International Criminal Court at a Crossroads or in an Impasse?
Some Obstacles Related to the Jurisdiction and Cooperation

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1. Introduction

There are no doubts that the Rome Statute of the International Criminal Court was a major achievement in the progressive development and codification of international law at the end of the 20th century. In spite of that, the document gave rise to some controversies and strong opposition from several important states. The fact that the Rome Statute has already entered into force - as of July 1st, 2002 - signifies a true success for international law in general and in particular that of the European perspective. Right from birth, however, the International Criminal Court has had to face to some problems. Although they are clearly of political origins, they have appeared also in a legal form. From the point of view of international law, it seems to be important to analyze a relationship between the ICC and the Security Council of the United Nations on the one hand, and some bilateral agreements referring to Article 98 of the Rome Statute on the other.

The present paper aims at formulating two research questions. First, are these recent developments consistent with the Rome Statute and other applicable rules of international law? Second, do they seriously undermine the ability of the ICC to perform the tasks entrusted to it by the States Parties?

2. UN SC Resolution 1422 and Its Successors

A. The Factual Background

It is already a well-known fact that the openly hostile attitude of the US administration of President G.W. Bush to the Rome Statute of the ICC led to some attempts to make its entry into force difficult and, when this goal proved to be impossible, to limit the jurisdiction and the scope of activities of the ICC. The political purpose behind it is to protect, as far as possible, US nationals from investigation and prosecution before the Court, and in particular those serving in various peace-keeping or other military missions abroad. The first of the international legal tools used by the US to this end (or misused, depending on the answer to the analyzed question) represent some resolutions of the UN Security Council.

The first example, Resolution 1422, was adopted by the Security Council on 12 July 2002, only a few days after the entry into force of the Rome Statute. All 15 members of the Security Council, including seven States Parties to the Rome Statute (among them also two permanent members of SC, i.e. France and UK) voted in favour of this resolution. Its preamble declares that the Security Council was "acting under Chapter VII of the Charter of the United Nations". The core of the resolution lies in the operative paragraph 1, which refers to Article 16 of the Rome Statute. It prevents the Court, for one year, from commencing or proceeding with

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investigation or prosecution of any case involving current or former officials or personnel from a contributing State not a Party to the Rome Statute, relating to any UN established or authorized operation. [1]

The adoption of the resolution by unanimous vote, which may appear surprising at first glance, was due to the threat that one permanent member (USA) would cast a negative vote (veto) for the proposal on renewal of the UN mission in Bosnia and Herzegovina. [2] However, during a public meeting of the Security Council on 10 July 2002, a number of States criticized the US proposal. Some States even argued that the draft resolution is not in conformity with the Charter. [3]

Since then the Security Council has adopted two further resolutions of a similar nature. First, on 12 June 2003 the SC adopted Resolution 1487 which had the same content as Resolution 1422. Following the example of Res. 1422, the Security Council reiterated, in para. 2. of the new resolution, its intention to renew the request to the ICC for the next 12-months period. In this case, only 12 members of the Security Council voted for adoption of the resolution, while France, Germany and Syria abstained in the voting.

Next, the Security Council adopted Resolution 1497 (2003) on Multinational Forces in Liberia. Although these UN authorized Forces would have already been covered by the conditions under Resolution 1487 (2003), the Council decided in para. 7 of the new resolution that "current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State". [4]

This text shows a shift in its wording in comparison with the two previous resolutions. Firstly, it does not even refer to Article 16 of the Rome Statute, which seems to stress a different legal basis, independent on the interpretation of this treaty provision. Secondly, it provides for a permanent immunity from the jurisdiction of the ICC instead of a mere deferral of investigation or prosecution. Thirdly, it establishes the exclusive jurisdiction of the sending State which may give rise to conflict with the jurisdiction of the ICC as well as the jurisdiction of other States under principles of international law (eg. based on the territoriality). Finally, it gives a power of waiver to the contributing State only, not to the Security Council.

As far as the above quoted Resolutions 1422 and 1487 are concerned, it may appear that they are *prima facie* compatible with Article 16 of the Rome Statute. However, a conclusion on

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[1] S/RES/1422 (2002): „1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise."

[2] See Am. J. Int'l Law, vol. 96, 2002, at 725-727. Cf. the statement by the US representative in the Security Council of 10 July 2002, UN Doc. S/PV/4568, at 9-10. Cf. also Stahn, C., The Ambiguities of Security Council Resolution 1422, European J. Int'l Law, vol. 14, 2003, at 85.

[3] See UN Doc. S/PV.4568, at 3 (Canada), at 16 (Jordan) and S/PV.4568 (Resumption 1), at 7 (Samoa), at 9 (Germany).

[4] S/RES/1497 (1 August 2003).

compatibility cannot be done without a double test of the legal effects of such resolutions in the light of the Rome Statute and the law of the UN Charter.

B. Analysis of the Legality and Effects of SC Res. 1422 and Its Successor

According to Article 16, "no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." A close examination of both the text and *travaux préparatoires* of Article 16 seems to prove[5] that this article allows for the deferment or suspension of investigation or prosecution on a case by case basis, for a limited period and only where the Security Council has determined that a particular situation constitutes a threat to peace or a breach of peace (or even an aggression) under Chapter VII of the UN Charter. [6]

It is possible to say that Resolutions 1422 and 1487 are incompatible *ratione temporis* with Article 16 of the Rome Statute because the SC resolutions intend to prevent the ICC from taking any steps in advance, when any crimes under consideration have not even been committed. This does not seem to be in conformity with the text and drafting history of Article 16. Its purpose is just to defer temporarily the exercise of jurisdiction of the Court, where its investigation or prosecution could hinder the Security Council in its efforts to arrive at a peaceful solution of situations constituting a threat to or a breach of international peace and security. It should not provide a blanket immunity for uncertain future cases.

Another question which arose in this context is whether Resolution 1422 and other similar resolutions are compatible with the powers of Security Council. From the formalistic point of view, such a resolution is within the powers of the Security Council which is, when acting under Chapter VII of the Charter, able to adopt a resolution binding on all Member States. The resolution could even prevail over some obligations arising from the Rome Statute on two grounds (under Art. 103 of the UN Charter and Art. 16 of the Rome Statute). This conclusion holds good only if the above resolutions have been adopted as valid.[7] The validity of the SC resolutions, being as unilateral acts of international organization a source of derived law, depends on the adoption *in accordance with the Charter*.

On the one hand, the Security Council, being a political body, enjoys an extremely large margin of appreciation. Accordingly, one may argue that a threat to peace in the sense of Article 39 seems to be whatever the Security Council says is a threat to peace, which is a political decision and not easily subject to legal evaluation.[8]

On the other hand, it is at least arguable that Resolutions 1422 et al. are *ultra vires*, because the conditions provided in Chapter VII were not fully met. The Security Council did not determine the existence of any threat to peace or other grounds under Article 39 (and indeed

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[5] Cf. Bergsmo, M., Pejić, J., Article 16, in: Triffterer, O. (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Nomos, Baden-Baden, 1999, at 373 ff.; Cassese, A., Gaeta, P., Jones, J.R.W.D. (eds.), The Rome Statute of the International Criminal Court: A Commentary, Oxford, New York, 2002, at 644-646.

[6] Cf. the statement by the Netherlands; UN Doc. S/PV.4772 (2003), at 20.

[7] Cf. Art. 25 of the UN Charter: „The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

[8] Cf. Akehurst. M., Modern Introduction to International Law, 7th ed., at 426.

could hardly do so, as at the moment of adoption of the said resolution there was no such situation, in particular in respect of any investigation over any members of troops established or authorized by the UN Security Council). According to prevailing views of doctrine, Chapter VII does not give to the Security Council the legislative power, i.e. power to make law (by way of binding resolutions) *in abstracto*, without any limits and links to situations which endanger international peace and security. Resolutions 1422 and 1487 have also been described as *ultra vires* by the Parliamentary Assembly of the Council of Europe. [9]

However, what legal consequences arise from the Security Council resolutions adopted *ultra vires*? According to the Commentary to the UN Charter "resolutions that cannot be considered as adopted under Chapter VII ... for lack of the necessary determination ... do not create binding effects for states". [10]

The question of whether States are, in such a case, free to evaluate the legality of the Security Council resolution and to refuse its binding effects, is not an easy one. Indeed, a decision of a State to refuse a resolution unilaterally, without any support of the authoritative decision of an international court or tribunal, would constitute a too dangerous and therefore unacceptable precedent. This conclusion raises another difficult issue of the judicial review. It is not clear which judicial body, if any, is competent to rule on the validity and effects of SC resolutions. In particular, the International Court of Justice, as one of the principals organs of the United Nations, has not yet definitively pronounced itself on the validity of SC resolutions and, when deciding in other cases, has acted on a presumption of validity. [11]

It is conceivable that the International Criminal Court itself, following the example of the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia, could address the legality of SC resolutions as a preliminary issue, in order to rule on its own *compétence de la compétence*. [12]

This kind of judicial review might happen not *in abstracto* but in relation to a specific case where the SC resolution would interfere with the exercise of the jurisdiction of ICC under the Rome Statute. This Court is not, in contrast with the ICJ, an organ of the United Nations, but an independent international institution, sitting outside the UN structures. That is why it could take a more critical approach to some acts of the Security Council. The Rome Statute does not provide any special procedure for a challenge to the SC resolution, but its legality could be examined *ex officio* by a competent chamber of the ICC pending a ruling regarding deferral or admissibility of a case. [13]

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[9] See Council of Europe, Res. 1336 (2003)(1) of 25.6.2003.

[10] See Frowein, J.A., Krisch, N., Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, in: Simma, B. (ed.), The Charter of the United Nations: A Commentary, 2nd ed., Oxford, 2002, at 727.

[11] See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US; Libya v. UK) Provisional Measures. ICJ Reports 1992; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia). Requests for Provisional Measures. ICJ Reports 1993.

[12] See Cassese, A., Gaeta, P., Jones, J.R.W.D. (eds.), op. cit., at 648: „In exercising its power of judicial review of the resolution requesting the deferral, the Court will establish the legality or otherwise of the Security Council's action. In so doing, the Court will also be entitled to ascertain that the Security Council has not exceeded its competence according to the Charter."

[13] See Cassese, A., Gaeta, P., Jones, J.R.W.D. (eds.), op. cit., at 650-651.

However, it is not a mere theoretical problem of the relationship between the limits of power of the political body on one side and of the judicial body on the other side. Although the Court should be legally able to rule the issue, there are some doubts that it would be willing to do so because of political consideration.

The recent development seems to calm down the excited discussion on the SC resolutions referring to Article 16 of the Rome Statute. In June 2004 the Security Council had on the agenda the proposal of the resolution on renewal of the general exemption of the officials and personnel of UN missions from the States not parties to the Rome Statute (in a sense of Res. 1422 and 1487). This year, however, it became evident that the US sponsored proposal would meet a much stronger disapproval from both the Secretary-General and some members of the Security Council (e.g. France, Germany, Spain). Therefore its adoption was far from being sure, due to the risk of veto, and the US representative within the Security Council having withdrawn its proposal. [14]

3. Bilateral Agreements under Article 98 of the Statute

The second of the highly controversial issues linked to the entry into force of the Rome Statute are bilateral agreements between the USA and both States parties to the Statute and the third states, precluding the other States from transferring the US nationals to the ICC. Since 2002, the US Government has initiated a campaign requiring other States to sign such agreements. The *bilateral immunity agreements* (BIAs) have been criticized mainly by NGOs who re-baptized them as "bilateral impunity agreements". One of them, the Coalition for International Criminal Court, counted some 60 agreements by 2003, amongst which 12 had already been ratified.[15] According to the US State Department, 79 agreements have been signed and 14 ratified.[16] It was reported that 58 out of 94 States Parties to the Statute of the ICC did not sign the BIAs. 23 States Parties have not signed, despite loss of the United States aid. Up to 45 States have publicly refused to sign such agreements.

The United States in its campaign made use of the wording of Article 98 para. 2 of the Rome Statute (Cooperation with respect to waiver of immunity and consent to surrender), which 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.

It is not easy to give answers to the question whether such new agreements (BIAs between the USA and some other States) are in conformity with Article 98 or not. It depends on the content of such agreements. In view of the legislative history of Article 98, it seems that its purpose is to

[14] See Press Release SG/SM/9379 - SC/8132 (23.6.2004): „The Secretary-General has been following the discussion in the Security Council on the International Criminal Court. He believes that the decision by the United States not to pursue a resolution on this matter will help maintain the unity of the Security Council at a time when it faces difficult challenges."

[15] Cf. Schabas, W.A., ILA Committee on the International Criminal Court. First report. Berlin Conference, 2004, at 12.

[16] Status of US Bilateral Immunity Agreements (BIAs), as of June 15, 2004.

allow the compliance with both international obligations relating to State and diplomatic immunities of a person or property of a third State (i.e. not a Party to the Statute of ICC) and international obligations arising from such agreements, such as the Status of Forces Agreements (SOFA), already concluded at the time prior to the establishment of the international criminal justice. [17] As far as it covers such agreements which constitute *lex specialis*, Article 98 of the Rome Statute may be considered to be a useful provision. However, such broadly drafted agreements ensuring the immunity for all US citizens seems contrary to the object and purpose of Article 98.

The possibility to judicially challenge such agreements seems to be rather limited. Indeed, the ICJ might be able to solve any dispute concerning interpretation of an international treaty, but its jurisdiction would be subject to declaration according to Article 36 of the Statute of the ICJ. Therefore it seems unlikely that the ICJ would rule in such an inter-state dispute. Perhaps the General Assembly might request an advisory opinion from the Court on this issue.[18]

As to the inherent jurisdiction of the ICC, this situation is not clear either. Unlike the above discussed resolutions of the Security Council under Article 16 of the Statute, where the jurisdiction of the ICC is at issue, the bilateral agreements under Article 98 are just a matter of the international cooperation between the States Parties and the Court. Such agreements provide for immunities for nationals of the third States, not bound by obligations from the Rome Statute. It seems to give less scope for the International Criminal Court to review these agreements in a framework of its inherent jurisdiction. Admittedly, in the case of a refusal of a State Party to comply with its request for cooperation (eg. the surrender of a person) the Court could insist on the *bona fide* implementation of obligations under the Rome Statute.[19] However, it could hardly rule on invalidity of the bilateral agreement between the State Party and the third State. Otherwise it would exceed its powers and place the State Party in a delicate situation, as this might imply the breach of its treaty obligation to the USA.

Therefore, it is advisable to prevent, as far as possible, a conflict of obligations under the Rome Statute and the BIAs. This is also the aim of the Council of the EU when it adopted its common position on Article 98 agreements in its Conclusions and Guiding Principles of 30 September 2002.[20] The essence of these Guiding Principles, which took into consideration various types of both existing and newly drafted agreements, is that such agreements are allowed under Article 98 para. 2 of the Rome Statute provided that they comply with the following principles:

- they must only cover persons who are not nationals of a State Party;
- they must have provisions to ensure that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy immunity;
- they should cover only persons sent officially on government missions by the State in question, therefore they cannot cover all citizens of that State.

The EU Guiding Principles aim at preserving the integrity of and compliance with the Rome Statute of the ICC, including its provisions under Part 9 (International cooperation and

[17] Cf. Prost, K., Schlunck, A., Article 98, in: Triffterer, O. (ed.), op. cit., at 1131-1133; Cassese, A., Gaeta, P., Jones, J.R.W.D. (eds.), op. cit., 975 ff., esp. at 992-997.

[18] Cf. Schabas, W., ILA Report, op. cit., at 18.

[19] According to Article 18 of the Vienna Convention on the Law of Treaties (1969).

[20] 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, Council Conclusions on the ICC. Brussels, 30 September 2002.

judicial assistance). They set some basic principles which have to be respected by the EU Member States in application of the existing agreements (e.g. SOFA) and negotiation of the new BIAs. In particular, any solution should prevent impunity of persons who have committed crimes falling within the jurisdiction of the ICC and allow prosecution by national jurisdictions.

4. Conclusions

To answer the questions formulated at the very beginning of this contribution supposes a case by case analysis of the issues. Both resolutions of the Security Council under Article 16 and the agreements under Article 98 may be *in abstracto* consistent with the relevant provisions of the Rome Statute. However, it depends very much on the actual content of such legal instruments. From this point of view, the legal analysis of the US sponsored resolutions (1422 and others) and BIAs has highlighted some serious problems of inconsistency between the object and purpose of the Rome Statute and other norms of international law, including the UN Charter.

The second question seems to be even more difficult. At present, when the Court has not yet ruled in the first case, it is not appropriate for the doctrine to present any strong conclusions on the question, whether they seriously undermine the ability of the ICC to act in an impartial and independent way.

However, the State practice, unlike the doctrine, is not so much interested in pure theoretical solutions, but rather in some feasible way out of the problem. Since the judicial review by either of the international courts (ICJ and ICC) is also not very likely, States tend to find some mutually agreeable solutions in order to avoid a direct confrontation between the Court and/or State parties to the Statute and the USA. The refusal of several States, members of the Security Council, prevented the USA from getting the renewal of the resolution 1422 (2002) again in June 2004. The withdrawal of the US proposal has not only political but also legal dimensions, as it allows the doctrine to exclude the hypothesis of amendment of treaty rules by the subsequent State practice. Therefore, the ability of the ICC to act will not be undermined. As far as the BIAs concern, there is no uniform practice because some States have signed them while some others have refused to do so. The EU Guiding Principles seem to provide a model on how to reconcile obligations of States Parties to the Rome Statute and obligations under such agreements. Nevertheless, a definitive answer to the second question would be premature.