

(full text)*

"ICC – The International Criminal Court (ICC) was established through the so-called Rome Statute, signed by 139 states in 1998 in Rome. So far, 77 countries have ratified the Statute, including all EU Member States and all candidate countries for accession with the exception of the Czech Republic and Lithuania. The U.S. had signed the Statute in December 2000, but "withdrew" its signature in May 2002. Following the 60th ratification, the Rome Statute entered into force on 1st July 2002. The Court, located in The Hague, is currently being set up and is likely to be operational as of next spring.

The ICC has jurisdiction for the most serious crimes of international concern, which the Statute identifies to be genocide, crimes against humanity, war crimes and the crime of aggression. It has jurisdiction over these crimes if committed in the territory of a state that has ratified the Statute or if committed by a national of that state. The ICC's jurisdiction is complementary, i.e. it is only triggered if a State is unwilling or unable to carry out investigation or prosecution of the case under its own national criminal jurisdiction.

EU Common Position – The EU Member States, in the CFSP context, have adopted a Common Position on the ICC in June 2001. That Common Position was followed up through an Action Plan in May 2002 and was reviewed and reinforced in June 2002. The candidate countries have aligned themselves on the Common Position. The Commission supports the objectives and priorities of the Common Position, primarily through funding activities under the European Initiative for Democracy and Human Rights (EIDHR).

The objective of the Common Position, as laid down in Article 1, is to support the early establishment and effective functioning of the Court and to advance universal support for the Court by promoting the widest possible participation in the Statute. The underlying motive and overall goal in trying to achieve universal adherence (as explained in Recital 11) is to ensure the full effectiveness of the ICC. The EU's active involvement in countering various recent U.S. initiatives (ASPA, Security Council) to undermine the ICC Statute demonstrates the Member States' strong commitment to this overall goal.

Bilateral agreements and the Statute – The U.S., in countries throughout the world, has tabled a proposal for a bilateral agreement, under the terms of which "current or former Government officials, employees (including contractors), or military personnel or nationals of one Party [to the agreement] [...] shall not, absent the expressed consent of [that] Party, be surrendered [...] to the ICC [...]." So far, to our knowledge, Israel (not party to the ICC statute) and Romania (party to the ICC Statute) have concluded such an agreement with the U.S.

It is argued that it is consistent with the Statute to conclude such agreements under its Article 98(2). Article 98(2) has the following wording:

"The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender."

Article 98(2), which to our knowledge was introduced at the behest of the U.S., constitutes an exception to the general obligation under the Statute to surrender persons to the Court.

Under general rules of international law, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It is a further principle of interpretation that exceptions to a general obligation (here the obligation to surrender to the Court) have to be construed narrowly.

It is to be noted, first, that the expression "sending State" in this provision is neither explained nor used anywhere else in the Statute. In fact, it is a "technical term" taken directly from so-called Status of Forces Agreements (SOFA), i.e. international agreements, under the terms of which members of a military force sent to another state (so called "host state") by the "sending state" are usually exempted from the criminal jurisdiction of the host state. Such SOFAs are commonly used by the U.S. and others who have troops stationed abroad in the framework of alliances or peacekeeping operations. Given the use of such specific terminology it can be argued that Article 98(2) was meant to apply only to SOFAs. Thus, only members/personnel of a military force stationed abroad in the context of a military assignment would come under agreements covered by Article 98(2). Indeed, any broader interpretation of the notion of international agreements in Article 98(2) would seem to be contrary to the above-mentioned principle of interpretation that requires exception clauses to be construed narrowly. The bilateral agreements now proposed by the U.S. do not constitute SOFAs. They cover all U.S. nationals, not just members/personnel of the military force, and are not related to any military assignment. Hence, they cannot be considered to be covered by Article 98(2).

Second, it must be recalled that the *raison d'être* of the Rome Statute is to put an end to immunity for the perpetrators of the most serious crimes (see Preamble of the Statute). To allow contracting Parties to the Statute to become safe havens for such perpetrators by simply

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contracting out of their obligation to bring them to justice defeats the very object and purpose of the Statute. Therefore, in order to be consistent with the object and purpose of the Statute, Article 98(2) should be read not only to apply exclusively to Status of Forces Agreements, but even to apply to these only where they are concluded between Parties to the Statute. For where such agreements are concluded between Parties to the Statute, there is no danger that the perpetrator will ever come outside the jurisdiction of the ICC. If the state that has claimed "immunity" does not itself properly try the perpetrator, the ICC will put a request for surrender directly to that State. In the case of a state not party to the Statute, that guarantee does not exist. Hence, even if the bilateral agreement proposed by the U.S. were restricted to members/personnel of the military force in the context of a military assignment, it would still not be covered by Article 98(2).

In light of the above it must be concluded that the bilateral agreements proposed by the U.S. are not covered by Article 98(2). A contracting party to the Statute concluding such an agreement with the U.S. acts against the object and purpose of the Statute and thereby violates its general obligation to perform the obligations of the Statute in good faith (principle of *pacta sunt servanda*). Its legal obligation vis-à-vis its co-contracting parties and the Court to surrender a person to the Court upon request cannot be modified by concluding an agreement of the kind proposed by the U.S.

Bilateral agreements and the Common Position – As seen above, the Common Position is an expression of the Member States' strong commitment to ensure full effectiveness of the Court. In light of the above analysis it is inconceivable to reconcile that commitment with any attempt to give positive consideration to the U.S. proposal."