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**The Power of the Weak State: Domestic Determinants Concerning Africa's  
Response to U.S. Article 98**

by

Deborah Helen Cotton

Under the Direction of Carrie Manning

**ABSTRACT**

*The literature on the capabilities of weak states to withstand pressure from strong states suggests that more often than not, weaker states tend to give into the stronger power. What are the motivating factors that enable weak states to withstand pressure from strong states? To ensure that the International Criminal Court does not gain jurisdiction over its nationals, the U.S. is currently seeking to sign BIAs with all countries under the rubric of the American Servicemembers' Protection Act. This thesis examines through a comparative case study analysis how a number of African Countries are able to withstand the pressure to sign a U.S. Bilateral Immunity Agreement (BIA). The study reveals how states are able to withstand pressure regarding foreign policy issues, which go against their interests by taking advantage of internal and external institutional structures and mechanisms. It also fills a gap in the literature by examining one regions response to the BIAs relative to the U.S. position regarding the ICC.*

**INDEX WORDS:** Africa, U.S. Article 98 Bilateral Immunity Agreement, International Criminal Court, Weak States, Strong States, American Servicemembers' Protection Act

**THE POWER OF THE WEAK STATE: THE DOMESTIC DETERMINENTS CONCERNING  
AFRICA'S RESPONSE TO U.S. ARTICLE 98**

by

Deborah Helen Cotton

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

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2005

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AFRICA'S RESPONSE TO U.S. ARTICLE 98**

by

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## LIST OF ABBREVIATIONS

ACOTA	African Contingency Operations Training and Assistance
ACP-EU	African-Caribbean-Pacific / European Union
ACSS	Africa Center for Strategic Studies
ASPA	American Servicemembers' Protection Act
AU	African Union
BAF	Benin's Armed Forces
BIA	Bilateral Immunity Agreement: U.S. Article 98
CAR	Central African Republic
CGS	Citizens for Global Solutions
CICC	Coalition for the International Criminal Court
DOD	Department of Defense
DRC	Democratic Republic Congo
DSCA	Defense Security Cooperation Agency
EAC	East African Community
ECOWAS	Economic Community of West African States
EDA	Excess Defense Article
ESF	Economic Support Fund
EU	European Union
EUROCOM	European Command
FAA	Foreign Assistance Act
FMF	Foreign Military Financing
FMS	Foreign Military Sales
FOIA	Freedom of Information Act
FY	Fiscal Year

GDP	Gross Domestic Product
ICC	International Criminal Court
ICG	International Crisis Group
ICRC	International Crescent Red Cross
ICTR	International Criminal Tribunal Rwanda
ICTY	International Criminal Tribunal Yugoslavia
IMET	International Military Education and Training
MET	Mobile Education Teams
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAU	Organization of African Unity
PKO	Peacekeeping Operations
PSI	Pan-Sahel Initiative
SADC	South African Development Community
SANDEF	South African National Defense Force
SAPS	South African Police Services
SOFA	Status of Forces Agreement
TPDF	Tanzanian Peoples' Defense Force
TRC	Truth and Reconciliation Commission
USAID	United States Agency International Development
USDOS	United States Department of State
USG	United States Government
WICC	Washington Working Group for the International Criminal Court

## CHAPTER

### 1. INTRODUCTION

How are weak states able to withstand pressure from strong states when foreign aid is at stake? I examine this issue through a comparative case study analysis as to how a number of African Countries are able and willing to sacrifice U.S. military and economic aid by not signing a U.S. Article 98 Bilateral Immunity Agreement (BIA). The literature on the capabilities of weak states to withstand pressure from strong states suggests that more often than not, the weaker state tends to give into the stronger power. Therefore, what are the factors within the African region that explain how some states are able to withstand pressure from the U.S., even at the cost of loss of aid?

To ensure that the International Criminal Court (ICC) does not gain jurisdiction over its nationals under any circumstance, the U.S. is currently seeking to sign BIAs with all countries under the rubric of the American Servicemembers' Protection Act (ASPA), which was signed into law on August 2, 2002 by President George W. Bush, codifying U.S. opposition to the ICC and restricting U.S. ability to cooperate with ICC investigations and trials.<sup>1</sup> July 1, 2003 marked the deadline set out in the ASPA for the cut off of U.S. military assistance to ICC State Parties that had not signed the BIAs.<sup>2</sup> Additionally, under the ASPA, the administration is obliged to cut off military aid to countries that have ratified the Rome Treaty to the ICC unless they are NATO allies or specially designated non-NATO allies.<sup>3</sup> Bush is also empowered to waive sanctions on countries if it serves the national interest.<sup>4</sup> As of July 2005, 100 governments worldwide have reportedly signed the BIAs, while 45 have publicly refused for varying reasons. In Africa, out of 47 countries (North Africa excluded),<sup>5</sup> 32 countries have signed the BIAs while eight have refused: Benin, Kenya, Lesotho, Mali, Namibia, Niger, South Africa and Tanzania. The countries tallied are in Table 1.<sup>6</sup>

**TABLE 1****(Africa Region) Status of U.S. Bilateral Immunity Agreements**

<b>COUNTRY</b>	<b>Non-ICC Party</b>	<b>ICC STATE PARTY</b>	<b>BIA STATUS by Country</b>	<b>Refuse to Sign BIA</b>
Angola	* s		Signed	
Benin		*		*
Botswana		*	Executive	
Burkina Faso		*	Signed	
Burundi		*	Signed	
Cameroon	**s			
Cape Verde	**s			
Central African Republic		*	Signed	
Chad	*s		Reciprocal	
Comoros	*s		Signed	
Congo (Brazzaville)		*	Signed	
Congo (DRC) (Kinshasa)		*	Executive	
Cote d' Ivoire	*s		Reciprocal	
Djibouti		*	Signed	
Equatorial Guinea	*		Signed	
Eritrea	*s		Reciprocal	
Ethiopia	*		Reciprocal	
Gabon		*	Signed	
Gambia		*	Ratified	
Ghana		*	Ratified	
Guinea		*	Signed	
Guinea-Bissau	**s			
Kenya		*		*
Lesotho		*		*
Liberia		*	Signed	
Madagascar	*s		Signed	
Malawi		*	Executive	
Mali		*		*
Mauritania	*		Ratified	
Mauritius		*	Signed	
Mozambique	*s		Ratified	

Namibia		*		*
Niger		*		*
Nigeria		*	Executive	
Rwanda	*		Reciprocal	
Sao Tome & Principe	**s			
Senegal		*	Signed	
Seychelles	*s		Reciprocal	
Sierra Leone		*	Ratified	
Somalia	*		No central gov't	
South Africa		*		*
Swaziland	**			
Tanzania		*		*
Togo	*		Reciprocal	
Uganda		*	Executive	
Zambia		*	Signed	
Zimbabwe	**s			
<b>TOTALS (47)</b>	<b>20</b>	<b>27</b>	<b>32</b>	<b>8</b>

\*s / country has signed but has not ratified the ICC Statute

#### (BIA TERMS)

**STATE PARTY TO BIA (SP):** Agreement of non-surrender to the ICC any U.S. national or U.S. military/government employee (past or present).

**RECIPROCAL:** U.S. has agreed not to surrender nationals of this country to the ICC.

**RATIFIED AND EXECUTIVE AGREEMENT:** BIA has entered into force. Based on public news reports; it is possible that other agreements have also entered into force, especially all countries that have received permanent waivers.

**EXEMPT:** Exempted under the American Service members' Protection Act (ASPA); military assistance cannot be suspended.

**WAIVED:** President Bush has declared that the country will continue to receive aid, despite being an ICC member state.

**UNCONFIRMED:** Not disclosed by the State Department/Country requested that the agreement not be revealed.

Information updated 20 June 2005. Source: Coalition for the International Criminal Court.

*"Status of U.S. Bilateral Immunity Agreements (BIAs)."*

\*\* As of the publication date of this report, the aforementioned is not a State Party to the Rome Statute; therefore, they are not prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) from receiving military assistance: Cameroon, Cape Verde, Guinea-Bissau, Sao Tome and Principe and Swaziland. Somalia: Lack of a central Government

This thesis will not debate the merits or non-merits of the ICC or the BIAs, albeit the implications within the domestic policy of certain African States do send a message that the ICC's purpose should not be hindered in any way through other legal instruments. The emphasis on the African region is important for two reasons: First, African proponents of the ICC argue that the BIAs undermine the legitimacy of the ICC thereby affecting the Court's potential. Currently there are four referrals to the ICC: the Central African Republic (CAR), Democratic Republic of the Congo (DRC), Sudan and Uganda.<sup>7</sup> Africa is therefore the litmus test as to the success of the ICC.<sup>8</sup> Although the ICC is not the subject of this study, the BIA issue is of indirect significance in relation to the ICC, therefore, the response of the African States is of importance when examining the foreign policy behavior of the BIAs between two separate actors who see the ICC from two extreme viewpoints. Also, since the U.S. has withheld millions of dollars in military assistance from State Parties to the ICC that refuse to sign the BIAs, those countries that refuse to sign the BIAs are at risk of losing the aid that would assist them in combating the very crimes for which the ICC stands for.

Second, for almost a decade, the United States has sought to strengthen Africa's ability to tend to its own crises. According to a report from the World Policy Institute in June of 2005, although the millions of dollars being spent on U.S. military aid and sales to Africa pale in comparison to the billions being expended in the Middle East and South Asia, all of the major U.S. bilateral aid and sales programs have increased sharply in recent years. Funding to sub-Saharan Africa under the largest U.S. military aid program, Foreign Military Financing (FMF) doubled from \$12 million in fiscal year 2000 to a proposed \$24 million in the FY 2006 budget proposal and the number of recipient nations have grown from one to nine. The Pentagon's International Military Education and Training (IMET) program has increased by 35 percent from 2000 to the 2006 proposal, from \$8.1 million to \$11 million, and from 36 participating nations to 47. FMF more than quadrupled from 9.8 million in fiscal year 2000 to 40.3 million in fiscal year 2003 (the most recent year for which full statistics are available). Commercial Sales of arms licensed by the State Department grew from \$.9 million to \$3.8 million over the 2000 to 2003 period. These

bilateral programs are just the tip of the iceberg in terms of overall U.S. military aid commitments going forward. The U.S. European Command (EUROCOM) has requested \$125 million over five years for the Pan-Sahel Initiative, which provides training and exercises with Chad, Mali, Mauritania, Niger and other nations in the region. U.S. engagement under the program has gone far beyond traditional training to include involvement in combat operations.<sup>9</sup> Therefore, the loss of aid would be detrimental to those struggling democracies in which the Bush Administration is concerned with when it comes to training personnel in order to protect their borders against would be terrorists.

Loss of funds would not only consist of aid for regular military training which the U.S. has given Africa throughout the years, but also through the Nethercutt Amendment, effective November 26, 2004.<sup>10</sup> The amendment, originally included in the House version of the foreign aid spending bill in July 2004 prohibits assistance from the Economic Support Fund (ESF) for countries that refuse to sign a BIA. With a budget of over \$2.5 billion, ESF promotes the foreign policy interests of the U.S. by assisting allies. The importance of this latest sanction is paramount as it would not only undermine the effectiveness of U.S. counter-terrorism efforts in Africa such as peace building, democratization and counter-drug initiatives but the frozen funds are intended to improve peacekeeping capacity, enhance border and maritime controls, thereby strengthening regional stability and decreasing reliance on U.S. peacekeeping capabilities.<sup>11</sup> Withholding aid is paradoxical and detrimental in that it may further undermine the ability for some countries in Africa to tend to their own crises.

My theory is that the countries in this study will continue to refuse to sign a BIA despite pressure applied by the U.S. The hypotheses used to test my theory are: (1) The eight countries refuse to sign a BIA because of an alignment and / or obligation to regional organizations (2) The countries refuse to sign a BIA because they are under pressure from civil society and non-governmental organizations who oppose signing a BIA (3) Based upon domestic jurisprudence, the Countries refuse to sign a BIA because they believe it would violate their obligations as State parties to the Rome Treaty and the Vienna Convention on the Law of Treaties and (4) The countries refuse to sign a BIA because they believe the

request by the U.S. to sign a BIA violates State sovereignty. I will also discuss the aid factor and its influence concerning the 32 countries that have signed a BIA.

Lastly, this thesis contributes to the growing literature of how domestic, regional and external variables influence a weak states behavior toward a more dominant power. Theories are used as analytical tools for identifying the relevant explanatory factors in relation to the research question. This study also fills a gap in the literature by examining one regions response to the BIAs relative to the U.S. stance concerning the ICC.

## **2. BACKGROUND**

In April 2002, the ICC came into force with over sixty ratifications. The ICC is a permanent tribunal in which the crimes of genocide, war crimes and crimes against humanity will be addressed. In May of 2002, the U.S. declared that it no longer intended to pursue ratification of the Rome Statute and asked to remove its signature from the Statute.<sup>12</sup> Threatening to withdraw American peacekeepers from Bosnia, the U.S. pushed through Resolution No. 1422 in the UN Security Council in July 2002, exempting all UN peacekeepers from the ICCs jurisdiction for one year; it was renewed in June 2003.<sup>13</sup> The U.S. then launched a campaign to ensure that its nationals would not fall within the jurisdiction of the Court.

The U.S. concern lies within a situation where a U.S. national could be accused of a crime in the territory of a State that is a party to the ICC. Under the “principle of complementarity,” the State where the crime occurred is obligated to surrender the U.S. national to the ICC, if the State is unable or unwilling to prosecute the matter.<sup>14</sup> Of utmost importance to the U.S., this obligation applies even when the accused is a national of a State that is not a party to the ICC.<sup>15</sup> In this respect, the U.S. has argued that the ICC gives too much discretion to prosecutors who may bring politically motivated charges against U.S. citizens, officials and / or military personnel.<sup>16</sup> The BIAs sought by the U.S. would require states to send an American national requested by the ICC back to the U.S. instead of surrendering him/her to the ICC.

According to Erik Rosenfeld, “the terrorist attacks of September 11, 2001 dramatically changed U.S. military strategy” (Rosenfeld 2003:288). He explains:

“While foreign countries have recently allowed the U.S. to station troops on their soil as part of the war on terrorism, it remains to be seen whether they will provide immunity against ICC jurisdiction in the form of Status of Forces Agreements” (SOFAs).<sup>17</sup>

Thus, Rosenfeld reasons: “the war on terrorism has exposed a need for access to foreign bases, thereby shifting some negotiating advantage in favor of the receiving country and away from the U.S.”(Rosenfeld 2003: 288). He continues:

“In several cases, the U.S. has obtained exclusive jurisdiction over military personnel from countries where it has been involved in humanitarian relief efforts or similar military interventions. These agreements have usually been negotiated with countries in dire need of U.S. assistance that are willing to sacrifice legal jurisdiction in order to obtain economic or military aid. Negotiated on a case-by-case basis, these agreements responded to the necessity for immediate U.S. military involvement” (Rosenfeld 2003: 291).

However, with the recent history of wartime abuses; the alleged torture at Guantanamo Bay, the torture incidents at Abu Ghraib and the assault on Fallujah in 2004, the debate over the BIAs have become more prominent, which serves to reemphasize the importance of the BIAs to the U.S. and ultimately, the scope of the BIAs to governments around the world.

### **3. LITERATURE REVIEW**

How are weak states able to withstand pressure from strong states? First, pressure needs defining, as do weak versus strong states. Pressure in the context of this study pertains to influence. Particularly, the ability to influence a state into signing a BIA through the inducement of aid. The inducement of aid is similar to the bargaining process whereby the stronger state bargains with the weaker state in order to produce results compliant with their interests. Baldwin describes the bargaining process as “non-aid” in which the stronger nation would get the weaker nation to do something they would not otherwise do, by rigging the incentives so that the weaker nation *must* choose in the stronger nations favor (Baldwin 1969: 430). Marshall R. Singer emphasizes how “weaker states are more likely to choose bilateral aid donors over multilateral aid donors because they often believe they can get more by direct negotiation with the

bilateral donor rather than a multilateral agency” (Singer 1972: 253). This would also give a weaker state more leverage over certain foreign policy issues in that they may bargain according to their political interests if necessary.

According to Bruce E. Moon, there are two conceptions that probe the influence relationship: (1) the bargaining model whereby threats and promises condition the weaker state to alter its foreign policy behavior towards the preferences of the dominant state or (2) that of a relationship in which influence occurs before the actual decision-making process and foreign policies are formed in relation to the interest and perspectives which they derive in part from a dependency relationship (Moon 1983: 317-318).

McKinlay and Little explain the dependency relationship:

“A dependency relationship exists when one party relies on another without the reliance being reciprocated. While one party can terminate the relationship with little or no cost, the other can do so only at considerable cost. The reliant party, therefore, operates in a subordinate or dependent position. A dominant state establishes dependency relationships because they generate a degree of control or influence. The main utility of dependency is the potential for control. This control can be used for a variety of ends dictated by the dominate state” (McKinlay and Little 1977: 62).

Singer reasons: “A weak country can be highly dependent upon a specific power economically while simultaneously being quite counter dependent politically, or, conversely, two countries can be politically and perceptually interdependent, yet one may be economically dependent upon the other (Singer 1972: 48).

The term weak state in this research is used synonymously with weak power or small state while strong state is used synonymously with great power, strong power or large state. There is a range of literature, which defines the weak versus strong state (See Rakipi 2004, Wise 2004, Rotberg 2003, Mitchell and Keilbach 2001, Anda 2000, Herbst 2000, Jackson and Rosberg 1982, Migdal 1987, Handel 1981, Singer 1972) but scholars differ on precise terms. However, various definitions do share some common characteristics such as legitimacy, sustainability, human security, the rule of law, political freedoms, an active civil society, etc. Mitchell and Keilbach define the weak versus strong state:

“Strong states consist of those that possess resources (such as military might or a strong trade relationship in a crucial good) that can be used to impose costs on others for undesirable behavior. Although weak states lack resources to coerce or compel by imposing costs, they may be able to persuade or induce

behavioral changes by using other resources...A state's power is thus relational and issue-specific; dependent on how committed it is to achieving its own goals and on how vulnerable and sensitive other countries are to the resources it controls" (Mitchell and Keilbach, 2001: 896).

Similarly, Michael O. Anda's definition is one of power:

"A state has interests, and the power to influence actors in pursuit of those interests, in other regions of the world as well as its own...nations which influence domestic politics and foreign policies of other countries in several areas of the world and which are individually superior to other nations materially, militarily, and in motivation" (Anda 2000: 32).

Taking the aforementioned into consideration, dependency would predict that the stronger state would be able to influence the weaker state into actions compliant with their interests. Therefore, if dependency suggests that weaker states tend to rely on the more powerful states, then what factors might account for why the eight countries in this study have been able to withstand U.S. pressure over the BIAs? It is obvious that the dependency paradigm does not adequately explain this paradox. Moreover, the reason *why* weaker states comply with stronger states is debatable in the literature. There seems to be no uniform pattern or theory that explains why weak states behave as they do.

According to Anda:

"In the study of international relations, a state's resources are frequently assumed to define its capacity for action, and power is often assumed to be exercised in affecting foreign policy behavioral output...some states matter more than others, that large states matter more than small states because their size provides them with more resources and greater power" (Anda 2000: 241).

However, according to Hans Mouritzen, "the size factor has been shown to possess only a modest or negligible causal power of its own" (Mouritzen 1991: 217). Handel agrees with this analysis in that "one cannot correlate positively the size (or strength) of a state with the shape or form of its decision-making process" (Handel 1981: 263). Robert O. Keohane has suggested defining states on "the basis of the scope of their influence on the international system. He refers to the great powers as 'system-determining' states: "A great power is a state whose leaders consider that it can *alone* exercise a large, perhaps decisive impact on the international system"...the weaker the state, the less its influence on the international system" (Keohane 1969: 295-296). Similarly, Singer emphasizes, "The crucial difference lies in the ability of the most powerful countries to determine...which commitments they will honor and which they

will not. The less powerful countries of the world have far less choice in such matters” (Singer 1972: 38). Handel undermines the aforementioned analyses to some degree by emphasizing how weak states *may* exert influence:

“Weak states are by no means impotent, helpless victims of the system. On the contrary, they are quick to take advantage of the opportunities arising from the nature of any given international system. They learn to manipulate the competition between the great powers to their own ends, and in this way they exert a considerable amount of influence, even if not a critical one, on the system itself...It often happens that the weak states manipulate a great power in the direction of their interests, more than the other way around” (Handel 1981: 45-46, 130).

There are also, according to Singer, “certain individuals or groups in society that are able to influence the behavior of others because they have what is believed to be prestige or status...this also applies to states” (Singer 1972:74-75). Lana Wylie, in her research on BIAs in the Carriibbean Region<sup>18</sup> suggests that “states make choices because they are seeking more abstract goals...prestige being one” (Wylie 2004: 2). She further emphasizes how “prestige is used to increase the visibility of the smaller state thus giving them some measure of influence which translates into more international respect and wider influence in international relations” (Wylie 2004: 20).

Which leads to the question: what options do weak states have in order to overcome the pressure from strong states? A great deal of literature discusses the *strategy* that weak states may employ. One strategy is for the weak state to turn inward in order to ward off increasing pressure from a stronger state. According to Handel, “weak states must learn to draw on or borrow strength from other states” (Handel 1981: 120). There are two major ways in which the weak states can recruit the support of other countries: (1) They may enter into a formal alliance with other states or (2) they may reach an informal, though not necessarily less helpful, understanding with partners sharing common interests.<sup>19</sup> According to Anda:

“There are over fifty states in Africa...most of which are poor and weak: it is therefore unsurprising that much of the continent’s diplomacy should be conducted through organizations, or that states should seek through myriad cooperation and integration schemes to compensate for their weaknesses as separate units” (Anda 2000: 12).

Institutionalism is theoretically relevant to how weak states may counter pressure from stronger states. An informal institutional alliance may include regional organizations, civil society and NGO’s where

members share common interests or causes. Allison and Zelikow argue that “domestic preferences are explained through regional and international organizations which play a large role in state decision-making and a major factor in explaining cooperation among states” (Allison and Zelikow, 1999:33) while North reasons: “the role of decision structures, allocations of power, authority, formal and informal rules play a role in decision-making and foreign policy outcomes” (North 1990:3). The political or legal obligations from such organizations, especially if they “represent some segment of domestic society, whose interests are reflected in state policy”<sup>20</sup> may override the concerns of threat from the stronger power, which enable the weaker state to ignore the threat.

Khadiagala and Lyons reason: “in order to overcome their inherent weaknesses, African states construct their own continental and regional institutions... they band together into blocs that enhance their leverage in world affairs....thereby solving problems collectively” (Khadiagala and Lyons 2001: 4).

“Southern Africa’s greatest strength has been the legacy of institution building, which lends meaning to the foreign policy actions of otherwise poor and weak states. Civil Society is also important in order to gain support as more groups with diverse interests are able to forge common positions along salient issues such as human rights, etc. This demonstrates the potential for collaborative coalescence... and bolsters collective latitude. In this respect, NGOs and civil society foster strategic links with networks to subvert the policy roles of formal state actors” (Khadiagala and Lyons 2001: 214-215).

Although institutions are useful in providing a common stance and a collective voice on issues of importance, they do have their drawbacks. Singer explains:

“No state in any of these organizations is formally bound to follow the international political lead of the mentor Power...but there is a high degree of similarity of international political behavior among members in following the international self-interest of the mentor power, either because there is a high degree of similarity among the members as to the definition of political self-interest in international matters, or because the weaker states feel obliged to go along with the definition of international self-interest supplied by the mentor power” (Singer 1972: 338).

A formal alliance may include allying with other states internally or externally. Handel explains:

“The attempt of a weak state to augment its own internal strength with the external strength of another state, usually a more powerful one-is a result of necessity, not preference. Whatever the inherent dangers of treaties between unequal partners, a weak state under the threat of a great power will choose the lesser of two evils: an alliance with another great power in order to reduce the pressures upon it...The major question for many if not most weak states is not whether they should enter into an alliance with a stronger power. It is rather, how to obtain the external aid of another powerful state, how to commit the other power to support their interests...for many weak states, this is the normal way of life rather than the exception” (Handel 1981: 121-122).

Similarly, in order for a weak state to gain leverage over a more powerful state, Mouritzen suggests that “weak states are able to overcome the power differential when they employ a ‘*non-commitment*’ strategy in which a weak state plays off two strong powers against each other” (Mouritzen 1991: 220). Hawkins et al., conclude that “although they do not have much influence, less powerful states can impose costs on powerful states through *non-cooperation*” (Hawkins, Lake, Nielson and Tierney, 2004:34-35). Non-commitment and non-cooperation are similar in that they allow the weaker state to bargain or gain leverage over the more powerful state in order to influence foreign policy outcomes. Theoretically, playing two powers against each other is indicative of game theory (2-player game) within the rational actor paradigm which holds that alliances form whenever two or more actors determine they will receive more benefits in coalition than each would do by going it alone. According to Allison and Zelikow, under this theory, governments are treated as the primary actor. In the rational actor model of decision making, decision makers seek to accomplish certain tasks: “accurately identify the problem that confronts them (the government examines a set of goals) take into account the key factors that bear on the problem (critically examine alternative courses of action and evaluate them according to their utility) and make a choice that will wisely maximize benefits and minimize costs “(picks a goal with the highest payoff) (Allison and Zelikow 1999: 23-25).

One theme running throughout this literature is that of the disparity between weak and strong states and the ability of the weak state to project its influence into foreign relations. Scholars differ on whether the size of a state reflects its foreign-policy decision-making, but what they do agree on is the number of ways in which weak states may exert their influence or counter pressure either alone or with other weak states. The strategy of using informal and formal sources such as regional organizations, NGOs and civil society may be one way; another way is to ally with international organizations or external powers that share their interests.

#### 4. DISCUSSION: THE AID FACTOR

The use of aid to induce states into signing a BIA creates significant economic incentives for states worldwide to sign. This is the main factor that has caused the majority of states in the African region to comply.<sup>21</sup> Are states more inclined to sign a BIA because they are dependant upon aid? Although aid is not a hypothesis in this study, I deemed it important enough to discuss, as the majority of countries in Africa that have signed BIAs have made their decisions based upon the aid factor.<sup>22</sup> Therefore, highlighting the issue will put forth one perspective as to why a majority of African countries have signed BIAs, which in turn will give some idea as to why the eight countries in this study do not sign a BIA.

In *A Foreign Policy Model of U.S. Bilateral Aid Allocation*, McKinlay and Little discuss two views of aid allocation: the humanitarian view considers that economic assistance is the primary rationale for aid, whereas the foreign policy view sees economic assistance as the means whereby a donor's interests can be satisfied (McKinlay and Little 1977:61). Accordingly, this study will analyze aid from the foreign policy view in that ASPA and ESF aid is used as an incentive in order to further the interests of the U.S.

The operationalization of aid consists of comparing bilateral aid receipts as a percentage of country GDP. According to McKinlay and Little, "this provides a measure of the importance of a donor's aid to the economy of the recipient and in turn, the degree of control the donor has over the recipient, which increases with the size of aid received" (1977:66). McKinlay and Little explain the operationalization of relative need versus commitment:

"The best single indicator of relative need is population and per capita GDP. As population increases and per capita GDP declines, the relative need for aid rises. Thus, GDP is the single best indicator of a country's assets. On the other hand, absolute commitment means that if two countries are offered the same amount of aid, but one countries population is higher and GDP per capita is lower, then preference is being shown to the wealthier countries in that its relative need is lower. The preference or deviation from the dictates of relative need constitutes relative commitment. Commitment identifies an attempt by one state to register its support for another" (McKinlay and Little 1977, 66).

Relative commitment is operationalized by the index:  $\text{Gross Aid} \times \text{Per Capita GDP} / \text{Population}$ . I chose this model of bilateral aid allocation because it provides a unique model by which a countries

relative need for aid may be analyzed but when combined with country studies shows the U.S. commitment and preference to certain countries in Africa based upon foreign policy interests.

The majority of country data for the status of BIAs were obtained through the CICC's website, which keeps an ongoing statistical table on the status of BIAs and aid withheld under the ASPA. The CICC also has an individual country section, which lists all of the legal and political issues from each region of Africa in relation to the ICC and BIAs. The Political-Military Affairs Bureau of the U.S. State Department Website (USDOS) has a page specifically dedicated to Article 98 Agreements. The only drawback to this website is that it is not regularly updated, so I relied mainly on the U.S. Department of Defense (DOD) for which I obtained very reliable data on the types of military programs in each country and aid provided under the ASPA. Instead of showing 2003 actual and 2004 estimates, I used 2005 requests as these figures are more indicative of current trends in each country. The statistical data obtained for military aid and its purposes are very reliable, as are the country studies and their relation to the U.S. in terms of aid provided. USDOS and the 2005 CIA Factbook were used for GDP and country information as data was more current.

### **ALTERNATE AID**

When examining aid, it is useful to look at the prospect of alternate aid, which may be used to offset aid that is withheld, thus eliminating the pressure factor. Consistent with game theory in the rational actor paradigm, coalition building with other spheres of influence is one strategy which can help disempowered States develop their power base and thereby better defend their interests. Moreover, states may bandwagon<sup>23</sup> in an attempt to show force against a stronger power. In this respect, if weak African countries are confronted with pressure that they do not have the power to resist, they can increase their power by combining their resources and advancing their common interests by forming with other nations with similar values and goals. The offer of aid from alternate sources is similar to the two-player game in Game Theory. The weaker states use another powerful source by which to counter-balance against the

original threat. The EU and Africa with their similar stance on the ICC and the BIAs are indicative of this trend.

I relied upon communiqués from Europe and Canada via statements regarding the offsetting of aid in order to influence African governments from signing a BIA. I also relied on country responses via news sources that have stressed the importance of turning to other countries for aid such as the EU, Japan, China, etc. Spheres of external influence are dominant in the aid issue regarding the opposition of the U.S. to the ICC via the BIAs and the opposition to the BIAs from the EU and Canada through their support to African Countries. Analyzing the prospect of aid offered by the EU, (very involved in Africa) and by Canada under the African Caribbean/European Union initiative (ACP-EU) offers another alternative which may explain why some countries do not sign a BIA. The data I have thus far for the eight countries are very reliable. Communiqués were obtained from the CICC website and reliable news sources. I also interviewed the Legal Advisor for Parliamentarians for Global Action (PGA), David Donat Cattin to get his input on alternate aid per the ACP-EU communique. I have also drawn upon personal interviews from African experts on the BIA issue regarding the need for certain countries to look for alternate aid from other regions of the world to offset the aid lost from the U.S.

## **5. HYPOTHESES AND DATA**

### **Regional Organizations**

One factor that may influence a country's decision-making is pressure within and among regional organizations. Pressure in this sense refers to the influence that regional organizations have upon countries when it comes to foreign policy interests. Regional organizations often work in tandem when supporting foreign policy issues, thereby forming a coalition on deterring neighbor states from doing what is against their interests. This is often accomplished by regional organizations creating mandates for their members to follow or making membership contingent upon states following certain requirements of the

organization. In Africa, there is widespread recognition of the benefits to be derived from regional collaboration.<sup>24</sup> As Wedgewood and Peck explain:

“Regional organizations are superior in being more familiar with local conditions, culture, and actors. They benefit from lower costs and faster response and are more adept at manipulating local organizations. These organizations have expanded their capacity to take on certain objectives other than that for which they were originally designed” (Wedgewood and Peck 2001: 578).

Peck also emphasizes:

“Organizations such as the OAU (now the AU-African Union), ECOWAS and the SADC which originally formed for economic reasons are now taking on a peace and security role, because of the realization that the two issues are closely linked” (Peck, 2001: 563).

Thus, acting as a solid front, regional organizations often unite on common goals when it comes to foreign policy. The human rights issues that have affected African countries past and present, the obligations that arise from being a party to the ICC and the subsequent act of regional organizations taking on expanding roles may be a factor in a countries refusal to sign a BIA. Stein (1983: 116) suggests that, “Regimes arise because actors forgo independent decision making in order to deal with the dilemmas of common interests and common aversion. They do so in their own self-interest.” Hence,

*Hypothesis 1: The eight countries refuse to sign a BIA because of an alignment and / or obligation to Regional Organizations.*

This variable examines the regional organizations of the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the South African Development Community (SADC) in order to see if there is a correlation between any of the states being a member of the organization (s) and / or being a party to the ICC. Specifically, do these organizations have specific mandates that would reinforce their legal obligation to the ICC thus influencing countries decision to sign a BIA? Have they organized meetings relevant to the issues of the BIAs thereby forming a coalition on deterring members from signing them? Lastly, what accounts for the fact that some members of these organizations have signed BIAs, while others have not? Statements from personal interviews, communiqués, mandates and reliable news sources are used to determine whether regional organizations within Africa have exerted an influence on a countries’ decision to sign a BIA.

## **Civil Society and Non-Governmental Organizations**

According to Iris Almeida:

“NGOs have learnt that.... educating and mobilizing public opinion provides leverage to influence policy decisions of States. The strategy used domestically is to target key actors in the Government and members of Parliament. Internationally, it is to use every opportunity available to work within the framework of the UN and to place the establishment of the ICC on the political agenda of world leaders” (Almeida: 63).

Civil-society and NGOs have had an impact on their respective governments concerning the ICC and BIAs. For example, NGOs in Africa have offered workshops and/or mandates in support of the ICC of which eight of the countries are members. The workshops have been instrumental in training officials on the issues and workings of the mechanisms of the ICC and BIAs. The workshops have also encouraged and involved civil society participation in engaging with governments to ratify and implement legal instruments important to the promotion and protection of human right. Hence,

*Hypothesis 2: The countries refuse to sign a BIA because they are under pressure from civil society and non-governmental organizations that oppose signing a BIA.*

Civil Society and NGOs consists of a group of persons and / or a network of organizations that represent other persons and organizations in their communities concerning cultural, ideological or political issues. Pressure within civil society and NGOs represent the influence that these groups have on their respective governments concerning the BIA issue. This hypothesis will be tested by examining the influence of civil society and NGOs concerning the BIA issue. Specifically, what steps have they taken and how significant has their influence been concerning the BIAs?

## **The Legal Factor**

While theories vary, there is a general understanding among international lawyers that states act in two realms: the external, where they are members of the community of nations, and the internal, where they exercise sovereign authority over matters within their respective territories. One consequence of this division is that international law generally leaves each state to give its own domestic effect to treaty obligations. In this connection, some states follow a "monist" approach to international law. That is,

international law and domestic law form a single body of jurisprudence governing internal affairs. Once ratified, treaties are regarded as self-executing or directly applicable, and they automatically have the force of law. Others adopt a "dualist" view. They see international law as quite separate and distinct from domestic law, requiring an act of domestic legislation in addition to ratification before international norms become binding nationally. The legislation becomes the sole legal authority in the state. In this regard, African states vary widely in how they effectuate treaty commitments at home. So what happens when a court must choose between a treaty provision and a national law? One possible resolution is a constitutional provision giving treaties superior status over domestic law.<sup>25</sup> Many African constitutions incorporate such a provision, including those of Benin, Mali and Niger.

Certain governments in Africa have declared openly that they believe signing a BIA would violate their obligations as State Parties under the Rome Statute. This is especially true concerning South Africa, a dominant power in the region who has been very vocal in espousing its reluctance on signing a BIA which it believes would undermine the ICC. Another example is Benin who sent the BIA to their Supreme Court for a legal analysis in order to get feedback on whether the BIA was consistent with domestic legislation per their obligation under the Rome Statute.

There are a few more factors that may be less significant under the realm of legal obligation that may contribute to whether a country signs a BIA. It should be mentioned here that these are my personal opinions and are not quotes from government official's scholars or journalists. Legal principle involving states obligations under the Rome Statute also includes the issue of ICC Judges elected from Ghana, Mali, and South Africa to sit on the ICC Bench. It serves to reason that any country that is a State Party to the ICC and has a Judge on the ICC bench would not want to do anything to undermine the functions of the Court. In this respect, I will analyze why Ghana chose to sign a BIA in spite of the fact that it has a sitting Judge in the ICC versus why Mali and South Africa refuse to sign a BIA. The third factor that might influence the legal principle is the ICTR, which is seated in Tanzania. Tanzania's relationship as the home of the ICTR falls under useful determinants in signing a BIA. I will admit to using a more common-sense

approach regarding this issue because of the human rights issues that arise from being the host of the ICTR and because of the Tanzanian Embassy Bombing (terrorism). In this respect, Tanzania has more than enough reason to refuse a BIA on the grounds of its history. It is also useful to explore why Rwanda signed a BIA and Tanzania has not relative to the ICTR. Hence,

*Hypothesis 3: Based upon domestic jurisprudence, the Countries refuse to sign a BIA because they believe it will violate their obligations as State parties to the Rome Treaty and the Vienna Convention on the Law of Treaties.*

Common domestic jurisprudence as it applies to the legal factor means the interpretation of foreign law to domestic law. This hypothesis will be tested using comments from country officials, legal opinions from domestic courts and interviews with African Journalists, law scholars and ICC experts. The data I obtained for the case of Ghana and Rwanda are quite valid via African news sources, scholarly writings and communiqués.

### **The Sovereignty Factor**

One of the oldest factors concerning a states decision to honor certain legal instruments is whether the state believes the instrument or the request in itself violates a nation's sovereignty. A common refrain popularly espoused about treaties is that they surrender national sovereignty, and therefore represent a threat to a countries' interest. Accordingly, the right to enter into a treaty and be legally bound by it is a vital aspect of any nation's sovereignty. Christopher Kilby discusses the issue of political sovereignty within the realm of aid. Although his essay is structured around official international aid, I have applied it to the bilateral aid relationship. Stressing the importance of the territorial domain and domestic policies of a sovereign state, he explains:

“Any action which directly or intentionally threatens the integrity of the state or the welfare of its citizens is prohibited. The duties of the aid donor appear to require aid conditionality that directly conflicts with respect for recipient state sovereignty in that it conflicts with the duty of the state to improve the welfare of its citizens, while at the same time preserving state sovereignty... “When governments consider the needs of their citizens instead of their wants, then they are not free to reject aid” (Kilby 1999:11-13).

Alternately, Jeffrey Herbst in his influential study of *States and Power in Africa* concludes that:

“African nations are still extremely insecure about their sovereignty because they do not exercise authority across their territories. Indeed, African nations jealously guard their sovereignty because it is so critical to the exercise of power and have constantly refused to implement arrangements like the European Union’s that diminish the authority of States” (Herbst, 2000: 234).

Hence,

*Hypothesis 4: The countries refuse to sign a BIA because they believe the request by the U.S. to sign a BIA violates State sovereignty.*

In examining this hypothesis, I will proffer statements from country officials, scholars and journalists who have stressed the importance of national sovereignty as a major issue in their countries refusal to sign a BIA.

In summary, the following hypotheses will be tested in this study:

Hypothesis 1: The eight countries refuse to sign a BIA because of an alignment and / or obligation to Regional organizations.

Hypothesis 2: The countries refuse to sign a BIA because they are under pressure from civil society and non-governmental organizations that oppose signing a BIA.

Hypothesis 3: Based upon domestic jurisprudence, the Countries refuse to sign a BIA because they believe it would violate their obligations as State parties to the Rome Treaty and the Vienna Convention on the Law of Treaties.

Hypothesis 4: The countries refuse to sign a BIA because they believe the request by the U.S. to sign a BIA violates State sovereignty.

## **6. DATA ANALYSIS AND DISCUSSION:**

### **COUNTRY STUDIES: U.S. FOREIGN POLICY INTERESTS / AFRICA**

The following country information regarding military programs is listed in the database on U.S. Military Assistance for the Congressional Budget Justification for FY05 Foreign Operations, April 2005. African Region-ASPA AID.<sup>26</sup> The following sections explain the U.S. interest in each country and the type of aid at stake under the ASPA. See Appendix B and C for an explanation of types of aid under ASPA and the breakdown for civilians trained under these programs in 2004 and 2005. Appendix C also shows U.S. statements regarding the prohibition of aid to seven countries (Kenya info outdated).

**BENIN / MALI / NIGER**

The primary U.S. interests in Benin militarily are working cooperatively on regional security concerns. The strategy for addressing these interests is to reinforce Benin's support of regional stability and peacekeeping through diplomacy and military-to-military contacts. FMF is beneficial in providing Benin with the tools necessary to play its role in regional peacekeeping operations. Benin hosted an ACOTA (African Contingency Operations Training and Assistance) program in mid-2004<sup>27</sup> and was eligible in FY 2005 to receive Excess Defense Articles (EDA) on a grant basis under Section 516 of the Foreign Assistance Act (FAA). Equipment received under this program such as several types of military equipment and hospital supplies would support Benin's peacekeeping and counterterrorism efforts.<sup>28</sup>

The primary U.S. military interests in Mali are democracy and helping the national government address humanitarian goals. Other interests include the PSI Initiative which supports efforts to establish lasting regional stability and enhances Mali's ability to prevent terrorists from using its territory for basing and trafficking. In FY 2005, the IMET program would reinforce the progress already made by the Malian Armed Forces towards becoming a more professional organization through training and seminars. It will also provide opportunities for the professional officer corps to attend courses that stress greater respect for and understanding of the requirement to support human rights and civilian control of the military. Over the past decade, Malian Armed Forces have evolved from an instrument of government control to a professional organization and many IMET graduates hold high positions in their ministries and the armed services. Mali was eligible in FY 2005 to receive EDA on a grant basis under Section 516 of the FAA while provisions of grant EDA would support Mali's ability to control its borders and undertake peacekeeping operations.<sup>29</sup>

U.S. Military interests in Niger include democracy, human rights, regional security and countering terrorism. Niger is a poor country, and is ringed by unstable neighbors, making its territory difficult to police. Its impoverished people are a ready target for anti-Western radical extremists. The Government of Niger considers extremism a threat and supports the coalition against terror. The failed, but very serious,

military uprisings of August 2002 underscore the critical nature of working intensively with Niger to encourage democracy to take firm root. Niger recognizes that its military can play a vital role in both security and development, and values the assistance it receives through the IMET program in helping to train its forces for peacekeeping and civic action duties, as well as for traditional security roles. IMET courses help increase the military's capacity and reinforce the military's role as a professional institution. The FY 2005 program would build on earlier IMET efforts by providing additional courses on civil-military relations, military justice, peacekeeping and English language training. These courses would also address special issues, such as technical training for Air Force personnel, training for the military police, and training for engineers for civic action. Initiated with FY 2002 peacekeeping operations (PKO) funds, Niger is a participant with Mali, Chad and Mauritania in PSI. The PSI program helps the four countries gain greater control over movement of potential terrorist groups, thus supporting the U.S. national security interests of waging war on terrorism and enhancing regional peace and security. Niger was eligible in FY 2005 to receive EDA on a grant basis under Section 516 of the FAA. Grant EDA would primarily be used to help Niger better control its borders and participate in peacekeeping activities.<sup>30</sup>

#### **KENYA / TANZANIA**

Kenya is the linchpin of East African stability and security. Its support for the war on terrorism has been solid and wholehearted, a recognition that Kenya has twice been a target of Al Qaeda bombs. It remains a principal point of access for U.S. military and relief operations within the region. Kenya is among the United Nations' top troop-contributing nations, taking on difficult assignments such as Sierra Leone and Ethiopia-Eritrea. The strategy for addressing these interests is to enhance Kenya's capability and confidence to participate in peacekeeping operations, improve its national security, governance, human rights situation and trafficking in persons. In FY 2005, IMET courses would fund Command and Staff College participation, civil-military relations, English language training, and technical specialty training. Sustained IMET funding and continued access to FMF funds would also enhance Kenya's

ability to protect its borders and coastal areas from terrorists and insurgents plus increase the professionalism of the Kenyan military while providing specialized border and coastal security training. Kenya was eligible in FY 2005 to EDA on a grant basis under Section 516 of the FAA. Equipment received under this program such as several types of military equipment and hospital supplies would support Kenya's peacekeeping and counterterrorism efforts.<sup>31</sup>

Regional stability, counter-terrorism, the promotion of democracy and human rights, humanitarian response (particularly to refugee issues), and law enforcement are the U.S. principal military interests in Tanzania. Tanzania's strategic location makes it a vital partner in assuring the stability of East Africa. Having suffered an Al-Qaeda terrorist attack (the 1998 bombing of the U.S. Embassy in Dar es Salaam), Tanzania is a strong supporter of the war on terrorism. Tanzania has historically enjoyed internal political stability and continues to support peace and stability in the region, particularly as regards conflict in and between the DRC, Burundi, Rwanda, and Uganda. In the past, IMET programs have helped to professionalize the Tanzanian Peoples' Defense Force (TPDF) and train it to better control the country's borders as well as manage refugee flows from conflict areas like Burundi. Tanzania's program focuses on training for all strata of the TPDF from senior-level, Ministry of Defense officials down to non-commissioned officers. The courses strengthen the TPDFs capacity to conduct peacekeeping and humanitarian operations. Funds would also be used to deepen the TPDFs understanding of the impact of HIV/AIDS upon the military. Prohibited by ASPA, Tanzania was eligible in FY 2005 to receive EDA on a grant basis under Section 516 of the FAA. Grant EDA, such as vehicles, radios, individual clothing and equipment, help support Tanzanian peacekeeping efforts in the region. As home to more than a million refugees over the last decade, Tanzania has benefited from IMET and EDA funds and used them effectively in the past.<sup>32</sup>

#### **LESOTHO / NAMIBIA / SOUTH AFRICA**

The primary U.S. military interests in Lesotho and Namibia are democracy and helping the national government address humanitarian goals. Assisting Lesotho in strengthening its democratic foundations

will serve to enhance regional security and lay the groundwork for continued national and regional economic stability. In FY 2005, the IMET program would reinforce the progress already made by Lesotho. Namibia was eligible in FY 2005 to receive EDA on a grant basis under Section 516 of the FAA. Provisions of grant EDA would support Namibia's ability to control its borders, undertake peacekeeping operations and will be used to support the Namibian Defense Forces efforts to undertake peacekeeping operations and respond to regional humanitarian crises.<sup>33</sup>

The U.S. has major military interests in South Africa's continuing development as a stable, democratic state, and one that is capable of addressing its major internal challenges. Although South Africa opposes some U.S. policies in international fora, it is a cooperative partner in tangibly addressing terrorist and international crime threats, nonproliferation, regional instability and the security of Americans visiting South Africa. A joint DOD-National Institute of Health (NIH) program will be launched in FY 2005 to help the South African National Defense Force (SANDF) deal with the HIV/AIDS challenge to the armed forces. The U.S. also has a clear interest in helping South Africa address a serious problem with local and international organized crime, as well as the related threat of terrorist activity. Islamic extremism is a growing threat. The national police force, the South African Police Service (SAPS), is an organization still in transition; its legacy as an instrument of the apartheid regime still evokes public hostility, and funding cuts have eroded morale and its ability to fight ever-stronger criminal elements. Modest funding for IMET activities was requested for FY 2005. South Africa was eligible in FY 2005 to receive EDA on a grant basis under Section 516 of the FAA. Provision of grant EDA would support South Africa's peacekeeping activities and enhance cooperative relationships. EDA C-130s from FY 1996, as well as FY 2002 and 2003 FMF and PKO funds were used to support South Africa's mission in Burundi.<sup>34</sup>

The \$5 million Safe Skies for Africa Program is also threatened by loss of aid. The program is meant to improve aviation safety and security in selected African programs. It also fosters economic growth, combats terrorism, narcotics trafficking and weapons smuggling, while also keeping airline passengers safe. Countries in this program include Namibia, Mali, Tanzania and Benin.<sup>35</sup>

**DATA ANALYSIS: The Aid Factor**

Tables 2 and 3 show the 2005 gross aid requests for military funding under the ASPA for the eight countries in this study and for the 32 that have signed BIAs. ESF is combined into Gross Aid under ASPA. The two separate tables are useful as comparisons in order to examine the relative need for aid versus the relative commitment from the U.S. to particular African countries. Gross aid under ASPA is listed in the database on U.S. Military Assistance for the Congressional Budget Justification for FY05 Foreign Operations, April 2005, African Region-ASPA AID.<sup>36</sup> See Appendix B for military aid defined. See Appendix C for a breakdown of civilians trained under these programs and for the specific dollar amount of foreign military training accompanied by U.S. statements on the status of the BIAs regarding the eight countries in this study.

**Relative Need for Aid: Countries Who Refuse to Sign a BIA**

**TABLE 2**

<b>Recipient</b>	<b>Gross Aid under ASPA</b>	<b>Population</b>	<b>Per Capita Aid</b>	<b>Per Capita GDP</b>	<b>Relative Commitment</b>
<b>Benin</b>	<b>250,000</b>	<b>7,460,025</b> **	<b>.03</b>	<b>1,200</b>	<b>40</b>
<b>Kenya</b>	<b>15,650,000</b>	<b>33,829,590</b> **	<b>.5</b>	<b>1,100</b>	<b>509</b>
<b>Lesotho</b>	<b>50,000</b>	<b>1,867,035</b> **	<b>.03</b>	<b>3,200</b>	<b>86</b>
<b>Mali</b>	<b>175,000</b>	<b>12,291,529</b>	<b>.01</b>	<b>900</b>	<b>13</b>
<b>Namibia</b>	<b>100,000</b>	<b>2,030,692</b> **	<b>.05</b>	<b>7,300</b>	<b>359</b>
<b>Niger</b>	<b>100,000</b>	<b>11,665,937</b>	<b>.008</b>	<b>900</b>	<b>8</b>
<b>S. Africa</b>	<b>1,050,000</b>	<b>44,344,136</b> **	<b>.02</b>	<b>11,100</b>	<b>263</b>
<b>Tanzania</b>	<b>100,000</b>	<b>36,766,356</b> **	<b>.002</b>	<b>700</b>	<b>2</b>

N=8

**\*\* Note Concerning Population:**

Estimates for all these countries explicitly take into account the effects of excess mortality due to AIDS; this can result in lower life expectancy, higher infant mortality and death rates, lower population and growth rates, and changes in the distribution of population by age and sex than would otherwise be expected. (July 2005 estimate.) Source: CIA Fact Book 2005.

Table 3

## Relative Need for Aid (Countries Who Have Signed BIAs)

N=32

Recipient	Gross Aid Under ASPA	Population	Per Capita Aid	Per Capita GDP	Relative Commitment
Angola	3,300,000	11,190,786	.3	2,100	619
Botswana	1,200,000	1,640,115 **	.7	9,200	6731
Burkina Faso	50,000	13,925,313 **	.004	1,200	4.3
Burundi	3,300,000	6,370,609 **	.52	600	311
Central African Rep.	110,000	3,799,897 **	.02	1,100	31.8
Chad	225,000	9,826,419	.02	1,600	36.7
Comoros	50,000	671,247	.07	700	52.1
Congo (Brazzaville)	110,000	3,039,126 **	.04	800	29
DRC	5,050,000	60,085,804 **	.08	700	58.8
Cote d' Ivoire	50,000	17,298,040 **	.003	1,500	4.3
Djibouti	6,325,000	476,703	13.3	1,300	17249.7
Equatorial Guinea	50,000	535,881	.09	2,700	252
Eritrea	950,000	4,561,599	.21	900	187
Ethiopia	7,600,000	73,053,286 **	.10	800	83.2
Gabon	210,000	1,389,201 **	.15	5,900	891.9
Gambia	75,000	1,593,256	.05	1,800	84.8
Ghana	1,075,000	21,029,853 **	.05	2,300	117.6
Guinea	350,000	9,467,866	.04	2,100	77.7
Liberia	25,000,000	3,482,211	7.18	900	6461.4
Madagascar	200,000	18,040,341	.01	800	8.9
Malawi	360,000	12,158,924 **	.03	600	17.8
Mauritania	130,000	3,086,859	.04	1,800	75.8
Mauritius	125,000	1,230,602	.10	12,800	1300.2
Mozambique	215,000	19,406,703 **	.01	1,200	13.3
Nigeria	6,800,000	128,771,988 **	.05	1,000	52.9
Rwanda	225,000	8,440,820 **	.03	1,300	34.7
Senegal	1,600,000	11,126,832	.14	1,700	244.4
Seychelles	100,000	81,188	1.2	7,800	9607.3
Sierra Leone	5,300,000	6,017,643	.88	600	528.4
Togo	120,000	5,681,519 **	.02	1,600	33.8
Uganda	225,000	27,269,482 **	.008	1,500	12.4
Zambia	225,000	11,261,795 **	.02	900	18

The country studies show that the U.S. is involved to some degree in all eight countries and that aid is a useful resource, it is not something that the countries do not need. The most important factor concerning U.S. interests in these eight countries is that the majority of aid withheld would go towards counter-terrorism efforts (See Appendix C). Military aid to these countries has increased over the years, not decreased. Therefore ASPA and ESF aid is needed in order for African countries to reinforce and support the counter-terrorism efforts of the U.S.

The tables are very illustrative of the need for aid versus the relative commitment on the part of the U.S. toward certain countries. However, an analysis of these tables show a definitive trend towards the relative need for aid more in Table 3 (countries that have signed a BIA) than in Table 2 (countries that refuse to sign a BIA). Table 2 is significant in that per capita aid to Namibia, Niger and Tanzania results in a coefficient of .002, .005 and .05 respectively. This leads me to believe that perhaps, for the eight countries in Table 2, aid may not be that significant of a factor for them to sign a BIA. The paltry sums of aid to Tanzania are staggering considering the total of its population, aids problems and the ICTR. The lower commitment numbers for the other countries, excluding Kenya (U.S. Embassy) do constitute, according to the formula, the relative need for aid.

However, there can be a relative need for aid and a refusal by a country to accept it if the aid is insignificant and the country has obligations that they deem more important. For example, according to Benson Olugbuo of the CICC, there is an understanding that “the so-called military cuts do not really affect much of the funding South Africa receives from the US government.”<sup>37</sup> In addition, Thuita Mwangi, the Director of Political Affairs in the Foreign Ministry of Kenya reasoned, “there are other countries that are willing to provide resources to Kenya and money available to cushion the country should aid be withheld.”<sup>38</sup>

The U.S. BIA strategy also appears to be receiving strong criticism from a much more unlikely source. General Bantz Craddock, Commander of the U.S. Southern Command responsible for U.S. forces in Latin

America and the Caribbean delivered a statement before the U.S. House Armed Services Committee on 9 March 2005. He stated:

“The ASPA, in my judgment, has the unintended consequence of restricting our access to and interaction with many important partner nations...[it] hamper[s] is an essential element of our regional security cooperation strategy...and may have negative effects on long-term U.S. security interests in the Western Hemisphere...” The following day, at a panel for military officials and security analysts in Miami, Craddock declared: “China is building up its military ties with Latin America, partly as military officials made 20 visits to the region last year and senior Latin American military officers who used to travel to the U.S. for training are going to China instead...It’s a new dynamic, a new factor to be watched.”<sup>39</sup>

Table 2 also puts the countries in Table 3 in a better perspective when measuring for the relative need for aid. The majority of countries in Table 3 have much lower relative commitment numbers, which according to the formula constitutes a higher relative need for aid. The higher relative need for aid added to the high number of countries that have signed a BIA (32) increase the odds empirically that aid is a major factor in signing a BIA. This fact also gives credence that other factors are at play for the eight countries that have not signed a BIA.

Interestingly, both tables show the trends of absolute commitment on the part of the U.S. toward certain countries more than others do. For example, in Table 2, the U.S. offered three countries aid worth \$100,000: Namibia, Niger and Tanzania. The relative commitment numbers are very significant regarding Namibia in relation to the same sums of aid being offered to Niger and Tanzania. The total population of Tanzania is much higher than Namibia and Niger. It seems that the U.S. has more of a relative commitment and interest towards Namibia as seen by the score of 359. Tanzania, on the other hand only gets a relative commitment score of 2 with Niger coming in at 8. Upon examining Table 3, once again there is more of a relative commitment on the part of the U.S. in Djibouti, Liberia, Seychelles, Mauritius and Sierra Leone, which can be explained easily. Djibouti is a strategic training area for U.S. troops. This can be seen by the small population versus the staggering relative commitment number. Mauritius is part of the Pan-Sahel initiative and Liberia and Sierra Leone are still in the process of reconstruction after civil wars of which the U.S. has provided logistical support and programs. Thus, these relative commitment figures match the output of U.S. interest and energy. In its totality, the tables show that the majority of

countries in the African region need aid and that there are other factors more important to the eight countries in Table 2 than aid.

The need for aid overall *has* caused a large number of countries in the African region to acquiesce in signing a BIA. There is evidence from statements proffered by country officials that the relative need for aid is a huge factor concerning the signing of a BIA. For example, The Associate Executive Director of the Centre for Democratic Development (CDD), Dr. Baffuor Agyeman-Duah stated:

“The U.S. government bullied the Ghana government into ratifying the BIA. According to him, the U.S. pushed economically, militarily and politically weak nations like Ghana into submission through the international politics of ‘carrots and sticks’ in order to pre-empt any possibility of its soldiers committing atrocities against humanity. It is for this reason; therefore, that the government ratified the agreement in the best interest of the nation.”<sup>40</sup>

Faced with poverty, the president must have taken into consideration the effects that Ghana would experience in rejecting the agreement. Alternately, Liberia signed for economic reasons. U.S. State Department Spokesman Richard Boucher stated: "Liberia and the United States have signed the agreement as part of a worldwide Article 98 agreement push, adding that the deal would make it easier for Washington to support peacekeeping efforts in Liberia.”<sup>41</sup> The same scenario would probably apply to the Congo and Sierra Leone as well, for the U.S. also assists with peacekeeping initiatives in these countries. In the case of Sierra Leone, upon signature of a BIA, it was announced that “the U.S. would invest \$25 million in the Sierra Rutile Mines.”<sup>42</sup>

Although Niger has resisted signing a BIA, the temptation is strong. According to a senior Ministry of Foreign Affairs official, “the United States threatened to suspend cooperative development projects if Niger does not sign a bilateral agreement.”<sup>43</sup> With Niger being extremely poor, it may cave into pressure from the U.S. in the future. However, the U.S. has suspended economic and military assistance to Niger twice: once in 1999 over a coup and again in 2003 over the uranium transfer issue.<sup>44</sup> Perhaps Niger is used to having aid withheld from the U.S. only to get it reinstated later. South Africa has also stressed the aid factor in its decision to not sign a BIA in that “the aid package that the U.S. is offering in return for signing a BIA does not fit South Africa’s requirements. Also, South Africa is aware that two years ago

the U.S. cut off key elements of their military aid when South Africa would not tow the line on the U.S. stance concerning the ICC.”<sup>45</sup>

These examples illustrate that countries are not taking the BIAs lightly and under some circumstances feel pressured into making decisions under the threat of aid. Francis Dako, the Francophone Coordinator for the African Region to the CICC, stressed the aids incentive factor:

“It can be said that almost all African Countries that have signed a BIA did so because of the ‘aids incentive’ factor. This is the obvious. The U.S. government has made it a clear policy to withhold all U.S. aid packages to any country that does not sign a BIA: this includes Benin, Mali and Niger. The effect of the U.S. policy is very damaging to the economies of these countries. Its long term effect will be that it will invariably delay and in some cases derail ongoing economic projects. In the event that such a scenario played out, I do not think that the EU would sit by and watch these countries groan under U.S. economic blackmail before coming in with European Development funds. Nevertheless, in the face of such a situation, I think the effects would be felt on economic and political fronts.”<sup>46</sup>

Other African scholars have also stressed a similar view regarding the aids incentive factor.

According to Godfrey Odongo of the Community Law Centre, University of the Western Cape:

“My opinion is that the fear of losing military / humanitarian U.S. aid is a key factor in the decisions of the majority of countries to sign a BIA. The case of South Africa where I am currently based is a little different from the rest. The economy is very strong as compared to the erst of African countries and its GDP is almost the total of Southern African States combined. We are talking of an economy that is driven domestically and is not dependent at all on the World Bank and IMF, unlike Kenya or Tanzania which may have up to half of their budgets dependent on bilateral funding and multilateral aid. So its refusal is pegged very much on its ability to maintain independent economic sustenance.”<sup>47</sup>

Sustenance is an important factor for a state to consider in its decision to sign a BIA. What can a country do to supplement aid that is withheld? Alternate aid is one option and there have been a number of statements from Kenya concerning this. Another option is to depend upon neighboring countries; much like Lesotho does with South Africa. Regardless of how it is handled, it is one move which may enable a country to refrain from signing a BIA.

### **Alternate Aid**

The EU is a strong supporter of the ICC and is against the BIAs. In order to offset the aid denied to African countries by the U.S., it stated in its Joint Parliamentary Assembly statement of October 2003,

“The African-Pacific-Caribbean (ACP) countries that are suffering financially from their refusal to submit to pressure concerning the ICC, receive compensation through extension of their cooperation programs.”<sup>48</sup> Further, in a Memorandum dated 16 October 2003, the ACP-EU Assembly stated that developing countries suffering financial measures should receive the support and assistance of the EU and other developed countries that are parties to the ICC. The memorandum reads:

“The sanctions on South Africa, approximately \$7m and the sanctions against even poorer countries such as Benin and Mali are a serious threat to the rule of law and they need to be compensated in the framework of the ACP-EU Cotonou Agreement.”<sup>49</sup>

In an interview with David Donat Cattin, the Legal Advisor for Parliamentarians for Global Action, I learned that the EU Commission decided that the "alternate aid issue" in the form of compensation to countries that did not sign a BIA was voted to be 'too controversial.' However, because of the EU 'point of honor' system, the ACP-EU decided to use a softer approach in that through the European Development Fund, those countries that refused to sign a BIA would receive *extra* aid. He also stated that “the ACP-EU countries who had already signed a BIA would still get aid because unlike the U.S., the EU does not want to punish countries that need aid.”<sup>50</sup>

Francis Dako, the Francophone Coordinator for the ICC also placed an emphasis on alternate aid being a factor in Benin, Mali and Niger when refusing to succumb to U.S. pressure:

“Recent developments have opened financial doors to some countries, namely the new ACP-EU Cotonou Agreement which is the most important multilateral treaty governing North–South cooperation. The European Development Fund is bigger than any other bilateral or multilateral cooperation fund and has encouraged Benin Mali, and Niger from succumbing to U.S. pressure. In the present dispensation however, the European funds serve as a consolation for the huge aids losses being suffered in the interim. Candidly speaking, the European Development Fund is still a long way from the National Treasuries of these countries.”<sup>51</sup>

Kenya has also stressed its reluctance on signing a BIA purely out of the need for aid. The Foreign Minister for Political Affairs, Thuita Mwangi reasons:

“There are countries willing to offer resources to help Kenya in this process and there are monies available to cushion the country should the Americans carry through their threats to cut off military support...Kenya has by default shown that it can live without donor support for almost 20 years...what lessons can we learn from this instead of continually begging for piecemeal donations...Donors tend to dictate what they want and if you accept their money, then you have to do what they want.”<sup>52</sup>

Additionally, Canada is another region that is set to offset military aid to the eight countries. In my research, I have found that Canada has signed a \$4.5 million agreement with ECOWAS, which will enable it to strengthen its capacity in peace building and security initiatives. Part of the grant will also go into the soon-to-be launched ECOWAS Peace Fund, as well as the establishment of an ECOWAS Scholarship Fund. The Scholarship Fund will finance specific training programs for West African military and civilian personnel at the Kofi Annan International Peacekeeping Training Center in Accra, Ghana. The Peace Fund is expected to enable ECOWAS to finance a wide-range of activities, including humanitarian assistance, conflict prevention and peace building activities such as child protection and elections monitoring.<sup>53</sup> One major objective of the FMF program is to “improve key capabilities of friendly countries to contribute to peacekeeping and humanitarian crises.”<sup>54</sup> Militarily, ECOWAS provides peacekeeping contingents in Africa. Benin, Mali, Namibia and South Africa are all leaders in peacekeeping efforts but the freeze on aid has not affected their decision to sign the BIAs. In fact, the U.S. provided nearly \$26 million in logistics support to enable the deployment of ECOWAS peacekeeping forces when they sent troops to assist Liberia in 2003.<sup>55</sup>

The implication to the aforementioned is that if financial aid will be offset through other initiatives, then countries may see no need to sign a BIA. The drawback to this theory is that it does not adequately explain why other countries have signed a BIA in spite of the fact that alternate aid has been offered. My theory here is that part of the reason could lie in the fact that the enactment of new policies often have to go through numerous channels and piles of red tape which take time. Perhaps, because of pressure from the U.S. and the time factor, some countries gave into signing a BIA rather quickly in order to keep aid flowing. Another theory is that the threat of withholding aid is easy to comprehend. However, some governments may not have comprehended the legal ramifications in signing a BIA. Two examples might be the relation of the BIA to Article 98 of the Rome Statute or the issue of whether the Executive may sign a BIA without the knowledge of Parliament. However, this can only be speculation on my part without examining each individual government response and Constitutional provision. This is where

NGOs and the EU and Canada have proven useful in educating officials on the provisions of the Rome Statute and the BIAs.

Finally, although this is considered additional aid, not alternate aid, according to the USAID 2005 Statutory Checklist, “countries that do not sign a BIA and are prohibited from receiving ESF under the Nethercutt Amendment, are still privy to Millennium Challenge Account (MCA) Funding. The Countries included are Benin, Lesotho and Mali.”<sup>56</sup> This prohibition only applies to ESF, not ASPA. Additionally, aid restriction does not apply to any regional organizations that may receive military assistance.<sup>57</sup> Thus, countries that may receive aid from regional organizations of which they are members may have another incentive to fall back on in that they can still receive some type of aid.

This brings me to the most important question concerning the topic of aid. What are the long-term effects of loss of aid for countries that do not sign a BIA? First, it is quite simple in that a state that cannot qualify for a waiver from the U.S. and consequently is faced with losing these privileges may be driven by its concerns for national security to sign a BIA with the United States, even if it is against their wishes to do so. Second, politically and legally, it may create further hardship for the ICC, as more states will feel obligated to extend exemptions to U.S. nationals, which in the long run may result in customary international law. What affect will this have on the ICC and its ability to do its job effectively? Moreover, what type of message does this send to those who need the ICCs protection? Third, it may affect countries economically. Francis Dako explained the economic and political implications of the loss of aid:

“Economically, the loss of aid would cause a series of setbacks in capital and technical projects and will bring a cessation to all developmental projects. Its effect will be felt throughout the economy by causing deficits in the national reserves and a loss of essential revenue that could lead to other hardships in these countries. Politically, it will cause a backlash of resentment towards U.S. government policies and U.S. anti-sentiment would rise. It will also cause the political opposition to use this issue as a campaign tool to discredit current government, which could lead to power shifts with the political setup. It will cause these nations to lose total respect and confidence in the U.S. Administration. In the event of such long drawn out policies by the U.S. Government, these countries will initiate new bilateral & multilateral cooperation with the EU and others that will cause the U.S. to loose its power of influence in these countries.”<sup>58</sup>

In sum, the majority of countries in Africa do need aid, some more than others. However, aid does not seem to be a dominating factor for whether the eight countries in this study sign a BIA. Thus, the need for other factors to be examined.

## **7. HYPOTHESES ANALYSIS**

*Hypothesis 1: The eight countries refuse to sign a BIA out of an alignment and / or obligation to Regional Organizations.*

If the literature is correct in that regional organizations unite and form coalitions on deterring neighbor states from doing what is against their interests; especially if the organization in question has a member mandate concerning a foreign policy issue at stake, then all things being equal, it would seem to hold true that countries within these organizations would refuse to sign a BIA. Consistent with institutionalism in that states may cooperate together through internal mechanisms and bargaining, African countries have used regional organizations to their advantage; although it is obvious that not all countries within Africa have abided by regional organization mandates. Regionally, ECOWAS has always been highly involved and committed in the ICC ratification process by attending the early workshops available by ICC NGOs.<sup>59</sup> For example, in January of 2002 in Abidjan, Cote d' Ivoire, ECOWAS and the ICRC co-hosted a seminar on the ratification and implementation of the ICC Statute. The meeting observed that all ECOWAS member states are party to the 1949 Geneva Convention and their additional Protocols of 1997, and that these treaties require state parties to adopt national implementing measures in respect of the Geneva Convention and the repression of grave breaches of international humanitarian law based on universal jurisdiction.<sup>60</sup> In addition, there is evidence to substantiate that external relations have played a big part towards motivating and educating African States and regional organizations on the workings of the ICC in general. For example, Canada is one of the largest donors to ECOWAS and one of the strongest proponents of the ICC.<sup>61</sup> Canadian Justice Officials, at a meeting with ECOWAS and SADC members in Abidjan, Cote d'Ivoire in January 2002, advised the

West African States on the implementation of the Rome Statute. Participants agreed that political capacity exists in most ECOWAS communities to work towards a smooth transitional process in implementing domestic legislation. All participants drafted a plan of action based on a common strategy to collaborate with governments to further the ICC campaign in the region.<sup>62</sup>

South Africa wields enormous influence in the Southern region of Africa and has been a leader of the "like-minded group" of more than 90 states, which seeks to form an ICC with strong and independent powers.<sup>63</sup> Delegations from Lesotho, Malawi, Swaziland, Tanzania and South Africa had participated in the effort to establish the ICC from as early as 1993. A number of consultative meetings were held between 1995 and 1997 to consider the possible implications and benefits arising from the establishment of the ICC. Additionally, on September 14, 1997, legal experts from the SADC states adopted the 'Principles of Consensus' in Pretoria and later issued a "Common Statement" which later became the instruction manual for SADC's negotiations during the Rome Conference in 1998.<sup>64</sup> Approximately one year after the Rome Conference in 1998, the members of SADC assembled a workshop in Pretoria to develop legislation intended to address all of the members' domestic concerns with ratifying the Rome Statute and to prompt its members to cooperate on advancing its causes, thereby showing the importance of international and regional cooperation for the future of the ICC.<sup>65</sup>

Furthermore, the Pretoria Statement adopted by the Delegates of the SADC States lists three elements of which 'legal principles' play a role in their decision to abide by the Rome Statute and its provisions. (1) the importance of safeguarding the integrity of the Rome Statute (2) affirming their desire to work together as SADC states and (3) acknowledging the important role played by the SADC countries in the adoption of the Statute.<sup>66</sup> Additionally, during the treaty negotiations for the ICC in Rome in 1998, South Africa, a democratic leader in the region, along with other states from the SADC, played an essential role in thwarting the efforts of some major powers to weaken the court. The strong united support for the ICC from SADC nations, which South Africa helped to forge, was critical to the successful adoption of the Rome Treaty in the face of strong opposition from the U.S.<sup>67</sup> It openly opposed the invasion of Iraq by

the U.S. and has been verbally dominant in its approach to the BIA issue. Alternately, Lesotho, Tanzania and Namibia are all SADC states, not to mention they were regarded as frontline states in the ending of apartheid in South Africa. Lesotho is surrounded geographically by South Africa and dependent economically upon it. Additionally, its internal affairs are strongly influenced by South Africa. South Africa and Namibia also have a very long historical linkage in that Namibia being formerly South West Africa; is also economically dependent upon South Africa. This commonality between the three could reinforce the stance that their respective governments have taken on the BIA issue. According to Thuita Mwangi, the Political Affairs Officer in Kenya, “there was an effort to form an East African position on the BIAs but once Uganda signed a BIA, the issue became moot.”<sup>68</sup> However, Uganda is the only country in the East African Community (EAC) trade bloc that has signed a BIA with the U.S.<sup>69</sup>

The ACP-EU Assembly met in Brazzaville, Republic of Congo from March 31-April 3, 2003. In this meeting, the assembly specifically addressed the incompatibility of the Rome Statute with the BIAs and its relationship with the ACP-EU member states: (4) recognizes that the agreements proposed by the U.S. are contrary to the Rome Statute and the treaty commitments of the EU member states, (8) Expects the EU and ACP governments and parliaments to refrain from adopting any agreement which undermines the effective implementation of the Rome statute; considers therefore that ratifying such an agreement is incompatible with membership of or our association with the EU or the ACP-EU Joint Parliamentary Assembly.<sup>70</sup>

Unfortunately, out of the number of member states in the aforementioned organizations, more have signed BIAs than not. Although members states may entertain the notion of a mandate concerning a certain foreign policy issue, as Singer mentioned; “The weaker states may feel obliged to go along with the definition of international self-interest supplied by the mentor power” (Singer 1972: 338).

In this respect, the mandates of organizations within Africa have not had an overwhelming impact on a majority of its members to not sign a BIA. Also, unlike the EU which at one point entertained the idea of membership contingent upon not signing a BIA, members of African Organizations have not had their

membership contingent upon the BIA issue, thus countries may feel less hesitant about complying with the U.S. request.

*Hypothesis 2: The countries refuse to sign a BIA because they are under pressure from civil society and non-governmental organizations that are against signing a BIA.*

If the literature on NGO's and civil society is correct, then NGOs and civil society educate and mobilize public opinion thereby providing leverage in order to influence policy decisions of States. One senior official of a small West African country was recently surprised that the U.S. was "using tremendous pressure to approach his country which has never been tied to any military cooperation with Washington for which there is almost no possibility of troop presence."<sup>71</sup> To address this issue, a number of ICC/ NGO groups have worked with countries in order to speed up the implementation of domestic legislation concerning the ICC. There have been workshops held in Tanzania, DRC, Burundi and Nigeria addressing legislation, draft implementation, and human rights issues. Meetings were held in countries in all regions illustrating the importance placed on universal acceptance of the ICC.<sup>72</sup>

Respectively, the same types of effort have taken place in relation to the BIA issue. According to Pascal Kambale, African NGOs are aware of the importance of forming a common strategy to address challenges to implementation in Africa. Their actions rest on three pillars: the central role of local organizations; good coordination among organizations; and better access to decision-makers.<sup>73</sup> Furthermore, NGOs are more familiar with the decision makers and the political climate, and have a better sense of what strategies will be more effective in each country.<sup>74</sup> The plan of action of the civil society participants at the recent ECOWAS conference in Abidjan sent a clear message to the region. Participants decided to make a concerted effort between and within NGOs to involve other civil society representatives. The success of the talks in Niger between the CICC, the Lawyers Committee on Human Rights (LCHR), Human Rights Watch (HRW), the media, the Niamey Faculty of Law and the twenty or so national NGOs is a good example of the benefits of increased consultation with civil society.<sup>75</sup> Regional conferences are always an excellent opportunity for such consultations. They allow the NGOs of

several countries of the same region to improve their respective campaign techniques by learning from one another. More direct and restricted meetings on a national level, however, can also be very effective in coordinating and raising awareness among civil society participants. This was confirmed at the meeting in Niger when the representatives of the entire national NGO community and of three international NGOs had an in-depth consultation and discussion of the ICC Statute, its mechanisms and potential challenges to practical application.<sup>76</sup>

Tanzania has a large NGO community that has close relations with the government while Benin has a very strong NGO, human rights presence in their country and is a model in the region concerning the education of civil society regarding ICC legislation and information on the BIA issue. Francis Dako emphasized the importance of civil society and NGOs concerning the BIAs: In respect to Benin, Mali and Niger and their ability to withstand U.S pressure concerning the BIAs, one main reason can be given for this:

“The present state of activeness within civil society organizations and NGOs have gone a long way by hampering the inability of the Governments in these Countries in acceding to the BIAs, even if the Governments wanted.”<sup>77</sup>

He continues regarding Mali:

“National pride has influenced policies in most African countries in recent times. In the case of Mali for example, partisan pressures, and national pride in not wanting to be stigmatized as a ‘puppet government’ of the U.S. superpower status, irrespective of whatever economic incentives the U.S. government gives to boost it’s economy, is to my understanding the reason why the Malian government has refused to signed the BIA.”<sup>78</sup>

In *Benin: A Model for Cooperation between Government and Civil Society*, Francis Dako emphasizes the importance of NGOs in promoting awareness of issues related to the ICC:

“In December of 2002, a dozen local NGOs in Benin created the Benin Coalition for the ICC. Composed mainly of human rights specialists and law practitioners, they developed a close collaboration with government experts interested in the ICC process, including officials of the Ministries of Justice and Foreign Affairs. As a result, NGOs have been able to engage in frank dialogues with government institutions. Moreover, NGOs in Benin have also successfully encouraged the government to resist intense pressure from the U.S. to sign a BIA. Among other activities, a televised debate was organized to increase awareness of this issue among the public. NGOs in Benin also urged the government to vote no in favour of UN Security Council Resolution 1422 which concerned the exemption of peacekeepers from non-state parties to the Rome Statute from the jurisdiction of the ICC. The result has been a good

relationship between civil society and public institutions which serves as an example for other states in the region to follow.”<sup>79</sup>

According to Godfrey Odongo, South African democracy is very unique in that NGOs and civil society have considerable say in the matters or affairs of government. He emphasizes:

“Indeed, a lot of government officials/Ministers were drawn from NGO ranks. This has meant that the South African Government is very responsive to international influence including the influence of international treaties: human rights treaties included.”<sup>80</sup>

There have been two human rights organizations within Namibia that have been instrumental in pressuring the government to not sign a BIA. The National Society of Human Rights (NSHR) urged lawmakers not to agree to U.S. requests to sign a BIA and the Legal Assistance Center (LAC) backed the Namibian government for rejecting a request by the U.S. to shield its soldiers from prosecution in the ICC.<sup>81</sup> In Kenya, the Kenya National Commission on Human Rights (KNCHR) has been very instrumental in educating the public and government concerning the ICC and BIAs. In a forum hosted by the commission, Political Affairs Minister Thuita Mwangi stated:

“Article 98 was never intended for use to enact new agreements and Kenya must be commended for standing up to the U.S. purely for the stakes involved in as far as Kenya’s role as a regional mediator and for resisting U.S. pressure when it seeks to bully those states that have chosen to stand with the ICC.”<sup>82</sup>

In sum, there are numerous influences that may contribute to a country’s stance on the BIA issue: internal and external. Thus, there is not only the pressure to sign a BIA, which a government must consider, but also the enormous pressure not to sign. In this respect, it could be that some governments face a Catch-22 situation: anger the U.S. and appease civil society or vice-versa. This is very true for those young democracies such as Benin and Mali who face increased domestic pressure to maintain the status quo. This is where civil society and local NGOs are helpful in that they may assuage the concerns of both parties through education and support, not to mention develop stronger ties with government officials thus influencing decisions concerning foreign policy issues.

*Hypothesis 3: Based upon domestic jurisprudence, the Countries refuse to sign a BIA because they believe it would violate their obligations as State parties to the Rome Treaty and the Vienna Convention on the Law of Treaties.*

In Benin, no implementing legislation was needed before ratification of the Rome Treaty. In Kenya, Government officials are reportedly in the advanced stages of drafting the necessary implementing legislation. Lesotho is using Canada's implementing legislation as a model. The National Assembly of Mali has completed the process of amendment to its Criminal Code to make it consistent with the Rome Statute. In Namibia, the government studied domestic laws as well as the Rome Statute, in order to determine if changes were necessary before ratification could take place. The bill on ratification of the Rome Statute in the National Assembly was adopted unanimously. In Niger, there was a positive attitude towards the Rome Statute in the National Assembly and among the leaders of the main political parties: legislation is in progress. In South Africa, Parliament adopted implementation legislation, which includes provisions on cooperation with the Court and universal jurisdiction, which came into effect in 2002. In Tanzania, an implementation network was formed which prepared an analysis of the compatibility of the Rome Statute with relevant Tanzanian law. Following approval by the Cabinet, the Parliament of Tanzania ratified a protocol on the Rome Statute.<sup>83</sup> In sum, all of the eight countries have worked vociferously to draft domestic legislation in order for laws to be consistent with the Rome Statute.

They have also covered all of the legal aspects of the BIA issue when needed with NGOs, legal scholars and government officials. For example, Benin has been a model when it comes to enacting legislation to cover the Rome Treaty. Its model has been followed by various countries in the region. Benin subsequently sent the Article 98 Agreement to its Supreme Court for a legal analysis. Accordingly, per Benin's Supreme Court, the violation of obligations under the Rome Statute prevent Benin from signing a BIA along with its obligations as a State Party to the Vienna Convention on the Law of Treaties (VCLT). The issue of legality seems to be an overriding issue concerning some states decisions to sign a BIA. For example, according to Francis Dako:

“Obviously, certain domestic issues, legal obligations, and alternate aides have obliged some of these Countries from signing the BIA. To illustrate this point, we can take the case of Benin. In this Country, the primacy of law for example, obliges the Head of State to seek legal opinions prior to acceding to any international agreement. And from the legal opinion issued by the Supreme Court, the Government of Benin cannot sign the bilateral agreement proposed by the American Government without compromising

its obligations under the Rome Statute establishing the ICC. A common stance is that Benin, Mali and Niger are State Parties to the Rome Statute and have common domestic legislation's that deter them from signing any international agreement that will compromise their commitment to the ICC.”<sup>84</sup>

The Supreme Court opinion stipulated that Benin cannot sign an agreement which would violate its obligations to the spirit and letter of the Rome Statute because:<sup>85</sup>

(1) General Principles Governing the Implementation of Treaties

It should be recalled that the rule *Pacta Sunt Servanda* affirmed in the Vienna Convention of May 23, 1969, to which Benin is also a party, rules that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”(Article 26). The corollary of this provision can be found in Article 18 of the Vienna Convention which provides that “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty.”<sup>86</sup>

(2) Specific Obligations of Benin to the Rome Statute

Benin ratified the Rome Statute, which imposes obligations such as cooperation with the International Criminal Court; the reach of such obligation would be limited by the draft agreement submitted for signature. Benin cannot go against the Rome Statute by basing itself on the examples of Article 98 of the statute. In the absence of reservations, which Article 120 formerly prescribes, any agreement which would come into effect following [the ratification of] the Rome Statute can only be interpreted as violating the good execution of its obligations.<sup>87</sup>

(3) Regarding the Internal Order

The Benin Constitution of December 11, 1990 defines the principles of defense of human values as indefeasible; it therefore cannot admit through bilateral agreements provisions that hamper the prosecution of crimes against humanity. Benin cannot sign the bilateral agreement, especially given the fact that it failed to emit any reservations during the ratification of the Rome Statute, pursuant to the provisions of Article 124 which stipulate that “a State which becomes party to the statute can declare, for a period of seven years from its entry into force of the statute, that it will not accept jurisdiction of the Court over the crimes defined in Article 8 when it is alleged that such crime was committed on its

territory or by one of its nationals.” Furthermore, if the motivations of Benin at the time of ratification have changed in light of new circumstances by virtue of the rule “*Rebus sic Santibus*” rule according to which one can invoke fundamental change of a circumstance to modify the content of its obligations, the Government of Benin could then foresee, prior to the signature of the said draft bilateral agreement, an amendment, revision or withdrawal provided for respectively in Articles 121, 123 and 127 of the Rome Statute.<sup>88</sup>

I asked Godfrey Odongo for his view on legal obligations and the impact on countries decisions to not sign a BIA. The following are his remarks:

“A feeling of a legal obligation towards the ICC is very much discernible in South Africa. I would also say that if you look at a general African record, a feeling of legal obligation towards the ICC is a premise that one can say has shaped Africa's perception towards the ICC. This is motivated by a number of factors: First, Africa, more than any other continent, remains the bloody continent of wars in which atrocities abound. The decades old wars in South Sudan (and now Darfur), Somalia, Northern Uganda (where forceful child conscription and mass atrocities, murders, rapes, pillage on civilians has been witnessed in high scale), the never ending wars in the DRC and Burundi, Rwanda pre and in 1994, Liberia, Sierra Leone, Angola (until much recently), Mozambique and many other examples, all point to the fact that the crimes within the ICC ambit have been witnessed in Africa, perhaps more than any region in the world. It is welcome that many initiatives at different levels are now in place to negotiate peace, forestall or prevent war etc. However, the fact is, these wars have had a big influence in the conscience of African governments, which have moved with remarkable speed to be party to the ICC by ratifying the treaty. The motivating point seems to be a desire to say “no” to crimes within the ICCs ambit (hence legal obligation). This desire to affirm a legal obligation may have filtered into the refusal by a number of African States to water down the ICCs purpose by being party to the BIAs.”<sup>89</sup>

“The South African Government is very responsive to the influence of international treaties. This extends to their Constitution as interpreted by an independent Constitutional Court. In effect, this means that the ICC rule of law framework falls into the scheme of a government or democracy, which is receptive to international ideas. There is in place a Judiciary, which is ready to question and in some cases veto the Executive/Parliament and a Parliament, which has the hallmarks of independence. These are relevant factors for South Africa's approach to a number of issues. The influence of international law on a number of issues-women's rights and domestic legislation, children's rights, restorative justice etc is very directly remarkable in South Africa even in court jurisprudence than say Kenya where international law's influence on a number of issues.”<sup>90</sup>

Odongo goes further by explaining the significance of domestic legislation versus international law:

“Another point is that for most Anglophone African Countries (with an English Common law or Roman-Dutch law heritage in their legal system), a system of dualism applies in respect of application of international law-hence domesticating legislation is often needed to bring into force international treaties. This may even apply to Francophone African countries (with a civil law system) and a monistic system where a treaty is not self-incorporating-like a significant part of the ICC treaty. The record of domestication with regard to general UN treaties for example ICESR, Torture Convention, CEDAW etc.,

has not been very good. However, the ICC treaty seems to be a different case. Domesticating legislation is in place or in the pipeline. What this tells us is that a number of African countries are taking their legal obligation under the ICC treaty seriously. This can further be supported by the premise that Africa had a prominent place in the drafting stage of the treaty (unlike in many other treaties e.g. human rights treaties such as the CRC that had only one African Sub-Saharan African State representing the rest). This way, Africa may feel as part of the ICC process as the rest of the world. Hence an active participation post adoption of ICC treaty as evidenced by ratification, nomination and election of judges and other officials and ICC meetings.”<sup>91</sup>

Additionally, I have found that Kenya has also opposed signing a BIA in part because of legal issues.

The Law Society of Kenya (LSK) believes that the BIA amounts to double standards. Chairman Tom Ojienda stated:

“The BIA is contrary to international law and would constitute a betrayal of the Kenyan people. The BIA also contravenes Article 18 of the VCLT, which states that countries that have ratified a treaty are obliged to refrain from acts that defeat the object and purpose of the treaty.”<sup>92</sup>

Mutula Kilonzo, a nominated Kanu MP, argued:

“Kenya should stand firm and only react to good laws given that the U.S. has in the past two decades been perceived as the vanguard of human rights, rule of law and administration of justice and governance. For lawyers and the LSK, the key issue is that signing a BIA with the U.S. could also mean the loss of EU support for any lawyer from Kenya ever getting a job at the ICC as a judge or prosecutor.”<sup>93</sup>

At a meeting for the formation of a South Africa-Kenya bi-National Commission (BNC), both governments rejected what they called U.S. “intimidation and diplomatic arm-twisting” on the BIA Issue.<sup>94</sup> Additionally, the South African Cabinet announced its decision to not sign a BIA with the U.S. stating: “South Africa’s position in this regard is premised on its commitment to the humanitarian objectives of the ICC and the country’s international obligations.”<sup>95</sup>

A few African countries may have other reasons for not signing a BIA through special ties to the ICC. For example, the South African Government nominated Judge Navanethem Pillay, President of the ICTR, for election as a judge at the ICC. Additionally, Mali nominated Judge Fatoumata Dembele Diarra, who served as ad litem Judge in the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>96</sup> It serves to reason that any country that is a State Party to the ICC and has a Judge on the ICC bench would not do anything to undermine the functions of the Court. I have found out through my research that Ghana (who also has a Judge on the ICC bench) did not sign a BIA, but instead received a waiver from

the U.S. This waiver means that Ghana is exempt from ratifying a BIA and its military aid would not be affected. It did however sign an executive agreement stating that it would not extradite U.S. nationals to the jurisdiction of the ICC.<sup>97</sup> In addition to this, at a meeting on the ICC and Africa in 2003, The Minister of Foreign Affairs in Ghana, the Hon. Nana Akufo-Addo stated:

“Despite the various conflicts that continue to bedevil the continent, the masses of people continue to support the rule of law. The signing of Article 98 agreements with the United States are not a reflection of double standards but rather a continuation of the United States policy of not supporting the Court. The emphasis should be to make the rule of law effective at the national level.”<sup>98</sup>

It is safe to say that although Ghana signed an executive agreement, it does not take away the concept of the rule of law inherent to the ICC.

Although I did not find any concrete evidence linking Tanzania's not signing the BIA to the ICTR, it stands to reason through some common sense that it might have some effect on the government's decision to abide by its principles under the Rome Statute. If anything, the ICTR has shown that the presence of the court raises the awareness of the importance and value of human rights and serves as a deterrent for people to commit war crimes. Additionally, the Government of Tanzania is frequently called upon to mediate between its neighbors. For example, it served a crucial political role, serving as the seat for the Arusha peace talks aimed at ending the ethnic bloodshed in Burundi.<sup>99</sup> However, I was told by a CICC official that “Tanzania would not sign a BIA because it finds the views by the U.S. towards the ICC confusing considering the U.S. supports the ICTR.”<sup>100</sup> Considering this statement, it is important to acknowledge that Rwanda is not a party to the ICC although its 1994 Genocide resulted in the tribunal. It is common knowledge that Rwanda has been very dissatisfied with the slow pace of trials and the bureaucracy involved in the ICTR and thus did not sign on as a party to the ICC. In turn, the Rwandan Government signed a BIA.

The legal obligation that some countries in Africa feel towards the ICC is very strong and not surprising considering the comments put forth by various experts and officials. It is possible that although some countries signed a BIA because of aid, they still feel strongly towards the ICC. This can be seen by the countries that currently have situations pending before the court (Sudan excluded). It is pretty much a

foregone conclusion that if a country cannot handle its own legal affairs, then it will most likely refuse to give up aid that would benefit them. In conclusion, it is my opinion that a legal obligation to the ICC is a powerful factor for whether the eight countries in this study sign a BIA.

*Hypothesis 4: The countries refuse to sign a BIA because they believe the request by the U.S. to sign a BIA violates State sovereignty.*

According to Francis Dako, sovereignty, more than foreign policy issues, is of more relevance when it comes to whether certain countries will sign a BIA:

“Regarding the issue of foreign policy differences between the U.S., Benin, Mali and Niger: there have been no major disputes on record that would warrant such a strong anti-U.S. stance as per the BIA issue. On the average, the U.S. government has enjoyed good bilateral and multilateral cooperation with all three countries over decades. In my opinion, the government and people of Niger refuse to sign the BIA simply because they believe that any international agreement should serve her interest to the fullest, and also respect her sovereignty without bias.”<sup>101</sup>

In Kenya, government officials said the U.S. move showed lack of respect for Kenya’s sovereignty. Kenyan lawmaker Paul Muite reasoned:

“The U.S. can keep their dollars as long as they respect our dignity. It is not only Americans who can train our military personnel, and it is time we started looking at the European Union, China, South Africa or even Japan for such training.”<sup>102</sup>

According to the Minister of Political Affairs, Thuita Mwangi, “Kenya does have some point of leverage with the U.S. in that it is the site of the regional headquarters and has the largest U.S. Embassy in East Africa, coordinating activities in nine other countries in the region.”<sup>103</sup> David Musila, the chairman of the Liaising Committee of Parliament in Kenya also stressed dissatisfaction with the U.S. stance on the BIAs. Musila recalled the 1980s saga of an American soldier who killed a Kenyan woman but got off with a Sh500 fine and repatriation back to his country: “We should not allow Kenya to be treated like that again. Let Americans keep their money and we protect our country's sovereignty.”<sup>104</sup>

Lesotho also cited sovereignty as an issue regarding the BIA. According to a statement made by His Excellency Professor Lebohang K. Moleko:

“Lesotho favors an approach that would take into consideration the concerns of those who are still doubtful of the ICC, with a view to accomplishing the universality of the Court. In a similar vein, Lesotho believes that the rights of States to sovereignty cannot be allowed to justify impunity and to compromise humanity’s best hope for justice.”<sup>105</sup>

However, one problem with the sovereignty argument is that it does not explain why so many African countries have signed BIAs while so few have not. Therefore, Hans Morgenthau adds a different dimension to the argument on sovereignty in that “sovereignty is not freedom from legal restraint” (Barker 2000: 42). He explains further:

“The quantity of legal obligation by which the nation limits its freedom of action does not as such, limit its sovereignty. The off-heard argument that a certain treaty would impose upon a nation obligations as onerous as to destroy its sovereignty is, therefore, meaningless. It is not the quantity of legal restraints that affect sovereignty, but their quality. A nation can take upon itself any quantity of legal restraints and still remain sovereign, provided those legal restraints do not affect its quality as the supreme law-giving and law-enforcing authority” (Barker 2000: 42).

I will admit that since so many African countries have signed BIAs, the sovereignty argument seems weak as countries are free to reject any type of bilateral agreement. It seems more likely that the strategy used to get the BIAs signed could be of importance also. It could be what some countries are referring to when they put forth the sovereignty argument. In other words, its not so much what you do but how you do it. For example, who the U.S. government sends to represent them and the diplomatic skills needed to persuade a country to acquiesce to a particular foreign policy issue. For example, Colin Powell’s powers of persuasion are probably different than John Bolton’s (both have been responsible for the BIA issue at times). Currently, Constance Newman, Head of African Affairs at USDOS, who is more familiar and sensitive to African politics, has entered the fray. Thus, *whom* the U.S. sends is an important diplomatic factor.

Of course, the other side to the sovereignty argument pertains to that argued by Kilby previously (p17) in that:

“The duties of the aid donor appear to require aid conditionality that directly conflicts with respect for recipient state sovereignty in that it conflicts with the duty of the state to improve the welfare of its citizens, while at the same time preserving state sovereignty.”

Kilby issues a powerful argument and one that may deserve closer attention providing there are no other factors than aid that would influence a countries decision to forego a BIA. In this respect, a government may feel that their duty to provide for citizens through aid is more powerful than state sovereignty.

Overall, the comments by government officials citing the sovereignty issue seem valid; however, I am not sure if the real issue is legal sovereignty, political sovereignty or both. I realized during the course of this research that sovereignty means different things to different people. No comment has been specific enough for me to conclude sufficiently that sovereignty is an important factor for the majority of countries, however, it does seem so for the eight countries in this study, particularly Kenya and Lesotho.

## **8. Conclusion**

The results of this study indicate general support for my hypothesis and approach. The degree of cooperation with respect to signing a BIA has been charted within the constraints imposed by NGO's and civil society, a legal obligation and state sovereignty and support the view that these variables remain important factors in the ability of the eight countries to refuse to give into signing a BIA. The findings also sustain an approach sensitive to the role of regional organizations and alternate aid through external allies. This study began following the traditional assumption that weaker states usually give into the stronger power because they are dependent upon them. However, the dependency theory paradigm does not hold true for the eight countries in this case study as the aid factor does not seem to be an explanatory factor for whether these countries sign a BIA.

The existing literature on weak states versus strong states is applicable to this research in that weak states have various alternatives at their disposal in order to gain leverage to withstand pressure from a stronger power. The theories of institutionalism and the rational actor model are also applicable. Institutions are important within the African region. They create an atmosphere of cooperation whereby common interests are realized and whereby groups may mobilize in order to promote their agendas. This is evident in hypothesis two regarding NGOs and civil society, citizen involvement in ICC meetings and

workshops designed to facilitate the implementation of the Rome Statute, individual governments' work involving domestic legislation, and educating the governments of countries on the BIA issue. The legal obligations that all of the countries stress regarding the ICC is also relevant under institutionalism as governments have used domestic legal institutions to examine the legality of the BIA in relation to their obligation under the Rome Statute and the Vienna Convention on the Law of Treaties. In the example of Benin and South Africa, this move has had an effect on their decision regarding the BIA. A legal obligation also falls in line with the rational actor model and is indicative of how African governments weigh their decisions accordingly and analyze what benefits they may obtain by the strategic decisions they make.

African countries have allied with external actors in order to further their goals concerning the ICC and the BIAs. The EU and Canada have embraced the ICC's jurisdiction and created spheres of influence within African countries thereby forcing policies in line with their own on them and vice-versa. One example is through the action of the EU who has created a series of mandates which support the ICC in the African region and is willing to assist certain African countries through extra aid in their quest to remain strong in the face of pressure concerning the BIA issue.

The stance that South Africa, Benin and Kenya have taken is of strong relevance in this author's view. Consistent with the rational actor model, all governments have remained strongly committed to the ICC through the implementation of domestic legislation and their vocal opposition to the BIA issue via outreach programs to all countries in Africa. Their maximum goal and payoff has been to enforce their obligations under the Rome Statute regardless of the pressure from the U.S. In this respect Kenya and Lesotho's governments have remained vocal and strengthened their ability to keep the U.S. at arms length through opposition to the BIA in the name of State sovereignty.

Individually, the most important variable concerning these eight countries to withstand pressure from signing a BIA seems to be a strong belief towards a legal obligation to the ICC. Although other countries that have signed the BIAs may feel strongly about the ICC too, there are obviously other mitigating

factors such as aid, which would explain why they signed a BIA while at the same time supporting the ICC and its mission. The variables of Judges and the ICTR alone may present a weak argument, but when taking into account the statement of the government of Ghana on aid and the relevance of Rwanda's view toward the ICTR, the legal factor is strengthened concerning Tanzania, Mali and South Africa.

In addition, the regional organizations of ECOWAS and the SADC concerning mandates relative to the ICC and BIAs are powerful yet do not explain why most of the countries in these organizations signed a BIA. I find the argument of sovereignty a little elusive, as certain aspects of sovereignty are bound to be relinquished with any type of agreement between countries. In my opinion, the main issue lies within the coercive pressures put on a government and their ability or decision to stand up or back down on certain issues. However, the ability to remain firm in the face of pressure from the U.S. is strengthened by the support of external allies. Moreover, there has always been a debate concerning sovereignty and legal issues, which may be useful for another study.

This research set out to explain the contributing factors that enabled *eight African countries to withstand pressure from the U.S. by not signing a BIA*. The ability of strong states to coerce weaker states into certain foreign policy objectives is nothing new. However, the response of weaker states concerning the BIA is interesting and relevant for today's times, not to mention overlooked in the literature. As Anda reasons in his study of the region of Western Africa in *International Relations in Contemporary Africa*, "little or no work has been done to estimate foreign policy behavior in Africa on a comparative basis" (Anda 2000: 11). Similarly, although there is existing literature concerning the legality of the BIAs, there has been little attempt to analyze the behavior of a certain region in response to the BIA issue with the exception of Lana Wylie's study on the Caribbean States. Thus, this study contributes to the literature and begins it concerning Africa's response to the BIA issue. The interest in countries that do not sign a BIA is of importance as it helps to understand why and how weaker countries refuse to give into pressure from a stronger power. Although theories may provide explanatory power towards the understanding of state behavior, specific variables are more instructive when examining *why and how* states behave as they do.

The strong commitment of all of the eight countries in this study reinforce how cooperation and facilitation may be enhanced by taking advantage of institutional structures and mechanisms through regional mechanisms and external power relations.

Why should one bother with studies of certain regions or studies of weak state behavior? First, behavior in any region deserves to be studied for the sake of understanding international relations behavior. Second, according to Anda, “neglecting the behavior of weak states in foreign relations is contradictory and unjustifiable as the weakness of states should provide the basis for scholarly understanding of their efforts at cooperation in international fora.”<sup>106</sup> Third, there seems to be a general assumption that weak states have no voice, no influence and no power. This study reinforces that weak states are powerful in their own right and do have avenues available to them should they seek to use them.

On a more theoretical level, this study demonstrates the relevance of institutionalism and the rational actor model in analyzing the foreign policies of weaker states in the international system. African countries are more likely to obtain a greater benefit from cooperating with other institutional structures and allying with other regions that are cognizant of Africa’s needs. This enables the weaker state to resist pressure or gain leverage over the stronger state. Thus, by extending existing theory, this study is an addition to other works that analyze the behavior of weaker states.

Studies of foreign policy that are generalizable should be applicable to all types of states. However, the variables I analyzed may not be regionally specific. Regional organizations, NGO’s and civil society, a legal obligation and the issue of sovereignty are all variables that may be issues within other regions although some variables may be more important than others. Godfrey Odongo summed up the problem of trying to generalize factors concerning the BIAs:

“My view is that we cannot have a general explanation (s) to explain the trend in different countries. The country-approaches to the BIAs remain domestic affairs. It is interesting how the approaches remain diverse and baffling on some occasions...each country is specific with a unique relationship with the U.S (these positions may be similar/converging for some countries). Hence, unique and diverse political, economic and social contexts would explain the different positions. Perhaps key government players in these countries such as Heads of States, Foreign Affairs Ministers and others may have given us specific explanations as to how they approach U.S requests for them to sign or ratify BIAs. As it is, we can only speculate provided this is grounded on some justification.”<sup>107</sup>

Domestic variables such as politics, social issues, elite behavior, executive and judicial issues may also contribute to states decisions in signing a BIA. These are issues that could be of further relevance concerning regional or individual country studies.

It is useful to look at some additional data observations concerning this study. I had difficulty in finding certain country data in relation to the BIAs. Therefore, one weakness to this study is that some of the countries that are included in the regional organizations I discuss have not publicly released information as to why they signed a BIA. Was it pressure over the aid that caused them to sign? One cannot say positively without delving deeper into each countries domestic issues. I do suspect that after speaking with experts within Africa that some governments are hard-pressed to relinquish information in order to bypass fallouts from other governments. However, lack of data should not keep a researcher from dealing with a particular issue simply on the basis that data is unavailable.

My inquiries into the AU did not produce anything substantial concerning mandates, etc. What I did find was that the AU constitution deems the issue of *jurisdiction* a sovereign matter, thus it is hesitant to pressure states on the issue of a BIA. Since all 53 African States are members of the AU (with the exception of Morocco), one recommendation would be for the “AU to play a more prominent role in issues such as the BIAs through harnessing a collective political role” considering its high profile involvement in peacekeeping, etc.<sup>108</sup> This issue would be relevant for future inquiry and research considering the huge obligations the AU is involved in currently; most notable, its peacekeeping initiatives in the region and its support to Sudan. Further research might also include the domestic politics of each individual country as a possible variable: this would involve a very large case study. These issues will be useful for an expanded study of Africa and for the inclusion of other geographical regions of the world.

Another area for future research might include examining existing SOFA agreements in each government in Africa. In addition, examining each governmental response relative to understanding the

legal ramifications of the BIA could be important: this would involve examining the Constitution of each country to see if the Executive may sign the BIA without the knowledge of Parliament.

## NOTES

<sup>1</sup> *American Servicemembers' Protection Act of 2002*, U.S. Code 7421, sec. 2001 (2002). Section 2008 authorizes the President to use all means necessary and appropriate to bring about the release of any U.S. military, elected or appointed USG personnel, or other persons working for or employed by the USG who is being detained or imprisoned by, on behalf of, or at the request of the Court. This also applies to the same named individuals with NATO countries, major non-NATO allies, and Taiwan. In addition, this applies to individuals detained or imprisoned for official actions taken while one of the above mentioned eligible individuals.

Note: On March 31, 2005, with eleven votes supporting, and four countries including the U.S. abstaining, the UN Security Council referred the situation in Darfur, Sudan to the ICC. Although the American Servicemembers' Protection Act of 2002 prohibits the U.S. from cooperating with the ICC, this legislation contains broad waivers that permit cooperation. Section 2015 reads: "Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity." Section 2011 also grants the President the capacity to cooperate with the ICC or provide national security information to the Court, requiring only a notification of Congress within 15 days.

**Note: See Appendix A for proposed text of BIA.**

<sup>2</sup> Coalition for the International Criminal Court. "*U.S. Bilateral Immunity or So-Called Article 98 Agreements.*" 30 September 2003.

<sup>3</sup> See Defense Institute of Security Assistance Management. "*Security Assistance Legislation and Funding Allocations.*" This includes Argentina, Australia, Egypt, Israel, Japan, Jordan, Philippines, New Zealand, South Korea and Taiwan.

<sup>4</sup> Jim Lobe, "U.S. Punishes 35 Countries for Signing on to the International Criminal Court." *Inter Press Service News Agency* 2004.

<sup>5</sup> North Africa is included in the Middle Eastern Region.

<sup>6</sup> Coalition for the International Criminal Court. "*Status of U.S. Bilateral Agreements.*" 20 June 2005. Note: North Africa includes Algeria, Egypt, Libya, Morocco, Sudan, Tunisia and Western Sahara, which represent the Middle Eastern Region. Morocco has administrative control over Western Sahara.

<sup>7</sup> International Criminal Court. Situation and Cases. <http://www.icc-cpi.int/cases.html>

<sup>8</sup> Cote d'Ivoire has also accepted the ICC's jurisdiction for specific crimes.

<sup>9</sup> World Policy Institute. June 2005. "U.S. Weapons at War 2005: Promoting Freedom or Fueling Conflict?" U.S. Military Aid and Arms Transfers since September 11.

<sup>10</sup> U.S. Congressional Record, House of Representatives debate on July 15, 2004, under the Heading H. 5881 and H 5882. to Amend the Foreign Operations Appropriations Bill.

Note: The countries in this study would be ineligible for assistance from this fund meant to help strengthen African countries capabilities to impede the flow of terrorist finances, improve border and airport security, and improve judicial systems.” Citizens for Global Solutions. “*Nethercutt Amendment: Cutting Off Our Nose to Spite Our Face.*” 23 July 2004.

<sup>11</sup> According to the State Department, the military cooperation programs reinforces democratizing efforts, develops peacekeeping capabilities, enhances regional stability, institutionalizes respect for human rights and combats terrorism. “Sanctioning Allies: Effects of the Article 98 Campaign.” World Federalist Association. December 2003.

<sup>12</sup> Bill Clinton had then War Crimes Ambassador David Schaffer sign the Rome Statute on December 31, 2001. This signature would ensure that the U.S. would still be able to be involved in the process of negotiations on the Court. U.S. Department of State. “*Fact Sheet: The International Criminal Court.*” May 2002.

<sup>13</sup> Carolyn Fehl, “Explaining the ICC: A Practice Test for Rationalist and Constructivist Approaches,” *European Journal of International Relations* 10, no.3 (2004): 362.

<sup>14</sup> *The Rome Statute of the International Criminal Court.* Article 17 (1) (a). Issue of Admissibility.

<sup>15</sup> Ibid. Articles 12 & 13.

<sup>16</sup> U.S. Department of State. Bureau of Political-Military Affairs. “*Frequently Asked Questions about the U.S. Government's Policy Regarding the International Criminal Court.*” (Washington, D.C. 2003).

<sup>17</sup> Status-of-forces Agreements define the legal status of U.S. personnel and property in the territory of another nation. The purpose of such an agreement is to set forth rights and responsibilities between the United States and the host government on such matters as criminal and civil jurisdiction, the wearing of the uniform, the carrying of arms, tax and customs relief, entry and exit of personnel and property, and resolving damage claims. See GlobalSecurity.org.

<sup>18</sup> Cited with Permission of the Author.

<sup>19</sup> Handel, 1981,120.

<sup>20</sup> J. Craig Barker, *International Law and International Relations.* (London: Continuum Press, 2000):79.

<sup>21</sup> Interview by Author with Francis Dako and Godfrey Ogondo, 2005.

<sup>22</sup> Ibid.

<sup>23</sup> This term is best known regarding Stephen M. Walt's "balance-of-threat" theory of alliance formation. I am using the term in a similar way but applying it as a defensive mechanism by which states may counter pressure from a stronger state.

<sup>24</sup> Richard Gibb, "South Africa in Transition: Prospects and Problems Facing Regional Integration," *The Journal of Modern African Studies* 36, no.2 (1998): 289.

<sup>25</sup> Anne Angwenyi and Cory Briggs. "How to Ensure the Judiciary Enforces Treaty Obligations." African Center for Technology Studies. <http://www.acts.or.ke/Innova99%20-%20Judiciary.htm>

<sup>26</sup> U.S. Foreign Military Assistance Budget Request by Region: Africa.  
[http://www.fas.org/asmp/profiles/aid/fy2005/CBJ05\\_Africa.pdf](http://www.fas.org/asmp/profiles/aid/fy2005/CBJ05_Africa.pdf)

<sup>27</sup> ACOTA is the successor to the African Crisis Response Initiative (ACRI), a popular partnership that helped train and equip more than 6,000 troops from seven African nations in the years 1997 to 2000. Several of those ACRI forces later helped implement Chapter VI peacekeeping provisions of the UN Charter in several conflicts on the continent. ACOTA emphasizes a more robust Chapter VII approach that allows UN mandated forces to more aggressively protect civilians while implementing cease-fire accords. It is an approach that lawmakers are calling for in Darfur, Sudan. ACOTA has trained and helped equip almost nine battalions of African troops, or close to 9,000 soldiers, for emergency duty as peace enforcers when called on by regional organizations like the Economic Community of West African States (ECOWAS) and the African Union (AU). Source: U.S. Policies and Issues: Embassy of the United States in Japan. Jim Fisher-Thompson.

<sup>28</sup> U.S. Department of State. (USDOS). FY 2005 Congressional Budget Justification for Foreign Operations. Africa Region. Benin.

<sup>29</sup> Ibid., USDOS, Mali.

<sup>30</sup> Ibid., USDOS, Niger.

<sup>31</sup> Ibid., USDOS, Kenya

<sup>32</sup> Ibid., USDOS, Tanzania.

<sup>33</sup> Ibid., USDOS, Lesotho and Namibia.

<sup>34</sup> Ibid., USDOS, South Africa.

<sup>35</sup> Safe Skies for Africa. Nethercutt Amendment: Cutting Off Our Nose to Spite Our Face. 23 July 2004. Citizens for Global Solutions.

<sup>36</sup> Ibid., U.S. Foreign Military Assistance Budget Request by Region: Africa.

<sup>37</sup> Benson Olugbuo. 5 July 2005, Interview.

<sup>38</sup> Thuita Mwangi. “*Relevance of ICC to Kenya: Interpretation of Article 98 to the Rome Statute.*” Kenya National Commission on Human Rights. The Forum on the ICC and African Court on Human and People’s Rights. October 2004. Follow up on Article: Phone Interview with Author July 2005. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

<sup>39</sup> Sally Eberhardt, “Aid that Binds: US Government ‘Insiders’ Mull the Real Costs of Anti-ICC Legislation.” The ICC Monitor, April 2005. p5.

<sup>40</sup> Ghana Web. “*U.S. Bullies Ghana through International Carrot and Sticks Politics.*” 7 November 2003.

<sup>41</sup> Associated Foreign Press. “*U.S. Signs ICC Immunity Deal with Liberia.*” Oct. 8, 2003.  
[http://quickstart.clari.net/qs\\_se/webnews/wed/cg/Qus-icc-liberia.R7Lb\\_DO8.html](http://quickstart.clari.net/qs_se/webnews/wed/cg/Qus-icc-liberia.R7Lb_DO8.html)

<sup>42</sup> CJIL. “*U.S. Threatens to Cut Military Assistance to Nations Supporting the International Criminal Court.*”  
<http://www.cejil.org/comunicados.cfm?id=393>

<sup>43</sup> Letter to Colin Powell from HRW on Bullying Tactics against ICC. June 30, 2003.  
<http://hrw.org/press/2003/06/usa063003ltr.htm>

<sup>44</sup> See Europa World Yearbook 2004. Niger.

<sup>45</sup> Benson Olugbuo, Notes to Author, July 5, 2005.

<sup>46</sup> Francis Dako, Francophone Africa Coordinator (Cotonou, Benin), Interview with Deborah Cotton: 7 July 2005. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

<sup>47</sup> Odongo, Godfrey Odhiambo. Community Law Centre, University of the Western Cape. Interview with Author. 25-26 May 2005. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

<sup>48</sup> ACP-EU Joint Parliamentary Assembly. “*Resolution on the Situation in West Africa.*” ACP-EU 3627/03/fin. 11-15 October 2003.

<sup>49</sup> ACP-EU Memorandum. “*ACP-EU Joint Assembly Affirms Principle of Compensation For Developing Countries Suffering Consequences of Bilateral Non-Surrender Campaign.*” 16 October 2003.  
Note: The Cotonou Agreement is the Treaty establishing the EU-ACP.

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- <sup>52</sup> Ibid., Thuita Mwangi.
- <sup>53</sup> Economic Community of West African States. “*ECOWAS, Canada Sign \$45 Million Dollar Agreement on Peace and Security.*” 17 March 2004.
- <sup>54</sup> Sanctioning Allies: Effects of the Article 98 Campaign. <http://www.iccnw.org/documents/otherissues/impunityart98/12.02.03-BIAsDamage.doc.pdf>
- <sup>55</sup> U.S. Dept. of State. 2003 Performance and Accountability Report.
- <sup>56</sup> USAID 2005 Statutory Checklist. <http://www.usaid.gov/policy/ads/200/202saa.pdf>
- <sup>57</sup> U.S. Policy Regarding the International Criminal Court. 3 September 2002. Library of Congress.
- <sup>58</sup> Ibid., Dako.
- <sup>59</sup> HRW. Special Issue and Campaigns for the ICC. World Report 2000. <http://www.hrw.org/wr2k2/contents.html>
- <sup>60</sup> Olugbuo, Benson Chinedu. “*Implementation of the Rome Statute of the ICC in Africa: An Analysis of the South African Legislation.*” p194-195.
- <sup>61</sup> Human Rights Watch. “*The Status of ICC Implementing Legislation.*”
- <sup>62</sup> ICC Monitor. “*African Countries Stress Importance of National Implementation.*” Issue 20. April 2002. p5.
- <sup>63</sup> Human Rights Watch. “*Rights Group Praises South Africa For Stand On International Criminal Court.*” Rome, 15 June 1998.
- <sup>64</sup> Ibid., Benson Olugbuo, p192-193.

<sup>65</sup> Pretoria Statement of Common Understanding on the International Criminal court Adopted by the Delegates from the SADC States at the Conference on the International Criminal Court, Pretoria, 5-9 July 1999. <http://www.iccnw.org/publications/monitor/12/monitor12.199908.pdf>

<sup>66</sup> *Ibid.*, Olugbuo, 196.

<sup>67</sup> Human Rights Watch. “*South Africa Praised on International Court: Pretoria Becomes 23rd State to Ratify War Crimes Tribunal.*” New York, 27 November, 2000.

<sup>68</sup> *Ibid.*, Mwangi.

<sup>69</sup> Fred Oluoch, “Kenya on Collision Course with ICC.” *The East African*. 25 April 2005. <http://www.nationmedia.com/EastAfrican/25042005/Regional/Regional2.html>

<sup>70</sup> ACP\_EU Joint Parliamentary Assembly. “*Resolution of the International Criminal Court (ICC).*” ACP- EU 3560/03/fin. 31 March- April 2003.

<sup>71</sup> ICC Monitor. “*The United States Attacks the ICC: Africa Must Consolidate Its Resistance.*” Feb, 2003. p7.

<sup>72</sup> ICC Monitor. “*Conferences Stress Implementation and Universal Ratification of Rome Statute.*” Feb. 2003, p12.

<sup>73</sup> Pascal Kambale, “New Momentum and New Challenges for Africa’s Ratification Campaign.” ICC Monitor. April 2002. p6.

<sup>74</sup> *Ibid.*, Kambale.

<sup>75</sup> *Ibid.*, Kambale.

<sup>76</sup> *Ibid.*, Kambale.

<sup>77</sup> *Ibid.*, Dako.

<sup>78</sup> *Ibid.*, Dako.

<sup>79</sup> Francis Dako. “Benin: A Model for Cooperation between Government and Civil Society.” *The ICC Monitor*. June 2004. p7.

<sup>80</sup> Ibid., Odongo.

<sup>81</sup> Summary of Information on Bilateral Immunity Agreements (BIAs) or so-Called "Article 98" Agreements as of June 28, 2005. [http://www.iccnw.org/documents/USandICC/BiaDB\\_Current.xls](http://www.iccnw.org/documents/USandICC/BiaDB_Current.xls)

<sup>82</sup> Thuita Mwangi has stated that these are his personal opinions and should not be stated as an opinion of the Kenyan Government.

<sup>83</sup> CICC. Africa Country Information. <http://www.iccnw.org/countryinfo/africa/tanzania.html>

<sup>84</sup> Ibid., Dako.

<sup>85</sup> Benin Supreme Court Legal Opinion on a Bilateral Agreement Between the United States and the Government of the Republic of Benin Relative to Article 98 of the Rome Statute Establishing the International Criminal Court. p3.  
**Note: Thank you to Francis Dako for information concerning Benin.**

<sup>86</sup> Ibid., p3.

<sup>87</sup> Ibid., p4.

<sup>88</sup> Ibid., p4.

<sup>89</sup> Ibid., Odongo.

<sup>90</sup> Ibid., Odongo.

<sup>91</sup> Ibid., Odongo.

<sup>92</sup> Ibid., Fred Olouch.

<sup>93</sup> Ibid., Fred Olouch.

<sup>94</sup> Ibid., Summary of Information on Bilateral Immunity Agreements (BIAs) or so-Called "Article 98" Agreements as of June 28, 2005. [http://www.iccnw.org/documents/USandICC/BiaDB\\_Current.xls](http://www.iccnw.org/documents/USandICC/BiaDB_Current.xls)

<sup>95</sup> "We'll go it alone, SA tells US." 24 July 2003. [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_1392282,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1392282,00.html)

<sup>96</sup> International Criminal Court Homepage. Judge Biographical Notes.

<sup>97</sup> Presidential Determination No. 2003-27, Waiving Prohibition on United States Military Assistance.

<sup>98</sup> Africa Legal Aid (ALA). *The International Criminal Court and Africa*. Accra, Ghana. 24-25 October 2003.

<sup>99</sup> *Ibid.*, USDOS, Tanzania.

<sup>100</sup> Desire Assogbavi, Outreach Liaison for Africa and Europe: CICC headquarters, New York. July 2004. Phone Interview by Deborah Cotton.

<sup>101</sup> *Ibid.*, Dako.

<sup>102</sup> *Xinhua News*. “Kenyans Indignant Over U.S. Pressure for Immunity Treaty.” 31 May 2005.

<sup>103</sup> *Ibid.*, Thuita Mwangi.

<sup>104</sup> Miring’uh, Eliud. “MP’s Move to Block State on ICC Treaty.” *The East African Standard*. 4 June 2005.

<sup>105</sup> “Statement by His Excellency Professor Lebohang K. Moleko, Permanent Representative of Lesotho to the United Nations, at the first meeting of the Assembly of State Parties to the Rome Statute of the ICC.” 9 September 2002.

<sup>106</sup> *Ibid.*, Anda.

<sup>107</sup> *Ibid.*, Odongo.

<sup>108</sup> Thanks to Godfrey Odongo for this suggestion.

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## **Appendix A**

### **Proposed Text of Article 98 Agreements with the United States**

#### **July 2002**

A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,

D. Bearing in mind Article 98 of the Rome Statute,

E. Hereby agree as follows:

1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.

2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,

(a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or

(b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.

4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.

5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

*(Paragraphs have been lettered and numbered for identification purposes.)*

Source: July 2002, U.S. Article 98 Template: CICC:  
<http://www.iccnw.org/documents/otherissuesimpunityagreem.html>

## **Appendix B**

### **Definitions of Types of Military Aid Withheld under ASPA**

#### **FMF (Foreign Military Financing)**

Foreign Military Financing, the U.S. government program for financing through grants or loans the acquisition of U.S. military articles, services, and training, supports U.S. regional stability goals and enables friends and allies to improve their defense capabilities. Foreign Military Sales (FMS) are made available under the authority of the Arms Export Control Act (AECA). Congress appropriates FMF funds in the International Affairs Budget, the Department of State allocates the funds for eligible friends and allies; and the Department of Defense executes the program. FMF helps countries meet their legitimate defense needs, promotes U.S. national security interests by strengthening coalitions with friends and allies, cements cooperative bilateral military relationships, and enhances interoperability with U.S. forces.

#### **IMET (International Military Education and Training)**

The International Military Education and Training (IMET) program is a low cost, key funding component of U.S. security assistance that provides training on a grant basis to students from allied and friendly nations. Authority for the IMET program is found pursuant to Chapter 5, part II, Foreign Assistance Act (FAA) 1961. The IMET program exposes students to the U.S. professional military establishment and the American way of life, including amongst other things, U.S. regard for democratic values, respect for individual and human rights and belief in the rule of law. Students are also exposed to U.S. military procedures and the manner in which our military functions under civilian control. They may receive as examples of types of training: Professional Military Education (PME) as well as technical training. Additionally, our EIMET program, a significant part of the overall IMET program, exposes students to the civilian community and its important democratic institutions. Overall objectives of the IMET program are to further the goal of regional stability through effective, mutually beneficial military-to-military relations. The IMET objectives are achieved through a variety of military education and training activities conducted by the DOD for foreign military and civilian officials. These include formal instruction involving over 2,000 courses taught at approximately 150 military schools and installations; on-the-job training; orientation tours for key senior military and civilian officials; and Mobile Education Teams (MET), which takes the curriculum to the host country.

#### **EDA (Excess Defense Articles)**

Working under authorities established in the Foreign Assistance Act of 1961 and the Arms Export Control Act, defense articles declared as excess by the Military Departments can be offered to foreign governments or international organizations in support of U. S. national security and foreign policy objectives. Typically, EDA is transferred to support U. S. allies in their modernization efforts and to assist Latin American and Caribbean nations in their counter-narcotics programs.<sup>108</sup> Excess Defense Articles (EDA) are defined in the Foreign Assistance Act (FAA) as amended, section 644(g), as the quantity of defense articles (other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors) owned by the United States Government, and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all Department of Defense Components at the time such articles are dropped

from inventory by the supplying agency for delivery to countries or international organizations under this Act.

### **Drawdowns**

Sections 506 and 552 of the Foreign Assistance Act (FAA) authorizes the President to direct transfers of on-hand Department of Defense (DOD)-stock defense articles and services (as well as articles and services from the inventory and resources of any agency of the USG) to foreign countries and international organizations in response to unforeseen military emergencies, humanitarian catastrophes, peacekeeping needs, or counter-narcotics requirements. DSCA is involved with the management of drawdowns to include coordination with the Joint Staff, Department of State, etc.; preparation and staffing of execute orders; monitoring of service execution; coordinating with the Comptroller to document expenditures against authorized ceilings; and providing formal reports to Congress on the articles, services, and training provided.

### **ESF (Economic Support Fund)**

The Economic Support Fund (ESF) promotes the economic and political foreign policy interests of the United States by providing assistance to allies and countries in transition to democracy, supporting the Middle East peace negotiations, and financing economic stabilization programs, frequently in a multi-donor context. The U.S. Agency for International Development (USAID), with overall foreign policy guidance from the Department of State, implements most ESF-funded programs.

## Appendix C

**Foreign Military Training: Joint Report to Congress,  
Fiscal Years 2004 and 2005 -  
Released by the Bureau of Political-Military Affairs  
April 2005**

**State Foreign Policy Objectives--Africa Region  
Updated: April 2005**

### U.S. Statements Regarding BIAs and Breakdown of Aid for Military Programs

Benin	FY 2004		FY 2005	
	Type of Activity	Number of Students Trained	Dollar Value	Number of Projected Students
IMET	7	\$105,098	10	\$315,077
Regional Centers	2	\$28,471	6	\$81,079
Service Academies	1	\$50,085	1	\$50,085
<b>TOTAL</b>	<b>10</b>	<b>\$183,654</b>	<b>17</b>	<b>\$446,241</b>

### U.S. Statement

Benin has still not signed an Article 98 agreement with the United States. We continue to urge the Government of Benin to do so and the government has repeated assurances that they believe an accommodation can be reached in the near future based on a draft non-aggression agreement provided by Washington. Programs such as IMET, the Africa Center for Strategic Studies (ACSS) and ACOTA will aid in increasing both the BAF's readiness and participation in international peacekeeping as well as buttressing democratic government and good governance. Benin's robust IMET program played a key role in keeping the Beninois military in the barracks, and reinstating their IMET program after signature of an Article 98 agreement will help signal our support for their democratization efforts.

As of the publication date of this report, Benin, a State Party to the Rome Statute, is prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) from receiving military assistance.

Kenya	FY 2004		FY 2005	
	Type of Activity	Number of Students Trained	Dollar Value	Number of Projected Students
ALP	2	\$18,881	3	\$1,078
CTFP	81	\$223,660	20	\$246,259
FMF	0	\$0	0	\$60,000
IMET	88	\$644,891	51	\$935,062
Masc. DOD/DOS Non-SA	2	\$295	0	\$0
Regional Centers	2	\$28,534	9	\$129,079
<b>TOTAL</b>	<b>175</b>	<b>\$916,261</b>	<b>83</b>	<b>\$1,371,478</b>

As of the publication date of this report, Kenya is not a State Party to the Rome Statute; therefore, it is not prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) from receiving military assistance. **Note: Outdated info-Kenya Ratified ICC Treaty March 2005.**

Lesotho	FY 2004		FY 2005	
	Type of Activity	Number of Students Trained	Dollar Value	Number of Projected Students
IMET	2	\$16,463	3	\$84,698
Regional Centers	2	\$27,744	4	\$66,635
<b>TOTAL</b>	<b>4</b>	<b>\$44,207</b>	<b>7</b>	<b>\$151,333</b>

As of the publication date of this report, Lesotho, a State Party to the Rome Statute, is prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) from receiving military assistance.

<b>Mali</b>	FY 2004		FY 2005	
Type of Activity	Number of Students Trained	Dollar Value	Number of Projected Students	Dollar Value
CTFP	56	\$210,563	7	\$49,866
IMET	3	\$76,534	8	\$372,213
Regional Centers	9	\$130,450	6	\$81,079
<b>TOTAL</b>	<b>68</b>	<b>\$417,547</b>	<b>21</b>	<b>\$503,158</b>

As of the publication date of this report, Mali, a State Party to the Rome Statute; is prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) from receiving military assistance.

<b>Namibia</b>	FY 2004		FY 2005	
Type of Activity	Number of Students Trained	Dollar Value	Number of Projected Students	Dollar Value
IMET	1	\$15,452	10	\$356,995
Regional Centers	2	\$28,511	6	\$81,079
<b>TOTAL</b>	<b>3</b>	<b>\$43,963</b>	<b>16</b>	<b>\$438,074</b>

Namibia, a State Party to the Rome Statute, is prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) (ASPA) from receiving military assistance, so no IMET-funded assistance has been provided since ASPA restrictions took effect. Additionally, no FMS, MTT, CT Fellowships, or Theater Security Cooperation events took place in Namibia during 2004.

<b>Niger</b>	FY 2004		FY 2005	
Type of Activity	Number of Students Trained	Dollar Value	Number of Projected Students	Dollar Value
CTFP	5	\$19,000	0	\$0
IMET	1	\$45,402	13	\$617,906
Regional Centers	8	\$123,541	6	\$81,079
<b>TOTAL</b>	<b>14</b>	<b>\$187,943</b>	<b>19</b>	<b>\$698,985</b>

As of the publication date of this report, Niger, a State Party to the Rome Statute, is prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) from receiving military assistance.

<b>South Africa</b>	FY 2004		FY 2005	
Type of Activity	Number of Students Trained	Dollar Value	Number of Projected Students	Dollar Value
CTFP	4	\$27,758	0	\$0
FMF	70	\$882,335	16	\$48,480
FMS	1	\$7,610	0	\$0
IMET	6	\$343,372	8	\$124,821
Regional Centers	4	\$51,758	11	\$147,472
<b>TOTAL</b>	<b>85</b>	<b>\$1,312,833</b>	<b>35</b>	<b>\$320,773</b>

As of the publication date of this report, South Africa, a State Party to the Rome Statute is prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) from receiving military assistance.

<b>Tanzania</b>	FY 2004		FY 2005	
Type of Activity	Number of Students Trained	Dollar Value	Number of Projected Students	Dollar Value
CTFP	2	\$47,670	1	\$40,088
IMET	2	\$51,070	24	\$552,165
Regional Centers	4	\$55,426	9	\$129,079
<b>TOTAL</b>	<b>8</b>	<b>\$154,166</b>	<b>34</b>	<b>\$721,332</b>

During FY 2003/2004, Tanzania sent one IMET-funded student to the U.S. Army Command and General Staff College at Fort Leavenworth, KS. Although ASPA restrictions preclude scheduling future IMET and FMF opportunities, the Tanzanian military has accepted three counterterrorism resident training courses scheduled for FY 2005.

The fact that Tanzania has not signed an Article 98 agreement limited their participation in U.S. military training opportunities in FY 2004 and will continue to do so in FY 2005. As of the publication date of this report, Tanzania, a State Party to the Rome Statute, is prohibited by § 2007 of the American Servicemembers' Protection Act of 2002 (22 U.S.C. 7421 et seq.) from receiving military assistance.

Note: CTFP is a Counter-Terrorism Fellowship Program under the Department of Defense that provides education and training to international partners in the war on terror.

Note: ALP is The Aviation Leadership Program that provides Undergraduate Pilot Training (UPT) to a small number of select international students from friendly, less-developed countries.