

HUMAN RIGHTS WATCH

350 Fifth Ave, 34th Floor
New York, NY 10118
Phone: 212-290-4700
Fax: 212-736-1300
E-mail: hrwnyc@hrw.org
Website: <http://www.hrw.org>

Kenneth Roth
Executive Director
Michele Alexander
Development and Outreach Director
Carroll Bogert
Communications Director
John T. Green
Operations Director
Barbara Guglielmo
Finance Director
Lotte Leicht
Brussels Office Director
Tom Malinowski
Washington Advocacy Director
Michael McClintock
Deputy Program Director
Rory Mungoven
Advocacy Director
Maria Pignataro Nielsen
Human Resources Director
Dinah PoKempner
General Counsel
Malcolm Smart
Program Director
Wilder Tayler
Legal and Policy Director
Joanna Weschler
UN Representative

DIVISION DIRECTORS

Peter Takirambudde
Africa
José Miguel Vivanco
Americas
Sidney R. Jones
Asia
Elizabeth Andersen
Europe and Central Asia
Hanny Megally
Middle East and North Africa
Joost R. Hiltermann
Arms
Lois Whitman
Children's Rights
LaShawn Jefferson
Women's Rights

BOARD OF DIRECTORS

Jonathan Fanton
Chair
Lisa Anderson
Lloyd Axworthy
David Brown
William Carmichael
Dorothy Cullman
Irene Diamond
Fiona Druckenmiller
Edith Everrett
Michael Gellert
Vartan Gregorian
Alice H. Henkin
James F. Hoge, Jr.
Stephen L. Kass
Marina Pinto Kaufman
Wendy Keys
Bruce Klatsky
Joanne Leedom-Ackerman
Josh Mailman
Joel Motley
Samuel K. Murumba
Jane Olson
Peter Osnos
Kathleen Peratis
Catherine Powell
Bruce Rabb
Sigrid Rausing
Orville Schell
Sid Sheinberg
Gary G. Sick
Domna Stanton
John J. Studzinski
Maureen White
Maya Wiley

Robert L. Bernstein
Founding Chair

August 2, 2002

United States Efforts to Undermine the International Criminal Court:

Article 98 Agreements

Introduction

On July 12, 2002, the United Nations Security Council passed Resolution 1422, which requests the International Criminal Court to defer an investigation or prosecution for 12 months for personnel from non-Rome Statute parties for acts or omissions relating to U.N. established or authorized operations. Human Rights Watch condemned the Resolution as being of questionable legality as it seeks to amend Article 16 of the Rome Statute. (See <http://www.hrw.org/press/2002/07/icc071202.htm>)

The Bush Administration has announced that Resolution 1422 was only a first step in its stated objective of seeking full protections for its citizens from the Court and that it intends to negotiate bilateral and multilateral “Article 98” agreements – for example, Status of Forces Agreements (SOFAs) – with many countries, nearly all of which have ratified or signed the Rome Statute. These agreements would complement U.N. Security Council Resolution 1422 by further exempting U.S. military and civilian personnel from the jurisdiction of the ICC.

Legal Analysis

Human Rights Watch believes that the use of article 98 agreements in this manner violates the Rome Statute and must be opposed. States parties, as well as signatories of the Rome Statute, have a legal obligation *not* to sign such agreements.

- (1) Article 98 must be construed narrowly and consistently with the jurisdictional regime in the Rome Statute, which is based on the nationality of the accused or the state where the crimes occurred.
- (2) Article 98 does not override the requirement that national prosecutions for Rome Statute crimes be subject to ICC scrutiny to determine whether investigations and prosecutions are conducted in good faith.
- (3) States parties and States that have signed but not yet ratified the Rome Statute (“signatory States”) are legally required to ensure that these basic and important aspects of the Rome Statute are not violated – States parties by virtue of their legal obligations in the Rome Statute to cooperate with the ICC; signatory States by virtue of their legal obligations under the Vienna Convention on the Law of Treaties not to defeat the “object and purpose” of the Rome Statute.
- (4) Article 98 permits a State party to enter into jurisdictional-routing agreements, that allow it first chance at prosecuting, with another State party – this is consistent with the complementarity principle in the Rome Statute. (Although Human Rights Watch discourages States parties from entering into Article 98 agreements with other State parties.)



- (5) Article 98 does not permit a *non-State party* (and particularly, one that has repudiated or not signed the Rome Statute) to remove crimes from the ICC's jurisdiction and to brush aside the ICC's capacity to either prosecute the most serious international crimes, or ensure that good faith national prosecutions occur.
- (6) States parties and signatory cannot sign an agreement providing immunity from ICC prosecution with a country that has repudiated or has not signed the Rome Statute – to do so would violate the “object and purpose” of the treaty.
- (7) Agreements that purport to require States parties and signatory States to turn over military personnel suspected of committing crimes within the ICC's jurisdiction to a country that has repudiated or has not signed the Rome Statute are not valid.
- (8) Article 98 was included in the Rome Statute to provide an orderly and rational process for the handling of suspects among states cooperating with the Court. It was not intended to allow a state that has refused to cooperate with the Court to negotiate a web of agreements internationally to secure exemption for its citizens or otherwise undermine the effective functioning of the Court.

Conclusion

U.S. efforts to exploit Article 98 of the Rome Statute by agreements, such as SOFAs, with States parties and signatory States must be opposed to ensure compliance with the ICC. At stake is the integrity of a vital instrument for international justice.