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## **THE EFFORTS TO LIMIT THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION OVER NATIONALS OF NON-PARTY STATES: A COMPARATIVE STUDY**

MARCO ROSCINI\*

“Our actions, taken consistently with constitutional principles, require no separate external validation to make them legitimate. Whether it is removing a rogue Iraqi regime and replacing it, preventing weapons of mass destruction proliferation, or protecting America against an unaccountable court, the United States will utilize its institutions of representative government, adhere to its constitutional structures, and follows its values when measuring the legitimacy of its actions.”

John R. Bolton<sup>1</sup>

### **Abstract**

The purpose of this article is to discuss and compare the multilateral and bilateral efforts to prevent the ICC from exercising its jurisdiction over nationals of states non-parties to the Rome Statute. In particular, the US secured the adoption of Security Council resolutions no. 1422 (2002), 1487 (2003), 1497 (2003), 1593 (2005) and launched a campaign for the conclusion of bilateral non-surrender agreements: the differences between the resolutions and between them and the agreements are analysed. None of the resolutions above can be qualified as an exercise of the Security Council's power to request the ICC not to commence or proceed with investigations or prosecutions under Article 16 of the Rome Statute, as this provision was not conceived to cover future and hypothetical cases. Furthermore, by adopting resolutions 1422 and 1487 and by including the paragraphs on the exclusive jurisdiction of the contributing state in

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<sup>1</sup> Address to the Federalist Society, 13 November 2003, <http://www.fed-soc.org/pdf/bolton.pdf>, 19–20.

resolutions 1497 and 1593, the Security Council acted *ultra vires*, since no threat to the peace can be found in order to justify the exercise of Chapter VII powers. The resolutions are also in contrast with the principles and purposes of the UN. As to the bilateral non-surrender agreements, they cannot be qualified as “international agreements pursuant to which the consent of the sending State is required to surrender a person of that State to the Court” as required by Article 98 (2) of the Statute, since they prohibit the surrender to the ICC of any individual who is “present” on the territory of the other party and they do not require the state to which the accused has been transferred to investigate and prosecute the case. Should Italy conclude a non-surrender agreement with the US, it would incur international responsibility. The law giving effect to such an agreement in the Italian legal order would also be in contrast with Articles 10 (1) and 11 of the Constitution.

#### I. INTRODUCTION

It is well-known that, under Article 12 of the Rome Statute, the International Criminal Court (ICC) can exercise its jurisdiction over nationals of non-party states if they have committed the crime on the territory of a state party. However, Article 12 must be read in conjunction with Articles 16 and 98. The former provides that no investigation or prosecution may be commenced or proceeded with by the Court for a period of 12 months (renewable under the same conditions) 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.<sup>2</sup> Even if it

<sup>2</sup> The Rome Statute does not define what constitutes “investigation” or “prosecution”. The former comprises action that might be taken with respect to a situation and/or an individual, while “prosecution” includes only actions taken with regard to a specific person (Bergsmo and Pejić, “Article 16”, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Baden-Baden: Nomos, 1999), 378). Furthermore, “prosecution” is a consequence of investigations. In any case, the borderline between the two concepts is not of paramount importance in the light of Art. 16, as both investigations and prosecutions are suspended by the request of the Security Council under Chapter VII. On the contrary, it is important to determine when the investigation commences: this happens “when the ICC prosecutor determines that there is a ‘reasonable basis to proceed’ and renders a decision to that effect” (Zeidy, “The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422”, 35 *Vanderbilt Journal of Transnational Law* (2002), 1513). Despite the Council’s request, the Prosecutor might still carry out preliminary activities which take place before the Pre-Trial Chamber’s authorization (e.g., seeking information

does not directly affect the ICC jurisdiction over a national of a non-party, Article 98 prevents a request by the Court of surrender or assistance whenever the requested state would have to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state or 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 that third state for the waiver of the immunity or the cooperation of the sending state for the giving of consent for the surrender.<sup>3</sup>

The purpose of the present article is not a general discussion of the above mentioned provisions, but rather a comparative analysis of the efforts to use them to prevent the ICC from exercising its jurisdiction over nationals of states non-parties to the Statute. In particular, Articles 16 and 98 have been employed by the current US administration as a Trojan Horse inside the complex and fragile legal structure created in Rome in 1998 in order to paralyse it whenever US nationals are involved.

from states, organs of intergovernmental or non-governmental organizations, receiving written or oral testimony at the seat of the Court, analysing the information received) (Bergsmo and Pejić, *supra* note 2, 379). In case of a request not to proceed with an investigation or prosecution, the question arises of the preservation of evidence, which is not contemplated by the Statute. If the request of deferral is renewed for several years, the right of the accused to be tried without undue delay might also be violated and the continued detention for the period of the deferral might be considered “arbitrary” (Condorelli and Villalpando, “Referral and Deferral by the Security Council”, in A. Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002), vol. I, 652–653). However, at least as far as the first problem is concerned, the case can be made that the preservation of evidence and the protection of witnesses and victims are not in contrast with the Security Council’s request of deferral, as they concern activities carried out before such request (*ibid.*, at 651–652).

<sup>3</sup> The limits to the ICC requests provided in Art. 98 apply only in favour of nationals of states non-parties to the Statute (Akande, “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits”, 1 *Journal of International Criminal Justice* (2003), 641). In effect, unlike the Security Council resolutions creating ad hoc judicial bodies, a treaty establishing an international court cannot remove the immunities of organs of states not parties to that treaty.

The American government has played its game both at the multilateral and bilateral levels.<sup>4</sup> As to the former, at the Rome Conference the

<sup>4</sup> The US objections to the ICC are well-known. The problem of the possible exercise of jurisdiction over nationals of non-parties is exacerbated by the fear that the Prosecutor might start proprio motu politically motivated proceedings against US citizens participating in military operations abroad. The US has also criticised the contrast between the Rome Statute and several provisions of its Constitution, in particular those providing for immunities of state officials and for the right to be tried by a jury (this position has been effectively criticised by Franck and Yuhan, "The United States and the International Criminal Court: Unilateralism Rampant", 35 *New York University Journal of International Law and Politics* (2002–2003), 541–545). Finally, the inclusion of the crime of aggression, which might affect the primary responsibility of the Security Council in the maintenance of international peace and security and submit to judicial review states' actions to protect their national security and their foreign policies has also been criticised. The risk highlighted by the US is that "senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to act of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression" (American Servicemembers' Protection Act, section 2002, para. 9, on which see below, section IV of this article). On the US objections to the ICC see, more extensively, Hafner, "An Attempt to Explain the Position of the USA Towards the ICC", 3 *Journal of International Criminal Justice* (2005), 323–332; Wedgwood, "The International Criminal Court: An American View", 10 *European Journal of International Law* (1999), 93–107. However, this criticism is not convincing. The territoriality principle is contained in all national legislations as a ground for the exercise of jurisdiction by national tribunals: the ICC is quite simply the entity to which states parties to the Rome Statute have delegated the exercise of their respective territorial jurisdictions for certain crimes and under certain conditions (Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)", 14 *European Journal of International Law* (2003), 86; Paust, "The Reach of ICC Jurisdiction Over Non-Signatory Nationals", 33 *Vanderbilt Journal of Transnational Law* (2000), 3–5, who recalls that, by establishing the Nuremberg Tribunal, states "have done together what any one of them might have done singly"). It is not helpful to argue that this delegation is unlawful as the exercise of jurisdiction is a fundamental prerogative of the state and thus inalienable: if a state can cede a part of its territory by treaty or even extinguish itself, a fortiori it will be able to delegate the exercise of its criminal jurisdiction over certain crimes to an international tribunal. Furthermore, the Rome Statute provides for effective safeguards against politically biased proceedings. Every decision of the Prosecutor to start proceedings must be authorized by the Pre-Trial Chamber, which is composed of judges elected by a majority of two thirds of the members of the Assembly of States Parties. The Prosecutor can be removed from office by the Assembly of States Parties at any time (Art. 46). The Security Council might

negotiations sent by the then President Clinton tried to have the consent of the national state of the accused included among the preconditions for the ICC jurisdiction when the situation is not referred to the Prosecutor by the Security Council.<sup>5</sup> After the failure of this strategy, the offensive was launched by the George W. Bush administration in the UN Security Council and managed to secure the adoption of resolutions no. 1422 (2002), 1487 (2003), 1497 (2003) and 1593 (2005).<sup>6</sup> At the same time, the US government has pursued a campaign to dissuade states from ratifying the Rome Statute and to conclude bilateral agreements providing for the obligation not to surrender or by any means or purpose transfer to the ICC US officials, employees, personnel or nationals who are present on the territory of the other party without the expressed consent of the US. The present article first examines the US multilateral strategy by comparing the different Security Council resolutions which affect the ICC jurisdiction, and then discusses the bilateral non-surrender agreements. Finally, the legal consequences arising from the conclusion of such an agreement by Italy will be investigated, taking into account both Italy's obligations under international law and the relevant provisions of its Constitution.

## II. THE MULTILATERAL STRATEGY: SECURITY COUNCIL RESOLUTIONS NO. 1422 (2002), 1487 (2003), 1497 (2003) AND 1593 (2005)

On 30 June 2002, when the Rome Statute was about to enter into force, the US declared that it would vote against a resolution renewing for 6 months the mandate of the UN Mission in Bosnia and Herzegovina (UNMIBH) and threatened to do the same with respect to all other UN peacekeeping operations if US military personnel participating in such operations were not granted an exemption from the ICC jurisdiction.<sup>7</sup> The outcome of such

also request the ICC not to commence or proceed with an investigation or prosecution under Art. 16. It is also worth recalling that under Art. 17 of the Statute the ICC can exercise its jurisdiction over a case only if the state party is "unwilling or unable" genuinely to carry out the investigation or prosecution. Finally, the definition of the crime of aggression will have to be "consistent with the relevant provisions of the Charter of the United Nations" (Art. 5).

<sup>5</sup> Williams, "Article 12", in Triffterer (ed.), *supra* note 2, at 336.

<sup>6</sup> The US has also opposed all reference to the ICC in Security Council resolutions. The only exceptions are resolution 1688 of 16 June 2006, which endorses the trial of Charles Taylor by the Special Court for Sierra Leone in the ICC premises, and of course resolution 1593 of 2005.

<sup>7</sup> The American Servicemembers' Protection Act (below, section IV of this article) provides that "[e]ffective beginning on the date on which the Rome Statute enters into force [...], the President should use the voice and vote of the

pressures was resolution no. 1422 of 12 July 2002, para. 1 of which provided that “consistent with the provisions of Article 16 of the Rome Statute, [...] 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 twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case unless the Security Council decides otherwise”.<sup>8</sup> The deferral of investigations and prosecutions could be renewed for further 12 months under the same conditions on 1 July of each year “as long as may be necessary” (para. 2), which punctually happened on 12 June 2003 with the adoption of resolution 1487.<sup>9</sup> A proposal for a resolution providing for a further renewal was withdrawn by the US in June 2004, because of the opposition of the majority of the members of the Security Council and thanks to the lobbying of non-governmental organisations.<sup>10</sup>

Resolution 1422 merely suspended the exercise of the ICC jurisdiction over officials or personnel from non-parties and did not prevent UN member states from prosecuting the crimes under the Rome Statute before their tribunals. One fails to see, though, why states could have exercised their jurisdiction separately but not jointly through the Court, which provides the defendant with better guarantees than those contained in the legislations of many countries.<sup>11</sup> This contradiction has

United States in the United Nations Security Council to ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution by the International Criminal Court for actions undertaken by such personnel in connection with the operation” (section 2005).

<sup>8</sup> The resolution was adopted unanimously, although certain members of the Security Council expressed their criticism.

<sup>9</sup> The resolution, which is identical to resolution 1422, was approved with 12 votes in favour and none against, and the abstentions of France, Germany and Syria.

<sup>10</sup> The widespread outrage caused by the abuses suffered by the prisoners detained by US authorities in Afghanistan and Iraq probably played a major role in the failed renewal.

<sup>11</sup> Zappalà, “The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements”, 1 *Journal of International Criminal Justice* (2003), 121.

been avoided in the subsequent resolutions. On 1 August 2003, the Security Council adopted resolution 1497, authorizing the establishment of a Multinational Force in Liberia in order to support the peace process in that country. Para. 7 provides 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”. A similar paragraph has been included in resolution 1593 of 31 March 2005, by which the Security Council decided to refer the situation in Sudan to the ICC Prosecutor.<sup>12</sup>

Unlike resolution 1422, the resolutions on Liberia and Sudan grant exclusive jurisdiction to the contributing state not party to the Rome Statute, thus excluding not only the jurisdiction of the ICC but also of any other state, including the state where the crime was committed, the state of nationality of the victim and any state which might be entitled to exercise universal jurisdiction.<sup>13</sup> Accordingly, if a US member of the UN force killed an Italian citizen in Liberia, he/she might be only tried before US courts. If the crime were committed by a French, the traditional legal grounds of jurisdiction and the complementarity principle under Article 17

<sup>12</sup> According to para. 6 of the resolution, “nationals, current or former officials or personnel from a contributing State outside Sudan 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 operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State”. The inclusion of this paragraph constituted the price to pay in order to secure the abstention of the US in the vote. The US also asked and obtained that the costs arising from investigations in Darfur would not be met by the UN (para. 7).

<sup>13</sup> Some commentators have however suggested that resolution 1497 should be interpreted consistently with peremptory norms on the matter by, inter alia, interpreting the “exclusive” jurisdiction as “primary” jurisdiction: if the national state requests extradition, the *forum deprehensionis* state must comply, but if the national authorities of the contributing state do not investigate or prosecute the case, the jurisdiction of any other interested state would resurrect. Accordingly, extradition might be refused by the *forum deprehensionis* state if it bona fide appears that the national state will not conduct a genuine trial (or no trial at all) (A. Cassese, *International Law* (Oxford: OUP, 2005), 206–207; Zappalà, “Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC”, 1 *Journal of International Criminal Justice* (2003), 676).



of the Rome Statute would apply.<sup>14</sup> It is worth noting that neither resolution 1497 nor resolution 1593 provide for the obligation of the contributing state non-party to the Rome Statute to exercise its jurisdiction over the accused: the exclusive jurisdiction might thus result in immunity.<sup>15</sup>

There are also other differences between the resolutions under examination. The scope of application *ratione personæ* of the deferral of the exercise of the ICC jurisdiction provided by resolution 1422 and of the exclusive jurisdiction contained in resolution 1497 includes all current or former officials or personnel (both military and civilian) from a contributing state which is not a party to the Rome Statute (including nationals of states parties under the command or authority of a contributing state non-party), while the scope of application of para. 6 of resolution 1593 is much broader: it includes not only “current or former officials or personnel”, but also any other national of states non-parties to the Statute (with the exception of Sudan) contributing to a mission established or authorized by the Security Council or the African Union in Sudan. For para. 6 to apply, then, there is no need that the person is (or was) in the employ of the state non-party, the nationality link being sufficient.

On the other hand, the scope of application *ratione materiae* of the three resolutions is identical and includes not only international crimes but also ordinary offences. However, there must be some link between the conduct and a peacekeeping operation or peacekeeping force. This is vague enough to cover acts or omissions committed by deserters or members of the force who are not any longer under its control. I do not share the opinion of those who argue that rape, forced prostitution or trafficking committed by members of the peacekeeping force could never be considered as “related” to the operation, as the commission of such crimes is not included in the mandate of the force.<sup>16</sup> Indeed, under a literal

<sup>14</sup> The three resolutions under examination prevent the exercise of the ICC jurisdiction over nationals or personnel of all states non-parties to the Rome Statute, not just of the US. A state non-party not wishing that its personnel participating in a peacekeeping mission enjoy the permanent or temporary exemption by the ICC jurisdiction could only ask the Security Council to amend the resolutions and remove the exemption with regard to its nationals and personnel (Lavalle, “A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court”, 14 *Criminal Law Forum* (2003), 215–216).

<sup>15</sup> Gaja, “Immunità squilibrate dalla giurisdizione penale in relazione all’intervento armato in Liberia”, 86 *Rivista di diritto internazionale* (2003), 763.

<sup>16</sup> Zappalà, *supra* note 13, 676.

interpretation of the resolutions under examination, the very fact that the conduct was carried out by a peacekeeper renders it “related” to the force or the operation, even if it does not fall within the mandate or has not been authorized by the UN.

If resolution 1497 requires that acts or omissions arise out of or be related to a specific Force (the Multinational Force or UN stabilization force in Liberia), resolution 1422 and 1593 refer to any current or future operation established or authorized by the UN (or by the African Union in the case of resolution 1593).<sup>17</sup> However, while resolution 1593 requires that the operation must be established or authorized specifically by the Security Council, resolution 1422 generically referred to the United Nations: even operations established by the General Assembly under the Uniting for Peace procedure might thus fall within its scope of application.<sup>18</sup> Furthermore, if resolution 1593 only applies to operations deployed on Sudanese territory, resolution 1422 does not specify the place where the operation should be carried out. “United Nations established or authorized operation” includes both traditional peacekeeping operations, deployed with the consent of the territorial state with an interposition function, and the so-called peacekeeping operations of the second generation with enforcement powers under Chapter VII of the UN Charter. Regional multinational forces employed by the Security Council under its authority as provided in Article 53 of the UN Charter can also be included. The only operations which are not covered are those not established or authorized by the UN, whether lawful or not: actions in self-defence (Article 51 of the UN Charter) or by invitation of the legitimate government, but also operations which do not fall within the cases mentioned above and nevertheless have not been expressly authorized by the Security Council (such as Operation “Allied Force” carried out by NATO against the Federal Republic of Yugoslavia in 1999). The case has been made that this was a positive feature of resolution 1422, as states non-parties to the Rome Statute which intended to use force against another state would try to secure the Security Council’s authorization with more zeal, in order to make the resolution applicable and thus prevent the exercise of the ICC jurisdiction over their officials and personnel.<sup>19</sup> Nonetheless, this would result in the (mis)use of multilateral institutions in

<sup>17</sup> Para. 6 of resolution 1593 will thus apply to the UN peacekeeping force which should be deployed in Darfur according to Security Council resolution 1706 of 31 August 2006.

<sup>18</sup> See General Assembly resolution 377 (V) of 3 November 1950.

<sup>19</sup> Akande, *supra* note 3, 647.

order to implement unilateral strategies.<sup>20</sup> What is more – as showed by the invasion of Iraq of March 2003 – the legal advisers of the intervening states would probably maintain the existence of an authorization, if implicit, by the Security Council, even at the cost of resorting to legal acrobatics.

### III. THE LEGALITY OF THE MULTILATERAL STRATEGY

The request not to commence or proceed with investigations or prosecutions contained in resolution 1422 would have been binding on the ICC only if it would have fallen within the scope of Article 16 of the Rome Statute.<sup>21</sup> The opinion according to which Article 16 is unnecessary in this context because “the ‘acting under Chapter VII’ magic renders the [Security] Council all-powerful” is simply not correct.<sup>22</sup> It is often forgotten that the UN Charter is still a treaty which binds only states parties. The ICC is instead an international organization with a legal personality on its own (Article 4 of the Rome Statute) and is not subordinated to the United Nations.<sup>23</sup> Hence, neither Article 25 and Article 103 of the Charter nor the “Chapter VII magic” apply to it. The Security Council could adopt deferral requests binding on the ICC only if the Rome Statute so provides, as in the case of Article 16.<sup>24</sup>

<sup>20</sup> The so-called “multilateral hegemonism” (Tanzi, *Introduzione al diritto internazionale contemporaneo* (Padova: CEDAM, 2006), 23–24).

<sup>21</sup> It would have been up to the ICC itself to incidentally establish the legality of resolution 1422 both with regard to the UN Charter and to the Rome Statute during a proceeding before it, even though the Security Council seemed to have already unilaterally determined that resolution 1422 was “consistent with Article 16” (para. 1). See Deen-Racsmany, “The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?”, 49 *Netherlands International Law Review* (2002), 381–386.

<sup>22</sup> This opinion is argued by Lavallo, *supra* note 14, 206, 210, 212–213.

<sup>23</sup> This has led to the conclusion of a relationship agreement between the two organizations, entered into force in October 2004. Art. 2 (1) provides that the United Nations “recognises the Court as an independent permanent judicial institution which [...] has international legal personality”, while para. 3 of the same provision provides that “[t]he United Nations and the Court respect each other’s status and mandate” (the text can be read at [http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf)).

<sup>24</sup> In any case, it has been noted that, by referring to Art. 16 in para. 1 of resolution 1422, the Security Council itself accepted to exercise its powers within the limits permitted by the Rome Statute, renouncing to invoke the primacy of the UN Charter (Zappalà, *supra* note 11, 119; Lattanzi, “La Corte penale

Both the contextual interpretation and the travaux préparatoires of Article 16 clearly show that this provision was not conceived to cover future and hypothetical cases, but rather specific situations where the exercise of the ICC jurisdiction might prejudice the Security Council's efforts to maintain international peace and security.<sup>25</sup> Furthermore, like all exceptions, Article 16 should be narrowly construed. On the contrary, resolution 1422 re-interpreted Article 16 and provided for the deferral of the ICC jurisdiction "if a case arises", without reference to any concrete situations. In fact, at the time the resolution was adopted, the Court had not yet become operative and the prosecution of US citizens was not in the least foreseeable. As observed by the representative of Canada to the UN, this would set a dangerous precedent under which the Council could change the negotiated terms of any treaty it wished.<sup>26</sup> It is however questionable that the Security Council can amend or re-interpret a treaty. All it can do is call on member states to act inconsistently with their treaty obligations if it is necessary to maintain or restore international peace and security: this is not technically "amendment", but rather a temporary and reversible interference in the operation of treaties.<sup>27</sup>

For the same reasons, and even though it is mentioned in the preamble, Article 16 of the Rome Statute cannot be a legal basis for

internazionale: una sfida per le giurisdizioni degli Stati", 4 *Diritto pubblico comparato ed europeo* (2002), 1372).

<sup>25</sup> Stahn, *supra* note 4, 88–91; Deen-Racsmany, *supra* note 21, 364–366. In particular, it has been maintained that Articles 13–15 all refer to situations where crimes under the Rome Statute have been committed or might have been committed, and the inclusion of Art. 16 after these provisions means that it covers similar scenarios (see, for a different view, Elias and Quast, "The Relationship Between the Security Council and the International Criminal Court in the Light of Resolution 1422 (2002)", 3 *Non-State Actors and International Law* (2003), 176). In the debates in the Security Council, most states supported this interpretation and criticised the adoption of resolutions 1422 and 1487 (Coulée, "Sur un Etat tiers bien peu discret: les Etats-Unis confrontés au Statut de la Cour pénale internationale", 49 *Annuaire français de droit international* (2003), 54–56). On the travaux préparatoires of Art. 16, see Bergsmo and Pejić, *supra* note 2, 373–378.

<sup>26</sup> S/PV.4568, 10 July 2002, at 3. As noted by Condorelli and Villalpando, "the intention to exclude any modification of the Court's jurisdiction by this UN organ is manifest in all the provisions concerning the amendment and review of the Statute" ("Can the Security Council Extend the ICC's Jurisdiction?", in A. Cassese, Gaeta and Jones (eds.), *supra* note 2, 574).

<sup>27</sup> Lavalle, *supra* note 14, 205.

resolution 1593.<sup>28</sup> From a strictly logical point of view, it would also be hard to reconcile the Security Council's decision to refer the situation in Sudan to the Prosecutor with the qualification of the exercise of the jurisdiction of the Court (and of all states apart from the state of the accused) over the peacekeepers of states non-parties as a threat to the peace.<sup>29</sup>

All the three resolutions under examination have been adopted by the Security Council invoking Charter VII of the UN Charter. This was essential for resolution 1422, which expressly ascribed itself to Article 16 of the Rome Statute: according to this provision, the Council's request to the Court not to commence or proceed with investigations or prosecutions must be contained in a resolution adopted under Charter VII. It seems that the only Charter provision under which the Security Council could take action under Article 16 is Article 41, which provides for measures short of the use of armed force.<sup>30</sup> The point, though, is not of paramount importance, as it is very much in vogue in the Security Council practice to invoke Chapter VII as a whole as the legal basis for its resolutions.

Be that as it may, the fundamental pre-requisite for the exercise of Chapter VII powers by the Security Council is the existence of a threat to the peace, breach of peace or an act of aggression and the Council's determination that one of those situations exists (Article 39 of the UN Charter). Nonetheless, neither a breach of peace nor an act of aggression had been committed in the context of the situation where resolution 1422 was adopted. As to a threat to the peace, it is a truism that this concept is a vague one and that the Council enjoys a broad margin of appreciation when determining its content. The threat to the peace might have been constituted by the exercise of the ICC jurisdiction over personnel participating in missions established or authorized by the UN, but this would be tantamount to argue that the prosecution of international crimes is in contrast with the maintenance of international peace and security and that the former can be realized only by sacrificing the latter and vice

<sup>28</sup> Cryer, "Sudan, Resolution 1593, and International Criminal Justice", 19 *Leiden Journal of International Law* (2006), 211; Happold, "Darfur, the Security Council, and the International Criminal Court", 55 *International and Comparative Law Quarterly* (2006), 232.

<sup>29</sup> Condorelli and Ciampi, "Comments on the Security Council Referral of the Situation in Darfur to the ICC", 3 *Journal of International Criminal Justice* (2005), 596. It is also doubtful whether Art. 16 applies to proceedings triggered by the Security Council itself.

<sup>30</sup> Lavalley, *supra* note 14, 201.

versa.<sup>31</sup> This situation could only occur in a specific and existing context, for instance when the ICC Prosecutor intends to start proceedings against the leader of a state with whom a peace agreement is being negotiated. Only if such a situation has been identified could the Security Council resort to Article 16. Furthermore, if it were true that the ICC interferences in the peacekeepers' activities are by definition a threat to the peace, it would be difficult to explain why the request of deferral contained in resolution 1422 was limited to proceedings against nationals of non-parties, and not also of states parties.<sup>32</sup> Another possible explanation is that the threat to the peace was the failed renewal of the peacekeeping operation in Bosnia and Herzegovina: however, this would make sense only if resolution 1422 itself provided for the extension of the UNMIBH mandate, which was instead contained in another resolution.<sup>33</sup> Finally, the threat to the peace might have been constituted by the US refusal to participate in the operation in Bosnia and Herzegovina and/or by the threat to use its veto power against the extension of this and other operations.<sup>34</sup> This seems to be suggested by the preamble of resolution 1422, according to which "it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council". But this conclusion would also be illogical, because, if adopted to face such situation, the resolution would have favoured the state responsible of the threat, rather

<sup>31</sup> On the contrary, the preamble of the Rome Statute recalls that the crimes under the Statute "threaten the peace, security and well-being of the world". According to Condorelli and Villalpando, the ICC was inspired by the "conviction that the prosecution of major international crimes constitutes a means to the maintenance of international peace and security" (supra note 2, 627). As Sarooshi notes, "[i]t is somewhat simplistic to counterpose the achievement of justice as being a distinct matter from the achievement of peace in a war-torn society", as well-illustrated "by the approach of the Security Council to the conflict in the Former Yugoslavia where it decided in resolution 827 to establish the ICTY as a contribution to the restoration of peace" (Sarooshi, "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council", in McGoldrick, Rowe and Donnelly (eds.), *The Permanent International Criminal Court* (Oxford and Portland, Oregon: Hart Publishing, 2004), 105).

<sup>32</sup> Arcari, "La risoluzione 1422 (2002) relativa ai rapporti tra Corte penale internazionale e forze di peacekeeping: (nuovi) problemi di legittimità dell'azione del Consiglio di sicurezza", 85 *Rivista di diritto internazionale* (2002), 728.

<sup>33</sup> Resolution 1423 of 12 July 2002.

<sup>34</sup> Zappalà, supra note 11, 118-119; Deen-Racsmány, supra note 21, 380-381, according to whom the Security Council determined implicitly the existence of a threat to the peace.

than sanctioning it.<sup>35</sup> The US threat of the veto was instead an abuse of the right set forth in Article 27 of the Charter and of the duty to fulfil in good faith the obligations contained in the Charter and to cooperate with the Organization (Article 2).

Resolutions 1497 and 1593 have also been adopted by the Security Council acting under Charter VII of the Charter. The threat to the peace justifying their adoption is identified in the situations in Liberia and Sudan. If they certainly justify the deployment of a multinational force and the referral to the ICC Prosecutor, it is hard to understand how those situations can be a valid basis for the exclusive jurisdiction of the contributing states non-parties to the Rome Statute. As observed by one commentator, the paragraph providing for exclusive jurisdiction “does not share the rationale behind the rest of the resolution[s] and [...] the threat to peace which constitutes the underpinning of Chapter VII powers and of resolution 1497 (2003) [and of resolution 1593 (2005)] does not cover or extend to operative paragraph 7 [and to paragraph 6]”.<sup>36</sup>

Even charitably assuming that a threat to the peace does exist, the Security Council must still exercise its powers within the purposes and principles enshrined in the Charter.<sup>37</sup> The case can well be made that the resolutions under examination conflict with the purposes to bring about “in conformity with the principles of justice and international law” the adjustment or settlement of international disputes or situations which might lead to a breach of the peace, and of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” (Article 1). The resolutions are also in contrast with the principle of the sovereign equality of states and with the principle according to which international disputes shall be settled “by peaceful means in such a manner that [...] justice [is] not endangered” (Article 2).

From the above considerations, it follows that resolution 1422, para. 7 of resolution 1497 and para. 6 of resolution 1593 are not binding on UN member states, as Article 25 of the UN Charter provides that members “agree to accept and carry out the decisions of the Security Council *in*

<sup>35</sup> It would rather seem that it is the ICC which was sanctioned by the resolution.

<sup>36</sup> Zappalà, *supra* note 13, 675.

<sup>37</sup> Art. 24 (2) of the Charter provides that the Security Council “shall act in accordance with the purposes and principles of the United Nations”. See *Prosecutor v Dusko Tadić*, ICTY, Case no. IT-94-1-T, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 28–29.

*accordance with the present Charter*".<sup>38</sup> Consequently, Article 103 is also not applicable, because it only provides for the prevalence of the "obligations" arising from the Charter over other agreements.<sup>39</sup> Not being ascribable to Article 16 of the Rome Statute, the resolutions under examination are not binding on the ICC either.

#### IV. THE BILATERAL STRATEGY: ARTICLE 98 (2) OF THE ROME STATUTE AND THE NON-SURRENDER AGREEMENTS

Both resolution 1422 (2002) and the resolutions on Liberia and Sudan shield nationals and personnel of states non-parties to the Rome Statute from the ICC jurisdiction (and, as far as the latter resolutions are concerned, from the jurisdiction of any state apart from that of the accused) only with regard to acts or omissions arising out of or related to an operation established or authorized by the UN. In order to cover all other cases, the US has launched a campaign for the conclusion of bilateral agreements to exempt its nationals from the ICC jurisdiction. These agreements have been concluded both with states non-parties to the Rome Statute and with states which have ratified it.<sup>40</sup> If concluded with a non-party, the agreements set forth the reciprocal obligation not to surrender or by any means or purpose transfer each other's nationals, officials, employees or military personnel to the ICC or to any other entity or third country, or to expel them to a third country, for the purpose of surrender to or transfer to the ICC, without the expressed consent of the state party of nationality or of employ. The prohibition to surrender or transfer "by any means" and "for any purpose" results in the impossibility to hand over to

<sup>38</sup> Italics added. Accordingly, all UN member states apart from those which have acquiesced could validly challenge the legality of the resolutions under examination and refuse to give effect to them (Conforti, *The Law and Practice of the United Nations* (Leiden: Martinus Nijhoff Publishers, 2005), 310-311).

<sup>39</sup> Bernhardt, "Article 103", in Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford: OUP, 2002), volume II, 1299.

<sup>40</sup> See, for instance, the agreements concluded by the US with Uzbekistan on 18 September 2002 (42 *International Legal Materials* (2003), 39-40) and East Timor on 23 August 2002 (97 *American Journal of International Law* (2003), 201-202; the Asian country ratified the Rome Statute two weeks after concluding the non-surrender agreement). According to the US Department of State, about 100 countries have signed bilateral non-surrender agreements (August 2006). However, only 39 are currently in force (source: [http://www.iccnw.org/documents/CICCFs\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFs_BIAstatus_current.pdf)).



The Hague even those who should only be heard as witnesses.<sup>41</sup> If the agreement has been concluded with a state which has signed or ratified the Rome Statute, the obligation not to surrender or transfer is not reciprocal and is provided only in favour of US nationals, officials, employees and military personnel. The non-surrender agreements with a state which has not ratified the Rome Statute further provide that when a state party to the agreement extradites, surrenders, or otherwise transfers a person of the other party to a third country, it will not agree to the surrender or transfer of that person to the ICC by the third country, absent the expressed consent of the state party of nationality or of employ.<sup>42</sup>

The non-surrender agreements are usually concluded with states sensitive to the US pressures, either because they depend on its military and economic assistance or because they aspire to becoming members of organizations such as NATO.<sup>43</sup> On 2 August 2002, President Bush signed the American Servicemembers' Protection Act (ASPA), which, apart from prohibiting any form of cooperation and financing of the ICC by US agencies or entities (section 2004), cancels Washington's military assistance to countries which have ratified the Rome Statute and have not concluded a non-surrender agreement (section 2007).<sup>44</sup> The Act also limits

<sup>41</sup> Fornari, "Corte penale internazionale, Stati Uniti e *impunity agreements*", 58 *La Comunità internazionale* (2003), 255.

<sup>42</sup> The non-surrender agreements provide for no final term: they remain in force until one year after the date on which one party notifies the other of its intent to terminate it. In this case, the provisions of the non-surrender agreement continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

<sup>43</sup> The non-surrender agreements cannot however be considered vitiated by coercion: it is well-known that Art. 52 of the Vienna Convention on the Law of Treaties only refers to the threat or use of *armed* force. The prominent position of one party and the disproportionality of the obligations assumed, even in the case of reciprocal non-surrender agreements, has led one commentator to qualify them as unequal treaties similar to the capitulations regime (Coulée, *supra* note 25, 60–61). The mere inequality of the obligations assumed or of the position of the parties, however, does not per se vitiate the treaty.

<sup>44</sup> The ASPA can be read at <http://www.state.gov/t/pm/rls/othr/misc/23425.htm>. The prohibition of military assistance can be waived if this is justified by the US national interest (section 2007 (b)). On 21 November 2003, the waiver was for the first time exercised with regard to states refusing to conclude a non-surrender agreement (Bulgaria, Estonia, Latvia, Lithuania, Slovakia and Slovenia) in order to favour their integration into NATO or to support Operation Enduring Freedom and Operation Iraqi Freedom. On 29–30 September 2006, the US House of Representatives and

the US participation in UN peacekeeping operations to cases where: a) the Security Council has permanently exempted, at a minimum, members of the US armed forces participating in the operation from criminal prosecution or other assertion of jurisdiction by the ICC for actions undertaken by them in connection with the operation; b) the country in which members of the US armed forces are present either is not a party to the ICC and has not invoked the ICC jurisdiction pursuant to Article 12 of the Rome Statute, or has entered into an agreement in accordance with Article 98 of the Rome Statute; c) it is in the national interests of the United States to participate in the peacekeeping or peace enforcement operation (section 2005).<sup>45</sup> The weirdest provision is perhaps section 2008, according to which the President can use “all means necessary and appropriate to bring about the release” of covered US and allied persons detained or imprisoned by, on behalf of, or at the request of the ICC: it is

the US Senate respectively passed an amendment which repeals the section of the ASPA that restricts International Military Education and Training (IMET) funds to ICC states parties that have refused to sign a non-surrender agreement. In a separate but simultaneous move, on 2 October 2006, the White House announced that President Bush had issued waivers to end prohibitions on IMET aid for 21 ICC states parties who have not signed a non-surrender agreement (<http://www.guardian.co.uk/uslatest/story/0,-6121333,00.html>). However, both of these recent measures only restore IMET funding, leaving in place the withholding of both foreign military funds under ASPA and economic support funds under the Nethercutt Amendment. It has also been reported that, due to the growing Chinese influence in the region, the White House is currently evaluating a change in its bilateral strategy against Latin American countries not willing to sign a non-surrender agreement with the US, but it is not clear whether aid cuts will be cancelled to all countries or just to some ([http://www.elmostrador.cl/modulos/noticias/constructor/noticia\\_new.asp?id\\_noticia=191098](http://www.elmostrador.cl/modulos/noticias/constructor/noticia_new.asp?id_noticia=191098)). On the ASPA, see Faulhaber, “American Servicemembers’ Protection Act of 2002”, 40 *Harvard Journal on Legislation* (2003), 537–557.

<sup>45</sup> Section 2015 of ASPA also provides that “[n]othing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity”. It is to be noted that the ASPA only refers to agreements preventing the ICC from prosecuting US personnel (section 2007 (c)), while – as we will see – the non-surrender agreements have a much broader scope of application *ratione personae*. Furthermore, the ASPA only applies to the relationship with the ICC and not with the ad hoc international criminal tribunals established by the Security Council (section 2004).

doubtful whether this provision (dubbed “Hague invasion clause”) constitutes a threat to the use of force in contrast with Article 2 (4) of the UN Charter.<sup>46</sup> On 7 December 2004, President Bush also signed the Nethercutt Amendment to the US Foreign Appropriations Act, which prohibits economic assistance (including programs against drug trafficking and promotion of human rights) to states parties to the Rome Statute which have refused to conclude a non-surrender agreement.<sup>47</sup> However, the President can waive the prohibition of providing funds with respect to NATO member states, other major allies such as Australia, Egypt, Israel, Japan, Jordan, Argentina, South Korea, New Zealand and Taiwan, and any other states if it is in the US national interests to do so.<sup>48</sup>

According to the US, the legal basis for the non-surrender agreements, which assures the compatibility with the Rome Statute, is Article 98 (2) of the Statute itself.<sup>49</sup> The achievement of the purpose of the Statute (to rule out impunity for those responsible of international crimes) is in fact subject to certain limitations set forth in Article 98. In particular, para. 2 of this provision provides that “[t]he Court may not proceed with a request for surrender which would call on the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of the 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”. Article 98 (2) imposes an obligation on the ICC (not to proceed with a request of surrender under Article 89 (1) of the Statute) and does not per se require states parties not to conclude agreements prohibiting the surrender of individuals to the Court. Hence, if the non-surrender agreements were ascribable to those described in Article 98 (2), states parties to the Rome Statute and to such agreements would not be obliged to comply with a request of surrender by the Court, as this – without the consent of the sending state - would be in violation of the Statute.<sup>50</sup>

<sup>46</sup> The ASPA has been criticized, among others, by the European Parliament (P5\_TA(2002)0367, 4 July 2002).

<sup>47</sup> Text at <http://www.amicc.org/docs/Nethercutt%202006.pdf>.

<sup>48</sup> In addition, the prohibition of financial assistance does not apply to states eligible for assistance under the 2003 Millennium Challenge Act. The Nethercutt amendment has been renewed for the fiscal year 2006.

<sup>49</sup> See J.R. Bolton, *supra* note 1, 15.

<sup>50</sup> It is up to the ICC to determine whether a certain agreement is covered by Art. 98 (2) in a proceeding before it. Should it establish that Art. 98 (2) applies, the Court should not proceed with the request of surrender. On the contrary, if Art. 98 (2) is not applicable and the state party persisted in not complying with a

Article 98 (2) generically refers to international agreements “pursuant to which the consent of a sending State is required to surrender a person of that State to the Court”. Nonetheless, the travaux préparatoires of the provision suggest that it was conceived to cover the Status of Forces Agreements (SOFAs) and the extradition agreements concluded by states parties to the Rome Statute.<sup>51</sup> The literal interpretation of the provision

request of surrender under Art. 89 (1), the ICC might make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council (Art. 87 (7)). The settlement of disputes mechanism provided in Art. 119 of the Rome Statute would also apply. The fact that resolution 1593, by which the Security Council has referred the situation in Sudan to the ICC Prosecutor, mentions the non-surrender agreements concluded by the US in the preamble does not have any consequences on the matter, since the resolution confines itself to “take note” of the existence of such agreements (see the statement of the representative of Denmark following the voting on the resolution: UN Doc S/PV.5158, 31 March 2005, at 6). The inclusion of such reference is a however political success for the US (Condorelli and Ciampi, *supra* note 29, 598).

<sup>51</sup> See Scheffer, “Article 98(2) of the Rome Statute: America’s Original Intent”, 3 *Journal of International Criminal Justice* (2005), 333–353; Nigro, “Corte penale internazionale e accordi bilaterali diretti a precludere agli Stati parti la consegna di presunti criminali”, 58 *La Comunità internazionale* (2003), 623–629; Prost and Schlunck, “Article 98”, in Triffterer (ed.), *supra* note 2, 1133. According to Amnesty International, Art. 98 (2) only refers to agreements concluded before the Rome Statute entered into force (*International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity, and War Crimes*, AI Index: IOR 40/025/2002, August 2002, 5–17). Nonetheless, the ordinary meaning of Art. 98, which omits reference to “existing” international obligations and simply refers to “obligations under international agreements”, does not allow to rule out with certainty agreements concluded after 1 July 2002. Indeed, when the Statute has intended to refer only to existing agreements, it has said so expressly: see Articles 90 (6) and 93 (3), also included in Part 9 (Crawford, Sands and Wilde, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute, Joint Opinion*, at 18 (<http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf>)). But see, *contra*, Benzing, “U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties”, 8 *Max Planck Yearbook of United Nations Law* (2004), 219; Mori, “Gli accordi di esenzione ex art. 98 dello Statuto della Corte penale internazionale”, 86 *Rivista di diritto internazionale* (2003), 1015; Kaul and Kreß, “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises”, 2 *Yearbook of International Humanitarian Law* (1999), 164–165.

seems to uphold this view: the expression “sending state” employed in Article 98 (2) also appears in the SOFAs to indicate the state dispatching the forces and in the extradition agreements to mean the extraditing state.<sup>52</sup> The SOFAs allow the forces of a state to station on the territory of another state and regulate their respective jurisdictions. In most cases, the “sending state” has exclusive or primary jurisdiction over its civilian and military personnel when they are serving abroad.<sup>53</sup> The receiving state which is also

<sup>52</sup> This wording is also employed in the Vienna Conventions on Diplomatic (1961) and Consular (1963) Relations.

<sup>53</sup> The SOFAs are usually modelled on the London Agreement of 19 June 1951 between the NATO member states, Art. VII (2) of which provides for the exclusive jurisdiction of the sending state or of the receiving state for conduct criminalized by the law of one country but not of the other (the text can be read in Fleck (ed.), *The Handbook of the Law of Visiting Forces* (Oxford: OUP, 2001), 561–574). When the jurisdiction is concurrent, the sending state has primary criminal jurisdiction over military members and civilian components of the force with regards to: (a) offences solely against the property or security of that state, or offences solely against the person or property of another member of the force or civilian component of that state or of a dependent; (b) offences arising out of any act or omission done in the performance of official duty. In any other case, the authorities of the receiving state have primary jurisdiction over the offence (Art. VII (3)). Hence, if a member of the US armed forces committed a crime under the ICC jurisdiction abroad in the performance of official duty and the territorial state had concluded a SOFA, the US would have the primary right to exercise jurisdiction over the case and the territorial state should transfer the accused to the US authorities. If the state having primary jurisdiction decides not to exercise it, it must notify its decision to the authorities of the other state as soon as possible. Finally, the authorities of the state having primary jurisdiction “shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance” (Art. VII (3) (c)). Some SOFAs (such as those with Tonga and the Philippines) partly differ from the London Agreement model, as they provide that, at the US request, these countries will waive their primary right to exercise jurisdiction (the waiver may be revoked if the case is of particular importance) (Rosenfeld, “Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute”, 2 *Washington University Global Studies Law Review* (2003), 288).

The ad hoc agreements concluded between the UN, the contributing states and the territorial state with regard to UN peacekeeping operations must also be distinguished from traditional SOFAs (*Model Status-of-Forces Agreement for Peacekeeping Operations*, UN Doc. A/45/594 (9 October 1990), published in Fleck (ed.), supra note 53, 603–614). Such agreements provide for a jurisdiction of the contributing state broader than that of the sending state under the NATO

party to the Rome Statute could thus be required by a SOFA to transfer the accused to the sending state and at the same time to surrender him/her to the ICC under Articles 86 et seq. of the Rome Statute (if it is a crime under the ICC jurisdiction). Article 98 (2) was included exactly to avoid such situations: the consent of the sending state must first be obtained before the ICC can proceed with a request of surrender.<sup>54</sup> As to extradition agreements, they usually contain a provision submitting to the consent of the extraditing state the transfer of an extraditee by the requesting state to a third state. If an individual accused of a crime under the Rome Statute has been extradited by a state non-party to a state party to the Statute under an agreement which submits re-extradition to the consent of the extraditing

SOFAs: in effect, they provide for the exclusive criminal jurisdiction of the contributing state over any crime committed by the military members of the military component of the force and for immunity from legal process only for acts performed in an official capacity in the other cases (paras. 46 et seq.). The exclusive jurisdiction of the participating state is also provided for multinational operations outside the UN system, like IFOR and SFOR in Bosnia and ISAF in Afghanistan (Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers Under Fire?", 10 *European Journal of International Law* (1999), 127–129). The preamble of the SOFA drafted by the European Union with regard to operations under Art. 17 (2) of the EU Treaty provides that "the rights and obligations of the parties under international agreements and other international instruments establishing international tribunals, including the Rome Statute of the International Criminal Court, will remain unaffected" (the text of the agreement is available at <http://www.difesa.it/backoffice/upload/allegati/2005/%7B9086B8BC-E2DB-4BE3-81FE-D1BC91210147%7D.pdf>). The inclusion of such a clause is not surprising, as all EU member states have either signed or ratified the Rome Statute.

<sup>54</sup> According to some commentators, however, the SOFAs do not fall within the scope of application of Art. 98 (2), as they do not submit the surrender of the accused to the sending state's consent, but confine themselves to define the jurisdiction of the sending and receiving states (Fleck, "Are Foreign Military Personnel Exempt from International Criminal Jurisdiction Under Status of Force Agreements?", 1 *Journal of International Criminal Justice* (2003), 656; Paust, supra note 4, 14). Furthermore, an international crime would never qualify as "an act or omission done in the performance of official duty" (Paust, supra note 4, 10–11). Finally, the SOFAs do not mention "the Court", as required by Art. 98 (2) (ibid., at 14). These opinions, though, are not supported by the travaux préparatoires of Art. 98. Moreover, as suggested by Akande, the prohibition of surrender without the sending state's consent is implicit in the SOFAs (Akande, supra note 3, 644).

state, under Article 98 (2) the ICC cannot request his/her surrender if it has not first secured the consent of the extraditing state.<sup>55</sup>

The SOFAs and the extradition agreements are consistent with the object and purpose of the Rome Statute, since they do not provide for immunity, but rather ensure that one state – be it the sending/extraditing state or the receiving/requesting state – will exercise its jurisdiction if the other does not: the mechanism is thus similar to the principle of complementarity which is the basis of the ICC jurisdiction.<sup>56</sup> However, there are several remarkable differences between the SOFAs and the non-surrender agreements concluded by the US. The scope of application *ratione personae* of the latter includes “current or former government officials, employees (including contractors), or military personnel or nationals of one Party”, while the former only apply to current members of military forces and to civilians in the employ of an armed service of the sending state. The scope of application *ratione personae* of the non-surrender agreements is also broader than that of resolutions 1422 and 1497, as it includes, like resolution 1593, nationals present on the territory of the other party in a private capacity. It is difficult to reconcile this approach with Article 98 (2), which requires the existence of a “sending state”: it is not enough that the individual is a national of the concerned state, as he/she must somehow be “sent” abroad on the basis of an official act.<sup>57</sup> If the drafters of the Rome Statute had intended a different meaning, they would have employed the expression “state of nationality” and not “sending state”. Individuals who have not been “sent” could thus only be covered by Article 98 (1) if the conditions provided in this provision are met: an example could be a Prime Minister on a private visit abroad.<sup>58</sup>

<sup>55</sup> On the contrary, if the extraditing state and the state requiring extradition are both parties to the Rome Statute, they are called upon not to hinder the re-extradition (*rectius*: surrender) to the ICC.

<sup>56</sup> Wirth, “Immunities, Related Problems, and Article 98 of the Rome Statute”, 12 *Criminal Law Forum* (2001), 455–456. The problem is not *whether* those accused of international crimes should be prosecuted, but by *whom* (Zappalà, *supra* note 11, 116).

<sup>57</sup> Mori, *supra* note 51, 1027. On the contrary, the US interprets the words “sending state” as “state with which the individuals have some connection”, thus including both the state dispatching the personnel participating in the operation (regardless of their nationality) and the state of nationality (regardless of its official capacity) (Scheffer, *supra* note 51, 346, 348). There might be ambiguous cases, such as students abroad on a governmental cultural exchange program.

<sup>58</sup> It is to be noted that Art. 98 (2) generically refers to “international agreements between the sending State and the requested State that create international

The second difference between the SOFAs covered by Article 98 (2) and the non-surrender agreements is that, according to the preamble of the latter, the US “expressed its intention” to investigate and prosecute acts within the ICC jurisdiction committed by its officials, employees, military personnel or nationals only “where appropriate”, while the exclusive jurisdiction provided in the former is based on the assumption that the sending state will prosecute the accused after he/she has been transferred to it. Article 98 was never intended to allow agreements that would preclude the possibility of a trial by the ICC where the sending state did not exercise jurisdiction over the case: such an interpretation of Article 98 would contradict Article 27 of the Rome Statute, which provides that no official capacity whatsoever can exempt from the ICC jurisdiction. Indeed, the absence in the non-surrender agreements of an obligation to exercise jurisdiction raises the danger that the accused might not be tried at all: it is worth remembering that under US law crimes against humanity (apart from torture) and many crimes of war committed abroad are not federal offences, and genocide can be prosecuted only if the accused is a US national or the crime has been committed on US territory.<sup>59</sup> The conclusion of an agreement which immunizes a person from prosecution at either international or national level would not be compatible with the obligation not to defeat the object and purpose of the Rome Statute and with the obligation to perform the treaty in good faith.<sup>60</sup> In effect, the realization of the purpose (to put an end to impunity for those accused of international crimes through the application of the principle of complementarity) depends on the fact that states exercise their jurisdiction over ICC crimes or otherwise cooperate with the Court according to Part 9, as the Statute

obligations for the requested State”. The 1961 Vienna Convention on Diplomatic Relations and the 1960 New York Convention on Special Missions also fall within this category, which determines a partial overlap of paras. 1 and 2 of Art. 98 (Akande, “International Law Immunities and the International Criminal Court”, 98 *American Journal of International Law* (2004), 428).

<sup>59</sup> Amnesty International, *supra* note 51, 21. On the consistency of US law with the Rome Statute, see Hatchell, “Closing the Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach”, 12 *ILSA Journal of International and Comparative Law* (2005), 183–252.

<sup>60</sup> Also States which have only signed the Statute must refrain from acts which would defeat the object and purpose of the treaty (Article 18 of the Vienna Convention).



prohibits trials in absentia: the conclusion of a non-surrender agreement would prejudice this cooperation, at least as far as surrender is concerned.<sup>61</sup>

States parties to the Rome Statute (and/or to conventions providing for the *aut dedere aut judicare* principle<sup>62</sup>) which conclude a non-surrender agreement with the US might also incur international responsibility for the assumption of competing obligations (Article 30 (5) of the Vienna Convention on the Law of Treaties).<sup>63</sup> Indeed, both obligations would be validly assumed and the treaty to which both states are parties would govern their mutual rights and obligations (Art. 30 (4) (b)). Accordingly, if the state party to the Rome Statute does not comply with an ICC request of surrender of a US national, official, or employee, it would commit an international wrongful act towards the ICC and the other parties. On the other hand, if it surrenders the accused to the ICC, it would incur international responsibility towards the US.

The conclusion of a non-surrender agreement by a state party to the Rome Statute would not authorize the other parties to do likewise: Article 60 (5) of the Vienna Convention provides that states cannot terminate or suspend the operation of provisions relating to the protection of the human person contained in treaties of a humanitarian character as a consequence of its breach by another party.<sup>64</sup> However, any state party could always invoke the right to withdraw from the Statute provided for in Article 127. There is no express obligation to motivate the withdrawal, which must be addressed by written notification to the UN Secretary-General and takes effect one year after the receipt of the notification, unless a later date is specified. Apart from remedies under customary international law, the only other measure available to the parties against the state which has concluded a non-surrender agreement after ratifying the Rome Statute would be that provided by Article 119 (2) of the Rome Statute, according

<sup>61</sup> Van der Wilt, "Bilateral Agreements Between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?", 18 *Leiden Journal of International Law* (2005), 100.

<sup>62</sup> Zappalà, *supra* note 11, 124, 130.

<sup>63</sup> Art. 30 (2) does not apply in the present case: the reference to Art. 98 contained in the preamble of the US non-surrender agreements cannot be interpreted as a subordination clause with respect to the Rome Statute.

<sup>64</sup> Art. 60 (5) must be interpreted as referring to all human rights treaties, not only to humanitarian ones (Treves, *Diritto internazionale. Problemi fondamentali* (Milano: Giuffrè, 2005), 428). The conclusion of a non-surrender agreement could well be qualified as a material breach, which, according to Art. 60, consists, *inter alia*, in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

to which “[a]ny other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties”. The Assembly “may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court”.<sup>65</sup>

#### V. THE BILATERAL STRATEGY AND ITALY

Italy has been under pressure for the conclusion of a non-surrender agreement with the US.<sup>66</sup> The possibility that Italy surrendered to Washington’s requests was not linked to the cancellation of economic or military aid,<sup>67</sup> but rather to the pro-American enthusiasm of the Berlusconi administration. The conclusion of a non-surrender agreement would however be criticizable from several points of view. As shown above, Italy would breach its obligation to perform the Rome Statute in good faith and not to defeat its object and purpose. Furthermore, Italy could incur international responsibility for the assumption of competing obligations (Article 30 of the Vienna Convention on the Law of Treaties). The non-surrender agreement would conflict not only with the Rome Statute, but also with other international obligations binding on Italy, such as Article VI of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,<sup>68</sup> Article 49 (2) of the I Geneva Convention the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 50 (2) of the II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 129 of the III Geneva

<sup>65</sup> The ICC could also settle any dispute concerning its judicial functions as provided for in Article 119 (1) of the Statute.

<sup>66</sup> See “The European Union, the United States and the International Criminal Court, Editorial Comments”, 39 *Common Market Law Review* (2002), 942. According to the former Prime Minister Berlusconi, states members of the EU can decide for themselves whether to conclude a non-surrender agreement with the US (“Italy May Exempt US From Tribunal”, *Guardian Unlimited*, 31 August 2002).

<sup>67</sup> As a NATO member state, the ASPA provisions do not apply to Italy.

<sup>68</sup> Art. VI: “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

Convention relative to the Treatment of Prisoners of War and Article 146 (2) of the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War.<sup>69</sup>

The constitutionality of the law giving effect to the non-surrender agreement in Italy is also dubious. Indeed, this law would be in contrast with Article 10 (1) of the Constitution, according to which the Italian legal order conforms to the generally recognized norms of international law. It can be maintained that among those norms there are those criminalizing international crimes and requiring their prosecution at the national or international level.<sup>70</sup> The law giving effect to the non-surrender agreement would also be in contrast with Article 11 of the Constitution, which ensures that EU law prevails over conflicting national laws.<sup>71</sup> In fact, the conclusion of a non-surrender agreement in its current version would be in violation of Article 11 (2) of the EU Treaty, which calls on member state to “support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity”, and with Article 15, according to which “Member States shall ensure that their national policies conform to the common positions” adopted by the EU Council. In 2001, the Council adopted a common position by which it expressed its support for the ICC (qualified as “an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace and the strengthening of international security”) and urged member states to support the universal accession to the Rome Statute.<sup>72</sup> The common position adopted on 16 June

<sup>69</sup> According to the Geneva Conventions, contracting states are under an obligation either to prosecute the accused or to extradite him/her to another contracting party concerned (or to an international tribunal: see the commentary to Art. 49 (2) of the I Convention, available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>), only if such party “has made out a prima facie case”.

<sup>70</sup> Indeed, the criminalization of certain conduct logically implies that those who commit it are penally responsible and must be prosecuted (Zappalà, *supra* note 11, 116).

<sup>71</sup> Art. 11 reads as follows: “Italy [...] on conditions of parity with other states, agrees to the limitations of sovereignty necessary for an order that ensures peace and justice among nations; promotes and encourages international organizations having such ends in view” (author’s translation).

<sup>72</sup> Art. 1 of common position 2001/443/CFSP of 11 June 2001, modified by common position 2002/474/CFSP of 20 June 2002. One commentator has argued that the conclusion of all agreements between the EU and third states, including

2003, which has repealed and replaced the previous ones, apart from confirming the European support to the Statute's ratification process and to reassert that the non-surrender agreements, in their present version, run counter the obligations arising from the Statute and from other conventions, states that "[i]t is eminently important that the integrity of the Rome Statute be preserved" and recalls the conclusions adopted by the General Affairs and External Relations Council on 30 September 2002, containing guidelines for member states when considering the necessity and scope of possible agreements or arrangements.<sup>73</sup> According to these guidelines, the agreements should: 1) ensure appropriate investigation and – where there is sufficient evidence - prosecution by national jurisdictions concerning persons requested by the ICC; 2) only cover persons who are not nationals of an ICC state party; 3) only cover persons present on the territory of a requested State because they have been sent by a sending State; 4) not extend to persons only in transit on the territory of a state party to reach the ICC; 5) include a "sunset clause" limiting the period in which the arrangement is in force; 6) be ratified by each state in accordance with its constitutional procedures.<sup>74</sup> It is obvious that the non-

admission agreements, should be conditioned on the ratification and implementation of the Rome Statute by those states (Mori, *supra* note 51, 1040).

<sup>73</sup> Common position 2003/444/CFSP of 16 June 2003, Art. 5. Art. 9 (2) also requires associated countries to align with the common position, which is particularly important if one considers that Romania was the first state to sign a non-surrender agreement with the US (the Romanian Parliament eventually refused to ratify the agreement: Gamarra Chopo, "La política hostil de Estados Unidos contra la Corte penal internacional: los acuerdos del artículo 98 o la búsqueda de la impunidad", 57 *Revista española de derecho internacional* (2005), 160). See also the action plan adopted by the EU on 15 February 2004 to follow-up on the 2003 common position (section B (3) (iii), available at <http://ue.eu.int/uedocs/cmsUpload/ICC48EN.pdf>), which also provides that member states should "preserve the integrity of the Rome Statute" and "monitor the situation as regards proposals of agreements or arrangements concerning conditions for surrender of persons to the ICC, the invocation of article 16 of the Rome Statute and other developments when they might impede the effective functioning of the Court" (section B (3) (xiii)).

<sup>74</sup> 42 *International Legal Materials* (2003), 241. For a criticism of the EU guidelines, see Amnesty International, *International Criminal Court: The Need for the European Union to Take More Effective Steps to Prevent Members from Signing US Impunity Agreements*, AI Index: IOR 40/030/2002, October 2002. In particular, the requirement of limiting the conclusion of non-surrender agreements to nationals of states non-parties would have the effect of seriously restricting the

surrender agreements in their present version do not meet these requirements.<sup>75</sup> It is also to be recalled that the crimes under the ICC jurisdiction fall within the scope of application of the Framework Decision on the European arrest warrant and the surrender procedures between member states (EAW), adopted by the EU Council on 13 June 2002, which replaces formal extradition procedures among member states with a simplified surrender procedure implying the inapplicability of the traditional rules regulating (and limiting) extradition.<sup>76</sup> A non-surrender agreement which submits to the consent of the state of nationality or of employ the surrender or transfer of an individual to any entity or third state in order to eventually surrender him/her to the ICC might be in contrast with the Framework Decision.<sup>77</sup>

The non-compatibility with the EU membership of the conclusion of agreements undermining the effective implementation of the Rome Statute has also been stressed by the European Parliament in a resolution adopted on 26 September 2002, which qualifies as “misuse” the reference to Article 98 (2) as the legal basis for the non-surrender agreements.<sup>78</sup> The non-

ICC jurisdiction, which extends to crimes committed on the territory of a state party by nationals of non-parties (Art. 12).

<sup>75</sup> On 13 August 2002, after Romania signed a non-surrender agreement with the US, an internal opinion of the Legal Service of the EU Commission stressed that such agreements are in contrast with the object and purpose of the Rome Statute and thus in violation of the general obligation to perform the obligations arising from the Statute in good faith. The common positions adopted by the EU Council were considered incompatible with the conclusion of the non-surrender agreements (the text can be read in 23 *Human Rights Law Journal* (2002), 158–159).

<sup>76</sup> Art. 2 (2). Italy implemented the Framework Decision by Law no. 69 of 22 April 2005.

<sup>77</sup> See Mori, *supra* note 51, 1042. However, the EAW will not play a major role in the cooperation with the ICC, since it only governs relations between states. The Framework Decision does not permit direct or indirect surrenders to the Court, but only facilitates extradition between member states. Indeed, the term “surrender”, as used in the EAW, means extradition within the EU or EAW states parties (while the term “extradition” is used with reference to third states), and not to international criminal tribunals. The EAW might then be relevant in a Pinochet type situation, i.e., in surrender from one EAW state to another for the purposes of prosecution of crimes under the jurisdiction of the Court, but not in surrenders from a EAW state to the Court itself.

<sup>78</sup> P5\_TA-PROV(2002)0049, 26 September 2002, para. 5. See also resolution P5\_TA-PROV(2002)0521, adopted on 24 October 2002, and the resolution of the ACP-EU Joint Parliamentary Assembly, adopted in Brazzaville on 3 April 2003,

compatibility with the EU membership arises from the fact that the Rome Statute is “an essential component of the democratic model and values of the European Union”.<sup>79</sup>

The law giving effect to the non-surrender agreement in the Italian legal order might also be declared in contrast with Article 11 of the Constitution by the Constitutional Court from another point of view. It could be maintained that the ICC is “an order that ensures peace and justice among nations” in favour of which Italy, on conditions of parity with other states, agrees to the necessary limitations of sovereignty, and “an international organization having such ends in view” which Italy promotes and encourages. In fact, the preamble of the Rome Statute provides that the ICC crimes “threaten the peace, security and well-being of the world” (para. 3) and that the purpose of the Court is “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” and “to guarantee lasting respect for and the enforcement of international justice” (paras. 5 and 11).<sup>80</sup>

which states that “the agreements proposed by the USA are contrary to the Rome Statute and to the Treaty commitments of the EU Member States” and declares that “ratifying such an agreement is incompatible with membership of an association with the EU or the ACP-EU Joint Parliamentary Assembly” ([www.iccnw.org/documents/ACP-EURes\\_BIAApril2003.pdf?PHPSESSID=8cb aecac7cc0c592b7614fc944b8d697](http://www.iccnw.org/documents/ACP-EURes_BIAApril2003.pdf?PHPSESSID=8cb aecac7cc0c592b7614fc944b8d697)). On the relations between the ACP countries and the EU in the field of human rights, see Pillitu, *La tutela dei diritti dell'uomo e dei principi democratici nelle relazioni della Comunità e dell'Unione Europea con gli Stati ACP* (Torino: Giappichelli, 2003). The Parliamentary Assembly of the Council of Europe also declared itself “greatly concerned by the efforts of some States to undermine the integrity of the ICC Treaty and especially to conclude bilateral agreements aiming at exempting their officials, military personnel and nationals from the jurisdiction of the Court” (resolution 1300 of 25 September 2002, para. 9). Such agreements are considered “non admissible under the international law governing treaties, in particular the Vienna Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and the purpose of a treaty” (para. 10). Member and observer states of the Council of Europe are thus required not to conclude non-surrender agreements. See also resolution 1336 of 25 June 2003.

<sup>79</sup> Para. 4. Art. 6 (1) of the EU Treaty provides that “[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”.

<sup>80</sup> Limitations to Italian sovereignty are admitted only as long as the core principles of the Constitution and inalienable human rights are preserved. Among these principles, one can mention the Republican form of state (Art. 139) and

Finally, it is worth mentioning that a non-surrender agreement could not be concluded by the Italian government “in simplified form”, i.e. without the ratification by the President of the Republic and without involving the Parliament in the decision. Indeed, under Italian constitutional law executive agreements cannot be concluded in the matters listed in Article 80 of the Constitution and a non-surrender agreement could easily be considered “of a political nature”.<sup>81</sup> Furthermore, if legislation fully and effectively implementing the non-self-executing provisions of the Rome Statute were at last passed, the non-surrender agreement would also entail “modifications of laws”.<sup>82</sup> For the same reasons, a non-surrender agreement could not be secretly concluded by the Italian government without informing the Parliament of its existence or content.<sup>83</sup> Should the non-surrender agreement be concluded in simplified form or secretly, the agreement would be invalid under Article 46 of the Vienna Convention on the Law of Treaties, which provides that a state can invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent if that violation was manifest and concerned a rule of its internal law of fundamental importance.

## VI. CONCLUDING REMARKS

The US position towards the ICC is the result of a series of well-known concerns. Washington’s aim is that Americans are tried solely before US

other principles on which the Constitution itself is based, such as the right to democracy and to jurisdictional protection. It is however unlikely that such principles could conflict with the provisions of the Rome Statute.

<sup>81</sup> Although the President of the Republic is the organ competent for the ratification of treaties (Art. 87), Art. 80 of the Constitution provides that the Parliament must authorize by law the ratification of international treaties which are of a political nature, provide for arbitration or judicial settlements, entail territorial changes, financial costs or modifications of laws.

<sup>82</sup> As of September 2006, though, a draft implementing law has not yet been submitted to the Parliament, although several ministerial commissions have been established to study the matter and draft the legislation implementing the provisions of the Rome Statute which are not self-executing (Roscini, “Great Expectations: the Implementation of the Rome Statute in Italy”, 5 *Journal of International Criminal Justice* (2007), forthcoming).

<sup>83</sup> Benvenuti, “Corte penale internazionale, Unione europea ed ‘Exemption agreements’”, 4 *Diritto pubblico comparato ed europeo* (2002), at XXI. On secret treaties, see Treves, *supra* note 64, 679–681.

courts, to the exclusion of any other tribunal, be it national or international. Security Council resolutions no. 1422, 1487, 1497, 1593 and the non-surrender agreements should thus be set as efforts by the US to prevent the exercise of the ICC jurisdiction over nationals of states non-parties to the Rome Statute. However, if resolution 1422 and the non-surrender agreements do not exclude the jurisdiction of the Court but only hamper it (by deferring it or by prohibiting the surrender of the accused), the resolutions on Liberia and Sudan go further by providing for the exclusive jurisdiction of the contributing state not party to the Statute over its officials, personnel and nationals, thus excluding not only the jurisdiction of the ICC but also of the states entitled to prosecute the crime under the principles of territoriality, passive nationality and, where applicable, universal jurisdiction.

The differences do not end here. If resolutions 1422 and 1497 confine their scope of application *ratione personæ* to the current and former officials or personnel of the contributing state not party to the Statute, resolution 1593 and the bilateral non-surrender agreements extend to any national, regardless of whether the person is or was in the employ of the state non-party. On the other hand, if the Security Council resolutions only apply to acts or omissions arising out of or related to an operation established or authorized by the UN (or, in the case of resolution 1593, by the African Union), the non-surrender agreements generically require that the nationals of one party be “present” on the territory of the other, regardless of the reason of such presence.

None of the examined resolutions can be seen as an exercise of the Security Council's power to request the ICC not to commence or proceed with investigations or prosecutions under Article 16 of the Rome Statute. Indeed, such power was conceived with regard to identifiable situations where the exercise of jurisdiction by the ICC could prejudice the maintainance of international peace and security, and not to future and vague scenarios. Furthermore, by adopting resolutions 1422 and 1487 and by including the paragraphs on the exclusive jurisdiction of the contributing state in resolutions 1497 and 1593, the Security Council has acted *ultra vires*, since no threat to the peace can be found in order to justify the exercise of Chapter VII powers. The above mentioned resolutions are also in contrast with the principles and purposes of the UN. For these reasons, the binding character of such resolutions on the UN member states and on the ICC itself can be seriously doubted.

As to the bilateral non-surrender agreements, they cannot be qualified as “international agreements pursuant to which the consent of the sending State is required to surrender a person of that State to the Court” as



required by Article 98 (2) of the Statute. First, absent the consent of the state of nationality or of employ, they prohibit the surrender to the ICC not only of individuals who have “sent” by a party, but also of those who are simply “present” on the territory of the other. Furthermore, like the resolutions on Liberia and Sudan, they do not call on the state to which the accused has been transferred to investigate and prosecute the case, thus creating a high risk of impunity.

Should Italy conclude a non-surrender agreement with the US, it would have to comply with competing obligations (on the one hand the non-surrender agreement, on the other the Rome Statute and the conventions on the prevention and repression of international crimes containing the principle *aut dedere aut judicare*), thus exposing itself to the risk of committing an internationally wrongful act. Italy would also breach its obligation to perform the Rome Statute in good faith and not to defeat its object and purpose. Finally, the law giving effect to the non-surrender agreement in the Italian legal order would be in contrast with Articles 10 (1) and 11 of the Constitution.

**COMPARATIVE CHART**

	<b>SC Res. 1422 (2002) and SC Res. 1487 (2003)</b>	<b>SC Res. 1497 (2003)</b>	<b>SC Res. 1593 (2005)</b>	<b>Bilateral non-surrender agreements</b>
<b>Scope of application <i>ratione personæ</i></b>	“current or former officials or personnel from a contributing State not a Party to the Rome Statute”	“current or former officials or personnel from a contributing state, which is not a party to the Rome Statute”	“nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute”	“current or former Government officials, employees (including contractors), or military personnel or nationals of one Party”
<b>Scope of application <i>ratione materiae</i></b>	“acts or omissions relating to a United Nations established or authorized operation”	“all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia”	“all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the [Security] Council or the African Union”	Not specified; presumably, only the crimes under the Rome Statute
<b>Operation within which the crime must have been committed</b>	Operations established or authorized by the United Nations	Multinational Force or United Nations stabilization force in Liberia	Operations in Sudan established or authorized by the UN Security Council or by the African Union	A link with an operation is not necessary, it suffices that the individuals are “present” on the other party’s territory
<b>Place where the crime must have been committed</b>	Not specified; presumably, states where the operations established or authorized by the United Nations are carried out	Liberia	Sudan	Not specified
<b>Entitlement to exercise jurisdiction over nationals of states non-parties to the Rome Statute</b>	State which has jurisdiction under the usual principles; the complementary jurisdiction of the ICC is not excluded, but cannot be exercised for 12 months renewable	Exclusive jurisdiction of the contributing state not party to the Rome Statute over its current or former officials or personnel	Exclusive jurisdiction of the contributing state not party to the Rome Statute (apart from Sudan) over its nationals and current or former officials or personnel	State which has jurisdiction under the usual principles; the complementary jurisdiction of the ICC is not excluded, but the above mentioned persons cannot be surrendered or otherwise transferred to it “by any means” and “for any purpose” without the consent of the state of nationality or of employ

