

Parliamentary Assembly of the Council of Europe

Report on risks for the integrity of the Statute of the International Criminal Court

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24 September 2002

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Dick Marty, Switzerland, Liberal, Democratic and Reformers' Group

Summary

The report 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.

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.

The report 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 Committee on Legal Affairs and Human Rights 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"). In the Committee's opinion, these "exemption agreements" are not admissible under the international law governing treaties and are not consistent with the provisions of the Statute of the ICC.

Accordingly, the Assembly calls on Council of Europe member and observer States, if they have not yet done so, to ratify the ICC Treaty or to adhere to it and, in particular, not to enter into any bilateral "exemption agreements" which would compromise or limit in any manner their cooperation with the Court.

I. Draft resolution

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”).

10. 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.

11. 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.

12. 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».

13. 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.

14. 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 compromise the integrity of the ICC Treaty and efficient work of the Court;
 - c.* not to enter into any bilateral “exemption agreements” which would compromise 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.

II. Draft recommendation

The Assembly, referring to its Resolution ... (2002), recommends that the Committee of Ministers adopt a joint position of the Council of Europe member States on the issue of bilateral "exemption agreements" along the lines of the above-mentioned Resolution.

III. Explanatory memorandum

by Mr Marty, Rapporteur

A. Introduction

1. Fifty years after the work started in the United Nations on the establishment of an international tribunal to judge those responsible for the most serious crimes known to mankind, a treaty creating the International Criminal Court and establishing its Statute (ICC Treaty) was adopted in Rome on 17 July 1998. The ICC Treaty entered into force on 1 July 2002, after the threshold of 60 ratifications was reached.

2. The tribunal is a permanent institution based in The Hague and it has jurisdiction with respect to the following crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

3. The ICC Treaty established an Assembly of the State Parties (ASP), which is the governing body of the Court. Each State Party has one representative in it. The ASP held its first meeting on 3-10 September 2002 in New York and took a series of important decisions, which laid foundations for the effective establishment of the Court.

4. The ASP elected Prince Zeid Ra'ad Zeid Al-Husseini, Jordanian Ambassador to the United Nations, as its President. It also adopted its budget and the procedure for the election of judges. The period for nomination of candidates for the 18 judges is now open and the election will take place in February 2003. I warmly welcome these important advances.

5. Nevertheless, maintaining the integrity of the Court requires, first of all, that there should be universal adherence and participation of all States in the Court's system. No country and no country's nationals should be placed above the law and outside the system of international justice. At the same time, States must refrain from any action which would not be consistent with the object and purpose of the Treaty, or which would contradict its provisions.

6. In the light of the action undertaken by some States, the Committee on Legal Affairs and Human Rights considered that there were acute risks for the integrity of the ICC Statute and efficient work of the Court. It therefore requested that an urgent debate be held on this issue with a view to adopting a resolution aimed at forging a common European position to counter these risks.

B. Universal adherence to the ICC Treaty

7. Universal adherence to the ICC Treaty is necessary in order that the Court could accomplish its objectives: to ensure equal justice for all throughout the world and to prevent impunity.

8. The ICC Treaty has so far been signed by 139 countries and ratified by 81 countries. 42 Council of Europe member States have signed it (the two remaining countries being Azerbaijan and Turkey) and 33 of them have ratified it (Albania, Armenia, Czech Republic, Georgia, Lithuania, Malta, Moldova, Russian Federation and Ukraine have still to ratify it). From the Council of Europe observer States, Canada has signed and ratified the ICC Treaty and Mexico has signed it. Japan has not signed the Treaty and the USA has not ratified it. Israel, which has observer status with the Parliamentary Assembly, has signed the Treaty.

9. The Court is, and must remain, a supreme body of international justice and, as such, it must not be subject to political pressures or be used for political purposes. A series of guarantees have been included in the ICC Treaty in this respect:

- the Court is complementary to national criminal jurisdictions (Preamble);
- the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute (Article 11);
- the commencement of the investigation is authorised only after a pre-trial chamber has considered that there is a reasonable basis to proceed with an investigation (Article 15);
- the UN Security Council can request the Court not to commence or proceed with an investigation or prosecution for a period of twelve months, such a request may be renewed by the Council (Article 16).

10. Despite these guarantees, some States are hesitant about adhering to the Statute, claiming that they fear prosecution of their nationals for politically motivated purposes.

11. The position of the United States of America is of particular concern. It has declared that it does not intend to become party to the ICC Treaty and that it considers that it has no legal obligations arising from its signature of the ICC Treaty in December 2000. Such a position, coming from one of the leading democracies in the world, may undermine the integrity of the Statute of the Court and the respect for international law in general.

12. I believe that solutions to this situation can be found through constructive dialogue. Unilateral steps, however, can only harm such a dialogue.

13. Among such unilateral steps are certain provisions of the recently enacted American Servicemembers' Protection Act (ASPA), which prohibit US cooperation with the Court, restrict US participation in United Nations peacekeeping operations and prohibit, with some exemptions (NATO members, for example, as well as some other US allies) military assistance to countries which ratify the ICC Treaty. The ASPA also authorised the US President to use all means necessary and appropriate to free from captivity any US or allied personnel held by or on behalf of the Court.

14. I am also seriously concerned by the link made by the US between the jurisdiction of the Court and the renewal of the UN Security Council mandates for peacekeeping operations, which could put at risk the whole system of United Nations peacekeeping. On 30 June 2002, the US vetoed the renewal of the mandate of the peacekeeping operation in Bosnia and Herzegovina as a means of pressure aimed at

obtaining exemption from prosecution by the Court of US officials and personnel. The US also threatened to cease paying its share of the peacekeeping operations budget. As a compromise, the Security Council Resolution 1422 adopted on 12 July 2002 granted exemption from the Court's jurisdiction to officials or personnel of a State non-party to the ICC Treaty to a UN established or authorised operation for a period of 12 months, which may be renewed for further 12-month periods. The issue may arise again in the Security Council next July.

C. Bilateral "exemption agreements"

15. The US is also using bilateral agreements in which the other party agrees not to surrender or transfer a broad range of US nationals (including current or former Government officials, employees, military personnel or nationals) to the Court. It claims that these "exemption agreements" are expressly contemplated in Article 98 (2) of the Rome Statute, which reads as follows: "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".

16. I share the opinion 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 (Article 18 of the Vienna Convention). The object and the purpose of the ICC Treaty is to bring to justice those responsible for the most serious crimes. Primarily to national justice but, if States do not take the necessary action, to the international justice of the Court. Accordingly, agreements which would prevent the Court from exercising this complementary function are against the object and the purpose of the ICC Treaty.

17. 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 of the ICC Treaty). Furthermore, Article 27 of the ICC Treaty specifies that "this statute shall apply equally to all persons without any distinction based on official capacity". In my opinion, the "exemption agreements" are not consistent with these articles.

18. Moreover, legal experts, including those involved in the drafting of the ICC Treaty, claim that Article 98 (2) was designed to prevent conflicts, which might arise because of already existing agreements. These would mainly be so-called "Status of Forces Agreements" which provide for the allocation of jurisdiction between the sending State (whose forces are stationed in another State) and the receiving State. Article 98 (2) was certainly not meant to incite States to conclude agreements preventing the Court from exercising its jurisdiction.

19. I should also like to recall that in Recommendation [1408](#) (1999) on an International Criminal Court, the Parliamentary Assembly recommended to the Committee of Ministers of the Council of Europe, *inter alia*, to invite the 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».

20. Four States have so far signed these “exemption agreements”, including one Council of Europe member State (Romania) and one observer State (Israel). East Timor and Tajikistan have also signed.

D. Article 124 of the ICC Treaty

21. According to Article 124 of the ICC Treaty, a State Party may declare that, for a period of seven years after the entry into force of the Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 (“war crimes”) when a crime is alleged to have been committed by its nationals or on its territory.

22. In Recommendation [1408](#) (1999), the Assembly recommended that the Committee of Ministers invite member and observer States, *inter alia*, “not to avail themselves of the clause in Article 124 which makes it possible to escape the Court’s jurisdiction for seven years”. Unfortunately, the Committee of Ministers, in its reply adopted in June 2000 (Doc 8780), did not react at all to this recommendation of the Assembly.

23. Among the Council of Europe member States, only France has made use of this article.

E. Search for a joint position of the European Union

24. The EU Ministers for Foreign Affairs have decided to agree on a common position on the issue of bilateral “exemption agreements” by 30 September 2002. According to the available information, the EU legal experts, at their meeting held in Brussels on 4 September 2002, declared that the “exemption agreements” were not compatible with the obligations of the States Parties to the ICC Treaty.

F. Conclusions

25. The signing of the ICC Treaty has been one of the most important achievements in the history of international law. By fighting impunity, it is promoting respect for international humanitarian law and, in a larger sense, it is contributing to the preservation of peace and to the strengthening of international security.

26. The Council of Europe and its member States must do their utmost to preserve the integrity of the Court's Statute and to ensure its earliest possible effective establishment. I therefore call on my colleagues in the Parliamentary Assembly to endorse the resolution presented by the Committee on Legal Affairs and Human Rights and to work in their national Parliaments in order to implement it.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Request for an urgent debate, Reference No. 2765 (23 September 2002)

Draft resolution adopted with 18 votes in favour, no votes against and 2 abstentions and *draft recommendation* unanimously adopted by the Committee on 24 September 2002

Members of the committee: Mr Lintner (Chairperson), Mr Magnusson, Mrs Gülek, Mr Marty (Vice-Chairpersons), Mr Akçali, Mr G. Aliyev, Mr Andican, Mr Arabadjiev (alternate: Mr Toshev), Mrs van Ardenne-van der Hoeven, Mr Arzilli, Mr Attard Montalto, Mr Barquero Vázquez, Mr Berisha, Mr Bindig, Mr Brecj, Mr Bruce, Mr Bulavinov, Mr Chaklein, Mrs Christmas-Møller, Mr Clerfayt, Mr Contestabile, Mr Daly, Mr Davis, Mr Dimas, Mrs Domingues, Mr Engeset, Mrs Err, Mr Fedorov, Mrs Frimansdóttir, Mr Frunda, Mr Guardans, Mr Gustafsson, Mrs Hajiyeva, Mr Holovaty, Mr Jansson, Mr Jaskiernia, Mr Jurgens, Mr Kastanidis, Mr Kelemen, Mr S. Kovalev, Mr Kresák, Mr Kroll, Mr Kroupa, Mr Kucheida, Mr Lacão, Mrs Libane (alternate: Mr Cilevics), Mr Lippelt, Mr Manzella (alternate: Mr Budin), Mrs Markovic-Dimova, Mr Martins, Mr Masson (alternate: Mr Hunault), Mr Mas Torres, Mr McNamara, Mr Meelak, Mrs Nabholz-Haidegger, Mr Nachbar, Mr Olteanu, Mrs Pasternak (alternate: Mr Markowski), Mr Pellicini, Mr Penchez, Mr Piscitello, Mr Poroshenko, Mrs Postoica, Mr Pourgourides, Mr Ransdorf (alternate: Mr Mezihorak), Mr Rochebloine (alternate: Mr Dreyfus-Schmidt), Mr Rustamyan, Mr Skrabalo, Mr Solé Tura, Mr Spindelegger (alternate: Mr Jung) Mr Stankevic, Mr Stoica (alternate: Mr Coifan) , Mrs Stoisits, Mrs Süßmuth, Mr Symonenko, Mr Tabajdi, Mrs Tevdoradze, Mr Tokić, Mr Vanoost, Mr Wilkinson, Mrs Wohlwend

N.B. The names of those members who were present at the meeting are printed in italics.

Secretaries to the committee: Ms Coin, Mr Sich, Ms Kleinsorge, Mr Čupina, Mr Milner