*Common Market Law Review* **39:** 939–944, 2002.


## EDITORIAL COMMENTS

### The European Union, the United States and the International Criminal Court

There is certainly no shortage of highly important issues which the European Union will have to confront in the coming period. The European Convention is in the process of examining the key issues relating to the future development and the constitutional underpinnings of the EU. A new referendum will soon be held in Ireland on the Treaty of Nice. Decisive steps are to be taken regarding the enlargement of the Union by 2004. The perennial problem of financing Community agricultural policy will have to be dealt with again in connection with the accession of new Member States.

Another set of thorny problems concerns the relationship with the United States. In this area a major problem is presented by the wide rift over the International Criminal Court (ICC). The EU is firmly committed to making sure that the Statute of Rome on the ICC will become fully operational as soon as possible and will be binding universally. In this it has been meeting strong opposition from the United States. The Rome Statute, which has been signed by 139 States and which by early September was ratified by 79 States, including all EU members, came into force on 1 July 2002. The USA, which had become a signatory country on 31 December 2000 during the Clinton administration, withdrew its approval in May of this year and now considers itself released from any obligations arising from its signature of the Statute. In a formal statement the EU has expressed its disappointment with this step. After restating its belief that the anxieties expressed by the United States with regard to the possibility that the ICC could be used for frivolous or politically motivated prosecutions are unfounded, it reaffirmed "its determination to encourage the widest possible international support for the ICC through ratification or accession to the Rome Statute and its commitment to support the early establishment of the ICC as a valuable instrument to combat impunity for the most serious international crimes".[1] It was also hoped that the U.S. would not close the door to any kind of cooperation with the ICC. In

1. Statement of the European Union on the position of the United States towards the International Criminal Court, Brussels 14 May 2002, 8864/02 (Presse 141).

any event the European Union declared itself ready for a dialogue aiming at developing effective and impartial international accountability for the most serious international crimes.

The object and purpose of the Rome Statute is to ensure that anyone, regardless of nationality, who commits crimes against humanity, genocide or war crimes is subject to the jurisdiction of the ICC in accordance with the principle of complementarity. The latter principle must guarantee that the primary responsibility for investigating and, if there is sufficient admissible evidence, for prosecuting such crimes is placed on States and that the ICC will be able to exercise jurisdiction only when States are unable or unwilling genuinely to investigate or to prosecute. Thus, any agreement or practice not expressly provided for in the Rome Statute that prevents the ICC from exercising jurisdiction when States fail to discharge these responsibilities is incompatible with the fundamental idea underlying the Statute that no one is entitled to immunity from accountability for serious international crimes.

The U.S. argues that States parties to the Rome Statute are at liberty to enter into bilateral agreements with the United States which seek to prevent such States from surrendering U.S. citizens accused of crimes against humanity, genocide or war crimes to the ICC. Reliance for what are already (suggestively) dubbed "impunity agreements" is placed on Article 98(2) of the Statute of the International Criminal Court. This clause provides for a narrow exception to the essential object and purpose of the Rome Statute. Article 98, entitled "Cooperation with respect to waiver of immunity and consent to surrender" reads:

> "2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

There is great concern in the European Union over the U.S. campaign to persuade States to enter into such "Article 98 agreements" constituted for the sole purpose of providing individuals or groups of individuals with immunity from the ICC. It is not certain, however, whether the Member States will manage to keep ranks closed and preserve solidarity among themselves. Indeed, there are signs that some Member States are not wholly unsympathetic to the requests of the Americans. Moreover, Romania, a candidate for EU membership, has already signed an immunity agreement with the US, though ratification has yet to take place. In the early days of September, differences of opinion on how to handle US hostility to the ICC have emerged in the Council of the EU. Decisions of the Council were postponed until the end of September. This

is a sure source of great embarrassment for the European Union, which has always shown itself determined to speak with one voice in this matter and to refuse to give in to U.S. pressure for granting exemptions for its soldiers involved in peace keeping operations.

The current state of affairs must be deplored for at least two major reasons. The first of these reasons is that giving in to American pressure does not appear to be compatible with the obligations assumed by the EU Member States under the Statute on the International Criminal Court. More generally speaking, if the U.S. were allowed to conclude the type of agreements which it contemplates, the result will be that a State non-party to the ICC Statute could subvert the fundamental principle that anyone, regardless of nationality, committing an international crime on the territory of a State party is subject to the jurisdiction of the ICC if the criterion relating to complementarity is fulfilled, i.e. that the State party or another State party does not investigate and/or prosecute. Ultimately, accepting that Article 98(2) allows for the kind of agreements the US is lobbying for, would permit and even compel State parties to the ICC Statute to escape their responsibilities under Article 86 et seq. of the Statute, which responsibilities include cooperating with the Court and arresting and possibly surrendering nationals of States non-parties accused of crimes committed on their territory or the territory of another State party. Such an interpretation of Article 98(2) would lead to a result which is "manifestly absurd or unreasonable" within the meaning of the Vienna Convention on the Law of Treaties and must therefore be firmly rejected.[2]

This is not the place to develop extensively the arguments militating against the U.S.-proposed interpretation of Article 98(2) of the Rome Statute. A few additional remarks must suffice.[3] It is clear from the language of Article 98(2) and from its drafting history that this provision was not intended to include the type of agreements that the U.S. wishes to conclude for the purpose of creating safeguards for U.S. citizens. The provision was designed to address the problem of possible conflicts between the Rome Statute and a particular type of pre-existing international agreement, namely Status of Forces Agreements (SOFAs). Under classic international law principles, the Rome Statute could not of itself override existing Treaty obligations of State parties towards States non-parties. Therefore, a specific rule was required.

SOFAs deal with the allocation of jurisdiction over persons in the sending State's armed forces (and certain accompanying civilians) who commit crimes

2. See Art. 32 of the Vienna Convention.

3. A wealth of documentation on the interpretation of Article 98(2) is available at the Internet site of the NGO Coalition for the International Criminal Court (www.iccnow.org). See in particular the Research Paper prepared by Amnesty International (AI Index: IOR 40/025/2002, August 2002) and the CICC Memo dated 23 Aug. 2002 on the subject of the Bilateral Agreements proposed by the US Government.

in the territory of a receiving State. Status of Missions Agreements (SOMAs) have similar objectives. They spell out the circumstances in which either State will surrender a person to the other State for investigation and prosecution. They are not designed to grant the members of the armed forces of the sending State impunity for crimes they commit. The use of the words "sending State" in Article 98(2), indicates that this provision is intended to cover only SOFAs and similar agreements such as SOMAs.

The agreements the U.S. now seeks to conclude, unlike SOFAs, do not restrict their coverage to current serving military personnel and related civilian staff sent to another country under some form of international agreement. They are also intended to provide for immunity for many other persons, even for American citizens conducting business or holidaying in the territory of another State. No possible interpretation of the term "sending State" could justify such a wide definition. Moreover, the purpose of U.S. impunity agreements seems far removed from that of the existing SOFAs. They do not allocate jurisdiction or provide for primary jurisdiction in the USA, but rather provide that the other State may not surrender or otherwise transfer persons to the ICC. Moreover, the U.S. does not want to guarantee that persons accused of international crimes which are brought under their jurisdiction and which another State is not to transfer to the ICC will be subject to criminal proceedings in the U.S. As far as concerns such persons returned to the U.S., the draft texts of the Article 98(2) agreements mention the intention of the U.S. to investigate and prosecute only "where appropriate".[4]

The second reason to deplore the current controversy between the U.S. and the European Union is that it is difficult to avoid the conclusion that Member States that show themselves prepared to conclude "immunity" agreements with the United States will be acting in breach of European Union law. Existing Common Positions adopted by the Council in 2001 and 2002 (see below) do not appear to allow the Member States an appreciable margin of autonomy in regard to matters concerning the ICC.

On 16 August 2002, the U.S. Secretary of State wrote letters to a number of European governments urging them to ignore prior EU decisions to adopt a common response to the U.S. attempts to conclude bilateral immunity agreements, and requested them to enter into such agreements as soon as possible.[5] Italy, which was the host of the Rome Diplomatic Conference on the International Criminal Court, and the Netherlands, on whose territory the Court will be located, appear to have been prime targets for the U.S. Government. It would seem to us that individual Member States are not at

4. The texts of the draft agreements can be found in Annexe 1 to the CICC Memo mentioned in note 3 *supra.*

5. Becker, "US Issues Warning to Europeans in Dispute over New Court", *New York Times*, 25 Aug. 2002.

liberty under EU law to accommodate the U.S. Government. As noted before, it is hard to see how bilateral treaty making in relation to the ICC in the form of Article 98(2) agreements can be reconciled with the obligations of the Member States under Union law. Indeed, in its Common Position of 11 June 2001,[6] the Council stressed the fundamental importance of the ICC Statute and affirmed the determination of the European Union and all its Member States to make every effort to contribute to the full implementation of the Rome Statute. In particular, Article 2 of the Common Position instructed the EU and the Member States to further this process by raising the issue of the widest possible ratification or accession to the ICC in negotiations or political dialogue with third countries, groups of States or relevant regional organizations. All forms of support to be given by the EU and its Member States must aim to achieve the effective establishment of the Court "with full respect for the integrity of the Statute to which all Member States are committed."[7] More specific forms of Union support towards the early and effective functioning of the ICC and for the purpose of advancing universal support for the Court were recently prescribed by a new Common Position of the Council.[8]

According to Article 15 TEU, "common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions". In light of this language it is difficult to see how individual Member States could contemplate a departure from a common approach which was articulated so clearly by the Council, without acting in breach of their Union law obligations and without creating massive political and legal problems. For one thing, the question arises whether the adoption of the ICC Statute, unadulterated by bilateral immunity agreements with the U.S., can be considered to form part of the *acquis*. The basic principle of the negotiations for membership is that all the applicant countries must accept the whole body of existing EU law.[9] This undoubtedly includes acts under the second pillar, such as the common positions of 11 June 2001 as amended in July 2002.

Can the Union really insist on compliance with the substance of these common positions as a condition for accession to the EU or for humanitarian aid or development cooperation with regard to Cotonou (ACP) countries if

6. Council Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court, O.J. 2001, L 155/19.

7. See para 9 of the preamble of the Common Position.

8. Council Common Position 2002/474/CFSP of 22 June 2002 amending Common Position 2001/443/CFSP on the International Criminal Court, O.J. 2002, L 164/1. See also the Action Plan of 15 May 2002 to follow-up on the common position on the International Criminal Court, available through ue.eu.int/pesc/icc/

9. See in general Delcourt , "The acquis communautaire: Has the concept had its day?", 38 CML Rev., 829–870.

there is no longer a common approach to the integrity of the system introduced by the Statute on the ICC? Can Romania be reproved for bowing to U.S. pressure (because it hopes to be admitted as a member to NATO) if some of the Member States allow themselves to be driven in the same direction? What legal complications will arise if U.S.-proposed "Article 98" agreements with Member States require such Member States to renegotiate their extradition treaties with other States, within and outside the EU, so as to ensure that US citizens extradited by a Member State to a third State will not be surrendered to the ICC by that third State?[10] Are bilateral immunity agreements with the U.S. a threat to the operation of the system agreed at Laeken in December 2001 regarding the European Arrest warrant?[11] This first concrete third pillar achievement in the area of criminal law aims to abolish extradition between the Member States and to replace it by a simplified system of surrender of sentenced or suspected persons for the purposes of prosecution or execution of criminal sentences. The list of punishable offences (as they are defined by the law of the Member State issuing the arrest warrant) which will give rise to surrender of suspected or convicted person, includes crimes within the jurisdiction of the International Criminal Court (Art. 2(2) of the Council Framework Decision). It is obvious that a very complicated situation will arise in the context of Third Pillar cooperation if the Union's approach regarding the ICC (Second Pillar) ceases to be homogeneous. In other words, if certain Member States were allowed to "opt out" of parts of the ICC system, this would have important repercussions on the integrity and uniformity of the system of surrender between judicial authorities, the dissident countries being obliged, pursuant to immunity agreements with the U.S., never to surrender Americans suspected of having committed serious international crimes.

There are lawyers who say that there are possibilities for the U.S. and the ICC to circumvent this very thorny issue. Let us hope this is truly possible. Otherwise there will only be losers: the fledgling ICC, European-U.S. relations, the European Union itself. The stakes are too high for a policy of *divide et impera* of the U.S. *vis-à-vis* its European friends and allies.

10. The obligation to prevent re-extradition of US nationals follows from the following clause in the typical draft immunity agreement: "When the Government of country 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 that third country, absent the express consent of the Government of the United States". See for the full text of the U.S. "Article 98" agreement template, the Memo of the CICC, cited *supra* note 3.

11. Council Framework Decision 2002/584/HA, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. 2002, L 190/1.