

Appendix 3A. The International Criminal Court

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I. Introduction

The Rome Statute, the founding treaty of the International Criminal Court (ICC), entered into force on 1 July 2002 after the required 60th ratification—56 years after the Nuremberg trials, when the idea of a permanent international war crimes court was first mooted.¹ The relative speed with which the ratification process was concluded took many by surprise. Approximately half of the required 60 ratifications occurred after 1 January 2002 whereas by August 2000, two years after the treaty was opened for signature, only 14 states had ratified it. As of 30 April 2003, there were 89 parties to the treaty (table 3A). Since the statute entered into force, an advance team of the ICC has started work in The Hague, where the court will be based.² The court is expected to be fully operational by the end of 2003. In September 2002, the states parties to the statute convened the First Assembly to discuss the practical arrangements that will enable the ICC to function. The assembly was able to make progress on the nomination of judges and the Prosecutor and approve a preliminary budget. Subsequent meetings led to the election of the first 18 judges, who were sworn in on 11 March 2003.³

The establishment of the ICC has not been without controversy. Several states continue to oppose the creation of such a body. The ICC was dealt a heavy blow in 2002 when the United States used its permanent membership of the UN Security Council to threaten to veto the extension of a UN peacekeeping mission unless peacekeepers were granted absolute immunity from prosecution by the ICC. This, and subsequent actions by the USA, raised concerns over the future of the court and its ability to perform the role—that of a deterrent and a conflict resolution tool—that was envisaged for it.

Section II of this appendix provides a brief overview of how the ICC will function. Section III describes the opposition to the ICC. The European Union (EU) position on the ICC is examined in section IV, and the consequences of and responses to US actions are addressed in the concluding section.

¹ The Rome Statute was adopted on 17 July 1998 at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome, by a vote of 120 to 7 with 21 abstentions. Article 126, 'Entry into force', allowed the statute to enter into force at the start of the first complete month, 60 days after the 60th ratification. In accordance with Article 125, 'Signature, ratification, acceptance, approval or accession', the statute remained open for signature until 31 Dec. 2000. 'Rome Statute: International Criminal Court', *International Legal Materials*, vol. 37 (Sep. 1998), pp. 1002–69; and 'Rome Statute of the ICC, as corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999', URL <<http://www.un.org/law/icc/statute/contents.htm>>.

² Under Article 3 of the Rome Statute, 'Seat of the Court', the Court may sit elsewhere.

³ United Nations, 'ICC assembly of states parties', Press Release, UN document L/3026, 7 Feb. 2003.

Table 3A. Signatures and ratifications of the Rome Statute of the International Criminal Court, by region, as of 30 April 2003

Parties			Signed but not ratified		
<i>Africa and the Middle East</i>					
Benin	Mali		Algeria	Eritrea	Oman
Botswana	Namibia		Angola	Guinea	Sao Tome
Central African Rep.	Niger		Bahrain	Guinea-Bissau	and Principe
Congo (DRC)	Nigeria		Burkina Faso	Iran	Seychelles
Djibouti	Senegal		Burundi	Israel	Sudan
Gabon	Sierra Leone		Cameroon	Kenya	Syria
Gambia	South Africa		Cape Verde	Kuwait	United Arab Emirates
Ghana	Tanzania		Chad	Liberia	Yemen
Jordan	Uganda		Comoros	Madagascar	Zimbabwe
Lesotho	Zambia		Congo (Rep. of)	Morocco	
Malawi			Côte d'Ivoire	Mozambique	
<i>South and East Asia and the Pacific</i>					
Afghanistan	Korea (South)	Nauru	Bangladesh		
Australia	Marshall Islands	New Zealand	Philippines		
Cambodia	Mauritius	Samoa, Western	Solomon Islands		
Fiji	Mongolia	Timor-Leste ^a	Thailand		
<i>East, West and Central Europe and members of the Commonwealth of Independent States</i>					
Albania	Germany	Poland	Armenia		
Andorra	Greece	Portugal	Czech Republic		
Austria	Hungary	Romania	Georgia		
Belgium	Iceland	San Marino	Kyrgyzstan		
Bosnia and Herzegovina	Ireland	Serbia and Montenegro	Lithuania		
Bulgaria	Italy		Moldova		
Croatia	Latvia	Slovakia	Monaco		
Cyprus	Liechtenstein	Slovenia	Russia		
Denmark	Luxembourg	Spain	Ukraine		
Estonia	Macedonia (FYROM)	Sweden	Uzbekistan		
Finland	Malta	Switzerland			
France	Netherlands ^b	Tajikistan			
	Norway	UK			
<i>The Americas and the Caribbean</i>					
Antigua and Barbuda	Costa Rica	Trinidad and Tobago	Bahamas		
Argentina	Dominica ^a	Uruguay	Chile		
Barbados	Ecuador	Venezuela	Dominican Rep.		
Belize	Honduras		Guyana		
Bolivia	Panama		Haiti		
Brazil	Paraguay		Jamaica		
Canada	Peru		Mexico		
Colombia	St Vincent and the Grenadines ^a		St Lucia		
			USA ^c		

^a Accession.

^b Acceptance.

^c The US Government informed the UN Secretary-General on 6 May 2002 that the USA did not intend to become a party to the treaty.

Source: 'Multilateral treaties deposited with the Secretary-General', URL <<http://www.un.org/law/icc/statute/romefra.htm>>.

Background

Although the concept of a permanent, international legal entity to deal with war crimes has been discussed since the 1949 International Military Tribunal, it was only in the early 1990s that the idea began to take a more concrete form. The end of cold war politics revived the stalled negotiations on the creation of an international criminal court. The campaign to push the issue to the forefront of the UN agenda was spearheaded by influential human rights organizations, such as Human Rights Watch,⁴ victims' groups and certain lead states, including Canada, Germany and Norway, in part because of the atrocities committed during the conflicts in the Balkan states and in Central Africa. In November 1992, the UN General Assembly passed a resolution requesting the International Law Commission (ILC) to begin the process of formulating draft language for the establishment of the ICC.⁵ Two years later, an ad hoc committee was established to enable states parties, relevant agencies, non-governmental organizations (NGOs) and other interested parties to review the draft statute prepared by the ILC. This was followed by the establishment of the Preparatory Commission for the Establishment of an International Criminal Court, which was given the task of reaching a common understanding on the wording of the treaty and arranging the conference in Rome in 1998 that would ultimately adopt the treaty.

The International Criminal Tribunal for the former Yugoslavia (ICTY), set up pursuant to UN Security Council resolution 808 in 1993,⁶ and the International Criminal Tribunal for Rwanda (ICTR), set up pursuant to UN Security Council resolution 955 in 1994,⁷ were the first international legal bodies to exercise jurisdiction over crimes committed in *internal* armed conflicts.⁸ This paved the way for a permanent structure with a similar mandate with the expectation that an institutionalized regime would provide a restraint on the actions of political leaders because of the likelihood that they would be held accountable for their actions. The tribunals also developed the norm of individual responsibility in times of war, particularly for political leaders who previously believed they were immune. The prosecution of former Prime Minister Jean Kambanda and of former President Slobodan Milosevic by the ICTR and the ICTY, respectively, set important precedents. These tribunals further developed the concept of 'crimes against humanity' and significantly codified international humanitarian law.⁹ For example, the ICTR acknowledged that rape, sexual violence and forced pregnancy are acts that can be tried as acts of genocide when committed with an intent to destroy a protected group. Similarly, rape was defined as a crime against humanity.¹⁰ In the case of Yugoslavia, the ICTY adopted a proactive approach and carried out their own investigations.¹¹ The launch of a victim-oriented restitutive justice programme for the ICTR was met with strong approval from gov-

⁴ Human Rights Watch Internet site URL <<http://www.hrw.org/campaigns/icc/index.htm>>.

⁵ UN General Assembly Resolution 47/33, 25 Nov. 1992.

⁶ UN Security Council Resolution 808, 22 Feb. 1993.

⁷ UN Security Council Resolution 955, 8 Nov. 1994.

⁸ The Rome Statute (note 1), Article 8, 'War crimes', gives the ICC the right to try any war crimes that may have occurred in intra-state armed conflicts, further redefining the limits of state sovereignty.

⁹ Popovski, V., 'International Criminal Court: A necessary step towards global justice', *Security Dialogue*, vol. 31, no. 4 (Dec. 2000), p. 406.

¹⁰ Boed, R., 'The United Nations International Criminal Tribunal for Rwanda: its establishment, work and impact on international criminal justice', *Perspectives*, vol. 12 (winter 2001/2002), p. 62.

¹¹ Dwan, R., 'Armed conflict prevention, management and resolution', *SIPRI Yearbook 2000: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2000), pp. 91–93.

ernments and NGOs alike and the principle of restitutive justice was consequently incorporated into the statute of the ICC.¹²

While the ICTR and the ICTY tribunals contributed significantly to international jurisprudence, and their success made it possible for the Rome Conference to take place, it was the shortcomings of the ICTR and the ICTY—and later the Special Court for Sierra Leone¹³—that demonstrated to the international community the need to establish a permanent court. First, there were growing concerns that the manner in which they were set up—on the terms of the victors and the UN Security Council—should not be repeated if respect for international humanitarian law was to become a universal norm. Second, the scope of the tribunals was limited by their specific remits. They were also extremely slow to proceed.¹⁴ It took six years for the case against Milosevic to be heard by the ICTY. The track record for the ICTR is not much better—a dismal number of arrests, an extremely slow prosecution list and a failure to protect witnesses, exacerbated by an uncooperative Rwandan Government.¹⁵

One of the biggest challenges these tribunals faced was the problem of finding qualified and independent legal officers who were prepared to take on the daunting task of prosecuting war criminals. Carla del Ponte was chief prosecutor for both tribunals and was therefore forced to divide her time and attention between them. This may have contributed to the slow progress of prosecutions. The extraordinary financial commitment required to maintain the ICTY and the ICTR was a significant factor in the debate surrounding the ICC. The UN General Assembly had allocated close to \$1 billion to the ICTY and about \$280 million to the ICTR over the course of their existence.¹⁶ Thus, as David Scheffer, former US Ambassador at Large for War Crimes Issues, explained, ‘our experiences with the establishment and operation of the [ICTR and ICTY] had convinced us of the merit of creating a permanent court that would more quickly be available for investigations and prosecutions and more cost effective in its operations’.¹⁷ The ICC, being an independent entity, would not need to rely on a UN Security Council mandate to investigate, arrest or prosecute perpetrators. It would have a ready pool of international and independent prosecutors and judges. The permanent structure would eliminate the need for the international community to periodically set up new tribunals.

¹² Lambourne, N., ‘The pursuit of justice and reconciliation: responding to genocide in Cambodia and Rwanda’, Paper presented to the International Studies Association 40th Annual Convention, Washington, DC, 16–20 Feb. 1999; and ICTR, ‘ICTR launches victim support initiative in Rwanda’, Press Release ICTR/INFO-9-2-242, The Hague, 26 Sep. 2000.

¹³ Set up under UN Security Council Resolution 1315, 14 Aug. 2000. See Dwan, R., ‘Armed conflict prevention, management and resolution’, *SIPRI Yearbook 2001: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2001), p. 88.

¹⁴ ‘UK pushes for war crimes court’, BBC News online, 25 Aug. 2000, URL <http://news.bbc.co.uk/1/hi/uk_politics/895384.stm>; and ICTY, ‘Remarks of Judge Richard May, Judge of the International Criminal Tribunal for the Former Yugoslavia, to the fourth session of the Preparatory Commission for the International Criminal Court’, Press Release JL/P.I.S./479-E, The Hague, 20 Mar. 2000.

¹⁵ International Crisis Group, *The International Criminal Tribunal For Rwanda: The Countdown*, Nairobi/Brussels, 1 Aug. 2002; and Barrow, G., ‘Rwanda rounds on genocide tribunal’, BBC News Online, 24 July 2002, <URL <http://news.bbc.co.uk/2/hi/africa/2150119.stm>>.

¹⁶ The 2002 biennium budgets are not included in this calculation. These figures represent the annual budget allocated by the General Assembly and not actual expenditure. Budget figures are available from the Coalition for International Justice at URL <<http://www.cij.org/index.cfm?fuseaction=faqs&tribunalID=1#q7>>; and URL <<http://www.cij.org/index.cfm?fuseaction=faqs&tribunalID=2#q7>>.

¹⁷ ‘Is a UN International Criminal Court in the US national interest?’, Senate Committee on Foreign Relations, hearing before the Subcommittee on International Operations, 105th Cong., 2nd session, July 1998, p. 12.

The objectives of the Rome Conference were to synthesize the expectations of states and to establish the basic principles of the court. There were three different camps: ‘the like-minded group’, the Non-Aligned Movement or ‘developing countries group’, and the five permanent members of the UN Security Council (the ‘P5 Group’).¹⁸ The like-minded group was in favour of a strong supranational court with automatic jurisdiction—that is, a state party to the Rome Statute would accept that the court need not obtain its consent to act—and jurisdiction over internal conflict. The P5 Group, on the other hand, favoured a more limited court that would be under the jurisdiction of the Security Council. The NAM were hesitant about extending the remit of the ICC to internal conflicts.¹⁹ There were also disagreements on the definition of crimes, in particular the crime of aggression; the role of the prosecutor vis-à-vis the Security Council; and the extension of the court’s authority. Because of the level of political commitment to the Rome Conference neither the majority of the delegates nor the Preparatory Commission wanted to reconvene, even if this would have achieved an outcome that had been more thoroughly worked out. The result is that, while the Rome Statute reflects a positive attempt to balance all the different objectives, the differences that existed at Rome continue to haunt the ICC today.

II. Structure and functions of the International Criminal Court

The ICC consists of six organs—the Presidency, an Appeals Division, a Trial Division, a Pre-Trial Division, the Office of the Prosecutor and the Registry. The Presidency, which consists of the President and the First and Second Vice-Presidents, is responsible for the overall administration and management of the ICC. The Appeals Division will be made up of the President and four other judges. The Pre-Trial and Trial divisions will have at least six judges each. In an attempt to institute some checks and balances, the Office of the Prosecutor has been separated from the overall administration of the ICC and does not come under the purview of the Presidency. The Office of the Prosecutor will also include a Deputy Prosecutor. The Registry is responsible for the non-judicial administration of the ICC. The Victims and Witnesses Unit is located within the Registry. It will provide security and arrange counselling for those who appear before or provide assistance to the ICC.

The role of the Prosecutor was a contentious issue during the Rome Conference. Most delegations wanted the Prosecutor to be free from the control of the UN Security Council and therefore able to initiate investigations independently. An independent prosecutor was one of the major achievements of the conference. The Rome Statute also authorizes the Prosecutor to make bilateral agreements with a state to ensure its cooperation when conducting investigations and prosecutions. It could be said that the ability of the Office of the Prosecutor to achieve its goals is dependent to a large extent on the personality and stature of the appointed Prosecutor and Deputy Prosecutor. The potential for abuse of power by the Prosecutor, for example, through politically charged but unfounded prosecutions, makes several governments,

¹⁸ At the start of the Rome Conference, the ‘like-minded group’ represented around 40 countries, including most of Europe, Australia, Canada, and several key regional democracies such as Argentina, Chile, South Africa and South Korea. It later grew to 60 countries. Kirsch, P., Presentation made at the Conference on the ICC organized by the Swedish Foundation for Human Rights, the Olof Palme International Centre and the Swedish Helsinki Committee for Human Rights, Stockholm, 7 Dec. 2002. A list of members of the Non-Aligned Movement can be found in the Glossary.

¹⁹ Kirsch (note 18).

especially the government of the USA, wary of the ICC. However, there are safeguards within the statute to limit the power of the Prosecutor and to prevent the initiation of unnecessary proceedings. There are three mechanisms in the Rome Statute that can 'trigger' a prosecution: a situation is referred to the Office of the Prosecutor by a state party to the statute; at the request of the Security Council; and on the initiative of the Prosecutor, but with limitations.²⁰ On receipt of information that a crime within the jurisdiction of the ICC has been committed, the Prosecutor may seek additional information from various appropriate and reliable sources. However, the Pre-Trial Chamber must concur with the Prosecutor's finding that a case has sufficient merit before authorizing investigations to be conducted.²¹ (The actual modalities of how the Office of the Prosecutor will conduct these investigations have not been defined.) Moreover, every attempt has been made to ensure that the staff of the ICC will be dedicated, qualified, fair and impartial—particularly in the case of the Prosecutor's Office, where the Prosecutor and the Deputy Prosecutor are not allowed to hold the same nationality. States parties have been reminded to be aware of the need for equitable representation of the various principal legal systems, equitable geographical representation and equitable gender representation when selecting their nominees.

Jurisdiction of the ICC

The ICC is set up under the principle of complementarity to national courts. A case will have to go through the national courts before coming before the ICC. Only in circumstances where the national court is unable or unwilling to try the case will it proceed to the ICC. In situations where non-state parties are involved, the case will only fall under ICC jurisdiction if the UN Security Council, acting under Chapter VII of the UN Charter, decides to refer a situation to the Prosecutor's attention. The Security Council can also, in accordance with Article 16 of the Rome Statute, pass a resolution suspending investigations for a renewable period of 12 months.²² However, this is only envisaged in extreme circumstances. The ICC is neither a UN body nor a subordinate organ to the Security Council. Finally, the ICC has no retroactive power and can only try crimes that have been committed after the statute entered into force, after 1 July 2002.

The ICC was not set up to be a venue for petty, frivolous or politically motivated claims. It has jurisdiction over only the most serious crimes—the crime of genocide, crimes against humanity, war crimes and crimes of aggression. Genocide is defined as a list of prohibited acts, such as killing or causing serious harm, committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.²³ Crimes against humanity include extermination of civilians; enslavement; torture; rape; forced pregnancy; persecution on political, racial, national ethnic, cultural,

²⁰ The Rome Statute (note 1), Article 13, 'Exercise of jurisdiction'.

²¹ The Rome Statute (note 1), Article 15, 'Prosecutor'.

²² The Rome Statute (note 1), Article 16, 'Deferral of investigation or prosecution', is also known as the 'Singapore compromise' because it was an effort to satisfy the 'P5', which wanted the ICC to fall under the complete control of the Security Council on matters such as deciding what to investigate and the appointment of judges and prosecutors, and the 'like-minded group', which wanted the ICC to maintain judicial independence. Bellamy, A. and Hanson, M., 'Justice beyond borders? Australia and the International Criminal Court', *Australian Journal of International Affairs*, vol. 56, no. 3 (Nov. 2002), p. 430.

²³ The Rome Statute (note 1), Article 6, 'Genocide'.

religious or gender grounds; and enforced disappearance—committed on a systematic and widespread basis.²⁴ The term ‘war crimes’ refers to those defined by the 1949 Geneva Conventions and the 1977 Additional Protocol, and other serious violations of the laws and customs that can be applied in intra- and interstate armed conflicts.²⁵ The last category—crimes of aggression—is still under negotiation.²⁶ Other crimes may be added to the jurisdiction of the ICC if states parties agree.

Contrary to the concerns of the critics of the ICC, the court’s jurisdiction is rather restricted. First, the ICC has jurisdiction over individuals only and may not try governments. Second, the ICC can claim jurisdiction over crimes only if certain conditions have been met: the act must have occurred on the territory of a state party, or the accused must be a national of a state party; one or more of the parties involved must be a state party; or a non-state party must have accepted the jurisdiction of the ICC. This restriction of the ICC’s powers was the result of intense negotiations during the Rome Conference. Germany had proposed that the ICC should be able to exercise its jurisdiction on the basis of universality alone, but it was the more cautious approach initiated by South Korea and the USA that prevailed.²⁷

III. Opposition to the ICC

The initiators of the ICC intended the court to set a universal norm. However, because the non-European great powers—China, India and Russia—and many Arab and Asian countries have neither signed nor ratified the treaty, there is a long way to go before the ICC reaches this goal. While the USA has been the most vocal opponent of the ICC, it is not alone. At the Rome Conference, China, Iraq, Israel, Libya, Qatar, the USA and Yemen voted against the establishment of the ICC.²⁸ China, Iraq and the USA were opposed to a supranational body having the authority to prosecute their citizens. Israel was opposed to including the transfer of civilian populations to the territory that a government occupies in the definition of war crimes.²⁹ The differences at Rome remain unresolved and the fundamental positions of most countries, especially the USA, unchanged.

The concerns of the USA are not without foundation. Because of its superpower status, the USA sees itself as more vulnerable to politically motivated prosecutions. With so many US soldiers participating in peacekeeping operations, US policy makers fear that some may be targeted, especially in the post-11 September 2001

²⁴ The Rome Statute (note 1), Article 7, ‘Crimes against humanity’.

²⁵ Protocol I on the Protection of Victims of International Armed Conflicts, and Protocol II on victims of Non-International Armed Conflicts. International Committee of the Red Cross (ICRC), *Protocols Additional to the Geneva Conventions of 12 August 1949, Resolutions of the Diplomatic Conference, Extracts from the Final Act of the Diplomatic Conference* (ICRC: Geneva, 1977), also available at <<http://www.icrg.org/Web/Eng/siteeng0.nsf/iwpList74/77EA1BDEE20B4CCDC1256B6600595596>>.

²⁶ Discussions continued within the Preparatory Commission on a July 2002 draft resolution and discussion paper and, by Sep. 2002, progress had been made with defining what constitutes a crime of aggression and under what circumstances the ICC is allowed to claim jurisdiction. United Nations, Report of the Preparatory Commission for the ICC (continued), Addendum, Part 2: Proposals for a provision on the crime of aggression, UN document PCNICC/2002/2/Add.2, 24 July 2002.

²⁷ Weller, M., ‘Undoing the global constitution: UN Security Council action on the International Criminal Court’, *International Affairs*, vol. 78, no. 4 (Oct. 2002), pp. 693–712.

²⁸ Israel and the USA signed the Rome Statute on 31 Dec. 2000.

²⁹ Off, C., ‘The International Criminal Court’, CBC News Online, 26 June 2001 (updated Apr. 2002), URL <http://cbc.ca/news/indepth/background/internationalcriminalcourt_part1.html>.

context. While the war on terrorism stiffened the Administration of George W. Bush's resolve in its opposition to the ICC, it is perhaps the 'Kissinger effect'—the vulnerability of senior civilian officials to legal action—that is the biggest concern for US policy makers. Clearly, the example of the former secretary of state having legal action brought against him by Chilean and US courts for his role in the 1973 Chilean coup resonates deeply with current government officials.³⁰ On a more philosophical level, the USA questions the subjugation of the 'supreme law of the land' to a higher authority.

However, none of the countries that opposes the ICC has gone to the same lengths as the USA has to undermine it. Despite its misgivings, the USA was one of the most active participants during the drafting process and a vital member of the Preparatory Commission. President Bill Clinton asserted in 2000 that the most effective manner for US concerns about the ICC to be addressed was from inside the process.³¹ The Bush Administration was quick to reverse the USA's position on the ICC when it entered office in January 2001. The American Service Members' Protection Act (ASPA), sponsored by Republican Tom DeLay, was introduced into the House of Representatives as an amendment to the 2001 Foreign Relations Act.³² Republican Senator Jesse Helms concurrently submitted the ASPA as a freestanding bill in the Senate. The act forbids US participation in UN peacekeeping missions unless US personnel have been granted immunity from the ICC's jurisdiction. The act also denies military aid to any non-NATO ally that ratifies the treaty.³³ Countries such as Colombia, the third-largest recipient of US military aid, and the Philippines, also heavily dependent on US military assistance, were reluctant to ratify the Rome Statute.³⁴ The act also authorized the president to use military force to free US personnel detained for prosecution by the ICC in The Hague. In August 2001, Congress indicated that it would halt payment of \$582 million in UN peacekeeping arrears unless the Bush Administration agreed to approve the ASPA legislation.³⁵ President Bush yielded to congressional pressure. Congress was due to vote on the ASPA–UN payment package on 11 September 2001, when the terrorist attacks intervened.

The USA's efforts to incapacitate the ICC intensified in 2002. In May, it took the unprecedented step of rescinding its signature of the treaty, provoking an international outcry. This step was argued by many to be against the spirit, if not the letter, of the 1969 Vienna Convention on the Law of Treaties. However, US lawmakers have pointed out that, because the USA had signed but not ratified the treaty, it is under no legal obligation to honour the decision of a previous administration.³⁶ The

³⁰ Becker, E., 'On court, US focus shifts to shielding top aides', *International Herald Tribune*, 9 Sep. 2002, p. 3.

³¹ Lee Meyers, S., 'Clinton approves war crimes court: In challenge to Republicans, global treaty is signed at UN', *International Herald Tribune*, 2 Jan. 2001, p.1.

³² Washington Working Group on the ICC (WICC), Chronology, URL < <http://www.wfa.org/issues/wicc/factsheets.html>>.

³³ This would take effect 1 year after the Rome Statute entered into force. The ASPA also stipulated that the President be given some leeway to waive the prohibition for a particular country if he believed this to be in the national interest.

³⁴ Although the Colombian President, Andres Pastrana, ratified the treaty, he opted to utilize the one-off 7-year exemption from war crimes prosecution under Article 124, 'Transitional provision', Part 13, Final Clauses. Preston, J., 'US discord with allies on world court widens: Canadian criticizes "unilateral" actions', *International Herald Tribune*, 11 Sep. 2002, p. 4.

³⁵ Mufson, S. and Sipress, A., 'US foes of world court play tough: conservatives will block UN fees unless Bush challenges tribunal', *International Herald Tribune*, 17 Aug. 2001, p. 1.

³⁶ Lewis, N., 'US to renounce its role in pact for world tribunal', *New York Times*, online edn, 5 May 2002, available at URL <<http://www.nytimes.com/2002/05/05/international/05TRIB.html>>.

USA also submitted an amendment to the UN Security Council resolution establishing the follow-on mission in Timor-Leste³⁷ seeking exemption for UN personnel from the ICC—a move that did not receive support from any other permanent member of the UN Security Council.³⁸

In Congress, the ASPA was attached as an amendment to the, \$29.4 billion, 2002 Defense Appropriations bill, which passed through the House and was awaiting Senate approval.³⁹ During the Senate debates, Senator Chris Dodd made a last-ditch attempt to dilute the measure by inserting a 12-month time limit on the validity of the ASPA and a clause to the effect that, in passing the ASPA, the US Congress was not prohibited from providing ‘assistance to international efforts to bring to justice . . . foreign nationals accused of genocide, war crimes or crimes against humanity’.⁴⁰ While the clause was successful, the proposal for a time-limit was voted down by the Senate. The act was finally passed by both the House and the Senate and was presented to President Bush for signature as part of the 2002 Supplemental Appropriations Act for Further Recovery and Response to Terrorist Attacks on the United States. The ASPA was signed into law on 2 August 2002. The final legislation prohibits any US cooperation with the ICC, restricting US participation in UN peace operations; prohibits the direct or indirect transfer of classified US national security information and law enforcement information to the ICC; and prohibits US military assistance to non-NATO parties of the ICC.⁴¹

In June, the USA disrupted what was supposed to be a routine renewal of mandate for the UN Mission in Bosnia and Herzegovina (UNMIBH). Ambassador John D. Negroponte, US Permanent Representative to the United Nations, conveyed to the UN Security Council that the USA would veto the extension of the mission unless one of its two proposed resolutions was adopted. The first resolution would grant blanket immunity from prosecution by the now functioning ICC to UN peacekeepers in all future missions and the second granted the same immunity for troops deployed in Bosnia and Herzegovina. Earlier efforts to block the UN mission in Timor-Leste had failed, and this time the USA was determined to stay the course. Observers noted that the conclusion of a Military Technical Agreement for International Security Assistance Force soldiers, between the UK and the Afghan Interim Administration in January 2002, may have precipitated the USA’s decision to seek similar concessions.⁴² Also on the negotiating table was the issue of the USA’s financial contributions to peacekeeping. The USA threatened to withhold its payments.⁴³ Since its contributions represent about 25 per cent of the total peacekeeping budget, this would in essence have paralysed UN peace operations. These actions therefore

³⁷ UN Mission of Support in East Timor, (UNMISSET), UN Security Council Resolution 1410, 17 May 2002.

³⁸ Hoyos, C., ‘US pursues creative ways to evade the reach of the world criminal court’, *Financial Times*, 30 May 2002, p. 4.

³⁹ Clymer, A., ‘Key House panel targets international tribunal’, *International Herald Tribune*, 13 May 2002, p. 3.

⁴⁰ WICC chronology (note 32).

⁴¹ US Supplemental Appropriations Act for Further Recovery and Response to Terrorist Attacks on the United States., Public Law 107–206, Sec. 2004 and 2005.

⁴² Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (‘Interim Administration’), UK Ministry of Defence, available at URL <<http://www.operations.mod.uk/isafmta.doc>>. Section 1 of Annex A contains a provision granting immunity from arrest or detention and prohibits the surrender or transfer of any ISAF personnel to the custody of an international tribunal or any other third party.

⁴³ Dempsey, J., ‘US threat to quit Balkans over world court treaty’, *Financial Times*, 28 June 2002, p. 2.

threatened to undermine not only the ICC but also the whole political and legal framework for UN peacekeeping.

During two temporary deferments, the other Security Council members in 2002, particularly the European members, attempted to salvage UNMIBH. The US veto drew sharp criticism not only because it was a politically motivated act but also because the sudden termination of UNMIBH placed the EU Police Mission (EUPM) in an extremely awkward position. EU officials had been planning for the past year for a January 2003 takeover of the mission and could now be forced to rush the transition phase, which could severely compromise the mission.⁴⁴ The severity of the situation forced EU officials to draw up a contingency plan that involved launching an interim mission. Although in the end UNMIBH's mandate was extended to 31 December 2002, it came at the price of a weakened ICC and strained transatlantic relations. The incident also illustrated the gulf between the USA and Europe in their approaches to international justice. Alongside UN Security Council Resolution 1423, which extended UNMIBH,⁴⁵ the UN Security Council adopted Resolution 1422,⁴⁶ which requested the ICC, on the basis of Article 16 of the Rome Statute, to defer investigations or prosecution of personnel in UN-mandated or UN-authorized peace operations for one year, commencing on 1 July 2002 and subject to a further renewal. While a compromise solution was imperative, many UN members queried whether the UN Security Council had the authority to interfere with the Rome Statute.⁴⁷

Having achieved only a partial success through the UN framework, the USA resolved to take the bilateral route. It approached several members of NATO, NATO candidate countries and other non-NATO countries to invoke Article 98 of the Rome Statute and conclude bilateral waiver agreements that would prevent US citizens from falling under the jurisdiction of the ICC.⁴⁸ This move frustrated many EU member states because they were not only parties to the ICC but also bound by their own EU policies to uphold their commitment to the court. Non-EU countries such as Canada, Norway and Switzerland were also quick to object to the conduct of the USA. To date, 14 countries have signed waiver agreements with the USA.⁴⁹ The European Commission's legal services, among others, questioned the propriety of the USA invoking Article 98, especially when it is not a party to the statute.⁵⁰

⁴⁴ Hoge, W., 'Bosnia veto by the US is condemned by Britain', *New York Times*, 2 July 2002, URL <<http://www.nytimes.com/international/europe/02EURO.html>>.

⁴⁵ UN Security Council Resolution 1423, 12 July 2002.

⁴⁶ UN Security Council Resolution 1422, 12 July 2002.

⁴⁷ Preparatory Commission for the International Criminal Court, Press release L/3008, 3 July 2002; and Schmemmann, S., 'US seeks deal over global court', *International Herald Tribune*, 12 July 2002, p. 3.

⁴⁸ The Rome Statute (note 1), Article 98, 'Cooperation with respect to waiver of immunity and consent to surrender'. '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.' And '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.'

⁴⁹ The 14 countries are Afghanistan, the Dominican Republic, Gambia, Honduras, India, Israel, Kuwait, the Marshall Islands, Mauritania, Palau, Romania, Tajikistan, Timor-Leste (East Timor) and Uzbekistan.

⁵⁰ The leading human rights organization, Amnesty International, also disputed the move. 'EU/ICC: EU 15 to adopt common position by 30 Sep. on exemptions requested by USA', *Atlantic News*, no. 3409 (4 Sep. 2002), p. 2.

IV. The EU position on the ICC

The European Union as a bloc has perhaps been the strongest proponent of the ICC. Its member states played a crucial role in ensuring that the final outcome of the Rome Conference was an effective and credible court. It has injected a considerable amount of financial resources into supporting the establishment of the ICC.⁵¹ In June 2001, the Council of the European Union adopted a Common Position on the ICC. The document bound each member state to ratify the Rome Statute and consequently contributed to its early entry into force.⁵² In addition to the relatively swift ratification by member states, the document affirmed the EU's commitment to assist third states with their accession process by political and financial means. When it became apparent that the ICC would be operational in July 2002, EU efforts increased. An EU Action Plan was adopted in May 2002 to further the Common Position of 2001.⁵³

The Action Plan has three parts and focuses on the period from the end of the Rome Conference until the ICC becomes fully operational. The first part relates to coordination between different EU institutions. The Plan opted for a more systematic approach to information sharing between the institutions, a departure from the casual and informal methods used in the past. For instance, the EU Presidency is expected to convene a meeting between the relevant actors in the Commission and the Council Secretariat at least once during each term. This will ensure that the principal EU bodies are kept informed of developments and will prevent duplication. Coordination mechanisms also ensure that the ICC is systematically taken into account in regular EU activities. However, the document makes no mention of a central body to take responsibility for ICC issues. The absence of such a unit, or even a body created with a temporary mandate, makes it less likely that attempts to improve coordination will be successful. The second component of the Action Plan pertains to EU support for ratification and implementation of the Rome Statute in third states. The EU will continue to provide political support and technical expertise to third states as they move to accede to or ratify the Rome Statute. Country- or region-specific strategies will be developed and applied accordingly. Any change in the ratification status of countries is duly noted and the above-mentioned strategies are amended accordingly. Furthermore, the ICC will be raised as a human rights issue in political dialogues with third states, either bilaterally through frameworks such as the 2000 Cotonou Agreement⁵⁴ or on a multilateral level through high-level summit meetings. The final part of the Action Plan deals with the EU contribution to the effective establishment of the ICC. This includes supporting the Preparatory Commission to complete its tasks, providing

⁵¹ European Union, Council Common Position of 11 June 2001 on the International Criminal Court, document no. 2001/443/CFSP.

⁵² It is no coincidence that 7 of the 15 EU member states and a further 8 European states, 6 of which are either Associate Countries or aspiring members, ratified the treaty soon after the issuance of the Common Position.

⁵³ The European Parliament passed a resolution on the ICC in Feb. 2002 which *inter alia* called for the adoption of an EU Action Plan to follow up on the 2001 Common Position. Council Common Position, 2002/474/CFSP amends Common Position 2001/443/CFSP. In a similar move, the Commonwealth Heads of Government Meeting, 2–5 Mar. 2002, at Coolumb, Queensland, Australia, issued a communiqué encouraging Commonwealth member states to ratify the Rome Statute.

⁵⁴ The Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou, Benin, on 23 June 2000 (Cotonou Agreement), is the renewal of the 1975 Lomé Convention. The full text of the agreement is available at URL <http://europa.eu.int/comm/development/cotonou/agreement_en.htm>.

assistance with the training of judges and legal officers for the ICC, and so on.⁵⁵ For instance, in 1998 the European Commission granted approximately \$1.3 million to major NGOs to support their work in promoting the ICC on their respective national agendas.⁵⁶ For 2002, the Commission increased the budget allocated to the ICC and the ad hoc tribunals.⁵⁷ At a meeting of the Preparatory Commission for the ICC in April 2002, the EU agreed to jointly finance an expert group to set up the technical systems.⁵⁸ At the same meeting, Belgium, Finland, Germany, Spain and Sweden pledged a total of \$1 million to help cover the costs of holding the first meeting of the Assembly of States Parties to the Rome Statute.⁵⁹

Perhaps the most interesting point to be taken from the Action Plan is that the EU intends to use the Cotonou Agreement as leverage to get the Africa–Caribbean–Pacific (ACP) states to ratify the Rome Statute. The distinguishing feature of the Cotonou Agreement is its emphasis on the political dimension and respect for human rights, democratic principles and the rule of law, and good governance. These ascribed norms will be the basis of the national policies of ACP countries and will also serve as the basis for their international policies. The Cotonou Agreement reflects a growing consensus that development aid and political initiatives need to be consistent. It is also a further indication that development aid as a policy tool, particularly in the EU, is rapidly increasing in importance. Although the Agreement does not specify that the EU would penalize countries for not adopting international policies that promote human rights, it is possible to infer that the adoption of such policies might go a long way towards positively affecting the level of aid a country receives. Thus, the mere fact that a reference to the Cotonou Agreement was made in the EU Action Plan on the ICC signals how strongly the EU feels about assisting third states to ratify and implement the Rome Statute. The European Commission had already indicated that the EU should be in the forefront with respect to exercising political and diplomatic pressure to convince other countries to join the ICC.⁶⁰ Since the issuance of the 2001 Common Position and the 2002 Action Plan, 13 ACP countries have ratified the treaty.

The cohesiveness of the European Union, in particular its ability to stand behind its policy directives, was severely tested in September when the USA sought bilateral agreements to protect US nationals from the ICC. Romania, an Associate Country of the European Union and a potential candidate for NATO and EU membership, was the first to sign a bilateral agreement. Italy, Spain and the United Kingdom indicated that they might follow suit.⁶¹ Romania faced censure from the European Commission for its decision to renege on its previous support for the Common Position supporting

⁵⁵ European Union, Action Plan to follow up on the Common Position on the International Criminal Court, document no. 9109/0215, May 2002.

⁵⁶ This was achieved through the framework of the European Initiative for Democracy and Human Rights (EIDHR) programme. 'European Union, European Commission supports establishment of permanent International Criminal Court', EU Press release no. 40/98, 12 May 1998.

⁵⁷ 'European Commission support for the International Criminal Court', Conference report, Brussels, 28–29 Jan. 2002, p. 1.

⁵⁸ United Nations, Preparatory Commission for ICC 36th meeting, UN document L/3001, 15 Apr. 2002.

⁵⁹ Because of fluctuations in exchange rates and the fact that Germany pledged a percentage of the total amount, the figure quoted is approximate.

⁶⁰ Conference report (note 57), p. 3.

⁶¹ Dempsey, J., 'Europe "fudge" predicted on criminal court controversy', *Financial Times*, 30 Sep. 2002, p.2.

the ICC.⁶² Other member states such as Germany and Sweden were angered that the common EU position had been departed from by key member states.⁶³ The EU was under a great deal of pressure to maintain its unified position towards the ICC. On 30 September, the General Affairs Council decided to permit its member states to engage with the USA, but suggested certain provisos. Specifically: (a) agreements should not allow impunity—they should contain provisions guaranteeing appropriate investigations of incidents and prosecution; (b) reciprocity should not be allowed—EU states entering into waiver agreements with the USA would continue to be under the ICC's jurisdiction; (c) only individuals serving in the armed forces or those in government positions sent by the USA should be covered; and (d) wherever possible, a 'sunset clause' should be included.⁶⁴ However, the provisos were only guiding principles which the EU states are not bound to abide by. Absent from the Council's conclusions was any official admonishment of states that signed agreements or those intending to do so.

Many were disappointed by the fact that the EU failed to go beyond drawing up guiding principles in the face of US pressure and, more importantly, disunity within the Union. If respect for human rights, the rule of law and democracy are to be the underpinnings of EU development policies and its Common Foreign and Security Policy, it is to be hoped that the September Council conclusions are an exception and not the beginning of a trend in lowest-common-denominator politics.

V. Conclusions

The year 2002 was a watershed for the ICC. The impact of the year's events is not limited to the functionality or the credibility of the ICC but has much wider implications for the role and effectiveness of international treaties, the future of peace operations, the future of EU enlargement and future NATO enlargement, the nature of foreign aid and trans-atlantic relations. The lack of US support and, particularly, its efforts to exclude itself from the ICC's jurisdiction also have sobering implications for the ICC's credibility and legitimacy. One of the objectives of establishing the ICC was that it should act as a deterrent. This can only be achieved if all individuals, of whatever nationality, are liable for the same punishment. Given the fact that the success of the ICC hinges in no small part on the cooperation provided by states, the bilateral waiver agreements signed by ICC signatories and states parties offer little assurance that this will be forthcoming. Furthermore, one of the intended virtues of the ICC was that it would be an independent judicial entity and not subject to great power politics or to the whims of the UN Security Council. This was quickly eroded when the Security Council granted a one-year exemption to UN peacekeepers.⁶⁵

Attempts to make EU and NATO membership, and development and military assistance, conditional on attitudes to the Rome Statute constitute another worrying

⁶² Traynor, I., 'East Europeans torn on the rack by international court row', *Guardian Unlimited*, 17 Aug. 2002, URL <<http://www.guardian.co.uk/international/story/0,3604,775974,00.html>>.

⁶³ Fuller, T., 'EU deal could give US troops immunity: agreement allows bilateral pacts to bar court prosecutions', *International Herald Tribune*, 1 Oct. 2002; and Black, I., 'Britain accused of sacrificing new court', *Guardian Unlimited*, 1 Oct. 2002, URL <<http://www.guardian.co.uk/international/story/0,3604,802129,00.html>>.

⁶⁴ European Union, General Affairs Council, 'GAC Conclusions', EU press release 12134/02 (Presse279), 30 Sep. 2002.

⁶⁵ Dempsey, J., 'UN balancing act on criminal court wins scant applause', *Financial Times*, 30 Sep. 2002, p. 2.

development. The EU and the USA are making diametrically opposed demands, putting third states in an extremely difficult situation. In order for the ICC, and the principles behind the court, to genuinely become a universally accepted norm, the EU, the USA and other actors must avoid pressuring countries with regard to their own positions on the ICC. The ICC was never meant to be a political tool but was supposed to be above politics.

The debate over the ICC also gave rise to uncertainty over the future of peace operations, particularly UN-authorized operations. The possible 'domino' effects of the ASPA are extremely disconcerting—the USA may participate in fewer and fewer operations and the vital political backing for UN operations might be severely eroded, making these operations even more fragile. This in turn may lead to the US Government declaring that it will reduce its financial contributions, which would further limit the UN's ability to conduct effective peace operations.