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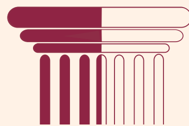

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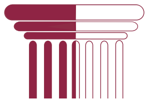
# THE INTERNATIONAL CRIMINAL COURT – A EUROPEAN PERSPECTIVE

*Hans – Werner Bussmann*

EKSPERTYZY • REKOMENDACJE • RAPORTY Z BADAŃ



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# I. THE INTERNATIONAL CRIMINAL COURT IS A REALITY

## 1.

The International Criminal Court (ICC) has brought about fundamental changes in international law, since in large parts of the world it has closed the „impunity gap". For all too long the international community has turned a blind eye to the most horrific atrocities and allowed those responsible for such crimes to escape punishment by invoking state immunity. The main purpose of the Rome Statute and the ICC is to provide the international community with the necessary instruments to close this gap and deter potential perpetrators. To achieve this objective, however, the Rome Statute will in the long run need to gain universal acceptance. Europe is confident this will eventually happen, as there is already broad agreement on the need to end impunity and disagreement only on how best this can be achieved.

## 2.

To date the Rome Statute (RS) has been signed by 139 and ratified by 92 countries. The States Parties include all EU Member States and the 10 countries acceding to the European Union on 1 May 2004 with the exception of the Czech Republic[1], as well as Canada, Australia, New Zealand and many African and Latin American countries. The Statute came into force after only 4 years, considerably earlier than expected[2] China, Russia and Japan are still considering whether to accede. A number of previously hesitant Arab countries appear to be moving towards a more positive stance, judging by the positions adopted at a recent conference on „Democracy, Human Rights and the Role of the International Criminal Court" organized by the Government of the Republic of Yemen in Sana'a from 10 to 12 January 2004.

*1 Since ratification requires an amendment to the constitution, the process has not yet been completed.*
*2 By comparison, it took twelve years (1982-1994) for the Convention on the Law of the Sea to enter into force with the same minimum number of ratifications (60).*

## 3. THE ICC WILL BE FULLY OPERATIONAL – AS FAR AS THE CORE FUNCTIONS OF ALL FOUR ORGANS ARE CONCERNED – AS OF APRIL 2004:

- **Judges:** The 18 judges representing the world's principal legal systems were elected in February 2003 and sworn in in March 2003. The judges are normally elected for a nine-year term. Art. 36 (9) (b) RS, stipulates, however, that at the first election one third of the judges elected shall be selected by lot to serve for a term of three years, one third of the judges elected shall be selected by lot to serve for a term of six years and the remainder shall serve a term of nine years. A judge who is selected to serve for a term of three years is eligible for re-election for a full term. Eleven of the judges have previously worked as judges, prosecutors, advocates or in a similar capacity and seven have a background in international humanitarian law and the law of human rights. Seven of the judges are women. Unfortunately, there is only one judge from Central Europe, Ms Anita Usacka (Latvia). Judges are assigned to one of the Court's three divisions – the Pre-Trial Division, the Trial Division and the Appeals Division – and may, with the exception of Appeals Division judges, sit on chambers[3]. Thirteen judges are present in The Hague, as the investigation of the first situation requires not only the presence of judges in the Pre-Trial Chamber but also of a chamber in the Appeals Division, since many decisions of the Pre-Trial Chamber are subject to appeal.

- The **Presidency** consists of three judges, who represent the ICC in its ex-ternal relations and oversee the Court's day-to-day administration, which is the responsibility of the Registrar. In addition, they each preside over one of the three Court's Divisions.

- The **Office of the Prosecutor** (OTP) enjoys a certain degree of independence[4], as far as its core function is concerned. However, when it comes to the formal opening of investigations and indictments, key decisions may be reviewed by the Pre-Trial Chamber. The Chief Prosecutor is Luis Moreno Ocampo and the Deputy Prosecutor Serge Brammertz, who will be in charge of investigations. A former high-ranking US Federal Prosecutor has joined the OTP as senior prosecutor in its Trial Division.

- The **Registry** provides the services required to support the work of the Court (general services and administration, translation and interpretation, extensive IT-based registration services, security). The Registrar, Bruno Cathala, is also responsible for liaising with defense counsel and providing support services for witnesses as well as victims and their representatives.

By March 2004 some 170 out of 375 budgeted posts for 2004 had been filled. All the staff required to start proper investigations will shortly be in place. In order to keep the Court lean and efficient and ensure costs

*3 The functions of the Pre-Trial Division may also be carried out by a judge sitting alone (Art. 57 (2) (b) RS).*
*4 That goes also for the recruitment of OTP staff, although it is still bound by the staff rules and regulations applicable to all Court staff.*

remain under control, great care is taken with recruitment[5]. Cost efficiency was one of the key considerations in drafting the Court Rules, which will be adopted by the judges sitting in plenary session in May 2004. They represent a well-balanced mix of common law and civil law traditions[6].

The ICC occupies premises in The Hague provided free of charge by the Netherlands as host country. Work is in progress to adapt the building to its new functions and two to three courtrooms are being added, one of which is already operational.

## 4.

The ICC is an independent international organization in its own right that operates under the authority of the Assembly of States Parties. As a rule the Assembly meets once a year to approve the budget, adopt important legal instruments implementing the RS and elect the Court's top personnel[7]. However, for reasons not only connected with its history, the ICC may also be viewed as an offshoot of the United Nations:

- The Diplomatic Conference on the Establishment of a Permanent International Criminal Court was convened under a General Assembly Resolution. This set in train the process that resulted in the Rome Statute, which was adopted on 17 July 1998 after five weeks of arduous negotiation and welcomed by the General Assembly on several occasions.

- The RS provides for the Security Council to refer situations to the ICC under Chapter VII of the UN Charter (Art. 13 (b) RS); it may also request the Court to interrupt investigations for up to 12 months (Art. 16 RS) if, in a given situation, this would benefit the peace process, for example; such a request is renewable.

- The RS provides for the investigation and indictment by the Court of four crimes: war crimes, crimes against humanity, genocide and the crime of aggression. The

5 The ICC's budget for 2004 amounts to 53 m euro.
6 The rules and regulations of the ad hoc International Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) established under Security Council resolutions are based predominantly on common law traditions, which is one reason for the high costs involved (approx. US$ 220 m. or roughly 10% of the UN budget). But there is no doubt that all international criminal proceedings have their price - a price the international community must be prepared to pay if we want to contribute to post-conflict justice and thereby create a sound basis for rebuilding societies that in many cases have been shattered by prolonged conflict and civil war.
7 The Assembly of States Parties will elect a second Deputy Prosecutor at its Third Session in September 2004.

definition of the latter is still under discussion – a discussion open to all UN member states – and is due to be incorporated into the RS at the review conference scheduled for 2009 (Art. 5 (2) RS).

In many post-conflict environments the Court will be able to conduct investigations only in close co-operation with the UN and its peacekeeping forces, since it has no police force of its own and only very limited security capacities. To facilitate liaison over initiating investigations as well as supporting them on the ground, there is a clear need, in the interest of both sides, for a co-operation agreement with the United Nations[8].

An Agreement on Privileges and Immunities[9], which has been signed by 47 but ratified by only 6 States Parties to date, is equally essential if the privileges and immunities contained in Art. 48 RS are to be given real substance, particularly as regards the security of investigators and other ICC personnel engaged in investigating situations on the ground and interviewing witnesses and victims. ■

8 A draft agreement to this effect was approved by the Assembly of States Parties at its First Session from 3-10 September 2002 (Res. ICC-ASP/1/3) and is currently being discussed by representatives of the Court and the UN Secretary-General.

9 Adopted at the First Session of the Assembly of States Parties (Res. PCNICC/2001/1/Add.3) and open for signature until 30 June 2004.

# II. MAIN FEATURES OF THE INTERNATIONAL CRIMINAL COURT

## 1.

Before looking at the Court's main features in greater detail, it seems worthwhile to review briefly the history of international criminal tribunals. At the end of World War II international criminal tribunals were set up in Nuremberg and Tokyo to try those responsible not only for atrocities committed during the War but also – in the case of the Nazi leadership – for sending millions of innocent people in Germany and all over Europe to their deaths because of their race or convictions. In 1948 the United Nations invited the International Law Commission to draw up a Draft Code of Crimes against the Peace and Security of Mankind. The Law Commission's proposals included a plan for a permanent international criminal court, but with the onset of the Cold War the idea was shelved.

Shocked by gross human rights violations in the former Yugoslavia and Rwanda, renewed calls were heard at the beginning of the past decade for the international community to take action to prevent those responsible for war crimes, crimes against humanity and genocide going scot-free by invoking state immunity. On the basis of Security Council resolutions[10], ad hoc Tribunals for the former Yugoslavia and Rwanda were set up in The Hague and Arusha respectively. They operate under the authority of the Security Council and their jurisdiction is limited to a specific region and crimes committed over a specific period. Their task is to bring to justice all those responsible for committing the crimes in question, whether top leaders or rank and file supporters. In view of the large number of defendants and the high costs involved, it is planned that, in the case of the former Yugoslavia and as part of the ICTY completion strategy, special chambers of the High Court of Bosnia and Herzegovina and a special court in Kosovo should take over some aspects of the investigations and indictments.

In a similar development, special courts have been set up in Eastern Timor, Cambodia (not yet functional) and Sierra Leone. These so-called „hybrid courts" were established by special agreement between the governments of the countries concerned and the UN. They apply domestic criminal law, are staffed by local judges and investigators supported by colleagues from overseas and are part-funded by voluntary contributions from the international community. Especially the Special Court in Sierra Leone seems to have had some success, although Charles Taylor, the main suspect, has been granted asylum in Nigeria. All these courts testify to the importance of holding individuals accountable for crimes they have committed. This is crucial not only to ensure that those who have suffered can see justice done but also to prevent entire communities being deemed collectively guilty. In the long run this will also, it is hoped, have a deterrent effect on dictators and other oppressors.

10 SC Res. 808 (1993) and 955 (1994).

## 2.

The ICC, by contrast, is wider in scope. It is intended to be not a short-lived body but a permanent court, with universal jurisdiction over a limited number of crimes of the most serious nature.

The RS requires that acts constituting the crime of genocide (Art. 6 RS) must be committed „with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". For acts to be deemed crimes against humanity (Art. 7 RS), the Court must be satisfied that they were „part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". The Court has jurisdiction in respect of war crimes (Art. 8 RS) „in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes".

## 3.

Most importantly, in line with the so-called „complementarity principle", the ICC will exercise its jurisdiction only when the State in which the crimes in question were committed is either unwilling or unable (or both) to genuinely investigate and prosecute them. Under the compromise deal agreed in Rome, other criteria for jurisdiction ratione personae are excluded (jurisdiction of a victim's home state or of the state having custody of the alleged perpetrator).

As a permanent court, the ICC creates legal certainty and avoids the difficulties and expense involved in setting up ad hoc tribunals. This is because:

- it has clear-cut jurisdiction for a limited number of crimes only and operates consistently under the same set of rules and regulations, thus ensuring equal treatment of comparable cases;

- prime responsibility for investigations and indictment rests not with the ICC but with the State Party concerned, a situation which has a number of important advantages:

  = trials take place closer to the scene of the crime and hence closer to witnesses and victims;

  = this in turn makes it easier for the prosecution and the defence to obtain evidence and call upon witnesses;

  = it avoids witnesses having to spend long periods in an often alien environment, which necessitates special support programmes;

= it enhances the efficiency of court proceedings and makes for lower costs;

= it makes trials more accessible to the victims or at least easier for them to follow, which promotes the process of reconciliation. This is crucial to heal wounds and bring about lasting peace as well as an atmosphere conducive to rebuilding community life and repairing damage to infrastructure and property caused by prolonged periods of instability or civil war;

= it gives trials greater credibility (in line with the maxim „justice must be seen to be done").

If a State Party is willing, yet unable to investigate and indict (e. g. due to a breakdown of infrastructure and lack of qualified personnel following a long period of civil war), prime responsibility still rests, according to the complementarity principle, with the State concerned. It may – as in Sierra Leone – opt to conduct domestic trials using „hybrid courts" reinforced by foreign experts. Should a State Party request such assistance, the international community must be prepared to take prompt action to deploy legal and other personnel where needed and provide the necessary logistical and financial support so that trials can take place within a reasonable period from the time when the relevant crimes were committed[11].

Furthermore, in certain post-conflict environments it might be advisable for the government in question to refer a situation[12] to the ICC so as to make sure that investigations and the trials of the highest-ranking defendants take place in The Hague (or elsewhere)[13]. This may help avoid civil unrest or the renewed outbreak of armed conflict when leaders of particular factions face charges. Less prominent defendants, however, will still have to stand trial in the State concerned (Art. 17 RS). Under such circumstances the ICC works in partnership with the State's domestic courts, which necessitates close collaboration as well as sensitivity in the exercise of their respective competences. ■

*11 As of April 2004 a working group composed of representatives from a number of State Parties, the European Union and the ICC is examining, with the help of non-governmental organizations with expertise in this area, the possibility of creating pools for specialized "rapid reaction teams".*

*12 Under Art. 13 RS it is not a "case" or specific atrocities committed by a person or persons that are referred to the ICC but the overall "situation" which has led to such acts. The intention is to avoid developments in which one side of an internal conflict attempts to use the Court as a vehicle for eliminating or at any rate incriminating the leadership of the other side.*

*13 The ICC organs may sit also outside The Hague (Art. 3 (3) RS).*

# III. THE INTERNATIONAL CRIMINAL COURT – A THREAT TO NON-STATE PARTIES?

## 1. DOES THE ICC AS AN INSTITUTION LACK LEGITIMACY UNDER PUBLIC INTERNATIONAL LAW AND DOES IT CONSTITUTE A THREAT TO NON-STATE PARTIES (NSP)?

Kofi Annan has rightly pointed out that the „ICC is not an organ for political 'witch hunts' but a 'fortress' against tyranny and lawlessness which will be guided by independence and neutrality". It has been inspired by the common conviction of most – if not all – nations that there must be an end to impunity for international crimes such as those covered by Arts. 5 to 8 RS. That is why the US, too, was actively involved in the process leading up to the aforementioned Diplomatic Conference of 1998 and the ensuing discussions in the ten successive sessions of the Preparatory Commission. The US finally signed the RS, albeit reluctantly[14], on the last day it was open for signature and also the last day of President Clinton's term of office. The fact that it did so reflects the leading role played by the US in setting up the other special tribunals as well as the values it shares with its partners in attempting to deal with post-conflict situations. This is consistent with the logic not only of US efforts to bring justice to the victims of horrific crimes but also its strenuous efforts to contain future conflicts through a strategy of deterrence, thus preventing such atrocities from being committed in the first place.

As shown above, the RS is based on the premise that the prime actor in the criminal prosecution process remains the State in which the crimes in question occurred or whose nationals were responsible for their commission.

There is no risk of politically motivated trials. Not only the provisions of the RS (Art. 15 RS) but also the qualities[15] a candidate for the office of Prosecutor must possess (Art. 42 (3) RS) make it highly unlikely that States Parties would elect to this key post a „frivolous" prosecutor, who could be manipulated by States potentially hostile to the US for their own political or other, non-judicial purposes. Despite such safeguards, it continues to be suggested in some quarters that a „runaway", uncontrollable prosecutor could and would get away with flagrantly anti-American, unfounded investigations and prosecutions, and that even an indictment informed by such motives would create immense moral and other damage[16].

Moreover, the Prosecutor does not enjoy complete independence in the way he

*14 When agreeing to the signing of the RS, President Clinton made a declaration expressing his doubts and recommending his successor not to submit it to the Senate for ratification.*

*15 The candidate must be of high moral character, highly competent and have extensive experience.*

*16 John Bolton, the US Under Secretary for Arms Control and International Security, is a strong advocate of such arguments, which he recently reiterated in a speech at the American Enterprise Institute on 3 November 2003 in Washington, D.C. – cf. http://www.state.gov./t/us/rm/25818.html.*

conducts investigations and prosecutions. Certain acts such as the issuance of an arrest warrant need to be authorized either by the three-judge Pre-Trial Chamber or at least by a single judge (Arts. 57 and 58 RS). Furthermore, the same judges must confirm the charges before a trial can go ahead (Art. 61 RS), whereby their decisions are again subject to appeal to the five-judge Appeals Chamber (Art. 82 RS). Finally, the Assembly of States Parties – which can be convened at any time – has the power to remove a Prosecutor from office by simple majority (Art. 46 RS). Given all these safeguards, which to a large extent were incorporated into the Statute precisely in order to allay the fears of the US and a number of other States concerning the improper use of the Prosecutor's powers, it is highly unlikely that prosecutions would be initiated for any such non-judicial purposes.

## 2.

The so-called group of like-minded states at the Rome Conference (comprising countries from all over the world, including the EU Member States, Canada, Australia and New Zealand, Brazil, Mexico, Argentine, Korea and many more) were keen to see the establishment of a court that would be strong, independent, effective and permanent. Those countries that took a more sceptical view (spear-headed by the US – which at the time, however, was still constructively engaged in the project – as well as Russia, China and Arab countries such as Yemen) preferred to begin with a more symbolic court that would be subject to the authority of the UN Security Council. Another possible option would have been to require recognition of the ICC's jurisdiction on a case-by-case basis ('permanent ad hoc court'). A third option would have made co-operation with the Court subject to the discretion of the State concerned, which would have given States virtually unlimited powers to protect their own nationals and undermined the whole idea of putting an end to impunity worldwide.

In this context it is worth examining a number of concessions made mostly in the final stages of the Rome Conference in order to accommodate key concerns of the more sceptical countries. These resulted in the following changes:

- introduction of an opt-out for war crimes valid for a period of seven years (Art. 124 RS),
- jurisdiction ratione personae was limited to exclude jurisdiction based on the victim's home country and the state having custody over the alleged perpetrator,

- if a State wishes to genuinely conduct its own investigations, it can require the Prosecutor to refrain from beginning or continuing investigations (Art. 18 (2) RS),
- definition of 'elements of crimes' as a means to aid interpretation of the RS; this concept, which is derived from US military law, is designed to limit judges' scope for interpretation and is alien to both civil law and common law traditions.

In this context it seems appropriate to recall also two comments made by the head of the US delegation to the Rome Conference, Professor David J. Scheffer:

- 'Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us of the merit creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operations.'[17]
- „At this conference [the Rome Conference], the US delegation has engaged in the most intensive discussions with other delegations in order to achieve our common objectives. We sought to find means to achieve fundamental US requirements for the court and also the objectives of other governments. In some instances our efforts have proven very useful in arriving at constructive language with broad appeal.' [18]

## 3. IN A DESIRE TO PROTECT THEIR OWN NATIONALS AND TO A CERTAIN EXTENT EVEN THOSE OF THEIR PARTNERS AND ALLIES, THE US HAS TAKEN A VARIETY OF STEPS:

- It has concluded non-surrender agreements (also known as 'Art. 98 agreements', since they are supposedly based on Art. 98 (2) RS) with around 70 countries, some 30 of which are States Parties to the RS. In most cases such agreements require the contracting parties, on a reciprocal basis, not to surrender to the ICC at its request, without obtaining the prior consent of the other contracting party, any of their nationals or even nationals of other countries (military personnel, active or former government officials and employees of whatever nationality) present in their territory. The contracting parties are also required to give an undertaking that, should an individual be extradited or surrendered to a third state, they will withhold consent to that individual's surrender to the ICC.
- In July 2002, in connection with renewal of the mandate of the UN mission to Bosnia and Herzegovina, the US insisted on the adoption of SC Resolution 1422, which exempts for a renewable twelve-month period personnel of NSP (including the US) serving with UN-authorized missions or UN peacekeeping operations from the jurisdiction of the ICC. This resolution was justified in terms of Chapter VII of the UN Charter, indica-

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*17 115 congress 11 (1998) as cited by Seguin in Boston University Law Journal, Spring 2000 (18 B.U. Int L.J. 85).*
*18 http://www.state.gov./www/policiy remarks/1998/980715 scheffer icc.html cited as above.*

ting that the ICC was deemed a threat to international peace and security! After lengthy dispute the Security Council voted unanimously in favour of the resolution, although a resolution to renew the exemption tabled in June 2003 met with 3 abstentions from France, Germany and Syria (Res. 1487). Although UN Secretary-General Kofi Annan subsequently expressed the hope that this was the last time such a resolution might be considered necessary, it is not unlikely that the US will ask for another 'renewal' in 2004.

- The US Congress has furthermore passed the American Service-members' Protection Act (ASPA), a bill tabled by Senator J. Holmes and signed into law by President Bush on 2 August 2002. This Act requires the Administration to conclude non-surrender agreements as described above and do everything in its power to ensure that Americans will not face trial before the ICC.[19] It also requires the Administration to withdraw military aid from countries unwilling to conclude such agreements. However, NATO allies and other partners deemed important to American interests are exempted or may be granted presidential waivers.

While none of these measures directly impinge on the ICC's jurisdiction, they do have an indirect impact. Since trials before the Court require the presence of the accused (Art. 63 RS), anything that prevents or renders more difficult the apprehension of the accused and his surrender to the ICC will impede the work of the Court.

The arguments of the USA are based on the wording of Art. 98 (2) RS, which reads as follows:

*'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'.*

Although the wording of this paragraph is admittedly somewhat ambiguous, the intention, it can safely be said, was to cover only cases where a special agreement with the US was already in force prior to the entry into force of the RS on 1 July 2002 and their respective provisions are incompatible. Such agreements include, for instance, the so-called 'Status of Forces Agreements (SOFA)', which in certain cases accord the sending state prime responsibility for investigating and prosecuting crimes. Under such circumstances, it is argued, a State Party should not be compelled to choose which of the two agreements (the RS or the SOFA) it will not comply with. Hence only in this one respect does the wording of Art. 98 (2) RS limit the obligation of States Parties to cooperate unconditionally with the ICC. It was never meant to allow for new agreements to the same effect after 1 July 2002.

This can be clearly deduced by applying the rules of interpretation as contained in Arts. 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969. First of all, Art. 98 RS has to be interpreted in

*19 Since the ASPA also permits the use of force to achieve its objectives, it is sometimes referred to in the Netherlands as the "Hague invasion act".*

conjunction with the integral Part 9 of the RS dealing with the obligations of State Parties in their relations with the ICC. Art. 86 RS requires the full and unconditional co-operation of States Parties with the Court; it goes on to specify a number of well-defined exemptions which are, however, very limited in scope and not subject to the discretion of States Parties. Hence it is clear that the wording of Art. 98 (2) RS must be inter-preted in a way that allows only the narrowest definition of any exemption from the basic obligation.

Such agreements must be viewed, furthermore, in the context of Art. 120 RS, which does not allow any reservations to be made with respect to the RS. However, any agreement concluded after the entry into force of the RS that curtailed a State Party's obligation to fulfill its commitments under the RS would indirectly constitute a reservation with regard to one of the Statute's key provisions. As such, it would be incompatible with both the spirit and the letter of the RS, since the ICC will only be able to function properly if States Parties scrupulously fulfill their obligations to fully co-operate with the Court. Finally, it should be recalled that what participants at the Rome Conference had in mind were exemptions only for cases where a State Party had concluded a binding agreement prior to the entry into force of the RS on 1 July 2002. Other exceptions or grounds for refusing co-operation were discussed at length but ultimately rejected, since any other course would have jeopardized the Court's ability to function properly under its own Statute and hence its entire raison dêtre.

## 4.

With a view to safeguarding the integrity of the RS and the viability of the ICC, the Council of the European Union adopted on 11 June 2001 a Common Position, which was amended on 20 June 2002[20]. In Art. 2 (2) of the latest version adopted on 15 June 2003[21], EU Member States undertake to 'contribute to the worldwide participation in and implementation of the Statute also by other means'. This should be read in conjunction with paragraph 10 of the Preamble stating: 'It is eminently important that the integrity of the Rome Statute be preserved. 'Since these decisions form part of the 'EU acquis', they are binding on the accession countries as well. This aspect was highlighted also in the Council Conclusions of 30 September 2002[22]:

'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.'

Furthermore, the Council expresses the hope that the US will continue to work together with its allies and partners in developing effective and impartial international criminal justice. To this end it proposes a broader dialogue between the EU and the US on all matters relating to the ICC, underlining in particular:

- The desirability of the US re-engaging in the ICC process (the US is entitled to be

*20 A "Common Position" is one of the instruments of the Common Foreign and Security Policy as provided for in Arts. 12 and 15 of the Treaty on European Union. Art. 15 (2) of the Treaty provides that Member States shall ensure that their national policies conform with such common positions. This means that a Common Position is of a more formalized nature than mere Council conclusions.*

*21 Council Common Position 2003/444/CFSP, Official Journal of the European Union L 150/67 of 18.06.2003.*

*22 2450th Council meeting in Brussels on 30 September 2002.*

an observer to the Assembly of States Parties).

- The development of a relationship entailing practical co-operation between the US and the Court in specific cases.

It is to be hoped that the dialogue will be resumed at an early date so as to avoid further friction within the transatlantic community and, by reaffirming partners' shared values, pave the way for renewed 'good neighbourliness' in ICC matters.

## 5.

A final postscript to round off the argument: any move by Germany – an entirely hypothetical case[23] – to conclude a non-surrender agreement would be in breach of the German ICC Act (Cooperation Act), which stipulates a duty to surrender suspects at the request of the Court (Section 2 (1) and (2) of the ICC Act). Such an agreement would be possible only after parliamentary approval of an amendment to the ICC Act, a step which by its very nature would result in the German legislature contravening its international obligations under the RS. ■

*23 As has been pointed out (cf. 10), under the terms of ASPA Germany as an NATO ally is exempted from the requirement to conclude such agreements.*