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October 21, 2002

Name
Minister of Foreign Affairs
Country

Via Fax:

Dear Foreign Minister:

We write to you in light of mounting U.S. pressure to sign a bilateral agreement that would exempt U.S. nationals from the jurisdiction of the International Criminal Court (ICC).

Human Rights Watch urges your government not to sign such a bilateral immunity agreement with the United States. As we have previously explained, we believe the agreements that Washington has pressed are contrary to the spirit and letter of the ICC Treaty. They would compel the return of a U.S. national, suspected of committing ICC crimes, to U.S. authorities on the basis of a mere U.S. promise to investigate and prosecute that the ICC would be unable to review. States parties and signatory states that enter into these agreements would violate their obligations under the Treaty.

As you may know, on September 30, 2002, the European Union rejected the particular bilateral agreements that Washington was pressing. Indeed, there are a number of EU Member States – for example, the Netherlands, Sweden and Germany – that have rejected signing any immunity agreement with Washington. We urge your government to join this group. By refusing to legitimize immunity, your government would underscore the point that the rule of law applies equally to all.

At the very least, we urge you to proceed slowly and take the appropriate time to consider the implications of the proposed agreements. The legal and policy implications for domestic laws and your government's international obligations are complex. Furthermore, the Court will not be in a position to request the surrender of anyone for at least a year, so it is unreasonable for the United States to demand that your government finalize negotiations quickly.

If your government does enter into discussions with the United States, we urge you to formulate a negotiating position that is fully consistent with the Treaty so as not to facilitate impunity. At their September 30 meeting, the EU foreign ministers endorsed a number of "guiding principles" for EU Member States that would permit bilateral negotiations with the United States. These principles are unfortunately vague and could allow loopholes that would contravene the ICC Treaty. However, the EU principles have some utility as a starting point, but they are not nearly specific enough to be meaningful benchmarks in bilateral negotiations. To close the door on impunity, more detailed provisions are required. These are elaborated below as Human Rights Watch recommendations and commentary on the EU principles:



(1) **EU Principle:** The agreements should incorporate the principle of “no impunity.”

Human Rights Watch Recommendation: The EU has not defined this condition with sufficient clarity, leaving it open to varying interpretations. No doubt the Bush administration, which has vowed not to cooperate with the ICC, will attempt to dilute the principle as much as possible. To be meaningful under the ICC Treaty, a “no impunity” safeguard requires a number of specific, legally binding commitments.

(a) First, an express clause should be inserted that commits the United States to investigate and, where appropriate, prosecute its nationals accused of committing ICC crimes. This is implicit in a “no impunity” pledge but should be made explicit. Such a clause could read: “The US authorities will submit the case without undue delay to the competent national authorities for the purposes of investigation, and if the evidence warrants, prosecution. Those authorities shall take their decision in the same manner as in the case of any other offense of a grave nature under national law.”

(b) Second, to ensure that the United States is capable of prosecuting all ICC Treaty crimes, an express clause should be inserted requiring the U.S. government to update federal laws to ensure that U.S. national courts can exercise jurisdiction over all such crimes. Currently, the U.S. courts do not have the necessary statutory authority to prosecute all of these crimes in domestic courts. The Bush administration has promised to seek legislation creating the necessary authority, but this promise must be enforced; without U.S. domestic jurisdiction, pledges of domestic prosecution remain empty. U.S. national courts cannot be relied upon to exercise ICC jurisdiction on the basis of customary international law. A bilateral agreement should be contingent on law reform.

(c) Third, and most important, the ICC’s fundamental role of overseeing national pledges of prosecution must be preserved. That is the essence of the ICC – its key innovation over the unverified national pledges of prosecution of the past which so often led to effective impunity and the commission of further abuses. It is not enough that as part of a bilateral agreement Washington pledge to investigate or prosecute Americans who are suspected of ICC crimes. For that pledge to be meaningful under the ICC Treaty, the ICC’s oversight function must be preserved. An express clause should be inserted saying: “If, after a person has been returned to the United States under this agreement, and the Court then issues a new surrender request - or re-issues a previous request - for that person on the basis that a case involving that person is admissible under article 17 of the Statute, the United States must surrender that person directly to the Court or return that person to [insert country].”

A bilateral agreement that omits any of these three clauses opens the door to impunity and would therefore undermine the overriding objective of the ICC.

(2) **EU principle:** The scope of persons covered in the U.S. text is too broad. It should be changed to conform with Status of Forces Agreements, and the plain language of article 98(2) of the ICC Treaty. The agreements should apply only to military personnel, and other closely associated civilian personnel, serving on your state’s territory. The exemption must not extend to all U.S. nationals. It should also not prevent your government from allowing another state to transport, through your state's territory, a U.S. national being surrendered to the Court by that other state.

Human Rights Watch recommendation: The objective of article 98 was never to protect American mercenaries or any U.S. citizen simply present in a state’s territory. Only persons serving on your state's territory in authorized military operations should be covered by these agreements. Article 98(2) must be narrowly interpreted to reflect the intent of the provision. Your government should not allow the Bush administration to rewrite this aspect of the ICC treaty.

(3) **EU principle:** A bilateral agreement could contain a “sunset” clause.

Human Rights Watch recommendation: These agreements should have a finite duration. Unfortunately, the EU does not specify a time limitation. Human Rights Watch believes that three years is a reasonable limit that should be explicitly stated in any agreement. It should not be assumed that in three years' time, after the ICC has demonstrated itself to be an effective and impartial tribunal, and a new administration may be in Washington, that U.S. opposition to the Court will remain as intense.

(4) **EU principle:** The immunity provided in the agreements cannot be reciprocal (i.e., immunity should extend only to the U.S. nationals and not to nationals of a state party or signatory state).

Human Rights Watch recommendation: Any deviation from this point would be a clear violation of your government's obligations under the ICC treaty.

(5) **EU principle:** Existing agreements between your government and the United States may mean that a separate bilateral agreement is unnecessary. Relevant existing agreements would include Status of Forces Agreements and treaties dealing with extradition and mutual assistance in criminal matters. These agreements may already provide the United States with an adequate level of protection.

Human Rights Watch recommendation: All existing relevant agreements should be assessed before signing any bilateral agreement. It may be prudent to incorporate elements of existing agreements into a bilateral agreement. It may also be necessary to amend existing agreements – for example, extradition treaties – in light of these agreements. Negotiations with the Bush administration should not focus on a separate bilateral agreement in isolation.

(6) **EU principle:** Any agreement, or amendment to an existing agreement, should be subject to the standard constitutional procedures in each state.

Human Rights Watch recommendation: National parliaments should be involved in scrutinizing any agreement entered into by your government, even if your constitution does not strictly require parliamentary ratification. Parliamentary scrutiny will promote transparency and provide a forum for public debate about the merits of any agreement. The significant consequences of signing a bilateral agreement deserve such debate. States that have already signed bilateral agreements – for example, Romania and East Timor – are likely to amend them through a parliamentary ratification process so that the final agreement contains these EU benchmarks. We expect that your national parliament will also be given an opportunity to scrutinize any negotiated agreement as well.

Taken together, these principles should form a core set of non-negotiable requirements for an agreement.

Please find attached a Human Rights Watch statement made at the International Criminal Court's historic first Assembly of States Parties meeting in September 2002 on this issue. We look forward to working with your government to defend the integrity of the Court's treaty, and to make the Court a credible and effective mechanism for justice.

Sincerely,

Kenneth Roth
Executive Director

Richard Dicker
Director, International Justice Program

Cc: Permanent Representative to the United Nations