

**ICC - Supportive Interpretation of and Commentary  
on the EU General Affairs Council Conclusions  
on the International Criminal Court of 30 September 2002**

### **Introductory Remark**

This paper consists of two parts, i.e.:

- Part One: General Remarks and Summary
- Part Two: Annotated Council Conclusions.

### **Part One: General Remarks and Summary**

- (1) It is obvious that *States Parties* of the Rome Statute must interpret the EU conclusions in full conformity with their obligations under the Rome Statute, in particular the core obligation to cooperate fully with the Court as specified in Part 9 of the Statute, insofar as these Conclusions deal with the US request for special bilateral non-surrender agreements excluding a specific group of persons from surrender to the ICC.
- (2) In the same manner *signatory States* of the Rome Statute (i.e. States that have signed but not yet ratified it) must interpret the EU Council Conclusions in full conformity with their obligation to "refrain from acts which would defeat the object and purpose" (Article 18 of the Vienna Convention on the Law of Treaties) of the Rome Statute, the principle of full cooperation with the Court as specified in Part 9 of the Statute being a centerpiece of the object and purpose of the Rome Statute.
- (3) It is positive and welcome that the EU Council Conclusions of 30 September 2002, triggered by the US request for special bilateral non-surrender agreements, represent, in general, a *strong and comprehensive reaffirmation of the EU commitment to the ICC*, to the integrity of the Rome Statute of the International Criminal Court and to the obligations of States Parties under the Statute, including the obligation of State Parties under Part 9 of the Rome Statute to cooperate fully with the International Criminal Court.

It is positive and welcome that the EU conclusions also contain the proposal to develop a *broader dialogue* between the EU and the United States on all matters relating to the ICC.

- (4) When interpreting the EU Council Conclusions it should be borne in mind that these Conclusions were elaborated under the *consensus principle*. This procedure allows EU Member States to reach a joint decision without a formal vote. It requires, however, that all participants share or at least accept the consensus. This may in turn result in a text adopted by consensus being rather broad and open, as the case may be on the basis of the lowest common denominator. If EU Member States wish to achieve a consensus on common Conclusions they are forced to accept this consequence of the consensus principle, as unwelcome as this may be.
- (5) Consequently, when interpreting the EU Conclusions it must be borne in mind that certain ambiguous text elements (cf. comments in Part Two on paras. 6, 18, 20, 23, 25 and 26) may have been the price to be paid, even by a large majority of Member States, in order to enable consensus to be achieved.
- (6) On the other side, when interpreting the generally positive and welcome EU Conclusions including the ambiguous text elements mentioned above, the *following considerations seem to be decisive*:
  - The EU Council Conclusions are, generally speaking, a strong message of support of all EU Member States for the ICC.
  - It is positive and welcome that the *principle of preserving the integrity of the Rome Statute* and the *principle of full cooperation of States Parties with the Court* are explicitly reaffirmed in the EU Conclusions (introductory paragraph of the "Guiding Principles").
  - The overwhelming majority of EU Member States is committed to preserve the integrity of the Rome Statute and the principle of full cooperation as specified in Part 9 of the Statute. They are apparently opposed to special bilateral non-surrender agreements excluding a specific group of persons from cooperation with the ICC.

In this perspective it is significant that German Foreign Minister, Mr Joschka Fischer, has ruled out on 30 September, during the presentation of the EU Conclusions, the conclusion by Germany of a special bilateral non-surrender agreement with the US. With regard to the EU Conclusions he stated: "We would have wished a clear rejection of the agreements. Thanks to the 'Principles' we are very close to that."

**Part Two: Annotated EU Council Conclusions on the ICC**

*Note: The comments on the respective paragraphs of the Council Conclusions are inserted single-spaced and in italics in order to render them conspicuous and easily distinguishable from the text of the Conclusions themselves. The paragraphs, which do not carry numbers in the original text, have been numbered by the commentators to facilitate reference.*

(1) The Council confirms that the European Union is firmly committed by the EU Common Position to support the early establishment and effective functioning of the International Criminal Court and to preserve the full integrity of the Rome Statute. The European Union reaffirms 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 ICC as a valuable instrument of the world community to combat impunity for the most serious international crimes.

*This paragraph is positive and welcome:*

*It refers to the EU Council Common Position of 11 June 2001, as amended on 20 June 2002 (Note: the "Common Position" is one of the instruments of the Common Security and Foreign Policy of the European Union, as provided for in Articles 12 and 15 of the EU Treaty. Art. 15 (2) provides that Member States shall ensure that their national policies conform to the common positions This means that the Common Position is of a more formalized nature than mere Council conclusions.). The centerpiece of this particular Common Position is a joint pledge of the EU Member States "to support the early establishment and effective functioning of the Court and to advance universal support for the Court" (Article 1 (2) of the Common Position). Para. 11 of its Preamble reads, "The effective establishment of the Court and the implementation of the Statute requires practical measures that the European Union and its Member States should fully support." While the Common Position emphasizes in particular the need to foster further ratifications as a means to achieve the universality at which the Court aims, it also includes other measures taken with a view to ensuring the full implementation of the Rome Statute and the successful work of the Court.*

*It should be mentioned at this point that all EU Member States and most candidates for accession are States Parties to the Rome Statute of the ICC, while the remainder of the candidate countries (with one exception) have signed the Statute. All States Parties are bound by the Statute. All signatories are under an obligation to refrain from any act which would defeat the object and purpose of the Statute (cf. Article 18 of the Vienna Convention on the Law of Treaties).*

(2) The International Criminal Court will be an effective tool of the international community to buttress the rule of law and combat impunity for the gravest crimes. The Rome Statute provides all necessary safeguards against the use of the Court for politically motivated purposes. It should be recalled that the jurisdiction of the Court is complementary to national criminal jurisdictions and is limited to the most serious crimes of concern to the international community as a whole.

*This paragraph is positive and welcome:*

*One of the concerns voiced by the US Administration with regard to the ICC is the perceived danger of the Court being instrumentalized for political, non-judicial purposes by States potentially inimical to the US. It is sometimes alleged that a "runaway", uncontrollable prosecutor could and would get away with flagrantly anti-American, unfounded investigations and prosecutions. It is worthwhile in this context, however, to have a closer look at the Rome Statute and its provisions on the elections and the work of the Prosecutor. Article 42 (3) states that the Prosecutor must be of high moral character, high competence and extensively experienced. Pursuant to Article 42 (5) he or she is forbidden to engage in any activity which might interfere with his or her prosecutorial functions or affect confidence in his or her independence. These rules alone render it highly unlikely that a potentially "runaway" candidate could achieve the high office of Prosecutor. However, even if he misbehaved seriously, he can be removed by the Assembly of States Parties (Article 46). The ultimate instance of control, which the US allege to be lacking, does indeed exist.*

*Moreover, the Prosecutor is not free to conduct investigations and prosecutions as he alone sees fit. There are a number of investigatory actions, in particular the issuing of a warrant of arrest, which have to be authorized either by the three-judge Pre-Trial Chamber, or at least by a single judge (Articles 57 and 58). It is also the Pre-Trial Chamber which has to confirm the charges brought by the Prosecutor before the trial can go ahead (Article 61). Finally, many decisions of the Pre-Trial Chamber are subject to appeal to the Appeals Chamber of five judges (Article 82). The allegation of possible frivolous and politically motivated prosecution thus presupposes not only serious misconduct on the part of the Prosecutor, but connivance and active participation in such misconduct by a number of judges of the Court. This is so unlikely an occurrence that it seems safe to say that for all practical purposes politically motivated prosecution will be prevented by the in-built safeguards of the Rome Statute.*

(3) The European Union will endeavour to secure that the Court will meet the highest standards of competence, fairness, due process and international justice. The European Union will do its utmost to ensure that highly qualified candidates will be elected as judges and prosecutors.

*This paragraph is positive and welcome:*

*It confirms the criteria laid down in Articles 36 (3) and 43 (3) of the Rome Statute. It*

*should be mentioned that in particular non-governmental organizations have been arguing for a transparent election procedure for the judges and the Prosecutor. This will contribute to making sure that these criteria are met.*

(4) The Council has taken note of the proposal by the United States for new bilateral agreements with ICC States Parties regarding the conditions for surrender to the Court.

*This paragraph is positive and welcome:*

*The US proposal entails:*

- *Exclusion of surrender of citizens of the other party to the ICC.*
- *In the case of extradition of such persons to a third country: Prohibition on their further surrender to the ICC by that third country.*

*The proposal, as drafted by the US, aims at including all US nationals (not just troops stationed abroad) and also certain groups of non-US nationals associated to the US by way of contract to the US.*

(5) The Council notes that a number of bilateral and multilateral treaties between individual Member States and the United States already exist, as well as treaties with third states, which are of relevance in this context and on which an inventory has been established. The Council notes that Member States are ready to engage with the United States in a review of these arrangements which may fall into the category of agreements defined in Article 98, paragraph 2 of the Rome Statute.

*This paragraph is positive and welcome:*

*It refers in particular to status of forces-agreements (SOFAs) and extradition treaties.*

*The most important SOFA in the European context is the NATO SOFA of 19 June 1961, as supplemented by bilateral agreements between the USA and certain other NATO Member States. The NATO SOFA (to which most EU-candidate countries have aligned themselves by way of the Partnership-for-Peace-Treaty) allocates jurisdiction in criminal matters (Article VII (1)) and, in cases of concurrent jurisdiction, allocates also primary rights (Article VII (3)). Thus, for instance, the primary right of jurisdiction for offences arising out of an act or omission done in the performance of official duty by a military person over whom the law of the sending State claims jurisdiction lies with that sending State. The receiving State's lack of jurisdiction would appear to preclude it also from arresting that person and surrendering him to the ICC.*

*Bilateral or multilateral extradition treaties between the US and EU Member States provide the US with a right to demand the extradition of a US citizen if certain conditions are met. This right may arguably be given precedence by the requested State over a request for surrender of the same person issued by the ICC, under Article 90 (6) of the Rome Statute.*

*It may also be that extradition treaties concluded by EU Member States with third*

*States do not allow in every case for a prohibition on the further surrender to the ICC to be included in an extradition arrangement. Should such be the case, these extradition treaties could collide with the new bilateral treaties which the US Government is seeking, with the result that one or the other would have to be terminated and renegotiated.*

(6) The Council has developed the attached set of principles to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in responding to the United States' proposal.

*This paragraph needs further interpretation:*

*It refers to two aspects under which possible agreements must be scrutinized: their scope and their necessity. The latter criterion is of particular importance in view of existing treaties. It is also important to note that this paragraph only states that certain aspects have to be taken into account if such an agreement is possible, but it does not declare that "agreements or arrangements" are "possible", i.e. not in contradiction to the Rome Statute. The paragraph is thus silent on the question of admissibility of new bilateral non-surrender agreements under the Rome Statute. This leaves room for an interpretation of Article 98 (2) of the Statute that was already advanced by many before the Common Affairs Council of 30 September 2002. This view takes Article 98 (2) to allow only for the continued application of "old" (i.e. already existing) SOFA-type agreements, but not for the conclusion of new agreements of this kind. The key argument is that otherwise any State Party to the Statute could, by the simple device of concluding treaties of this kind, redefine, limit or even opt out unilaterally its obligations under the Rome Statute – something which it could not even have achieved by way of a reservation at the time of signature or ratification, as the Rome Statute specifically prohibits reservations (Article 120). This would be contrary both to the letter and to the spirit of the Rome Statute, as the ICC will only be able to function properly if States Parties unreservedly meet their obligations to cooperate fully with the Court (Articles 86 et seq. of the Statute).*

(7) The Council recalls that the European Union and the United States fully share the objective of individual accountability for the most serious crimes of concern to the international community. The ad hoc tribunals for the former Yugoslavia and Rwanda were created as a result of our common efforts.

*This paragraph is positive and welcome:*

*The ad hoc tribunals for the former Yugoslavia and for Rwanda were both created by Security Council resolutions under Chapter VII of the UN Charter, involving the active and leading participation of the US as one of the permanent members of the Security Council. In spite of some harsh US criticism of these two tribunals earlier in 2002, including allegations of corruption and mismanagement, the US Government has always stated that it will support them to carry through their tasks.*

(8) The Council expresses the hope that the United States will continue to work together with its allies and partners in developing effective and impartial international criminal justice. To this end, the Council proposes to develop a broader dialogue between the European Union and the United States on all matters relating to the ICC, including future relations between the United States and the Court. In particular this dialogue should address the following issues:

*This paragraph is positive and welcome.*

- (9) The desirability of the United States re-engaging in the ICC process - the United States is entitled to be an observer to the Assembly of States Parties;

*This paragraph is positive and welcome, as well as relevant to an important objective of the EU:*

*The ICC aims at universality. The objective of "one law applicable to all" can only be achieved if the highest possible number of States participate in the effort. This includes naturally a State as important as the USA.*

- (10) The development of a relationship entailing practical cooperation between the United States and the Court in specific cases;

*This paragraph is positive and welcome, as well as relevant to an important objective of the EU:*

*It should be noted in this context that not even the proposed bilateral treaties on non-surrender would totally exclude such cooperation. The text does not prohibit surrender as such, but makes it contingent on the consent of the US – which conceivably could be granted. The American Servicemembers Protection Act (ASPA), signed into law by President Bush on 2 August 2002, however, dampens hopes that such consent might be forthcoming. While it allows for certain waivers on its otherwise general prohibition on cooperation of US authorities with the ICC, and states that nothing in ASPA shall prevent the US from assisting international efforts to bring to justice persons accused of genocide, war crimes or crimes against humanity, both potential concessions to the ICC are limited to non-US nationals. Making the surrender of US citizens contingent on the consent of the US administration will therefore likely mean, for all practical purposes, the exclusion of such surrender. The field for practical cooperation called for in this paragraph therefore seems extremely limited by ASPA.*

- (11) The application of presidential waivers of the ASPA legislation to the main provisions of this legislation, in particular vis-à-vis Member States and their associated countries.

*This paragraph on an important objective of the EU is positive and welcome. For the possible scope of waivers see above.*

(12) The Council notes that Member States will keep the Council informed about any new developments.

(13) The Presidency will convey these conclusions to the United States, noting that they represent the EU position in response to the United States' concerns.

(14) The Council will remain committed to the ICC and will keep developments under review.

*These paragraphs are positive and welcome.*

#### **ANNEX:**

#### **EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court**

(15) The guiding principles listed below will preserve the integrity of the Rome Statute of the International Criminal Court and – in accordance with the Council Common Position on the International Criminal Court – ensure respect for the obligations of States Parties under the Statute, including the obligation of States Parties under Part 9 of the Rome Statute to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes falling within the jurisdiction of the Court.

*This paragraph is positive and welcome. It is important to note that this paragraph asks for any agreement possibly envisaged by a EU Member State to "preserve" (not only to take into account) the integrity of the Rome Statute. Likewise, "respect for the obligations of States Parties under the Statute" must be "ensured", not just aimed at. This sets up the Rome Statute as the definite and immovable borderline to any discretion that might exist on the part of States Parties. Part 9 is singled out here because it contains the principal duties and obligations of the States Parties. Article 86 (the first provision in this part) lies down the general rule, which is the obligation of Member States to cooperate fully with the Court. The following articles spell out this obligation in greater detail, but they do not contain any exceptions or waivers of which a State Party might avail itself to escape the obligation. A number of possible exceptions and "grounds for refusal" were discussed during the Rome conference in 1998, but they were all discarded. It was rightly felt that this would touch on the key issue of the ability of the Court to function. In view of the fact that the Court will not*

*have its own police forces, the very exercise of its judicial functions will depend on the States Parties performing this function. This is particularly true with regard to the arrest and surrender of a person suspected of a crime under the jurisdiction of the Court: as the trial in the ICC requires the presence of the accused (Article 63 of the Statute), it quite simply cannot take place if the accused does not either appear voluntarily or is arrested and surrendered by a State Party. The obligation to cooperate fully with the Court is thus not just an ancillary duty whose interpretation might be open to some flexibility, but it is the central and decisive contribution the States Parties make to the functioning of the Court. It is therefore of the utmost importance that the guiding principles restate this basic and fundamental rule in their chapeau.*

**(16)** The guiding principles are as follows:

- **(17)** Existing agreements: Existing international agreements, in particular between an ICC State Party and the United States, should be taken into account, such as Status of Forces Agreements and agreements on legal cooperation on criminal matters, including extradition;

*This paragraph is positive and welcome.*

*Existing agreements are relevant either under Article 98 (2) of the Statute (SOFAs and like agreements) or under Article 90 (6) (extradition treaties). Wherever such an existing agreement satisfies the desire of the US for the handing over of certain persons to its authorities rather than to the ICC, there is clearly no need to conclude any additional agreement.*

- **(18)** The US proposed agreements: Entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties;

*This paragraph is positive and welcome:*

*The words "as presently drafted", however, need careful further interpretation. The paragraph clearly states that the present text of the bilateral agreements proposed by the US is incompatible with the Rome Statute. The consequence is that any State Party to the Rome Statute (or, for that matter, any signatory State bound by Article 18 of the Vienna Convention on the Law of Treaties) which concluded such an agreement would act in breach of its obligations under the Rome Statute.*

*The wording "- as presently drafted –" does however not mean that e contrario a different drafting aspiring to the same purpose (i.e. exclusion of surrender) would not be inconsistent with the Rome Statute. The same reasoning that makes the present draft inconsistent with the Statute would arguably apply to any other agreement which would result in a limitation of a State Party's obligation to cooperate fully with the Court and in particular to arrest and surrender a person*

*for whom the Court has issued a warrant of arrest, and which is not covered by Article 98 (2) of the Statute. As only such agreements as are preexisting to the Rome Statute may be covered by this provision, this means that any new agreement limiting or excluding the surrender of persons to the Court would also be incompatible with the Rome Statute.*

- **(19)** No impunity: any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and – where there is sufficient evidence – prosecution by national jurisdictions concerning persons requested by the ICC;

*This paragraph is positive and welcome:*

*It refers implicitly to Article 17 of the Rome Statute, which lays down the principle of complementarity. The objective of the Rome Statute and the ICC is not to try every single suspect in the ICC itself (if only for reasons of capacity). Both the Statute and the Court are quite content with prosecution taking place in a national Court, provided only it is genuinely carried out. In other words: The aim is not to generate work for the ICC, but to abolish impunity for certain particularly serious crimes. Whatever operative provision a bilateral agreement might make to ensure effective investigation and prosecution, it still has to be noted that it is for the ICC to judge whether a national court is genuinely able and willing to prosecute and try a given individual. This is central to the whole notion of complementarity.*

- **(20)** Nationality of persons not to be surrendered: any solution should only cover persons who are not nationals of an ICC State Party;

*This paragraph needs further interpretation:*

*As the nationality of the suspect is one possible criterion for determining the jurisdiction of the ICC (Article 12 (2)(b) of the Rome Statute), it is natural that no citizen of a State Party can be allowed to escape surrender to the Court. This does not, however, mean *e contrario* that citizens of non-States Parties may freely be withheld from the ICC. The jurisdiction of the ICC may alternatively be based on the State where the offence has been committed being a State Party, and in this case citizens of a State that itself is not a State Party may come under the jurisdiction of the ICC. This paragraph therefore states a condition which is necessary, but not sufficient. It should be noted that adherence to this principle does not solve the problem that any new agreement by a State Party limiting or excluding the surrender of persons to the Court would also be incompatible with the Statute.*

- **(21)** Scope of persons:
- **(22)** Any solution should take into account that some persons enjoy State or diplomatic immunity under international law, cf. Article 98, paragraph 1 of the Rome Statute.

*This paragraph is positive and welcome:*

*It is self-evident and provided for in the Rome Statute itself. The reason is the same as that for Article 98 (2), viz., that no State Party should find itself in a situation where it would have to breach either the Rome Statute or some other rule of international law already binding upon it.*

- (23) Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute.

*This paragraph needs further interpretation:*

*It refers to the wording of Article 98 (2) of the Rome Statute, which expressly mentions the consent of a "sending State" as a prerequisite of surrender. Whatever else Article 98 (2) may be construed to mean, it is clear that these words require for a situation to be present in which a certain individual is "sent" by one State (probably, but not necessarily that of which he is a national) to another State for a certain purpose. To construe the words "sending State" as simply meaning "the State with which they have some connection" would be to depart from the ordinary meaning of the words, which is the basic criterion for their interpretation under international law. The word "send" does not have the same meaning as the words "to be connected to or with". Moreover, this condition, like the one described in para. 20, is necessary but not sufficient. It should be noted that adherence to this principle would not solve the problem that any new agreement by a State Party limiting or excluding the surrender of persons to the Court would also be incompatible with the Statute.*

- (24) Surrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute.

*This paragraph is positive and welcome.*

*Article 98 (2) of the Rome Statute provides for a limitation on the Court's powers solely with regard to surrender. No such limitation is allowed with regard to States Parties' obligation to comply with the Court's request for transfer.*

- (25) Sunset clause: The arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force.

*This paragraph needs further interpretation:*

*It does not imply that an agreement or arrangement should or must be concluded. It merely states hypothetically that it should be limited in time.*

- (26) Ratification: The approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state.

*This paragraph needs further interpretation:*

*The paragraph does not presuppose that any new agreement should or will be concluded. It merely reminds EU Member States to check their own constitutional procedures for ratifying and implementing agreements of this type. Such procedures might involve national parliaments, either because ratification needs to be authorized by a law duly passed by parliament, or because internal legislation has to be amended in order to enable the respective Government to implement the agreement, or both.*

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