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Fédération Internationale des Ligues des Droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO, ET DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

INTERNATIONAL FEDERATION OF HUMAN RIGHTS

FEDERACION INTERNACIONAL DE LOS DERECHOS HUMANOS

الفدرالية الدولية لحقوق الانسان

Press Release

Council of the European Union / ICC
Consecration of an ICC « à la carte »

Paris, October 2, 2002 – The meeting of the Council of the European Union on October 30, 2002 demonstrated once more the political fear of the Union towards US attempts of entirely excluding its nationals from the jurisdiction of the International Criminal Court (ICC).

In fact, the jurists had to decide on a common position concerning the bilateral agreements that could be signed between its Members States – or candidates – and the United States. One must recall that these agreements, based on Article 98 of the ICC Statute, aim at obliging signatory States to refuse the handing over of any American citizen to the ICC and to deliver them « when necessary » to the American national jurisdictions.

Far from firmly condemning the US position, as did the European Parliament on September 26, the Council of the European Union on the contrary tried to give a moral guarantee to the bilateral agreements by defining principles supposed to guide « *Member States when considering the necessity and scope of possible agreements or arrangements in responding to the United States' proposal* ».

Infringement of international law

The position of the European Union, by defining criteria of legality of the immunity agreements, de facto encourage States to be in violation with international law. Indeed, according to Article 32 of the Vienna Convention on the Laws of Treaty, it is possible to use supplementary means of

unreasonable ».

However, the bilateral agreements sought by the Americans precisely lead to an absurd result, as they permit States non-parties to question the fundamental principle of the Rome Statute according to which any person, whatever his or nationality, who commits a war crime, a crime against humanity or genocide on the territory of a State Party is subject to the jurisdiction of the ICC. Any agreement that would prevent the ICC from exercizing its complementary function with national jurisdictions, and which would be used when a State does not want or cannot judge, violates the object and purpose of the Statute.

Similarly, using a principle titled « no impunity », the EU considers that « *any solution <u>should</u> (we emphasize) include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Cour do not enjoy impunity* ».

But the complementarity with national jurisdictions principle which establishes the action of the ICC is enough in itself to screen the US from the judgement of American criminals by the ICC. Indeed, the Court is only competent when States refuse or are unable to carry out the investigation or prosecution, when the judiciary is failing. Thus it is not necessary for the State which wants to elude the risk of seeing its nationals prosecuted before the Court for crimes within the jurisdiction of the Court, to enter into bilateral agreements on the basis of Article 98 of the Statute. It suffices, each time that one of its nationals is the subject of such a complaint, to try him before its own judicial system. The ICC, noting that either an investigation or a prosecuting is in progress, or that, after an investigation, a decision not to prosecute was taken, or finally that the person concerned has already been tried, will declare, by applying the complementarity principle, that the case is not admissible. The bilateral agreements, which violate the complementarity principle, place the States Parties who have ratified them, in obvious infringement of the object of the Statute. In addition, in this context, how can one stop doubting the American expressed will of prosecuting, in any circumstance, American nationals before their own tribunals?

Moreover, according to the travaux préparatoires, international agreements admissible unde Article 98(2) were only referred to as pre-existing agreements. The article was precisely negotiated in order to deal with eventual conflicts between the Statute and existing obligations of international law. Thus, the object of Article 98(2) was only an express reference to standard provisions of SOFAs (Status-of-Force Agreements) and did not allow the subsequent conclusion of such agreements, which appear to be in complete violation with the travaux preparatoires of the ICC Statute and thus in violation with the obligations of States.

The US encourages de facto the signature of bilateral treaties

The EU consacred the legality of the immunity agreements permitting to refrain any handing over to the Court of nationals of States non-parties, « sent » by the latter on the territory of the receiving State of the agreement. The FIDH underlines that, by the term « sent », the EU is designating officials enjoying a State or diplomatic immunity, according to international law, while Article 27 of the Statute provides that no immunity can be an obstacle to the proceedings started by the prosecutor of the Court.

This position may implicitly encourage States non parties, as well as States that are reluctant

of the Court. The Statute gives, in theory, jurisdiction to the Court to judge nationals of States non-parties guilty of the most serious crimes, committed on the territories of a State Party. Nothing therefore prevents China, Russia or Israel, from trying to conclude such agreements with other States.

This behavior can only be considered as a lack of confidence in the ICC. The Statute of the Court precisely contains effective guarantees against improper complaints, notably by the control mechanism on the acts of the Prosecutor by the Pre-Trial Chamber or the measures of protection for information regarding the national security of States. The encouragement given by the European Union to the signature of the bilateral agreements represents in fact a radical change of position from the Members States of the EU. This encouragement is to be deplored, as it very strongly undermines the competence of the Court, still looking for legitimity.

While many States – including non parties – were waiting for a strong position of the EU to refuse the signature of bilateral agreements with the United States, the conclusions on the common position leave States in prey to strong American pressure. One can fear that they are worth encouragement to the signature of such agreements.

The FIDH deplores that the European Union priviledged a political and opportunistic approach, against the strict application of juridical principles inherent in the Statute and which link its Members States.