimes of concern to the international community as a whole.

The European Union will endeavour to secure that the Court will meet the highest standards of competence, fairness, due process and international justice. The European Union will do its utmost to ensure that highly qualified candidates will be elected as judges and prosecutors.

The Council has taken note of the proposal by the United States for new bilateral agreements with ICC States Parties regarding the conditions for surrender to the Court.

The Council notes that a number of bilateral and multilateral treaties between individual Member States and the United States already exist, as well as treaties with third states, which are of relevance in this context and on which an inventory has been established. The Council notes that Member States are ready to engage with the United States in a review of these arrangements which may fall into the category of agreements defined in Article 98, paragraph 2 of the Rome Statute.

The Council has developed the attached set of principles to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in responding to the United States' proposal.

The Council recalls that the European Union and the United States fully share the objective of individual accountability for the most serious crimes of concern to the international community. The ad hoc tribunals for the former Yugoslavia and Rwanda were created as a result of our common efforts.

The Council expresses the hope that the United States will continue to work together with its allies and partners in developing effective and impartial international criminal justice. To this end, the Council proposes to develop a broader dialogue between the European Union and the

United States on all matters relating to the ICC, including future relations between the United States and the Court. In particular this dialogue should address the following issues:

- The desirability of the United States re-engaging in the ICC process - the United States is entitled to be an observer to the Assembly of States Parties;
- The development of a relationship entailing practical cooperation between the United States and the Court in specific cases;
- The application of presidential waivers of the ASPA legislation to the main provisions of this legislation, in particular vis-à-vis Member States and their associated countries.

The Council notes that Member States will keep the Council informed about any new developments.

The Presidency will convey these conclusions to the United States, noting that they represent the EU position in response to the United States' concerns.

The Council will remain committed to the ICC and will keep developments under review.

ANNEX:

The guiding principles listed below will preserve the integrity of the Rome Statute of the International Criminal Court and – in accordance with the Council Common Position on the International Criminal Court

– ensure respect for the obligations of States Parties under the Statute, including the obligation of States

Parties under Part 9 of the Rome Statute to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes falling within the jurisdiction of the Court.

The guiding principles are as follows:

- Existing agreements: Existing international agreements, in particular between an ICC State Party and the United States, should be taken into account, such as Status of Forces Agreements and agreements on legal cooperation on criminal matters, including extradition;
- The US proposed agreements: 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;
- No impunity: any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and – where there is sufficient evidence – prosecution by national jurisdictions concerning persons requested by the ICC;

- Nationality of persons not to be surrendered: any solution should only cover persons who are not nationals of an ICC State Party;

Scope of persons:

- Any solution should take into account that some persons enjoy State or diplomatic immunity under international law, cf. Article 98, paragraph 1 of the Rome Statute.

- Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute.

- Surrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute.

- Sunset clause: The arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force.

Ratification: The approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state."

ANNEX II: EXCERPTS FROM PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE RESOLUTION OF 25 SEPTEMBER 2002

1. The Assembly recalls its Recommendation [1408](#) (1999) on the International Criminal Court adopted on 26 May 1999.
2. The Assembly warmly welcomes the entry into force on 1 July 2002 of the Rome Statute of the International Criminal Court (ICC), which represents a decisive step towards achieving justice and ending impunity for the most serious crimes known to mankind - war crimes, crimes against humanity and genocide.
3. The ICC Treaty has so far been signed by 139 countries and ratified by 81 countries. The Assembly notes with satisfaction that 42 Council of Europe member States have signed it and 33 of them have ratified it.
4. The Assembly welcomes the outcome of the Assembly of States Parties to the ICC Treaty held on 3–10 September 2002 in New York, which laid foundations for the effective establishment of the Court.
5. The Assembly considers that universal adherence to the ICC Treaty is of crucial importance in order to enable the Court to become a truly efficient international instrument to prevent impunity and to ensure equal justice for all.
6. Democratic States must be the most ardent supporters of the Court, which represents the expression of their commitment to promote the universal values of human rights, international humanitarian law and the rule of law.
7. The Court is, and must remain, a supreme body of international justice and must not be subject to political pressures or be used for political purposes. The Assembly underlines the importance of the safeguards incorporated in the ICC Treaty in this respect.
8. The Assembly regrets that some States have not yet acceded to the ICC Treaty or declared that they do not intend to become party to it. The Assembly is of the opinion that such attitudes may weaken the integrity of the Statue of the Court as well as respect for international law in general.
9. Moreover, the Assembly is greatly concerned by the efforts of some States to undermine the integrity of the ICC Treaty and especially to conclude bilateral agreements aiming at exempting their officials, military personnel and nationals from the jurisdiction of the Court (“exemption agreements”).

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

10. The Assembly recalls that States Parties to the ICC Treaty have the general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction (Article 86) and that the Treaty applies equally to all persons without any distinction based on official capacity (Article 27). It considers that the “exemption agreements” are not consistent with these provisions.

11. The Assembly also recalls that in Recommendation [1408](#) (1999), it asked the Committee of Ministers of the Council of Europe, inter alia, to invite member and observer States to «refuse to enter into agreements with States which are not parties to the statute in order to prevent nationals of their country who are accused of crimes against humanity from being handed over to the Court».

12. The Assembly is also concerned that the link made by some countries between the jurisdiction of the Court and the renewal of the United Nations Security Council mandates for peacekeeping operations could put at risk the whole system of United Nations peacekeeping.

13. Accordingly, the Assembly calls:

i. as regards the Council of Europe member States:

a. on Azerbaijan and Turkey to adhere to the Rome Statute of the ICC;

b. on Albania, Armenia, the Czech Republic, Georgia, Lithuania, Malta, Moldova, the Russian Federation and Ukraine to ratify the Rome Statute of the ICC;

c. on Romania not to ratify the bilateral “exemption agreement” signed with the USA, given that it was among the first countries to ratify the Rome Statute of the ICC;

ii as regards the Council of Europe observer States:

a. on Japan to adhere to and on the United States of America to ratify the Rome Statute of the ICC;

b. on Mexico to ratify the Rome Statute of the ICC;

c. on Israel, having observer status with the Parliamentary Assembly, to ratify the Rome Statute of the ICC and not to ratify the bilateral “exemption agreement” signed with the USA:

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

a. to establish a joint and solidary position with a view to ensuring the efficient functioning of the ICC;

b. to refrain from any action which might decision the integrity of the ICC Treaty and efficient work of the Court;

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

d. to provide all necessary cooperation and assistance with a view to ensuring the earliest possible effective functioning of the Court;

e. not to avail themselves of the provision in the ICC Treaty which makes it possible to escape the Court's jurisdiction on war crimes for seven years.

15. The Assembly welcomes that all members of the European Union have signed and ratified the ICC Treaty and encourages the European Union to adopt a joint position on the issue of the «exemption agreements» as soon as possible along the lines of the present Resolution.

16. The Assembly sincerely hopes that the United States of America will join the majority of democratic States in their support for the ICC.

[1] Assembly debate on 25 September 2002 (29th Sitting) (see Doc. [9567](#), report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Marty). Text adopted by the Assembly on 25 September 2002 (29th Sitting).

ANNEX III: EXCERPTS FROM EUROPEAN PARLIAMENT RESOLUTION OF 26 SEPTEMBER 2002

The European Parliament adopted a resolution on 26 September 2002, noting

“the current worldwide political pressure being exerted by the government of the United States to persuade States Parties and Signatory States of the Rome Statute, as well as non-signatory states, to enter into bilateral immunity agreements which seek, through misuse of its Article 98, to prevent US government officials, employees, military personnel or nationals from being surrendered to the International Criminal Court should not succeed with any country, in particular with the Member States, the candidate countries, the countries involved in the Stabilisation and Association Process, the countries associated with the EU in the Euro-Mediterranean partnership, the Mercosur, Andean Pact and San José Process countries or the ACP countries,

E. regretting that the Council and the Commission did not address clear political guidelines in this regard to the candidate countries, as well as to all the other countries associated with the EU under various agreements,

F. deeply disappointed by the decision of the Romanian government to sign an agreement with the United States contradicting the spirit of the status of the ICC and worried that three other candidate countries – the Czech Republic, Lithuania and Malta – have not yet ratified the treaty,

....

H. deeply concerned at the approach to the ICC expressed by representatives of some of the governments of Member States during the informal meeting of the EU foreign ministers in Helsingor on 29 and 30 August 2002 and at the lack of clear information on the outcome of the meeting held in New York on 13 September 2002 between the US Administration and the Foreign Affairs Ministers of the Member States,

....

J. insisting that the common guidelines that the Council is to adopt on 30 September 2002 should not represent any step backwards in EU support for the full effectiveness of the ICC and should respect the letter and spirit of the EU common position already adopted in this regard,

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

....

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

....

5. Expects the governments and parliaments of the Member States to refrain from adopting any agreement which undermines the effective implementation of the Rome Statute; considers in consequence that ratifying such an agreement is incompatible with membership of the EU;

6. Addresses the same request to the candidate countries, the countries associated with the EU in the Euro-Mediterranean partnership, the Mercosur, Andean Pact and San José Process countries, the countries involved in the Stabilisation and Association Process and the ACP countries which are parties or signatories to the Statute; encourages the parliaments of Romania, Israel, Tajikistan, East Timor, Honduras, India, Uzbekistan, Mauritania, Palau, the Marshall Islands and the Dominican Republic not to ratify the agreements signed by their governments with the United States, under Article 98 of the Rome Statute;

European Parliament Resolution, P5_TA-PROV(2002)0449, 26 September 2002