

# Shall I surrender thee to the International Criminal Court?

The United States and bilateral 'non-surrender' agreements

THESIS

MASTER DUTCH CRIMINAL LAW

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≈ 23,295 words

Josh Lyman: Mr. McGarry, the United States refuses to recognize the U.N. International Criminal Court's jurisdiction as it applies to itself, yet implicitly seems to expect the rest of the world to submit to that body's legal authority.

Isn't this arrogant and hypocritical?

Leo McGarry: Yes.

Congressional withholding of recognition of the ICC has been one of the factors contributing to growing international resentment toward the United States.

And I know the argument on the other side: because the U.S. regularly takes the leading role in military interventions overseas, it leaves itself especially vulnerable to potentially illegitimate legal claims motivated solely by ideological or political animas with no countervailing checks and balances.

Lou: Ten seconds.

Leo McGarry: But, to get back to our original position... The ICC requires the participation, to have true legitimacy, of the world's remaining superpowers, sole remaining...

Lou: Time.

Josh Lyman: Lou?

Lou: Okay, that was good. You spent, perhaps, a little more time laying out the other side's position rather than your own.

Leo McGarry: Yeah, I felt that.

*The West Wing*, episode 10, season 7, "Running Mates". LeoMcGarry, Vice-Presidential Candidate for the Democratic Party, practices for a debate.

## INDEX:

<b>Chapter 1: Introduction</b> .....	4
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### PART I: Factual background

#### **Chapter 2: The United States and the ICC: from the diplomatic conference in Rome to the Security Council in New York**

2.1 Introduction .....	7
2.2 American policy prior to and during the Rome conference.....	7
2.3 American policy after the Rome conference.....	9
2.4 American policy towards the ICC during the Bush administration.....	14
2.5 The United Nations Security Council resolutions.....	16
2.6 Conclusion.....	17

#### **Chapter 3: The United States and the ICC: The ‘non surrender’ agreements**

3.1 Introduction.....	19
3.2 The ‘non-surrender’ agreements campaign.....	19
3.3 Response by NGOs and the international community.....	22
3.4 Introduction to the ‘non-surrender’ agreements.....	24
3.5 Conclusion.....	25

### PART II: Legal analysis

#### **Chapter 4: Are the bilateral ‘non-surrender’ agreements invalid under international law?**

4.1 Introduction.....	27
4.2 What makes a treaty invalid?: Section 1 and 2 of Part V of the Vienna convention on the Law of Treaties.....	27
4.3 Article 52 of the VCLT: Coercion of a state by the threat or use of force.....	28
4.4 Article 53 of the VCLT: Treaties conflicting with <i>jus cogens</i> .....	30
4.5 Conclusion.....	34

#### **Chapter 5: Does Article 98, paragraph 2 of the ICC Statute apply to the ‘non-surrender’ agreements?**

5.1 Introduction.....	37
5.2 The legal framework for interpreting a treaty.....	37
5.2.1 Section 3 of Part III of the Vienna Convention on the Law of Treaties.....	37
5.2.2 The object and purpose of the ICC Statute.....	41
5.2.3 Article 98, paragraph 2 in context: Part 9 of the ICC Statute.....	43
5.2.4 Article 31, paragraph 3, sub a and c of the VCLT: subsequent agreement	

and subsequent practice.....	47
5.3 The proper interpretation of Article 98, paragraph 2.....	50
5.3.1 To whom does it apply?.....	50
5.3.2 The relationship between Article 98, paragraph 1 and 2.....	60
5.3.3 ‘Obligations under international agreement’.....	64
5.3.4 Impunity prohibited?.....	65
5.3.5 For whose benefit may Article 98, paragraph 2 be invoked?.....	68
5.3.6 The <i>travaux préparatoires</i> of Article 98.....	70
5.4 Application of this proper interpretation of Article 98, paragraph 2, to the ‘non-surrender’ agreements.....	73
5.4.1 The preamble.....	73
5.4.2 Article A: Persons covered.....	74
5.4.3 Articles B-C (Type 1), B-D (Type 2) and B-E (Type 3): Conduct covered.....	76
5.4.4 Reciprocal agreements: Type 2 and 3 agreements.....	78
5.5 Who decides on the applicability of Article 98, paragraph 2?.....	79
5.6 Conclusion.....	81

**Chapter 6: Treaty conflict and State responsibility for breach of an international obligation: What to do if the ‘non-surrender’ agreements are neither invalid nor (fully) covered by Article 98, paragraph 2?**

6.1 Introduction.....	83
6.2 The law on treaty conflict.....	84
6.3. State responsibility for breach of an international obligation.....	86
6.3.1 State responsibility for <i>concluding</i> a ‘non-surrender’ agreement.....	87
6.3.2 State responsibility for <i>applying</i> a ‘non surrender’ agreement.....	90
6.3.3 Consequences of incurring state responsibility for (non-)application of a ‘non-surrender’ agreement.....	91
6.4 Conclusion.....	92

**PART III: Conclusion and annexes**

<b>Chapter 7: Conclusion and summary of findings.....</b>	<b>93</b>
Annex I: Article 98 of the ICC Statute.....	97
Annex II: Overview of ‘non-surrender’ agreements concluded.....	98
Annex III: Standard ‘non-surrender’ agreement.....	109
Annex IV: References.....	111

## **CHAPTER 1:**

### **Introduction**

On 17 July 1998 and after years of negotiation, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome conference)<sup>1</sup> adopted the Statute of the International Criminal Court (ICC).<sup>2</sup> Although some heralded the creation of the ICC as “[one of the] major achievements in international law during the past century”,<sup>3</sup> that sentiment was and is certainly not universally shared.

In particular the United States has strong reservations about the ICC. The last five years, it has taken what some have called “unprecedented diplomatic, legislative, and executive measures designed to diminish the effectiveness of the Court.”<sup>4</sup> The most recent of these efforts is the conclusion of so called bilateral ‘non-surrender’ agreements,<sup>5</sup> in which each state agrees that it will not surrender citizens of the other party to the ICC without the express consent of that other party. The United States argues that these agreements are specifically provided for by Article 98, paragraph 2 of the ICC Statute.<sup>6</sup>

The ‘non-surrender’ agreements are highly controversial and have stirred considerable debate in the international community as well as in the literature. In both cases, however, a piecemeal approach prevails and emotions rather than legal arguments seem to dominate the debate. This thesis aims to remedy these shortcomings by providing a comprehensive legal analysis of the ‘non-surrender’ agreements without taking a stance on their political or even moral ‘appropriateness’.

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<sup>1</sup> The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court took place in Rome, Italy from 15 June to 17 July 1998.

<sup>2</sup> Rome Statute of the International Criminal Court, United Nations, 17 July 1998, United Nations Treaty Series, Volume 2187, p. 3. The ICC Statute entered into force on 1 July 2002 and currently has 108 state parties. See status chart of the Rome Statute of the International Criminal Court. Available via: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en>; visited 14 November 2008.

<sup>3</sup> Secretary-General (Ban Ki-Moon) statement on the Fifth Anniversary of the Entry into Force of the Rome Statute. Available via: <http://www.un.org/apps/sg/sgstats.asp?nid=2641>; visited 14 November 2008.

<sup>4</sup> M. Kielsgard, War on the International Criminal Court, 8 New York City Law Review 2005, p. 2.

<sup>5</sup> Like Scheffer, I have chosen to refer to the agreements as ‘non-surrender’ agreements, rather than the more popular term ‘bilateral immunity (or even impunity) agreements’. I fully agree with Scheffer that “Article 98(2) establishes a right of nonsurrender of a suspect and does not grant him or her immunity per se. The suspect may still be brought to justice in national courts or through other procedures [...] before the ICC. (D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, 3 Journal of International Criminal Justice 2005, p. 335, footnote 4). See also Chapters 4 and 5.

<sup>6</sup> In order to prevent needless repetition, the text of Article 98 of the ICC Statute has been attached to this thesis as Annex I.

The main research question of this thesis is: are the ‘non surrender’ agreements as currently concluded by the United States compatible with international law (in particular the ICC Statute) and if not, what would be the consequences thereof?

Part I of this thesis (Chapters 2-3) will provide the relevant factual introduction necessary to put the phenomena of the ‘non-surrender’ agreements into context. In particular, it will focus on the position of the United States towards the ICC prior, during and subsequent to the negotiations of the ICC Statute.

Part II of this thesis (Chapters 4-6) will provide a legal analysis of the ‘non-surrender’ agreements and answer the main research question of this thesis.

First, it will assess the validity of the ‘non-surrender’ agreements under international law. Chapter 4 of this thesis will argue that as international law currently stands, the ‘non surrender’ agreements are not invalid under international law.

Having established the validity of the ‘non surrender’ agreements allows us to move on to perhaps the most important question: Does Article 98, paragraph 2 of the ICC Statute apply to the ‘non-surrender’ agreements? Chapter 5 – which forms the core of this thesis – will argue that the ‘non-surrender’ agreements are only partially covered by Article 98, paragraph 2 and thus not fully compatible with the ICC Statute.

Having established that the ‘non-surrender’ agreements are neither invalid nor fully covered by Article 98, paragraph 2, we are left with a final question: What consequences does this have under international law? Chapter 6 will argue that as international law currently stands, a signatory or state party to the ICC Statute that enters into a ‘non surrender’ agreement does not breach any obligation under international law. A state party to the ICC Statute that is also a party to a ‘non surrender’ agreement cannot avoid a breach, however, if it is confronted with an incompatible request (i.e. a request prohibited by the ‘non-surrender’ agreement but not covered by Article 98, paragraph 2). In such a case it incurs state responsibility.

The thesis concludes with a conclusion and summary of findings (Chapter 7).

**PART I:**  
**Factual background**

**CHAPTER 2:**  
**The United States and the ICC: from the diplomatic conference in Rome to the Security Council in New York**

**2.1 Introduction**

The aim of this chapter is to provide an overview of the relevant factual events leading up to the conclusion of the ‘non-surrender’ agreements. It will first discuss American policy prior to and during the Rome conference. It will then analyse American policy subsequent to the Rome conference and the significant shift that occurred in this policy during the Bush administration. Finally, it will discuss the United Nations Security Council resolutions exonerating peacekeepers from non-state parties to the ICC Statute from the jurisdiction of the ICC.

**2.2 American policy prior to and during the Rome conference**

The United States strongly supported the establishment of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).<sup>1</sup> When it became clear that continuation of this *ad hoc* approach was unfeasible, many members of the United Nations, including the United States, saw the benefits of a permanent international criminal tribunal.<sup>2</sup>

According to Van der Vyver, the United States thus in principle supported the establishment the ICC “subject to one overriding condition: the court was not to have jurisdiction over American nationals – at least not as far as crimes against humanity and war crimes are concerned.”<sup>3</sup> The justification commonly put forward for this exceptional position was that “[t]he United States shoulders responsibilities worldwide that no other nation comes even close to undertaking. [...] Even those close allies that are deeply engaged in support of UN

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<sup>1</sup> D. McGoldrick, Political and Legal Responses to the ICC, in D. McGoldrick *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Portland 2004, p. 400.

<sup>2</sup> M. Scharf, *The Politics Behind U.S. Opposition to the International Criminal Court*, 6 *Brown Journal of World Affairs* 1999, p. 100.

<sup>3</sup> J. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 *Emory Law Journal* 2001, p. 793.

peacekeeping operations are not assuming the vast international security responsibilities that the United States Armed Forces have worldwide.”<sup>4</sup> US military personnel and officials would thus be particularly vulnerable to the potential jurisdiction of the ICC.<sup>5</sup>

In light of the above, it is not surprising that the United States clearly favoured a Security Council controlled court.<sup>6</sup> Or as Orentlicher put it: “If the Court could consider cases only with the blessing of the Security Council, U.S. nationals (along with nationals of other veto-wielding Council members) would enjoy effective immunity from ICC scrutiny.”<sup>7</sup>

During the negotiations in Rome, however, it soon became clear that there was insufficient support for an ICC controlled by the Security Council. Although most delegations were of the view that the Security Council should be able to refer situations to the ICC, they could not support the requirement of Security Council approval in case a state party referred the situation to the ICC or in case the prosecutor had started an investigation *proprio motu*.<sup>8</sup> In the end a compromise was therefore reached in which the Security Council would have the power to temporarily (12 months) defer an investigation or prosecution.<sup>9</sup>

Despite the fact that the United States supported that compromise “as the best we could obtain under the circumstances”,<sup>10</sup> it was clear that the absence of prior Security Council approval, coupled with the fact that consensus at the Rome conference was moving towards ICC jurisdiction over all crimes committed in the territory of a state party to the ICC Statute, meant that there was a real risk that American citizens would be subject to ICC jurisdiction without prior US consent and without the United States having ratified the ICC Statute. It had clearly been the American position throughout the negotiations, however, that such a situation would be unacceptable. Or to put it in the words of Senator Helms, Chairman of the Senate

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<sup>4</sup> D. Scheffer, *Staying the Course with the International Criminal Court*, 35 *Cornell International Law Journal* 2001-2002, p. 70.

<sup>5</sup> M. Scharf, *The Politics Behind U.S. Opposition to the International Criminal Court*, *supra* note 2, p. 102.

<sup>6</sup> See, for example, D. McGoldrick, *Political and Legal Responses to the ICC*, *supra* note 1, p. 402;

<sup>7</sup> D. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 *Cornell International Law Journal* 2003-2004, p. 419.

<sup>8</sup> D. Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 4, p. 70.

<sup>9</sup> This compromise was in the end adopted as Article 16. See also *infra* paragraph 2.5 ‘The United Nations Security Council resolutions’.

<sup>10</sup> D. Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 4, p. 70.

Foreign Relations Committee: “A treaty establishing such a court without a clear U.S. veto [...] will be dead-on-arrival at the Senate Foreign Relations Committee.”<sup>11</sup>

During the final two weeks of the Rome conference, the US delegation therefore sought different paths in order to achieve American support for the ICC Statute – i.e. prevent the ICC from exercising jurisdiction over US personnel and officials.<sup>12</sup> In this regard it made several suggestions,<sup>13</sup> the most important of which were by far the proposals put forward at the last night of the conference to 1) make the exercise of jurisdiction dependant on the approval of both the territorial of the alleged crime and the state of nationality of the alleged perpetrator in the event either was a non-state party to the ICC Statute,<sup>14</sup> or 2) deny jurisdiction to the ICC over acts committed by officials or agents of a non-state party to the ICC Statute in the course of official duties and acknowledged by the state as such unless that state had consented.<sup>15</sup>

None of these proposals, however, garnered sufficient support among the delegations, forcing the United States to call for a vote on the adoption of the ICC Statute (which it lost by 120-7 with 21 abstentions).<sup>16</sup>

### **2.3 American policy after the Rome conference**

Despite having voted against the adoption of the ICC Statute, the United States continued to participate in the sessions of the Preparatory Committee (PrepCom) which was responsible for the drafting and adoption of *inter alia* the Rules of Procedure and Evidence (RPE), Elements of Crimes and the relationship agreement between the ICC and the United

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<sup>11</sup> Letter of Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, to Secretary of State Madeleine Albright, 26 March 1998 (emphasis in original).

<sup>12</sup> D. Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 4, p. 70.

<sup>13</sup> These included a proposal to allow state parties to permanently ‘opt out’ of crimes against humanity and/ or war crimes but not genocide and (when this proved not feasible) a proposal for a ten-year transitional period during which a state party could ‘opt out’ of these crimes. See D. Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 4, p. 71.

<sup>14</sup> Proposal submitted by the United States of America to the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court; Article 7, U.N. Doc. A/CONF.183/C.1/L.70 (1998).

<sup>15</sup> Proposal submitted by the United States of America to the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court; Article 7*ter*, U.N. Doc. A/CONF.183/C.1/L.90 (1998).

<sup>16</sup> L. Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, 21 *Wisconsin International Law Journal* 2003, p. 591. The other countries that voted against adoption of the ICC Statute were China, India, Iraq, Israel, Qatar and Yemen (*Ibid.*, p. 470, footnote 48)

Nations.<sup>17</sup> Although the United States had articulated several problems with the ICC Statute as adopted,<sup>18</sup> its fundamental concern remained without a doubt the possible ICC jurisdiction (absent a Security Council referral) over nationals of states (including the United States) that had not ratified the ICC Statute.<sup>19</sup>

During the first sessions of the PrepCom in 2000, the US delegation therefore put forward several proposals that would (partially) provide for an exemption in this regard,<sup>20</sup> by far the most prominent of which was a two part package circulated informally in March 2000: The first part consisted of a rule to Article 98 in the RPE,<sup>21</sup> obligating the ICC to proceed with a request for surrender only in a manner consistent with its international obligations.<sup>22</sup> The second part consisted of a provision in the UN-ICC relationship agreement which would require the ICC to abstain from requesting the surrender of a national of a non-state party to

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<sup>17</sup> See, Articles 51, 9 and 2 of the ICC Statute respectively. See furthermore, Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/10. Although the United States also did not sign the ICC Statute, it was invited to participate in the sessions of the PrepCom.

<sup>18</sup> See, for example, D. Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 4, p. 77-87; D. McGoldrick, *Political and Legal Responses to the ICC*, *supra* note 1, p. 402-408; B. Brown, *U.S. Objections to the Statute of the International Criminal Court: A brief Response*, 31 *International Law and Politics* 1999, p. 855-891; S. Markovic, *The Modern Version of the Shot Heard 'Round the World: America's Flawed Revolution Against the International Criminal Court and the Rest of the World*, 51 *Cleveland State Law Review* 2004, p. 263-299. It would go well beyond the scope of this thesis to address these concerns or objections, suffice it to say that most of these objections were either 'fixed' or withdrawn (see *ibid.*).

<sup>19</sup> See, D. Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 4, p. 64-65. According to Wedgwood, "the issue of third-party jurisdiction goes to the heart of the debate over American security policy. The worthy aims of the International Criminal Court will not justify unworkable constraints on the exercise of the American security role in the common interest." (See R. Wedgwood, *The Irresolution of Rome*, 64 *Law and Contemporary Problems* 2001, p. 214). The ICC has jurisdiction over nationals of non-party states to the ICC Statute if the crime was committed within the territory of a state party or if a non-state party has referred the situation to the ICC. (See, Article 12, paragraph 2, sub *a jo.* Article 13 of the ICC Statute). The United States argues that such jurisdiction violates international law. See most prominently, M. Morris, *High Crimes and Misconceptions: the ICC and Non-Party States*, 64 *Law and Contemporary Problems* 2001, p. 13-66. For a critique see, for example, M. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 *Law and Contemporary Problems* 2001, p. 67-117; F. Mégret, *Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law*, 12 *European Journal of International Law* 2001, p. 247-268; and D. Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 *Journal of International Criminal Justice* 2003, p. 618-650. In any case, the matter will most likely be settled sooner rather than later, now that on 24 August 2006, the ICC issued an arrest warrant for Bosco Ntaganda, a Rwandan national whereas Rwanda is not a state party to the ICC Statute. (See, ICC, *Warrant of Arrest, Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Pre T. Ch. I, 24 August 2006)

<sup>20</sup> These included a proposal to gloss Article 12 to exempt "official acts" from third party jurisdiction (See, R. Wedgwood, *The Irresolution of Rome*, *supra* note 19, p. 201); and a proposal to add a rule to Article 17 laying down several principles for consideration when complementarity is considered *inter alia* requiring special consideration in case the persons was acting in the course of his or her official duties. (*Ibid.*, p. 202).

<sup>21</sup> For an elaborate discussion of Article 98, see *infra* Chapter 5.

<sup>22</sup> The proposed rule read: "The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international agreement." (Non-paper of the United States, Proposed Text of Rule to article 98 of the Rome treaty, March 2000)

the ICC Statute if such a person acted within the overall direction of a state and this was acknowledged as such by that state.<sup>23</sup> According to McGoldrick, the package was “described by US representatives as a ‘procedural fix’ that would allow the US to be a good neighbour of the ICC while not a party for the foreseeable future.”<sup>24</sup>

Most delegates, however, were of the view that both the proposed rule and the text for the relationship agreement were not legally justified and would be harmful to the ICC.<sup>25</sup> According to Schense and Washburn, “[m]any also resented the insistence of the United States in obtaining the exemption without regard to the serious damage it would do to the credibility and effectiveness of the Court.”<sup>26</sup>

That being said, the United States saw the package as *the* solution and began pressing vigorously for its adoption. Indeed, the proposal was accompanied by a letter from then Secretary of State Madeleine Albright addressed to foreign ministers around the world calling for support of the US position.<sup>27</sup> At that point, however, “most delegations had come to

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<sup>23</sup> The proposed provision read: “The United Nations and the ICC agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a U.N. Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.” (Non-paper of the United States, Proposed Text to Supplement Document to the Rome Treaty, March 2000). According to Wedgwood, the proposal “speaks of “overall direction” rather than “official duties,” perhaps in a post-Pinochet attempt to avoid controversy on what legitimately qualifies as an official duty. But the political premise of the U.S. proposal is that the heinous offenses for which the ICC was designed, such as genocide and systematic outrages against civilians, are not likely to be openly embraced by governments as official policy or acts under their direction. Hence, the immunity’s practical reach would be limited to military conduct within the range of reason.” (R. Wedgwood, *The Irresolution of Rome*, 64 *supra* note 19, p. 206).

<sup>24</sup> D. McGoldrick, *Political and Legal Responses to the ICC*, *supra* note 1, p. 411-412.

<sup>25</sup> Coalition at the PrepCom, in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley 2001, p. 726.

<sup>26</sup> J. Schense and J. Washburn, *The United States and the International Criminal Court*, 35 *The International Lawyer* 2001, p. 615.

<sup>27</sup> The text of the letter reads as follows (reprinted in: *Ibid.*, p. 616, footnote 4):

17 April 200

Dear Mr. Minister:

I am writing to you at this time to emphasize the critical importance we attach to our proposal for the proposed International Criminal Court (ICC). We are seeking a provision in the UN-ICC relationship agreement and a Rule to Article 98 of the Rome Statute to address our fundamental objective to prevent, unless certain conditions are met, the surrender or acceptance by the ICC for trial of nationals of non-party States who are acting under governmental direction and whose actions are acknowledged as such by the non-party State.

believe that neither an exemption nor any reconsideration in Washington would ever happen. Moreover, they were increasingly irritated by U.S. demands for concessions to which it was now clear there would never be any return.”<sup>28</sup>

Realizing that the full package was generating strong (insurmountable) opposition, the US delegation therefore dropped the second part of the package (the provision in the UN-ICC relationship agreement) and instead – and for the time being – began to press for the adoption of the first part only (the rule to Article 98).<sup>29</sup> Although a large majority of the delegates opposed even this proposal,<sup>30</sup> “[t]he PrepCom bureau flatly opposed a vote on the Rules [...] because of the belief that while a rule to Article 98 would alone be harmless, the possibility of adoption of the Rules [...] by anything less than consensus would reflect disagreement about their universal acceptability and slow the momentum of ratifications.”<sup>31</sup>

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We must achieve, before it is too late, the proper balance between the noble aims of the ICC treaty, namely, to bring to justice perpetrators of genocide, crimes against humanity, and serious war crimes, and the continuing need for responsible nations to maintain or restore international peace and security and to undertake humanitarian missions. We believe our proposal advances both goals with non-parties and with parties to the ICC Treaty. Yet, it would still make it extremely difficult for individuals from rogue states to act with impunity. Our proposal is consistent with Article 98 and is not an amendment or modification of the Rome Statute. If our proposal is adopted by the U.N. Preparatory Commission on the ICC this year, it would address the fundamental concern that leads U.S. to oppose the treaty and would enable U.S. to assist the ICC as appropriate. The end result would be a stronger ICC that would benefit from a relationship with the United States. It also would give U.S. time to evaluate the treaty regime and the Court's operation before making a final decision about our participation in the Court.

There is too much at stake for international justice and international peace to go down a path that would drive a wedge between the United States and the ICC. I strongly urge you to support our proposal as the June session of the preparatory commission approaches, and to instruct your delegation accordingly. In any event, we would appreciate your consulting U.S. prior to making any final decision on this important matter.

Sincerely,

Madeleine K Albright  
Secretary of State

<sup>28</sup> *Ibid.*, p. 615.

<sup>29</sup> Coalition at the PrepCom, *supra* note 25, p. 727.

<sup>30</sup> According to McGoldrick, 39 of 45 delegations which took the floor during the discussions objected to the proposed rule. (D. McGoldrick, Political and Legal Responses to the ICC, *supra* note 1, p. 411).

<sup>31</sup> J. Schense and J. Washburn, The United States and the International Criminal Court, *supra* note 26, p. 618. According to Hall, “[T]he Côte d’Ivoire was induced only under heavy pressure, both in the working group and in the plenary meeting of the commission, not to press for a vote.” (C. Hall, The First Five Sessions of the UN Preparatory Commission for the International Criminal Court, 94 *American Journal of International Law* 2000, p. 786).

In the end a compromise was therefore reached resulting in the adoption of the current Rule 195, paragraph 2 of the ICC RPE.<sup>32</sup> At the insistence of several delegations, however, a proviso was included in the report on the PrepCom's proceedings indicating that the rule "should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State."<sup>33</sup>

The American delegation, however, continued to seek a full exemption, having indicated at the very same day that the compromise rule was adopted, that it would introduce the second part of the package at the next PrepCom session.<sup>34</sup> Although several proposals were indeed submitted in this regard in December 2000, discussion thereof was postponed until the next year.<sup>35</sup>

In the meantime, the deadline for signature of the ICC Statute (31 December 2000) had come and although concerned about "significant flaws in the treaty" President Clinton (in one of his last acts as president) decided to sign the ICC Statute. According to President Clinton, doing so would not only reaffirm "our strong support for international accountability" but would also have the advantage that as a signatory "we will be able to influence the evolution of the Court. Without signature, we will not."<sup>36</sup> That being said, President Clinton indicated that "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied".<sup>37</sup>

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<sup>32</sup> For an elaborate discussion of Rule 195, paragraph 2, see *infra* Chapter 5, paragraph 5.2.4 'Article 31, paragraph 3, sub a and c VCLT: subsequent agreement and subsequent practice'.

<sup>33</sup> See, Proceedings of the Preparatory Commission at its Fifth Session, U.N. Doc. PCNICC/2000/L.3/Rev.1 (2000), p. 3.

<sup>34</sup> See, C. Hall, The First Five Sessions of the UN Preparatory Commission for the International Criminal Court, 94, *supra* note 31, p. 787.

<sup>35</sup> See, most prominently, Proposal submitted by the United States of America, U.N. Doc. PCNICC/2000/WGICC-UN/DP.17 (2000). See also, D. Scheffer, Staying the Course with the International Criminal Court, *supra* note 4, p. 61-62.

<sup>36</sup> See, Text of President Clinton's Remarks on the ICC Treaty. Available via: <http://news.bbc.co.uk/1/hi/world/1095580.stm>; visited 29 October 2008.

<sup>37</sup> *Ibid.* Upon news of the signature by President Clinton, Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, argued that the action was a "blatant attempt by a lame-duck President to tie the hands of his successor." (See, Press Release, United States Congress, Statement of Senator Jesse Helms (31 December 2000).

## 2.4 American policy towards the ICC during the Bush administration

On 20 January 2001 – only twenty days after President Clinton decided to sign the ICC Statute – George W. Bush was sworn in as the next president of the United States. Even before taking office it was clear that the Bush administration was going to be much more opposed to the ICC than the Clinton administration had been. Indeed, on 17 January 2001, at his confirmation hearing before the Senate Foreign Relations Committee, the new Secretary of State Colin Powell had already indicated that “[t]he new administration will be opposed to the International Criminal Court” and that no one should be “standing on [...] tippy-toes waiting for the Bush administration to ask for any movement toward ratification of the treaty.”<sup>38</sup>

Thus, despite being allowed to remain fully engaged (now that it had signed the ICC Statute), the United States was virtually absent from the first PrepCom sessions that took place under the new administration.<sup>39</sup> According to Scheffer, only “[a] few mid-level lawyers were tasked to engage minimally in the discussions on the crime of aggression and the financial rules and regulations, but concentrated on nothing else that was included in the 2001 Preparatory Commission agenda.”<sup>40</sup> Indeed, the UN-ICC relationship agreement was finalized in October 2001, without further American input and absent the American proposals submitted in December 2000.<sup>41</sup>

The rift between the United States and the ICC grew even wider with the terrorist attacks of 11 September 2001. According to Lantto “the Bush administration realized that if U.S. troops were to be deployed at an unprecedented level to places around the globe, places that were hostile to U.S. presence, all necessary precautions needed to be taken to protect those citizens from ICC jurisdiction.”<sup>42</sup>

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<sup>38</sup> Confirmation Hearing of General Colin Powell to be Secretary of State, Senate Foreign Relations Committee, 17 January 2001. Abstracts available via: <http://query.nytimes.com/gst/fullpage.html?res=9902EFD61E3DF93BA25752C0A9679C8B63&sec=&spon=&pagewanted=all>; visited 29 October 2008.

<sup>39</sup> J. Schense and J. Washburn, *The United States and the International Criminal Court*, *supra* note 31, p. 621.

<sup>40</sup> D. Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 4, p. 62.

<sup>41</sup> *Ibid.*

<sup>42</sup> M. Lantto, *The United States and the International Criminal Court: A Permanent Divide?*, 31 *Suffolk Transnational Law Review* 2007-2008, p. 626.

In these circumstances, many conservatives within the United States Congress and the Bush administration held the view that it was not only “inadvisable for the U.S. to ratify the Statute, but the Court must be eliminated or disabled to remove it as a political constraint to the use of U.S. military force.”<sup>43</sup> Assistant Secretary of State for International Organization Affairs John Bolton, for example, argued that the ICC “is harmful policy to the national interests of the United States, is unsound foreign policy, and is a threat to the independence and flexibility that America’s military forces need to defend U.S. national interests around the world.”<sup>44</sup>

Accordingly, American policy shifted from cautious engagement/ reform from within to active opposition. Or as Bolton put it: “[T]he correct policy now is to press Congress and subsequent administrations to ignore the ICC in official U.S. statements, and attempt to isolate it through U.S. Diplomacy, in order to prevent it from acquiring any further legitimacy or recourses. America’s posture toward the ICC should be “Three Noes”: no financial support, directly or indirectly; no cooperation; and no further negotiations with other governments to ‘improve the ICC.’”<sup>45</sup>

Having re-evaluated its policy towards the ICC,<sup>46</sup> the Bush administration’s first step was to inform the Secretary General of the United Nations on 6 May 2002 that the United States no longer intended to become a party to the ICC Statute.<sup>47</sup> Although largely a symbolic move (at

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<sup>43</sup> L. Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, *supra* note 16, p. 591.

<sup>44</sup> J. Bolton, *The Risks and Weaknesses of the International Criminal Court from America’s Perspective*, 64 *Law and Contemporary Problems* 2001, p. 169.

<sup>45</sup> *Ibid.*, p. 180.

<sup>46</sup> See, for example, The National Security Council, *The National Security Strategy of the United States of America*, 15 September 2002, p. 31. Available via: <http://www.whitehouse.gov/nsc/nss.pdf>; visited 29 October 2008.

<sup>47</sup> See Letter from Under Secretary of State for Arms Control and International Security John R. Bolton to United Nations Secretary General Kofi Annan, 6 May 2002. Available via: <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>; visited 29 October 2008. The letter reads:

Dear Mr. Secretary-General:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.

Sincerely,

John R. Bolton

that point it was already clear that ratification of the ICC Statute was never going to happen) it had the additional effect of freeing the United States of the obligation it was arguably under not to actively oppose the ICC – i.e. not to take measures contrary to the object and purpose of the ICC Statute.<sup>48</sup>

## 2.5 The United Nations Security Council resolutions

Having also stopped participating in all ICC PrepCom sessions,<sup>49</sup> the Bush administration's second step was to obtain an exemption from the jurisdiction of the ICC via a Security Council resolution. The US strategy was based on the prerogative of the Security Council laid down in Article 16 of the ICC Statute pursuant to which “[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect”.

In order to show that it was serious about the issue, the United States on 30 June 2002 vetoed the resolution that was to extend for six months the mandate of the United Nations peacekeeping Mission in Bosnia (UNMIBH).<sup>50</sup> Explaining the veto, US Ambassador to the United Nations, John D. Negroponte said that “[c]ontributing personnel to peacekeeping efforts demonstrates a commitment to international peace and security that [...] can involve hardship and danger to those involved in peacekeeping. Having accepted these risks, by exposing people to dangerous and difficult situations in the service of promoting peace and stability, we will not ask them to accept the additional risk of politicized prosecutions before a court whose jurisdiction over our people the Government of the United States does not accept.”<sup>51</sup>

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Although at the time this was an unprecedented move, Israel (28 August 2002) and Sudan (26 August 2008) have subsequently followed suit and issued similar declarations. (See, status chart of the Statute of the International Criminal Court. Available via: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en#8>; visited 29 October 2008.

<sup>48</sup> See also *infra* Chapter 6, paragraph 6.3.1 ‘State responsibility for concluding a ‘non-surrender’ agreement’.

<sup>49</sup> D. McGoldrick, Political and Legal Responses to the ICC, *supra* note 1, p. 400.

<sup>50</sup> See U.N. Doc. S/PV.4563 (2002), p. 3.

<sup>51</sup> J. Negroponte, Statement in the UN Security Council (Explanation of Vote on Renewal of the Mandate for the UN Mission in Bosnia and Herzegovina), 30 June 2002. Available via: <http://www.state.gov/p/io/rls/rm/2002/11564.htm>; visited 29 October 2008.

According to Franck and Yuhan, “[w]hat followed was a two-week standoff in the Security Council pitting the United States against some of its closest allies, including the members of the European Union, Canada and Mexico.”<sup>52</sup> The deadlock finally ended with the passing of resolution 1422 (2002) requesting that the ICC “if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 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>53</sup>

Despite the fact that the resolution was ultimately passed unanimously it was immensely controversial.<sup>54</sup> Furthermore, it only provided for a deferral for a period of 12 months and therefore had to be renewed periodically. Although the first renewal occurred on 12 June 2003 with the passing of resolution 1487,<sup>55</sup> three members abstained from voting, including permanent member France. One year later it was clear that a second renewal was not feasible given the fierce opposition of other (permanent) Security Council members and the slim prospect of even reaching the necessary majority. All efforts to seek such a renewal were therefore abandoned.<sup>56</sup>

## 2.6 Conclusion

The United States in principle supported the establishment of the ICC as long as it did not have jurisdiction over US military personnel and officials. American policy under the Clinton administration therefore focussed on obtaining an exemption in this regard, initially in the ICC Statute itself, later via subsequent legal instruments related to the ICC Statute. Under the

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<sup>52</sup> T. Franck and S. Yuhan, *The United States and the International Criminal Court: Unilateralism Rampant*, 35 *New York University Journal of International Law and Politics* 2003, p. 525.

<sup>53</sup> United Nations Security Council Resolution 1422 of 12 July 2002, U.N. Doc. S/RES/1422 (2002), par. 1.

<sup>54</sup> D. McGoldrick, *Political and Legal Responses to the ICC*, *supra* note 1, p. 419. For an excellent overview of the discussions in the Security Council preceding the adoption of the resolution, see T. Franck and S. Yuhan, *The United States and the International Criminal Court: Unilateralism Rampant*, *supra* note 52, p. 525-530. The compatibility of the resolution with the ICC Statute and the UN Charter has also been fiercely debated in the literature. See, for example, C. Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 *European Journal of International Law* 2003, p. 85-104; S. Zappalà, *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, p. 117-121; M. El 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, p. 1503-1544; Human Rights Watch, *The ICC and the Security Council: Resolution 1422*. Available via: <http://hrw.org/campaigns/icc/docs/1422legal.htm>; visited 29 October 2008.

<sup>55</sup> United Nations Security Council Resolution 1487 of 12 June 2003, U.N. Doc. S/RES/1487 (2003).

<sup>56</sup> See, C. Lynch, *U.S. Abandons Plan for Court Exemption*, *Washington Post*, 24 June 2004. Available via: <http://www.washingtonpost.com/wp-dyn/articles/A64323-2004Jun23.html>; visited 29 October 2008.

Bush administration, this American policy of cautious engagement/ reform from within shifted to active opposition. The United States successfully pressed for the adoption of Security Council resolutions exempting UN peacekeepers from non-state parties to the ICC Statute (such as the United States) from ICC jurisdiction.

## CHAPTER 3:

### The United States and the ICC: The ‘non surrender’ agreements

#### 3.1 Introduction

As we have seen in Chapter 2, American policy under the Bush administration had shifted from cautious engagement/ reform from within to active opposition of the ICC. Although the non-renewal of Security Council resolutions 1422 and 1487 represented a significant defeat in this regard, it had always been clear that these resolutions were at best an *interim* and partial solution. The same day that resolution 1422 was passed, the United States therefore embarked on a more comprehensive campaign to obtain an exemption from the jurisdiction of the ICC. This chapter will first discuss the campaign underlying the ‘non-surrender’ agreements. It will then give a brief overview of the response to this campaign from NGOs and the international community, followed by an introduction to ‘non-surrender’ agreements themselves.

#### 3.2 The ‘non-surrender’ agreements campaign

In April 2002, all US ambassadors were instructed to explore whether their host countries were open to creating mutual agreements in which each state agreed that it would not surrender citizens of the other party to the ICC without the express consent of that other party.<sup>1</sup>

The Bush administration argued that these ‘non-surrender’ agreements are expressly contemplated by Article 98, paragraph 2 of the ICC Statute. Or to put it in the words of Philip Reeker, Deputy Spokesman for the Department of State, “[i]t’s what the Rome Treaty provides for. That’s why there is an Article 98, to allow us to negotiate these types of bilateral agreements with individual countries. And that’s the way we’re going to pursue it.”<sup>2</sup> The ultimate goal of the campaign was to conclude ‘non-surrender’ agreements “with every

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<sup>1</sup> D. McGoldrick, Political and Legal Responses to the ICC, in D. McGoldrick *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Portland 2004, p. 424.

<sup>2</sup> Daily Press Briefing of the Department of State by Philip T. Reeker, Deputy Spokesman, 8 August 2002. Available via: <http://www.state.gov/r/pa/prs/dpb/2002/12530.htm>; visited 1 November 2008.

country in the world, regardless of whether they are a signatory or Party to the ICC, or regardless of whether they intend to be in the future.”<sup>3</sup>

The ‘non-surrender’ agreements campaign received strong bipartisan support from the United States Congress.<sup>4</sup> On 23-24 July 2002, Congress passed the American Servicemembers’ Protection Act (ASPA) as Title II of the Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the US.<sup>5</sup> The act was signed into law by President Bush on 2 August 2002.<sup>6</sup> As of today, the ASPA is still in force, albeit in a slightly amended form (see *infra*).

The ASPA is intended to shield members of the United States armed forces and other covered persons from the jurisdiction of the ICC.<sup>7</sup> For example, it prohibits cooperation with the ICC by any agency or entity of the federal government, or any state or local government (Section 2004) and puts restrictions on participation by the United States in peacekeeping missions (Section 2005). Most importantly for the purposes of this thesis, however, it also prohibited military assistance (International Military Education and Training (IMET) and Foreign Military Financing (FMF) to any country that is a state party to the ICC Statute – except for NATO members and major non-NATO allies<sup>8</sup> as well as Taiwan (Section 2007).

The President, however, may waive this prohibition in the national interest (Section 2007, paragraph b) or if he determines that “such country has *entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International*

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<sup>3</sup> J. Bolton, American Justice and the International Criminal Court, Remarks at the American Enterprise Institute, 3 November 2003. Available via: <http://www.state.gov/t/us/rm/25818.htm>; visited 1 November 2008.

<sup>4</sup> CRS Report for Congress, Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America, 10 April 2006, p. 2. Available via: <http://ciponline.org/facts/060410crs.pdf>; visited 1 November 2008.

<sup>5</sup> According to McGoldrick, “[t]his was a veto proof Bill authorising billions of dollars to combat terrorism.” (D. McGoldrick, Political and Legal Responses to the ICC, *supra* note 1, p.435) Earlier attempts in 2000 (H.R. 4654 and S.2726, 106<sup>th</sup> Congress) to introduce the ASPA never came out of committee as they were strongly opposed by the Clinton administration which argued that “it worsened its negotiating position, infringed the President’s constitutional authority as Commander-in-Chief, damaged US national policy objectives, made it impossible for the US to engage in critical multilateral operations, and weakened essential military alliances.” (*Ibid.*, p. 433-434).

<sup>6</sup> Public Law 107-206; US Code Collection, Title 22, Chapter 81, Section 7421 *et seq.* See also, Chronology of US opposition to the International Criminal Court: From ‘Signature Suspension’ to Immunity Agreements to Darfur, 28 October 2008. Available via: <http://www.amicc.org/docs/US%20Chronology.pdf>; visited 1 November 2008.

<sup>7</sup> CRS Report for Congress, U.S. Policy Regarding the International Criminal Court, 29 August 2006. Available via: <http://www.fas.org/sgp/crs/misc/RL31495.pdf>; visited 1 November 2008.

<sup>8</sup> According to Section 2007, paragraph d, sub 2 these included *inter alia* Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea and New Zealand.

*Criminal court from proceeding against United States personnel present in such country.”* (Section 2007, paragraph c (emphasis added)). Later, this prohibition of aid for countries refusing to sign a ‘non-surrender’ agreement was extended by the so-called ‘Nethercutt amendment’ to include the Economic Support Fund (ESF) for Fiscal Years 2005,<sup>9</sup> 2006<sup>10</sup> and 2008<sup>11</sup> (but oddly enough not 2007).<sup>12</sup> On 30 September 2006, the prohibition of IMET aid was stricken from the ASPA sanctions,<sup>13</sup> followed on 22 January 2008 by the prohibition of FMF aid.<sup>14</sup> In addition to countries that have concluded a ‘non-surrender’ agreement, President Bush has granted (permanent) waivers to various countries that have refused to do so.<sup>15</sup>

It has been argued by several authors that the actual withholding of aid (or the threat of doing so) has had a major effect on the success of the ‘non surrender’ agreements campaign.<sup>16</sup> Indeed, several countries lost most or all of their aid (sometimes amounting to millions of US dollars) for their refusal to conclude a ‘non-surrender’ agreement.<sup>17</sup> For some, this was a major (or the only) reason to comply with the request of the United States.<sup>18</sup> President Bharrat

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<sup>9</sup> See, Section 574 of the Consolidated Appropriations Act, 2005 (H.R. 4818, 108<sup>th</sup> Congress; Public Law No: 108-447)

<sup>10</sup> See, Section 574 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006 (H.R. 3057, 109<sup>th</sup> Congress; Public Law No: 109-102)

<sup>11</sup> See, Section 671 of the Consolidated Appropriations Act, 2008 (H.R. 2764, 110<sup>th</sup> Congress; Public Law No: 110-161)

<sup>12</sup> See also, Chronology of US opposition to the International Criminal Court: From ‘Signature Suspension’ to Immunity Agreements to Darfur, *supra* note 6.

<sup>13</sup> Section 1222 of the John Warner National Defense Appropriations Act for Fiscal Year 2007 (H.R. 5122, 109<sup>th</sup> Congress; Public Law No: 109-364)

<sup>14</sup> Section 1212 of the National Defense Authorization Act for Fiscal Year 2008 (H.R. 4986, 110<sup>th</sup> Congress; Public Law No. 110-181)

<sup>15</sup> See Presidential Determinations 2003-27 (30 June 2003), 2003-28 (29 July 2003), 2003-40 (24 September 2003), 2004-03 (3 March 2004), 2004-07 (1 November 2003), 2004-09 (21 November 2003), 2004-17 (30 December 2003), 2004-27 (6 April 2004), 2004-31 (25 May 2004), 2006-27 (29 September 2006), 2007-04 (22 November 2006), 2007-05 (27 November 2006), 2007-30 (31 August 2007). Available via: [http://www.amicc.org/usinfo/administration\\_policy\\_BIAs.html](http://www.amicc.org/usinfo/administration_policy_BIAs.html); visited 1 November 2008.

<sup>16</sup> See, for example, M. Kielsingard, War on the International Criminal Court, 8 New York City Law Review 2005, p. 29; D. Orentlicher, Unilateral Multilateralism: United States Policy Toward the International Criminal Court, 36 Cornell International Law Journal 2003-2004, p. 425; D. McGoldrick, Political and Legal Responses to the ICC, *supra* note 1, p. 424; I. Traynor, US plays aid card to fix war crimes exemption, The Guardian, 12 June 2003. Available via: <http://www.guardian.co.uk/world/2003/jun/12/warcrimes.iantraynor>; visited 1 November 2008.

<sup>17</sup> For an overview, see Coalition for the International Criminal Court, Countries Opposed to Signing a US Bilateral Immunity Agreement (BIA): US Aid Lost in FY04 & FY05 and threatened in FY06, 11 December 2006. Available via: [http://www.iccnw.org/documents/CountriesOpposedBIA\\_final\\_11Dec06\\_final.pdf](http://www.iccnw.org/documents/CountriesOpposedBIA_final_11Dec06_final.pdf); visited 1 November 2006. See also, CRS Report for Congress, Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America, *supra* note 4.

<sup>18</sup> See also, L. Waylie, The United States, the International Criminal Court and Bilateral Immunity Agreements: Explaining the Resistance of Weak States and Consequences for American Foreign Policy, March 2005, p. 7. Available via: [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/6/9/9/6/pages69961/p69961-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/9/9/6/pages69961/p69961-1.php); visited 1 November 2008.

Judgeo of Guyana, for example, stated that “[t]he US has made it clear that they will cut off aid. I need the military cooperation with the US to continue. It is as clear as that. I can’t be more clear.”<sup>19</sup>

On the other hand, several countries continued to refuse to sign a ‘non-surrender’ agreement despite the withholding of aid.<sup>20</sup> South Africa, for example, after having lost 7.2 million US dollars in aid, announced on 24 July 2003 that it “will maintain its decision not to sign an agreement with Washington giving United States nationals immunity from prosecution by the International Criminal Court.”<sup>21</sup>

Whatever the reasons for doing so, however, the United States State Department was able to announce on 3 May 2005, that it had signed ‘non-surrender’ agreements with 100 countries.<sup>22</sup> The names of 95 of those 100 countries are known, the remaining five have – according to the State Department – “asked us not to identify them as signers.”<sup>23</sup> Four countries have publicly announced that they have signed a ‘non-surrender’ agreement since 3 May 2005, bringing the total to 104 (of course, more could have been signed secretly). Of the 104 ‘non-surrender’ agreements, 95 were confirmed to have entered into force.<sup>24</sup>

### **3.3 Response by NGOs and the international community**

NGOs – virtually without exception – vigorously opposed the ‘non-surrender’ agreements and the campaign underlying their conclusion.<sup>25</sup> The international community on the other hand,

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<sup>19</sup> BBC Monitoring International Reports, Guyana to grant US citizens ICC exemption, 18 July 2003. Available via: [http://www.accessmylibrary.com/coms2/summary\\_0286-23874489\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-23874489_ITM); visited 3 November 2008.

<sup>20</sup> For a fascinating explanation of the resistance of some small states in the Caribbean, see L. Waylie, *The United States, the International Criminal Court and Bilateral Immunity Agreements: Explaining the Resistance of Weak States and Consequences for American Foreign Policy*, *supra* note 18.

<sup>21</sup> South African Cabinet, cited in M. du Plessis and S. Pete, *Who Guards the Guards?: The International Criminal Court and Serious Crimes Committed by Peace Keepers in Africa*, ISS Monograph Series No 121, February 2006, p. 32. Available via:

[http://www.iss.co.za/dynamic/administration/file\\_manager/file\\_links/121FULL.PDF?link\\_id=24&slink\\_id=727&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.iss.co.za/dynamic/administration/file_manager/file_links/121FULL.PDF?link_id=24&slink_id=727&link_type=12&slink_type=13&tmpl_id=3); visited 1 November 2008.

<sup>22</sup> Press Statement by Richard Boucher, Spokesman, 3 May 2005. Available via: <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>; visited 1 November 2008.

<sup>23</sup> Daily Press Briefing of the Department of State by Richard Boucher, Spokesman, 12 June 2003. Available via: <http://www.state.gov/r/pa/prs/dpb/2003/21540.htm#article>; visited 1 November 2008.

<sup>24</sup> For a full overview, see Annex I.

<sup>25</sup> See, for example, Amnesty International, *International Criminal Court: “US efforts to obtain impunity for genocide, crimes against humanity and war crimes, AI Index: IOR 40/025/2002, August 2002, p. 2; Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Article 98(2) Agreements, 9 July 2002. Available via: [http://www.hrw.org/campaigns/icc/icc\\_article98.pdf](http://www.hrw.org/campaigns/icc/icc_article98.pdf); visited 27 September 2008; Coalition for the International Criminal Court, *US Bilateral Immunity or So-called “Article 98” Agreements, 18**

responded very much divided on the issue. Various countries spoke out openly against the agreements. The government of Brazil, for example, issued an official press release in which it stated that “[i]t is the view of the Brazilian government that such an agreement runs counter to the letter and the spirit of the Rome Statute and constitutes a threat to the judicial equality of States.”<sup>26</sup> Similar reactions came from other Latin-American countries (*inter alia* Argentina, Chile, Costa Rica, Ecuador, Mexico, Peru and Venezuela) most European countries (*inter alia* Austria, Bulgaria, Croatia, France, Germany, the Netherlands and Serbia), several countries in the Caribbean (*inter alia* Barbados, St. Vincent and the Grenadines, Trinidad and Tobago) and Canada and South Korea.<sup>27</sup>

Other countries, however, announced that they were seriously considering the request of the United States. The government of the United Kingdom, for example, stated that “[w]e value the US role in international peacekeeping and we want to enable the United States to continue to play that role. It is in that spirit that we are looking at the possibility of a bilateral agreement.”<sup>28</sup> Similar reactions came from Australia, Estonia, Italy, Poland and Spain.<sup>29</sup> Other countries that had always been ambivalent or even opposed to the ICC – such as, for example, Bhutan, Brunei, Equatorial Guinea, Ethiopia, Grenada India, Israel, Kazakhstan, Kiribati, the Federated States of Micronesia, Rwanda, Singapore, the United Arab Emirates – seemed to have little or no difficulties with signing a ‘non-surrender’ agreement.

Several regional or pan-regional organizations (or institutions thereof) issued statements or common positions on the ‘non-surrender’ agreements. Some, for example, those of the Parliamentary Assembly of the Council of Europe,<sup>30</sup> Mercado Común del Sur

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April 2003. Available via: <http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm>; visited 27 September 2008.

<sup>26</sup> Press Release of the Government of Brazil No. 033/2003, US Military Aid and the International Criminal Court, 2 July 2003. Available via: [http://www.amicc.org/docs/Brazil\\_BIA.pdf](http://www.amicc.org/docs/Brazil_BIA.pdf); visited 1 November 2008.

<sup>27</sup> For a very thorough overview, see Coalition for the International Criminal Court, Quotes from High Officials Opposing the US Campaign for Bilateral Immunity Agreements.

Available via: [http://www.iccnw.org/documents/HighOfficialQuotes\\_Current.pdf](http://www.iccnw.org/documents/HighOfficialQuotes_Current.pdf); visited 1 November 2008.

<sup>28</sup> Statement made by Baroness Amos, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, before the House of Lords, 14 October 2002, HL Deb 14 October 2002 vol 639 cc592-4. Available via: <http://hansard.millbanksystems.com/lords/2002/oct/14/international-criminal-court-us-immunity>; visited 1 November 2008.

<sup>29</sup> See, J. Kelley, Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements, 101 American Political Science Review 2007, p. 573-589.

<sup>30</sup> Resolution 1300 (2002), Risks for the Integrity of the International Criminal Court, adopted 25 September 2002. Available via: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta02/ERES1300.htm>; visited 1 November 2008.

(MERCOSUR),<sup>31</sup> the European Parliament,<sup>32</sup> and the Joint Parliamentary Assembly of the Africa Caribbean Pacific-European Union (ACP-EU)<sup>33</sup> were highly opposed. Others, for example, the joint statement of the heads of state of the Caribbean Community (CARICOM)<sup>34</sup> and the European Union ‘guiding principles’,<sup>35</sup> were much more sympathetic to the US request. In particular the latter, intended “to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in responding to the United States’ proposal” does not exclude the conclusion of a ‘non-surrender’ agreement *per se* as long as it meets certain criteria.<sup>36</sup>

### 3.4 Introduction to the ‘non-surrender’ agreements

All ‘non-surrender’ agreements are based on a standard agreement, which (in order to prevent needless repetition) has been annexed to this thesis as Annex III. That being said, several ‘non-surrender’ agreements contain (slightly) diverging provisions, without, however, affecting the content and scope of the agreement. Insofar as relevant, such discrepancies will be addressed in the rest of this thesis.

All ‘non-surrender’ agreements were either concluded directly or effectuated by exchange of notes. The Bush administration considers all ‘non-surrender’ agreements to be executive agreements meaning that they do not require the advice and consent of the Senate, pursuant to

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<sup>31</sup> Presidential Declaration of MERCOSUR’s Commitment to the Rome Statute of the International Criminal Court, statement adopted at the 28<sup>th</sup> meeting of the Council of the Common Market, 20 June 2005. Unofficial translation available via: [http://www.iccnw.org/documents/MERCOSUR\\_Decl\\_BIA\\_Jun05.pdf](http://www.iccnw.org/documents/MERCOSUR_Decl_BIA_Jun05.pdf); visited 1 November 2008.

<sup>32</sup> European Parliament Resolution on the International Criminal Court, 14 November 2003, Official Journal C273E/291.

<sup>33</sup> ACP-EU Joint Parliamentary Assembly Resolution on the International Criminal Court, 3 April 2003, ACP-EU 3560/03/fin. Available via: [http://www.iccnw.org/documents/ACP-EURes\\_BIAApril2003.pdf](http://www.iccnw.org/documents/ACP-EURes_BIAApril2003.pdf); visited 1 November 2008.

<sup>34</sup> Press Release 95/2003, Statement issued by the Conference of Heads of Government of the Caribbean Community on Bilateral Agreement under Article 98 of the Rome Statute establishing the International Criminal Court, 4 July 2003. Available via: [http://www.caricom.org/jsp/communications/meetings\\_statements/icc\\_statement\\_24hgc.jsp?menu=communications](http://www.caricom.org/jsp/communications/meetings_statements/icc_statement_24hgc.jsp?menu=communications); visited 1 November 2008.

<sup>35</sup> EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, in General Affairs and External Relations Council, 2450<sup>th</sup> Council session, 30 September 2002, E.U. Doc. 12134/02 (Presse 279).

<sup>36</sup> *Ibid.* I will address the EU guiding principles more elaborately in Chapter 5.

Article II, section 2 of the United States Constitution.<sup>37</sup> Accordingly, their entry into force depends solely on any domestic legal procedure to be fulfilled by the other contracting state.

The majority of the agreements applies only to the ICC (74), the rest (22), however, are applicable to any international criminal tribunal, (unless such tribunal was established by the United Nations Security Council).<sup>38</sup> Whether the ‘non-surrender’ agreement applies solely to the ICC or also to other international criminal tribunals has been indicated in Annex II as well.

There are three types of ‘non-surrender’ agreements:

1. **Type 1 (non-reciprocal)**: These agreements (19) contain Articles A (type 1), B (type 1), C and F of the standard agreement.
2. **Type 2 (reciprocal)**: These agreements (52) contain Articles A (type 2), B (type 2), C, F and F of the standard agreement.
3. **Type 3 (reciprocal ‘plus’)**: These agreements (24) contain Articles A (type 2), B (type 2), C, D, E and F of the standard agreement.

Whether the ‘non-surrender’ agreement is a Type 1, 2 or 3 agreement has also been indicated in Annex II.

### 3.5 Conclusion

Although the non-renewal of the Security Council resolutions represented a significant defeat for the Bush administration, it had always been clear that these resolutions were at best an *interim* and partial solution. The same day that resolution 1422 was passed, the United States therefore embarked on a more comprehensive campaign to obtain an exemption from the jurisdiction of the ICC by concluding bilateral ‘non-surrender’ agreements, in which each state agrees that it will not surrender citizens of the other party to the ICC without the express consent of that other party. The campaign seems to have been facilitated by the ASPA, which

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<sup>37</sup> See, D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, 3 Journal of International Criminal Justice 2005, p. 344.

<sup>38</sup> See the diverging and broader language in this regard, however, of the agreements with Brunei, India, Laos, the Maldives and Rwanda (“unless otherwise obligated to do so by an international agreement to which both the United States of America and X are parties”). Naturally, the effect is the same as all these countries as well as the United States are also a party to the United Nations Charter.

*inter alia* provided for economic sanctions for countries refusing to enter into a 'non-surrender' agreement.

**PART II:**  
**Legal analysis**

**CHAPTER 4:**

**Are the bilateral ‘non-surrender’ agreements invalid under international law?**

**4.1 Introduction**

Having analysed the factual background of the ‘non-surrender’ agreements and thus placed them in the appropriate context, we can now move on to the legal analysis of this thesis. As we have seen in Chapter 1, the first question in this regard is whether or not the bilateral ‘non-surrender’ agreements are invalid under international law. Some authors have argued that this is indeed the case. This chapter will discuss the relevant legal framework for the invalidity of treaties and apply this framework to the bilateral ‘non-surrender’ agreements.

**4.2 What makes a treaty invalid?: Section 1 and 2 of Part V of the Vienna convention on the Law of Treaties**

The rules governing the invalidity of treaties are laid down in Section 1 and 2 of Part V of the Vienna convention on the Law of Treaties (VCLT).<sup>1</sup>

The United States although a signatory, is not a party to the VCLT.<sup>2</sup> The same applies to several states that have entered into a ‘non surrender’ agreement with the United States.<sup>3</sup> It is generally accepted, however, that the VCLT is to a large degree a restatement of customary international law, and its provisions therefore bind states regardless of whether they are a

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<sup>1</sup> Vienna Convention on the Law of Treaties, 21 March 1986, United Nations Treaty Series, Volume 1155, p. 331.

<sup>2</sup> See status chart of the Vienna Convention on the Law of Treaties. Available via: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=467&chapter=23&lang=en>; visited 2 October 2008.

<sup>3</sup> These states are: Afghanistan, Antigua and Barbuda, Azerbaijan, Bangladesh, Belize, Benin, Bhutan, Botswana, Brunei, Burundi, Cambodia, Cape Verde, Chad, Comoros, Côte d'Ivoire, Djibouti, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Fiji, the Gambia, Ghana, Grenada, Guinea-Bissau, India, Madagascar, Marshall Islands, Mauritania, Micronesia, Nepal, Nicaragua, Pakistan, Palau, Papua New Guinea, Romania, Sao Tome and Principe, Seychelles, Sierra Leone, Singapore, Sri Lanka, St. Kitts and Nevis, Swaziland, Thailand, Timor-Leste, Tonga, Tuvalu, Uganda, the United Arab Emirates, Yemen and Zambia. (See *ibid.*)

party to it or not.<sup>4</sup> The United States Department of State, for example, has acknowledged that “[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”<sup>5</sup>

According to Article 42 of the VCLT, “[t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.” The list of articles in Section 2 of Part V (Articles 46-53), on the basis of which the invalidity of a treaty or consent to be bound may be invoked, is therefore exhaustive.

There are no indications that the consent to be bound of any of states that concluded a ‘non-surrender’ agreement was obtained in violation of Article 46-51 (dealing with, for example, fraud, error and coercion of a representative of a state). We are therefore left with Articles 52-53 dealing with the general invalidity of treaties.

#### **4.3 Article 52 of the VCLT: Coercion of a state by the threat or use of force**

Article 52 entitled ‘Coercion of a State by the threat or use of force’ provides that “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

Notably absent in this article is the threat or use of political or economic coercion. Indeed, during the negotiations of the VCLT this issue was debated, but the delegates failed to agree that economic and political coercion falls within the ambit of the prohibition against the use of force.<sup>6</sup> Or as the International Law Commission’s fourth Special Rapporteur, Sir Humphrey Waldock, put it: “[I]f ‘coercion’ were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure, the door to the evasion of treaty obligations might be opened very wide; for these forms of ‘coercion’ are much less capable of definition and much more liable to subjective appreciations. Moreover, the operation of political and economic pressures is part of the normal working of the relations between States, and

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<sup>4</sup> M. Frankowska, *The Vienna Convention on the Law of Treaties Before the United States Courts*, 28 *Virginia Journal of International Law* 1988, p. 286; T. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge 2000, p. 11; D. A. Tallman, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 *Georgetown Law Journal* 2004, p. 1052.

<sup>5</sup> United States Department of State, *Vienna Convention on the Law of Treaties*. Available via: <http://www.state.gov/s/l/treaty/faqs/70139.htm>; visited 2 October 2008.

<sup>6</sup> See, for example, J. Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 *California Law Review* 1990, p. 962.

international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treaties.”<sup>7</sup>

Instead, a declaration was appended to the Final Act of the Conference on the Law of Treaties solemnly condemning “the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.”<sup>8</sup> An attempt by the Syrian Republic to nevertheless incorporate such a prohibition in Article 52 of the VCLT via an ‘interpretive declaration’<sup>9</sup> was strongly rejected by other states.<sup>10</sup>

The view of Chibueze that “the validity of these bilateral immunity agreements are doubtful considering that they were procured under coercion and/or threat of withdrawal of military aid, including education, training, and financing the purchases of equipment and weaponry if the States failed to sign the immunity agreements”,<sup>11</sup> should thus be rejected as not (yet) being supported by international law. Despite indications that at least some of the ‘non-surrender’ agreements were concluded as a result of economic or political coercion (or threat thereof),<sup>12</sup> this has thus no consequences for their validity.

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<sup>7</sup> H. Waldock, Special Rapporteur, Second Report on the Law of Treaties, U.N. Doc. A/CN.4/156 and Add.1-3, p. 52.

<sup>8</sup> Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, United Nations Conference on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF.39/26.

<sup>9</sup> The ‘interpretive declaration’ provides that “[t]he Government of the Syrian Arab Republic interprets the provisions in article 52 as follows: The expression “the threat or use of force” used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests.” Available via: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=467&chapter=23&lang=en>; visited 23 October 2008.

<sup>10</sup> See, for example, the objections made by Japan, the United-Kingdom and the United States of America. Available via: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=467&chapter=23&lang=en>; visited 23 October 2008.

<sup>11</sup> R. Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 *Annual Survey of International and Comparative Law* 2006, p. 215. See also, *Coalition for the International Criminal Court, US Bilateral Immunity or So-called “Article 98” Agreements*, 18 April 2003, p. 1. Available via: <http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm>; visited 27 September 2008. (“As it did in seeking an exemption for peacekeepers from the jurisdiction of the ICC through the Security Council, the U.S. government is using coercive tactics to obtain immunity from the jurisdiction of the ICC for its nationals. U.S. officials have publicly threatened economic sanctions, such as the termination of military assistance, if countries do not sign the agreement. In several instances, there have been media reports of the U.S. providing large financial packages to countries at the time of their signature of bilateral immunity agreements.”)

<sup>12</sup> See Chapter 3, paragraph 3.2 ‘The ‘non-surrender’ agreements campaign’.

#### 4.4 Article 53 of the VCLT: Treaties conflicting with *jus cogens*

The remaining ground of invalidity is that of Article 53, which provides that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” The same article defines ‘peremptory norm’ as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” In other words, Article 53 provides that a treaty is void if it conflicts with *jus cogens*.

It has been argued by some authors that the ‘non-surrender’ agreements are invalid because they violate *jus cogens*.<sup>13</sup> The argument seemingly advanced in this regard, is that the ‘non-surrender’ agreements may have the effect of providing for impunity for crimes within the jurisdiction of the ICC, whereas the prohibition of impunity for such crimes has the status of *jus cogens*.<sup>14</sup> In my view, this argument should be rejected.

As a preliminary remark, it should be emphasized that the existence of a *jus cogens* norm may not be assumed lightly, given the ever dominant principle in international law that a state is only bound by virtue of its consent.<sup>15</sup>

A prohibition of impunity for the crimes within the jurisdiction of the ICC implies a general duty to prosecute and punish such crimes. Some authors have argued that such a duty to prosecute follows directly from the fact that certain crimes may be characterized as *jus cogens*. According to Bassiouni, for example, such a characterization “places upon states the obligation *erga omnes* not to grant impunity to the violators of such crimes.”<sup>16</sup> Such a view, however, – at least as customary law currently stands – is not supported by what is generally understood as the relationship between *jus cogens* and *erga omnes* obligations. The former concerns the legal character of the norm, the latter concerns the question as to towards whom

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<sup>13</sup> Most notably, S. V. Ettari, A Foundation of Granite or Sand? The International Criminal Court and United States Bilateral Immunity Agreements, 30 Brooklyn Journal of International Law 2004-2005, p. 252-253.

<sup>14</sup> *Ibid.*

<sup>15</sup> P.H. Kooijmans, Internationaal Publiekrecht in Vogelvlucht [A Bird’s-Eye View of International Public Law], Kluwer, Deventer 2002, p. 19.

<sup>16</sup> M. Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, 59 Law and Contemporary Problems 1996, p. 66.

a state is obligated to comply with that norm.<sup>17</sup> Thus, as Naqvi rightly notes, “the fact that a State has a legal interest in ensuring that an obligation is complied with does not necessarily translate into a positive duty to prosecute”.<sup>18</sup>

The better view therefore seems to be that the qualification as a *jus cogens* crime gives states a *right* and not (yet) a *duty* to prosecute,<sup>19</sup> something, which even Bassiouni himself seems to acknowledge: “[t]he practice of states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations. [...] The gap between legal expectations and legal reality is therefore quite wide.”<sup>20</sup>

Accordingly, if a duty to prosecute and thus a prohibition of impunity exists under international law, it should be found elsewhere.

Perhaps surprisingly, the ICC Statute itself is virtually silent on this issue. According to Seibert-Fohr, despite “some reference” in the preamble,<sup>21</sup> “[t]here is no provision on prosecuting duties by the States Parties in the operative part of the Statute. [...] Indeed, it is

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<sup>17</sup> See, for example, P.H. Kooijmans, *Internationaal Publiekrecht in Vogelvlucht [A Bird’s-Eye View of International Public Law]*, *supra* note 15, p. 18.

<sup>18</sup> Y. Naqvi, *Amnesty for War Crimes: Defining the limits of international recognition*, 85 *International Review of the Red Cross* 2003, p. 613.

<sup>19</sup> See, also B. Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law*, 35 *New England Law Review* 2000-2001, p. 406 (“[T]he best that can be said is that customary law allows a permissive, and may be evolving toward a mandatory exercise of universal jurisdiction”). This also seemed to be the view of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Furundžija* which held that “it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is *entitled* to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. [...] It has been held that international crimes being universally condemned wherever they occur, every State has the *right* to prosecute and punish the authors of such crimes. (emphasis added)” (ICTY, Judgment, *Prosecutor v. Furundžija*, Case No. IT-95-17/i-T, T. Ch. II, 10 December 1998, Klip/ Sluiter, ALC-III-685, par. 156). See, however, Ettari who argues that this transformation from ‘right’ into ‘duty’ has already occurred (S. V. Ettari, *A Foundation of Granite or Sand? The International Criminal Court and United States Bilateral Immunity Agreements*, *supra* note 13, p. 227-228); and SCSL, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, *Prosecutor v. Gbao*, Case No. SCSL-2004-15-AR72(E), A. Ch., 25 May 2004, par. 10 (“Under international law, states are under a duty to prosecute crimes whose prohibition has the status of *jus cogens*.”). In light of the above, I fully agree with Cryer that this statement is “controversial” and “cries out for greater discussion”. (R. Cryer, Commentary, Klip/ Sluiter, ALC-IX-56, p. 60)

<sup>20</sup> M. Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, *supra* note 16, p. 66.

<sup>21</sup> See preambular paragraphs 4 (“AFFIRMING that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”) and 6 (“RECALLING that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”)

not the objective of the Rome Statute, which is concerned with international prosecution and not with the international enforcement of state obligations, to deal with prosecuting duties by the States Parties.”<sup>22</sup> Crawford *et al.*, however, argue that “it is implicit in the requirement of Article 17(1)(a) and (b) that the ICC Statute imposes upon States Parties a general obligation to investigate allegations relating to the crimes identified in the Statute and, if a case is made out, to ensure that the persons concerned do not escape prosecution.”<sup>23</sup>

Even if this view is accepted, however, such a duty to prosecute only exists for the states parties to the ICC Statute unless such a duty also follows from another source of international law. In this regard it should be noted that the ICC Statute itself has not (yet) received sufficient ratifications for its provisions to transition into customary law on that basis alone.<sup>24</sup>

There are several other treaties relating to crimes within the jurisdiction of the ICC that provide for a specific duty to prosecute: the Geneva Conventions<sup>25</sup> and Protocol I thereto,<sup>26</sup> the Genocide Convention,<sup>27</sup> the Convention against Torture,<sup>28</sup> the Apartheid Convention<sup>29</sup> and

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<sup>22</sup> A. Seibert-Fohr, *Relevance of the Rome Statute for Amnesties*, 7 *Max Planck Yearbook of United Nations Law* 2003, p. 558-560. See also, L. Nadya-Sadat, *National Amnesties and Truth Commissions*, in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, University of Pennsylvania Press, Philadelphia 2006, p. 203.

<sup>23</sup> J. Crawford, P. Sands and R. 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)*, par. 30. Available via: <http://www.amicc.org/docs/Art98-14une03FINAL.pdf>; visited 1 November 2008.

<sup>24</sup> See also, D. Akande, *International Law Immunities and the International Criminal Court*, 98 *American Journal of International Law* 2004, p. 421, footnote 90.

<sup>25</sup> Article 49 of the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, United Nations Treaty Series 1950, Volume 75, p. 31; Article 50 of the Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, United Nations Treaty Series 1950, Volume 75, p. 85; Article 129 of the Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, United Nations Treaty Series 1950, Volume 75, p. 135; and Article 147 of the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, United Nations Treaty Series, Volume 75, p. 287.

<sup>26</sup> Article 85 of the Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, United Nations Treaty Series, Volume 1125, p. 3.

<sup>27</sup> Article I *jo.* VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations Treaty Series, Volume 78, p. 277.

<sup>28</sup> Article 4 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations Treaty Series, Volume 1465, p. 85.

<sup>29</sup> Article 4 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, United Nations Treaty Series, Volume 1015, p. 243.

the Enforced Disappearances Convention.<sup>30</sup> Not all of these conventions, however, are widely ratified<sup>31</sup> nor is it entirely clear to what extent (all of) their provision reflect customary law.

Nevertheless, it seems safe to assume that the obligation to prosecute genocide,<sup>32</sup> grave breaches of the Geneva Conventions when committed in international armed conflict<sup>33</sup> and torture<sup>34</sup> is (at least emerging) as a rule of customary international law. With respect to all the other crimes within the jurisdiction of the ICC, including crimes against humanity<sup>35</sup> as well grave breaches of the Geneva Conventions committed in a non-international armed conflict<sup>36</sup> and grave breaches of additional protocol I,<sup>37</sup> a duty to prosecute as a rule of customary law is highly questionable.<sup>38</sup>

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<sup>30</sup> Article 11 of the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, U.N. Doc.A/61/488.

<sup>31</sup> There are 188 state parties to the Geneva Conventions (see, A. Roberts, R. Guelff, Documents on the Laws of War, Oxford University Press, Oxford 2007, p. 355-362; 155 parties to 140 state parties to the Genocide Convention (see, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=317&chapter=4&lang=en>; visited 25 October 2008); 145 state parties to the Torture Convention (see, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=128&chapter=4&lang=en>; visited 25 October 2008); 107 state parties to the Apartheid Convention (see, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=324&chapter=4&lang=en>; visited 25 October 2008); and 5 state parties to the Enforced Disappearances Convention (see, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=3&chapter=4&lang=en>; visited 25 October 2008).

<sup>32</sup> See, for example, A. O'Shea, Amnesty for Crime in International Law and Practice, Kluwer Law International, The Hague 2002, p. 242; R. Boed, The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations, 33 Cornell Journal of International Law 2000, p. 320; L. Keller, The False Dichotomy of Peace versus Justice and the International Criminal Court, 3 Hague Justice Journal 2008, p. 19. It should be noted, however, that this duty only obliges states to exercise territorial criminal jurisdiction, as was recently confirmed by the ICJ. (International Court of Justice, Judgement (Merits), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, par. 442.

<sup>33</sup> See, for example, Y. Naqvi, Amnesty for War Crimes: Defining the limits of international recognition, *supra* note 18, p. 597; L. Scully, Neither Justice, nor Oasis: Algeria's Amnesty Law, 33 Brooklyn Journal of International Law 2007-2008, p. 988; F. Domb, Treatment of War Crimes in Peace Treaties - Prosecution or Amnesty?, 24 Israel Yearbook on Human Rights 1994, p. 263.

<sup>34</sup> See, for example, A. O'Shea, Amnesty for Crime in International Law and Practice, Kluwer *supra* note 32, p. 238; L. Scully, Neither Justice, nor Oasis: Algeria's Amnesty Law, *supra* note 33, p. 993.

<sup>35</sup> See, for example, A. O'Shea, Amnesty for Crime in International Law and Practice, *supra* note 32, p. 238; L. Scully, Neither Justice, nor Oasis: Algeria's Amnesty Law, *supra* note 33, p. 260; M. Scharf, The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes, 59 Law and Contemporary Problems 1999, p. 59; R. Boed, The Effect of Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations, *supra* note 32, p. 317; A. Cassese, International Criminal Law, Oxford University Press, Oxford 2003, p. 315.

<sup>36</sup> See, for example, L. Scully, Neither Justice, nor Oasis: Algeria's Amnesty Law, *supra* note 33, p. 988; L. Nadya-Sadat, National Amnesties and Truth Commissions, *supra* note 22, p. 202.

<sup>37</sup> See, for example, Y. Naqvi, Amnesty for War Crimes: Defining the limits of international recognition, *supra* note 18, p. 597 and footnote 59 arguing that "[d]uring the negotiations in Rome, on the list of war crimes to be included in the Statute of the International Criminal Court, States strongly disagreed on the customary statues of the rules in Additional Protocol I."

<sup>38</sup> See, however, Ferdinandusse who argues that the duty to prosecute is ongoing for all core crimes and has not yet resulted in a rule of positive law. (W. Ferdinandusse, Direct Application of International Criminal Law in National Courts, T.M.C. Asser Press, The Hague, p. 193-194)

Even if it is accepted, however, that a customary rule exists, prohibiting impunity for all the crimes within the jurisdiction of the ICC, it simply cannot be argued that such a rule has acquired the status of *jus cogens* – i.e. a customary rule from which no derogation is permitted. I fully agree with Naqvi that “[t]he historical – and continuing – practice of States enacting amnesties at the end of armed conflicts [...] and the more recent State practice in the form of special courts in transitional societies prosecuting only those ‘most responsible’ [...], all lead to conclude that the international community does not at the present time consider that this rule has a non-derogable character.”<sup>39</sup>

Indeed, the issue was discussed during the negotiations of the ICC Statute but no clear consensus developed among the delegates as to how the question should be resolved.<sup>40</sup> The ICC statute therefore leaves the question of the admissibility of an amnesty open.<sup>41</sup> Indeed, the United Nations Security Council may suspend an investigation or prosecution by a resolution adopted under Chapter VII of the United Nations Charter (Article 16 of the ICC Statute), the prosecutor has the possibility to abstain from an investigation “in the interests of justice” (Article 53, paragraph 2, sub c of the ICC Statute) and a state may take the decision not to prosecute (Article 17, paragraph 1, sub b of the ICC Statute).<sup>42</sup>

Accordingly, even if the ‘non-surrender’ agreements were to provide for impunity (*quod non*),<sup>43</sup> that would not make them invalid under Article 53 of the VCLT now that the prohibition of impunity has not (yet) acquired the status of *jus cogens*.<sup>44</sup>

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<sup>39</sup> Y. Naqvi, *Amnesty for War Crimes: Defining the limits of international recognition*, *supra* note 18, p. 612; See also, W. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge 2006, p. 338 (“It seems reckless to suggest that in all cases international law prohibits amnesty when, in fact, such a mechanism may be the key to ending armed conflict.”); M. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, p. 25 (“the duty to prosecute has not attained *jus cogens* status”) Available via: <http://ssrn.com/abstract=799004>; visited 25 October 2008. See, however, International Court of Justice, *Dissenting Opinion Judge Al-Khasawneh, Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, par. 7 (“effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance.”)

<sup>40</sup> L. Nadya-Sadat, *National Amnesties and Truth Commissions*, *supra* note 22, p. 204.

<sup>41</sup> See, for example, K. Ambos, *Commentary, Klip/ Sluiter, ALC-IX-103*, p. 107; L. Nadya-Sadat, *National Amnesties and Truth Commissions*, *supra* note 22, p. 204.

<sup>42</sup> See also O’Shea, who argues that a protocol should be added to the ICC Statute facilitating the recognition of amnesties for crimes within the jurisdiction of the ICC in limited circumstances. (A. O’Shea, *Amnesty for Crime in International Law and Practice*, *supra* note 32, p. 194 *et seq.* and appendix).

<sup>43</sup> It is important to stress that the ‘non-surrender’ agreements simply do not provide for impunity. (see also the preamble of the agreements with Botswana, Nicaragua and the United Arab Emirates: “Affirming that nothing in this Agreement provides impunity with regard to war crimes, crimes against humanity and genocide.”). First, preambular paragraph 4 clearly indicates that “the Parties have each expressed their intention to investigate and

## 4.5 Conclusion

The rules governing the invalidity of treaties are exhaustively laid down in Section 1 and 2 of Part V of the VCLT. As international law currently stands, there is no ground for invalidating a treaty on the basis of a threat or use of military, political or economic coercion. Despite indications that at least some of the ‘non-surrender’ agreements were concluded as a result of economic or political coercion (or threat thereof), this has thus no consequences for their validity. Although the VCLT does provide for a ground to invalidate a treaty if it conflicts with *jus cogens*, the prohibition of impunity has not (yet) acquired this status. Accordingly, even if the ‘non-surrender’ agreements were to provide for impunity (*quod non*), that would not make them invalid under Article 53 of the VCLT.

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to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel or nationals” (See also the preamble of the agreements with Macedonia and Saint Kitts and Nevis which in addition states that “[t]he Government of the United States of America remains committed to its legal obligations arising from the 1907 Hague Conventions, the 1949 Geneva Conventions, the 1948 Genocide Convention, and the 1984 Torture Convention”). Secondly, the agreements in no way affect the rights of the states parties to the agreements to exercise their criminal jurisdiction over the persons covered by them. (see also the preambles of the ‘non-surrender’ agreement with Benin, Egypt, Lesotho and the United Arab Emirates: “Affirming that nothing in this Agreement precludes either Party from exercising its criminal jurisdiction over those responsible for genocide, crimes against humanity and war crimes.”) Thirdly, the agreements in no way (nor could they for that matter) affect the rights of third states to exercise criminal jurisdiction over persons covered by them. Furthermore, it could even be argued that the ‘non-surrender’ agreements will enhance the observance of international humanitarian and criminal law given the undoubtedly considerable political pressure on the United States to prosecute those accused of crimes within the jurisdiction of the ICC.

<sup>44</sup> That is not to say, however, that a state cannot incur state responsibility for violating its obligation to prosecute international crimes if for some reason abiding to the terms of a ‘non-surrender’ agreement leads to impunity. See also Chapter 6.



## CHAPTER 5:

### Does Article 98, paragraph 2 of the ICC Statute apply to the ‘non-surrender’ agreements?

#### 5.1 Introduction

As we have seen in Chapter 4, the ‘non-surrender’ agreements are not invalid under international law. We are therefore faced with the question of the compatibility of these agreements with the ICC Statute. As we have seen in Chapter 3,<sup>1</sup> the United States government argues that the ‘non-surrender’ agreements are specifically provided for by Article 98, paragraph 2 of the ICC Statute. Opponents on the other hand argue that this is not the case. The question as to which of those two opposite views is correct thus requires an interpretation of this article. This chapter will first analyse what the legal framework for interpreting a treaty is by analyzing Section 3 of the Vienna Convention on the Law of Treaties (VCLT) (paragraph 5.2). Secondly, it will determine the proper interpretation of Article 98, paragraph 2 (paragraph 5.3) and finally, it will apply this interpretation to the ‘non-surrender’ agreements as they are currently concluded (paragraph 5.4). Paragraph 5.5 will then address the question as to who in the end decides on the applicability of Article 98, paragraph 2.

#### 5.2 The legal framework for interpreting a treaty

##### 5.2.1 Section 3 of Part III of the Vienna Convention on the Law of Treaties

The ICC Statute was adopted in the form of a multilateral treaty and should therefore be interpreted as such.<sup>2</sup> The rules governing treaty interpretation are laid down in Section 3 (Articles 31-33) of Part III of the Vienna Convention on the Law of Treaties (VCLT).<sup>3</sup>

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<sup>1</sup> See Chapter 3, paragraph 3.2 ‘The ‘non-surrender’ agreements campaign’.

<sup>2</sup> See, for example, R. Haveman, in R. Haveman, O. Kavran and J. Nicholls, *Supranational Criminal Law: A System Sui Generis*, Intersentia N.V. Antwerp 2003, p. 20. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has interpreted its statute as a treaty. The Appeals Chamber held that “[n]otwithstanding the fact that the ICTY Statute is legally a very different instrument from an international treaty, in the interpretation of the Statute it is nonetheless permissible to be guided by the principle applied by the International Court of Justice with regard to treaty interpretation.” See, ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/ Sluiter, ALC-III-761, par. 282. See also, ICTY, Decision on Preliminary Motions, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, T. Ch. III, 8 November 2001, Klip/ Sluiter, ALC-VIII-15, par. 47, (“The Statute of the International Tribunal is interpreted as a treaty.”); ICTY, Reasons for Decision on Assignment of Defence Counsel, *Prosecutor v. Milošević*, Case No. IT-02-54, T. Ch. III, 22 September 2004,

Article 31 of the VCLT lays down the general rule of treaty interpretation. Paragraph 1 provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

The term ‘ordinary meaning’ is misleading as it seems to imply that there is necessarily one meaning that is the ‘ordinary’ meaning of a word. A simple look in the dictionary, however, reveals that words almost always have several meanings. What is the ordinary meaning of a term depends on the context. As Gardiner rightly stresses, “the ordinary meaning is not an element in treaty interpretation to be taken separately when the general rule is being applied to a particular issue requiring treaty interpretation. Nor is the first impression as to what is the ordinary meaning of a term anything other than a very fleeting starting point. For the ordinary meaning of treaty terms is immediately and intimately linked with context, and then to be taken in conjunction with all other relevant elements of the Vienna Rules.”<sup>4</sup>

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par. 31 (“From the earliest days of the work of the International Tribunal, it was decided that the Statute is to be interpreted as a treaty.”) For an example at the International Criminal Tribunal for Rwanda (ICTR), see ICTR, Decision on the Admissibility of the Prosecutor’s Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, *Prosecutor v. Bagosora and 28 Others*, Case No. ICTR-98-37-A, A. Ch., 8 June 1998, Klip/ Sluiter, ALC-II-307, par. 28. For a critique of this position see, C. Lister, What’s in a Name? Labels and the Statute of the International Criminal Tribunal for the Former Yugoslavia, 18 *Leiden Journal of International Law* 2005, p. 77-92. The Special Court for Sierra Leone (SCSL) has also interpreted its statute as a treaty, SCSL, Decision on Constitutionality and Lack of Jurisdiction, *Prosecutor v. Kallon, Norman and Kamara*, Cases No. SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E) and SCSL-2004-16-AR72 (E), A. Ch, 13 March 2004, Klip/ Sluiter, ALC-IX-19, par. 42-43 and 67. On the other hand, the ICC could adopt an approach similar to that of the Court of Justice of the European Communities (ECJ). The ECJ has consistently held that the European Community “constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals.” (European Court of Justice, *Van Gend en Loos v. Netherlands Inland Revenue Administration*, Case 26-62, section II B) According to Gardiner, “[d]istinguishing the legal order of the Community in this way from public international law has generally resulted in the ECJ not applying the Vienna rules to these treaties.” R. K. Gardiner, *Treaty Interpretation*, Oxford University Press, Oxford 2008, p. 121. One could argue that the ICC involves a limited transfer of sovereignty as well (namely that of the right to exercise criminal jurisdiction) and thus warrants a similar method of interpretation. There is no indication in its early case law, however, that the ICC is leaning towards such an approach.

<sup>3</sup> On the applicability of the VCLT with respect to non-state parties to it, see Chapter 4, paragraph 4.2 ‘What makes a treaty invalid?: Section 1 and 2 of Part V of the Vienna convention on the Law of Treaties’. Specifically with respect to the customary law nature of the provisions of the VCLT regarding treaty interpretation, see R. K. Gardiner, *Treaty Interpretation*, *supra* note 2, p. 14-15. See also, for example, International Court of Justice, Judgement, Arbitral Award of 31 July 1989, (*Guinea-Bissau v. Senegal*), 12 November 1991, ICJ Reports 1991, p. 53, par. 48; International Court of Justice, Judgement, Case Concerning Avena and other Mexican Nationals (*Mexico v. United States of America*), 31 March 2004, ICJ Reports 2004, p.12, par. 83; and International Court of Justice, Judgement, Case Concerning Oil Platforms Case (*Iran v. United States of America*), 6 November 2003, ICJ Reports 2003, p. 161, par. 41.

<sup>4</sup> R. K. Gardiner, *Treaty Interpretation*, *supra* note 2, p. 162.

Similar reasoning applies to the term ‘good faith’ which according to Gardiner “is an excellent example of a term whose ‘ordinary meaning’ is elusive.”<sup>5</sup> “[It] means more than simply *bona fides* in the sense of absence of *mala fides* or rejection of an interpretation resulting in abuse of rights (though, of course, it includes such absence and rejection). It signifies an element of reasonableness qualifying the dogmatism that can result from purely verbal analysis. [...] [T]he term is also capable of a sufficiently broad meaning to include the principle of effective interpretation.”<sup>6</sup> What is a ‘good faith’ interpretation of a treaty thus also very much depends on the context.

It follows from Article 31, paragraph 2 of the VCLT, that this ‘context’ is primarily comprised of the text of the treaty including its preamble and annexes but also agreements and instruments made in connection to the treaty (sub a and b). Paragraph 3 further provides that “[t]here shall also be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.”

The first two sub-categories are rather straightforward. The last requires a bit more elaboration. It is undisputed that the term ‘relevant rules of international law’ includes customary international law and general principles of law.<sup>7</sup> Although it is generally accepted that the term also includes treaty rules,<sup>8</sup> it is unclear what the exact interpretation of ‘between the parties’ should be. Is it necessary that all parties to the treaty being interpreted are parties to any other treaty being used or is it sufficient that all parties to the dispute over interpretation are party to that other treaty? Although the law as it currently stands does not provide a definitive answer,<sup>9</sup> the best view seems to be that treaty rules (regardless of who is a party to the treaty) may always be taken into account but that the weight to be accorded to such rules depends on the circumstances. In my view the International Law Commission summarised it best when it wrote in its 2006 report that

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<sup>5</sup> *Ibid.*, p. 150.

<sup>6</sup> *Ibid.*, p. 151.

<sup>7</sup> See, for example, International Law Commission Report on the work of its Fifty-eighth Session (2006), U.N. Doc. A/61/10, p. 413; R. K. Gardiner, Treaty Interpretation, *supra* note 2, p. 262-263.

<sup>8</sup> *Ibid.*

<sup>9</sup> R. K. Gardiner, Treaty Interpretation, *supra* note 2, p. 269-275.

“[Article 31, paragraph 3, sub c] requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also party parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.”<sup>10</sup>

Perhaps surprisingly, what the drafters of a certain treaty actually intended is of lesser relevance when interpreting a treaty. Or to put it in the words of Eubany “the legislative history of the provision does not have as much weight as an interpretation derived from an ordinary reading of the provision.”<sup>11</sup> Recourse to the preparatory work (*travaux préparatoires*) may only be had in two circumstances: 1) to confirm the meaning resulting from the application of Article 31 or 2) to determine the meaning when the interpretation according to Article 31: (a) “leaves the meaning ambiguous or obscure”; or (b) “leads to a result which is manifestly absurd or unreasonable.”<sup>12</sup>

In this regard it is also important to mention Article 31, paragraph 4 of the VCLT which provides that “[a] special meaning shall be given to a term if it is established that the parties so intended”. At first sight, the language of this provision is slightly misleading as it seems to allow recourse to the preparatory work as well in order to determine the intention of the parties. It follows from the preparatory work of the International Law Commission, however,

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<sup>10</sup> International Law Commission Report on the work of its Fifty-eighth Session (2006), *supra* note 7, p. 414.

<sup>11</sup> See, for example, C. Eubany, Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court, 27 *Hastings International & Comparative Law Review* 2003-2004, p. 116.

<sup>12</sup> It is unclear if the preparatory work may be used in a situation in which it cannot be shown that applying Article 31 VCLT leaves the meaning of the interpreted treaty ‘ambiguous or obscure’, nor that it leads to a result ‘which is manifestly absurd or unreasonable’. It has been argued by some authors that even in such a case of ‘perfectly clear results’, the preparatory work may be used to ‘correct’ or ‘replace’ rather than confirm the meaning of a treaty provision. (See, for example, S. Schwebel, May Preparatory Work be Used to Correct Rather Than Confirm the “Clear” Meaning of a Treaty Provision?, in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century*, Kluwer Law International, The Hague 1996, p. 541-547) This position, however, is highly controversial and the better view therefore seems to be that adherence to the VCLT interpretation scheme is warranted. (See, for example, U. Linderfalk, Is the Hierarchal Structure of Articles 31 and 32 of the Vienna Convention Real or not? Interpreting the Rules of Interpretation, 54 *Netherlands International Law Review* 2007, p. 133-154, arguing that not one of the arguments in favor of this view “stands up to careful legal analysis” (p. 153); M.H. Mendelson, Comment on ‘May preparatory Work be Used to Correct Rather than Confirm the “Clear” Meaning of a Treaty Provision?’, par. 2 and 5. Available via: <http://www.blackstonechambers.com/document.rm?id=45>; visited 3 October 2008; R. K. Gardiner, Treaty Interpretation, *supra* note 2, p. 321, footnote 62). That being said, “[i]n practice, a divergent meaning disclosed by the preparatory work would be present in the interpreter’s mind throughout any competently conducted interpretive exercise.” (*Ibid.*, p. 322-323) Furthermore, the rather elastic concepts of ‘obscure’ and ‘ambiguous’ will almost always allow for recourse to the preparatory work in order to determine the meaning in appropriate cases. (*Ibid.*, p. 328.)

that instead this provision relates to special meanings in for example a treaty's definition provision.<sup>13</sup>

Although not specifically mentioned in the VCLT, customary international law regarding treaty interpretation seems to include the principle of *exceptio est strictissimae applicationis* (exceptions to treaty obligations are construed restrictively).<sup>14</sup>

## 5.2.2 The object and purpose of the ICC Statute

It goes without saying that the ICC Statute is premised on the desire to prevent impunity for those responsible for crimes within the jurisdiction of the ICC. This is made all too clear by preambular paragraphs 4 and 5:<sup>15</sup>

**AFFIRMING** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

**DETERMINED** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

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<sup>13</sup> *Ibid.*, p. 294: “[T]he outcome of the work of the ILC was to change the original idea of a special meaning derived from evidence of the intention of the parties, in particular by reference to the preparatory work, to one which was centred on the primary means of interpretation. This would leave as the most obvious cases of special meanings those in a treaty’s definition provision, elsewhere in the context, or in any of the instruments identified by application of the rest of the general rule.”

<sup>14</sup> See, for example, Amnesty International, International Criminal Court: “US efforts to obtain impunity for genocide, crimes against humanity and war crimes, AI Index: IOR 40/025/2002, August 2002, p. 2; Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Article 98(2) Agreements, 9 July 2002, p. 2, footnote 1. Available via: [http://www.hrw.org/campaigns/icc/icc\\_article98.pdf](http://www.hrw.org/campaigns/icc/icc_article98.pdf); visited 27 September 2008; Legal Service of the EU Commission, Internal Opinion, 13 August 2002, reprinted in 23 Human Rights Law Journal 2003, p. 158. H. 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, p. 103. See also, for example, French-Italian Conciliation Commission, Decision No. 136 (Interpretation of Article 79 of the 1947 Peace Treaty), 25 June 1952, UNRIAA, Volume XIII, p. 397. Permanent Court of International Justice, Judgement, Certain German Interests in Upper Silesia, 25 May 1926, PCIJ Series A, No. 7, p. 56 and Permanent Court of International Justice, Advisory Opinion, Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 4 December 1935, PCIJ Series A/B, No. 65, p. 71; North American Free Trade Agreement Arbitration Panel Established Pursuant to Chapter 20, Final Report of the Panel (Cross-Border Trucking Services), Secretariat File No. USA-MEX-98-2008-01, 6 February 2001, par. 237; and European Court of Justice, *Commission v. Grand Duchy of Luxembourg and Kingdom of Belgium*, Joined cases 2/62 and 3/62, 14 December 1962, ECR 425, p. 432.

<sup>15</sup> It must be noted, however, that “[w]hile the preamble may seem an obvious starting point for ascertaining the object and purpose of the treaty, caution is necessary because preambles are not always drafted with care and a preamble itself may need interpreting.” (R. K. Gardiner, Treaty Interpretation, *supra* note 2, p. 196)

Ending impunity for crimes within the jurisdiction of the ICC means that persons suspected of committing such a crime should be subjected to proper investigation, if a *prima facie* case exists prosecuted and if found guilty punished.<sup>16</sup> It follows from the principle of complementarity as laid down in Article 1 of the ICC Statute and preambular paragraph 10 that the first to act should be the state parties to the ICC Statute themselves. Or as Crawford *et al.*, put it: “[the ICC Statute] assumes that it will be first and foremost for investigation and prosecution to occur at the national level, in accordance with the domestic legal system of the relevant State Party. The establishment of the ICC is premised on the basic principle that States are to be given the first opportunity to exercise criminal jurisdiction.”<sup>17</sup>

It follows from that same complementarity principle as further worked out in Article 17 of the ICC Statute, however, that in principle and as a last resort, the ICC will be able to exercise jurisdiction when those same states parties (or in case of a Security Council referral pursuant to Article 13, paragraph b of the ICC Statute, a non state party) are unwilling or unable genuinely to pursue the matter. The ICC Statute is thus “predicated on ICC review of national prosecutions to remove the possibility of impunity.”<sup>18</sup>

The object and purpose of the ICC Statute could therefore be defined as follows: to end impunity for crimes within the jurisdiction of the ICC which is to be achieved through the principle of complementarity.<sup>19</sup>

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<sup>16</sup> J. Crawford, P. Sands and R. 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), par. 26. Available via: <http://www.amicc.org/docs/Art98-14June03FINAL.pdf>; visited 1 November 2008.

<sup>17</sup> *Ibid.*

<sup>18</sup> Human Rights Watch, United States Efforts to Undermine the International Criminal Court (Legal Analysis of Impunity Agreements), p. 2. Available via: <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm>; visited 27 September 2008.

<sup>19</sup> *Cf.* Amnesty International, International Criminal Court: “US efforts to obtain impunity for genocide, crimes against humanity and war crimes, *supra* note 14, p. 1; H. 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?, *supra* note 14, p. 100; J. S. Dietz, Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court With U.S. Article 98 Agreements, 27 Houston Journal of International Law 2004-2005, p. 156; and Coalition for the International Criminal Court, Memo on Art. 98 of the Rome Statute and the Bilateral Agreements Proposed by US Government, 23 August 2002, par. 4. Available via: <http://www.derechos.org/nizkor/icc/ciccart98.html>; visited 28 September 2008. As we shall see, however, the object and purpose are of limited value when interpreting Article 98, paragraph 2 (see *infra* paragraph 5.3.4 ‘Impunity prohibited?’).

### 5.2.3 Article 98, paragraph 2 in context: Part 9 of the ICC Statute

Part 9 of the ICC Statute (Articles 86-102) is entitled ‘International Cooperation and Judicial Assistance’ and deals with the arrest and surrender of persons to the ICC as well as other forms of cooperation during the investigation and trial.<sup>20</sup> The majority of the articles in Part 9 (89-92 and 101-102) deal exclusively with arrest and surrender.<sup>21</sup> It goes without saying that in order to ensure that the ICC is able to fulfil the object and purpose of its statute, it is of crucial importance “that states fully co-operate with the ICC in criminal investigations and, in view of the prohibition from rendering judgements in the absence of the accused, comply with requests of the ICC to surrender suspects.”<sup>22</sup>

Before proceeding further, however, it is important to address some terminology issues in Part 9 since the (in some cases inconsistent or illogical) use of terms has consequences for the interpretation of Article 98, paragraph 2.

First, given the title of Part 9 (‘International Cooperation and Judicial Assistance’), ‘cooperation’ and ‘assistance’ seem to have been intended as being two separate things. Given the language of Articles 86-88 it further seems that the overarching term is ‘cooperation’, which can be subdivided into ‘arrest’ and ‘surrender’ (Articles 89-92) and ‘other forms of cooperation’ (Article 93). The word ‘assistance’ is not used in the articles dealing with ‘arrest’ and ‘surrender’ but instead only appears in those articles that deal with ‘other forms of cooperation’ (Article 93, 96 and 99).<sup>23</sup> The term ‘assistance’ therefore appears to have been intended as being narrower than ‘cooperation’, namely as a synonym for ‘other forms of cooperation’. As such it does not include ‘arrest’ and ‘surrender’, which – as we shall below – is also confirmed by Article 98. That being said, the terms appear to have been used

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<sup>20</sup> B. Swart, Arrest and Surrender, in A. Cassese *et al.*, The Rome Statute of the International Criminal Court, A Commentary (Volume II), Oxford University Press, Oxford 2002, p. 1676

<sup>21</sup> Part 9 is not the only part of the ICC Statute that deals with arrest and surrender, Article 58-59 in Part 5 (‘Investigation and Prosecution’) also address the issue. In general one could say, however, that the provisions of Part 5 deal with the power of the ICC to *order* arrest and surrender, whereas those of Part 9 are mainly concerned with the *execution* of such a request. See *ibid.*, p. 1677. According to Swart, however, “the distinction between the two perspectives has not been rigorously maintained.” (*Ibid.*)

<sup>22</sup> H. 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?, *supra* note 14, p. 100. See also Article 63 of the ICC Statute.

<sup>23</sup> *Cf.*, for example, Article 93, paragraph 1 (“requests by the Court to provide [...] assistance”); Article 96, paragraph 1 (“request for [...] assistance”); and Article 99, paragraph 1 (“requests for assistance”)

interchangeably on at least one occasion<sup>24</sup> and applying this distinction throughout Part 9 may raise some problems.<sup>25</sup>

Secondly, it is not entirely clear if ‘arrest’ and ‘surrender’ are two distinct notions of cooperation or always go together. That is, does a ‘request for surrender’ always involve a ‘request for arrest’ and *vice versa*? The best view seems to be that this is not the case. First, in the definition of ‘surrender’ no mention is made of ‘arrest’.<sup>26</sup> Secondly, Article 89, paragraph 1 authorizes the ICC to issue a ‘request for arrest *and* surrender’ (if they were one and the same, the former could have been omitted) whereas paragraph 2 of that article only allows the requested state to postpone the ‘request for surrender’ (‘arrest’ is omitted here). This seems to imply that such a state is not released of its obligation to comply with the ‘request for arrest’ and thus that they are two separate requests.<sup>27</sup> Furthermore, it follows from Article 92 that a ‘request for (provisional) arrest’ can be made separately from a ‘request for surrender’.<sup>28</sup>

Thirdly, it follows from Article 102 that ‘extradition’ is not the same as ‘surrender’.<sup>29</sup>

Fourthly, it follows from Article 89, paragraph 3 that a ‘request for transit’ is not the same as a ‘request for surrender’.

Fifthly, throughout Part 9, the term used to denote a state that requests cooperation or extradition is ‘requesting state’. The term used to denote a state which is requested to cooperate or extradite is ‘requested state’.

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<sup>24</sup> See the title of Article 93 ‘Other Forms of *Cooperation*’ with the title of Article 96 ‘Contents and Request for Other Forms of *Assistance* under Article 93’ (emphasis added).

<sup>25</sup> First, it would mean that the ICC would be allowed to enter into an *ad hoc* agreement regarding ‘assistance’ but not regarding ‘arrest and surrender’ (Article 87, paragraph 5). Secondly, it would mean that in relation to a request for ‘assistance’ the ICC “may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of and victims, potential witnesses and their families” but not regarding a request for ‘arrest and surrender’ (Article 87, paragraph 4). It could very well be argued that this is an illogical or even absurd result and that ‘assistance’ should be read as meaning ‘cooperation’ in these articles.

<sup>26</sup> “For the purposes of this Statute [...] “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute.” (Article 102, sub a) On the other hand, one could argue that it is impossible to ‘deliver someone up’ without having first arrested him.

<sup>27</sup> Cf. Article 90 which allows a state party to give priority to a competing request for ‘surrender’ of another state over the ICC, but this provision does not seem to release the state of its obligation to ‘arrest’ that person.

<sup>28</sup> “[T]he Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request”.

<sup>29</sup> According to Swart, Article 102 of the ICC Statute was included “in order to make clear that the handing over of a person the International Criminal Court is fundamentally different in nature from the handing over of a person within the framework of extradition between States.” (B. Swart, Arrest and Surrender, *supra* note 20, p. 1677). See also Article 31, paragraph 4 of the VCLT.

The first article of Part 9, Article 86, is entitled ‘General obligation to cooperate’ and provides that “[s]tates Parties shall, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” With regard to arrest and surrender, this obligation is reiterated in Article 89, paragraph 1<sup>30</sup> and with regard to assistance in Article 93, paragraph 1.<sup>31</sup>

Since the ICC Statute was concluded in the form of a treaty, it does not and could not create any obligations to cooperate on states not party to the ICC Statute without the consent of such a state.<sup>32</sup> This is clearly reflected in the language of Part 9 which in Article 87, paragraph 5 provides that the ICC “may invite” such states “to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.”<sup>33</sup>

Third states are also given special consideration when it comes to the obligation to cooperate itself. Article 98 entitled ‘Cooperation with respect to waiver of immunity and consent to surrender’ provides for an exception to the general rule of Article 86.<sup>34</sup> In specific circumstances, it allows state parties to respect their obligations *vis-à-vis* third states with regard to requests for surrender and assistance by the ICC by subordinating such a request to the consent of that third state.<sup>35</sup> An in-depth analysis of the content of both paragraphs will follow below. For now it suffices to address three issues that follow from the context of the article.

First, Article 98 does not affect the jurisdiction of the ICC (and thus the right of the prosecutor to investigate crimes and initiate proceedings). Rather it limits the circumstances in

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<sup>30</sup> Article 89, paragraph 1 of the ICC Statute provides (insofar as relevant): “States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”

<sup>31</sup> Article 93, paragraph 1 of the ICC Statute provides (insofar as relevant): “States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance”.

<sup>32</sup> Article 34 of the Vienna Convention on the Law of Treaties. See also the differing view of the United States government on this issue, Chapter 2, footnote 19.

<sup>33</sup> On the question of whether this is any different in case the Security Council has referred a situation to the ICC pursuant to Article 13 of the ICC Statute will be addressed, see *infra* Chapter 6, paragraph 6.2 ‘The law on treaty conflict paragraph’.

<sup>34</sup> Legal Service of the EU Commission, Internal Opinion, *supra* note 14, p. 158.

<sup>35</sup> S. 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, p. 122.

which the ICC will be able to exercise its jurisdiction now that the ICC Statute prohibits trials *in absentia* (Article 63) and the presence of the accused is thus necessary to commence trial. If the accused decides to appear voluntary or pursuant to a summons to appear (*cf.* Article 60 of the ICC Statute), Article 98 does not come into play and the ICC may proceed with the trial. If, however, this is not the case and surrender is necessary, Article 98 applies, barring the ICC from proceeding with a request in this regard. In that case the ICC may not commence the trial, not because it does not have jurisdiction but because it cannot ensure the appearance of the accused.

Secondly, it should be noted that in contrast to paragraph 1, paragraph 2 only applies to a ‘request for surrender’ and not to a ‘request for assistance’. As we have seen above, the ICC statute is not entirely consistent in its terminology, but in my view – and for the purposes of this article – a ‘request for assistance’ should be interpreted as meaning a request pursuant to Article 93. Paragraph 2 therefore does not provide an exception to the rule that states are obligated to comply with requests pursuant to this article.

Thirdly, both paragraph 1 and 2 only apply to a ‘request for surrender’ and not to a ‘request for arrest’. As we have seen above the ICC Statute seems to treat these as two separate requests. This means that Article 98, paragraph 1 and 2 do not provide an exception to the rule that states are obligated to comply with a ‘request for arrest’. As we shall see below, however, paragraph 1 also applies to categories of persons who enjoy inviolability – that is persons who are not liable to any form of arrest or detention.<sup>36</sup> Now that Article 98, paragraph 1 does not apply to a ‘request for arrest’, the ICC could (technically speaking) request states to arrest such persons.<sup>37</sup> It goes without saying that this would have serious diplomatic and legal consequences for the requested state. That being said, the likelihood of this actually

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<sup>36</sup> See *infra* paragraphs 5.3.1 ‘To whom does it apply?’ and 5.3.2 ‘The relationship between Article 98, paragraph 1 and 2’.

<sup>37</sup> One could argue, however, that given the fact that treaties should be interpreted taking into account “any relevant rules of international law” (Article 31, paragraph 3, sub c VLCT) and thus the rules on inviolability, the term ‘request for surrender’ should be interpreted as also including ‘request for arrest’ (at least for the purposes of Article 98). (See also *infra* paragraph 5.3.2 ‘The relationship between Article 98, paragraph 1 and 2’) Furthermore, it must be born in mind that it is generally accepted that the jurisdiction of the ICC is based on delegated jurisdiction from the states parties. See, for example, S. Wirth, Immunities, Related Problems and Article 98 of the Rome Statute, 12 Criminal Law Forum 2001, p. 453; M. Scharf, The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 Law and Contemporary Problems 2001, p. 110. As Wirth rightly argues, “[a]ccording to the principle *nemo [dat] quod non habet*, [...] states cannot transfer a jurisdiction to the Court that was not limited by the immunities these states would have to observe in national procedures.” (S. Wirth, Immunities, Related Problems and Article 98 of the Rome Statute, *supra* note 37, p. 453) According to this line of reasoning, the ICC would thus act *ultra vires* if it were to request the arrest of a person enjoying inviolability.

happening is virtually non-existent. I for one cannot imagine a situation in which the ICC would request the arrest of a person without (subsequently) requesting the surrender of that person (unless of course it wanted to prove that it could). Since it is barred from doing the latter it would not make any sense to request the former.

#### **5.2.4 Article 31, paragraph 3, sub a and c VCLT: subsequent agreement and subsequent practice**

As we have seen above, in addition to the text including its preamble and annexes account should also be taken of 1) subsequent agreements; 2) subsequent practice; and 3) relevant rules of international law.<sup>38</sup> The implications of the last one are rather straightforward. It is important, however, to specifically address the first two since – as we shall see – the subsequent agreements and practice that first come to mind when it comes to the ICC Statute, may in fact not be taken into account at all.

##### Subsequent agreement: the ICC RPE

The most relevant subsequent agreement is without a doubt the ICC Rules of Procedure and Evidence (RPE) adopted by the Assembly of States Parties in September 2002.<sup>39</sup> Section V of the ICC RPE is entitled ‘Cooperation under Article 98’ and consists of one rule (Rule 195), which provides:

1. When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.
2. The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.

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<sup>38</sup> Article 31, paragraph 3, sub a-c of the VCLT. See also, *supra* paragraph 5.2.1 ‘Section 3 of Part III of the Vienna Convention on the Law of Treaties’. Of course, one should also take into account agreements or instruments made in connection with the conclusion of the treaty. (Article 31, paragraph 2 VCLT) In this regard one could think of for example ‘interpretative declarations’. No such declarations (nor agreements for that matter), however, were made with respect to Article 98.

<sup>39</sup> Official Records ICC-ASP/1/3. The RPE were adopted by general consensus despite the fact that only a two third majority was required (Article 51, paragraph 1 of the ICC Statute).

The first paragraph deals with the provision of information in case a requested state foresees an ‘Article 98 problem’ regarding a request for surrender or assistance. As such it does not really help us in interpreting the ‘controversial’ terms in Article 98, paragraph 2.<sup>40</sup>

The second paragraph is a slightly rephrased version of Article 98, paragraph 2. The most important difference is the absence of the term ‘requested state’ and ‘its’ (before ‘international obligations’). Under Article 98, paragraph 2, the ICC may only not proceed with a request for surrender if it would require *the requested state* to act inconsistently with *its* obligations under international agreements. Under Rule 195, paragraph 2, however, the ICC may not proceed if an international agreement requires the consent of a sending state, *regardless* of whether the absence of such consent would have legal ramifications for the requested state.

The scope of Rule 195, paragraph 2, is thus broader than that of Article 98, paragraph 2.<sup>41</sup> This raises doubts regarding the validity of paragraph 2, now that Article 51, paragraph 5 of the ICC Statute provides that “[i]n the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.” The better view therefore seems to be that paragraph 2 should not be taken into account when interpreting Article 98, paragraph 2.<sup>42</sup>

#### Subsequent practice: statements and common positions and the conclusion of 104 ‘non-surrender’ agreements

As we have seen in Chapter 3, the past six years have resulted in considerable practice in the application of Article 98, paragraph 2. An estimated 104 states entered into ‘non surrender’ agreements with the United States. Furthermore, numerous countries and regional organizations issued statements or common positions regarding the (il)legality of such agreements (and thus on the interpretation and application of Article 98, paragraph 2). The

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<sup>40</sup> It is, however, relevant when it comes to the question as to who should decide on the application of Article 98 to ‘non surrender’ agreements. See *infra* paragraph 5.5 ‘Who decides on the applicability of Article 98, paragraph 2?’.

<sup>41</sup> See also, M. 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, p. 208; R. Wedgwood, The Irresolution of Rome, 64 Law and Contemporary Problems 2001, p. 207. As we have seen this rule was the controversial result of fierce discussion within the PrepCom. See Chapter 2, paragraph 2.3 ‘American policy after the Rome conference’.

<sup>42</sup> See also, M. 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, *supra* note 41, p. 209.

question is, however, if all this has any relevance for the interpretation of Article 98, paragraph 2.

Perhaps the first issue is if it constitutes ‘practice’ at all for the purposes of Article 31, paragraph 3, sub b of the VCLT. In my view, the answer should be in the affirmative. It is generally accepted that ‘practice’ may consist of executive, legislative and judicial acts as long as it can be attributed to the state (i.e. the practice must be under the authority of the state).<sup>43</sup> It goes without saying that the conclusion of the ‘non surrender’ agreements and the issuing of statements or common positions by governments (be it alone or through a regional organization) qualifies as such. Another issue, however, is that the practice should be that of the *parties* to the treaty (*in casu* the ICC Statute).<sup>44</sup> The agreements concluded between the United States and non-state parties (including signatories) to the ICC Statute are thus not relevant (52 in total). The same applies to statements of states that are not (yet) parties to the ICC Statute (for example signatories). Common positions made on behalf of a regional organization that includes non party states are also only relevant to the extent that they reflect practice of the state parties to the ICC.

The second issue is whether it is necessary that all parties participate in the practice. Given the language of Article 31, paragraph 3, sub b of the VCLT the answer should be no. What matters is *agreement* of all parties, not practice. Or as Gardiner put it: “[P]articipation of all the parties in the practice is not required. What is required is their manifest or imputable agreement. Participation in the practice is obviously the clearest evidence of this.”<sup>45</sup> In this regard the conclusion of ‘non surrender’ agreements by 46 state parties to the ICC Statute and the (at least partially) favourable guiding principles of the European Union<sup>46</sup> is clearly not enough to assume agreement of *all* parties to the ICC Statute. Possible ‘imputable’ agreement should also be ruled out given the fact that several state parties have explicitly spoken out against the ‘non surrender’ agreements.<sup>47</sup>

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<sup>43</sup> See, for example, R. K. Gardiner, Treaty Interpretation, *supra* note 2, p. 228 and 235.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, in General Affairs and External Relations Council, 2450th Council session, 30 September 2002, E.U. Doc. 12134/02 (Presse 279).

<sup>47</sup> See, Chapter 3, paragraph 3.3 ‘Response by NGOs and the international community’.

The remaining issue is then if some states parties to a multilateral treaty can through their practice establish an interpretation which becomes binding on them alone even though it differs from that of the majority of the parties. Gardiner has convincingly argued that this possibility should be ruled out: the practice of some parties only does not interpret a treaty *inter se* unless so agreed.<sup>48</sup> There is no evidence, however, of such an agreement in case of the ICC Statute.

The conclusion should thus be that despite considerable practice in the application of Article 98, paragraph 2, none of it is relevant when interpreting Article 98, paragraph 2.<sup>49</sup>

### **5.3 The proper interpretation of Article 98, paragraph 2**

Having established the relevant rules for doing so we can now move on to interpreting Article 98, paragraph 2. As we have seen above, it provides for an exception to the general obligation to cooperate with a request for surrender in case such a request would “require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court”. There are several aspects that require interpretation which I will deal with accordingly.

#### **5.3.1 To whom does it apply?**

##### The term ‘sending state’

Perhaps the most controversial part of Article 98, paragraph 2, is the question of who is actually covered by it. It goes without saying that it applies to persons but it is not necessarily clear as to how broad this group of persons is.

A first limitation in this regard follows from the context of Article 98, paragraph 2. Given the fact that it deals with ‘surrender’ and a conflicting obligation of the ‘requested state’<sup>50</sup> a

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<sup>48</sup> R. K. Gardiner, Treaty Interpretation, *supra* note 2, p. 236.

<sup>49</sup> See also, M. 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, *supra* note 41, p. 220.

person should be within the sphere in which this state could enforce its jurisdiction (occasion the surrender), in general this means the person should be on the territory of the ‘requested state’. A second limitation lies in the use of the term ‘sending state’.<sup>51</sup> Although the ICC Statute defines some terms, no definition exists of ‘sending state’.<sup>52</sup> Article 31, paragraph 4 of the VCLT therefore does not apply which means we have to apply the general rule of interpretation as laid down in Article 31 VCLT.

A good starting point in such a case is the ordinary meaning of the term. The Oxford dictionary defines ‘to send’ as “1. cause to go or be taken to a destination. 2. cause to move sharply or quickly; propel. 3. cause to be in a specified state.”<sup>53</sup> The first definition seems the most appropriate and applicable in our case. It implies that a sending state is not just any state but instead it must have done something special; it must have caused something or somebody to go somewhere. An ordinary meaning of the term ‘sending state’ thus suggests that the presence of a person on the territory of the requested state must have been occasioned by some positive act of the sending state.<sup>54</sup> Taking into account the object and purpose of the ICC Statute does not seem to contradict this nor could it be said that this would lead to an interpretation in bad faith.

As we have seen above, however, Article 31, paragraph 3, sub c of the VCLT requires that account is also taken of the use of term ‘sending state’ in other treaties in force between the parties.<sup>55</sup>

The first group of treaties in which the term ‘sending state’ appears consists of the conventions relating to diplomatic and consular relations (including the convention on special

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<sup>50</sup> As we have seen above, ‘requested state’ is the ICC Statute’s term for the state to which the ICC has directed its request for cooperation. See *supra* paragraph 5.2.3 ‘Article 98, paragraph 2 in context: Part 9 of the ICC Statute’.

<sup>51</sup> See, also D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, 3 *Journal of International Criminal Justice* 2005, p. 338: “[T]he scope of non-surrender is, and was intended to be, limited by explicit use of the term ‘sending state’.”

<sup>52</sup> See, for example, Article 102 of the ICC Statute.

<sup>53</sup> Oxford Dictionary Online. Available via: [http://www.askoxford.com/concise\\_oed/send?view=uk](http://www.askoxford.com/concise_oed/send?view=uk); visited 8 October 2008.

<sup>54</sup> J. Crawford *et al.*, 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), *supra* note 16, par. 43 and 45. See also, C. J. Tan, The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome State of the International Criminal Court, 19 *American University International Law Review* 2003-2004, p. 1139.

<sup>55</sup> See *supra* paragraph 5.2 ‘Section 3 of Part III of the Vienna Convention on the Law of Treaties’.

missions).<sup>56</sup> None of these conventions defines the term ‘sending state’, most likely because the meaning thereof was believed to be clear.<sup>57</sup> It is generally accepted, however, that in all these conventions, the term ‘sending state’ refers to the state to which the protected official (consul, ambassador, embassy staff, members of the special mission, for example a minister, etc.) or protected premises (consulate, embassy etc.) belongs.<sup>58</sup> It thus applies to a wider category of persons. For example, a diplomatic agent (but not a member of the ‘technical and administrative or ‘service’ staff) or consular officer (but not other members of the consular post) could be ordinarily resident in (or even a national of) the receiving state – i.e. his or her presence in the territory was not occasioned by some positive act of the sending state since that person might have very well been already present there.<sup>59</sup> It further also encompasses family members of diplomatic agents (but not a member of the ‘technical and administrative or ‘service’ staff) even when they are ordinarily resident in the receiving state.<sup>60</sup>

A second group of treaties in which the term ‘sending state’ appears consists of the so-called ‘Status of Forces Agreements’ (SOFAs). A SOFA can be defined as a bilateral agreement that permits one state to deploy military personnel to the territory of another state and defines in what circumstances this personnel is subject to the (exclusive) jurisdiction of the sending state or the receiving state.<sup>61</sup> In the context of a peacekeeping mission the term is usually Status of

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<sup>56</sup> These are: The Vienna Convention on Diplomatic Relations, adopted on 18 April 1961, entry into force 24 April 1964, United Nations Treaty Series Volume 500, p. 95; the Vienna Convention on Consular Relations, adopted on 24 April 1963, entry into force 19 March 1967, United Nations Treaty Series Volume 596, p. 261; and the Convention on Special Mission, adopted on 8 December 1969, entry into force 21 June 1985, United Nations Treaty Series Volume 1400, p. 231. Both Vienna Conventions are widely ratified (186 and 172 state parties respectively). The Convention on Special Missions, however, has only 38 state parties. The United States as well as most ICC states parties are not a party to this convention. It is unclear to what extent this convention reflects customary international law. See C. Wickremasinghe, Immunities Enjoyed by Officials of States and International Organizations, in M. D. Evans (ed.), *International Law*, Oxford University Press, Oxford 2003, p. 402.

<sup>57</sup> With respect to the Convention on Consular Relations, for example, the International Law Commission, found it “unnecessary to define expressions the meaning of which is quite clear such as ‘sending state’ and ‘receiving state’”. Report of the International Law Commission Covering the Work of its Thirteenth Session (1 May-7 July 1961), U.N. Doc. A/4843, p. 5.

<sup>58</sup> See, for example, the commentary of the International Law Commission to Article 4 (Establishment of a consulate) of the Convention on Consular Relations, in which it noted that “[t]he expression ‘sending state’ means the State which the consulate represents.” Report of the International Law Commission Covering the Work of its Thirteenth Session (1 May-7 July 1961), U.N. Doc. A/4843, p. 7. See furthermore, H.S. Schiffman, Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention, 8 *Cardozo Journal of International and Comparative Law* 2000, p. 30 footnote 6.

<sup>59</sup> See, Article 37-38 of the Vienna Convention on Diplomatic Relations; Article 71 of the Vienna Convention on Consular Relations; and Article 40-41 of the Convention on Special Mission.

<sup>60</sup> See, Article 37 of the Vienna Convention on Diplomatic Relations. (See also, Article 71, paragraph 2 of the Vienna Convention on Consular Relations; and Article 39 of the Convention on Special Missions.

<sup>61</sup> C. Eubany, Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court, *supra* note 11, p. 117. Referring to Lt. Col. A. C. Bredemeyer, *International Agreements: A Primer for the Judge Advocate*, 42 *Air Force Law Review* 1997, p. 105; E. Rosenfeld, *Application of U.S. Status*

Mission Agreement (SOMA).<sup>62</sup> There are many SOFAs in force and it would be impossible to discuss all of them here.<sup>63</sup> It is generally accepted, however, that the North Atlantic Treaty Association (NATO) SOFA<sup>64</sup> represents a widely accepted approach to regulating the status of foreign forces and associated personnel.<sup>65</sup> I will therefore use its terms for the purposes of this thesis.

Contrary to the ‘diplomatic’ conventions, the NATO SOFA does contain a definition of ‘sending state’. Article I, paragraph 1, sub d provides that ‘sending state’ “means the Contracting Party to which the force belongs”. Sub a of the same paragraph defines ‘force’ as “the personnel belonging to the land, sea or armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connexion with their official duties”. Again, it thus applies to a wider category of persons. For example, a member of the force (but not the ‘civilian component’) could be ordinarily resident in the receiving state.<sup>66</sup>

It thus follows from the ‘diplomatic’ conventions as well as the NATO SOFA that the term ‘sending state’ applies to more than just persons whose presence on the territory of the requested state is the result of some positive act of the sending state. It also applies to persons having a sufficiently strong nexus with the very subject of what the sending state ‘sent’ (the diplomatic agent with the embassy, the consular officer with the consulate, the soldier with the force) as well as in exceptional cases the family members of the persons having such a strong nexus. Although not all states parties to the ICC Statute are parties to the ‘diplomatic’ conventions let alone to the NATO SOFA, this – as we have seen above – does not preclude

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of Forces Agreements to Article 98 of the Rome Statute, 2 Washington University Global Studies Law Review 2003, p. 280.

<sup>62</sup> See, A. Sari, Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice, 19 European Journal of International Law 2008, p. 68.

<sup>63</sup> The United States alone is currently party to more than 100 agreements that may be considered SOFAs. See, for example, CRS Report for Congress, Status of Forces Agreement (SOFA): What Is It, and How Might One Be Utilized In Iraq?, 16 June 2008, p. 2. Available via: [http://assets.opencrs.com/rpts/RL34531\\_20080616.pdf](http://assets.opencrs.com/rpts/RL34531_20080616.pdf); visited 8 October 2008.

<sup>64</sup> Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, adopted on 19 June 1951, entry into force 23 August 1953, United Nations Treaty Series, Volume 199, p. 67.

<sup>65</sup> See, for example, E. Rosenfeld, Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute, *supra* note 61, p. 283, footnote 84.

<sup>66</sup> See, Article I, paragraph 1, sub b of the NATO SOFA (“‘civilian component’ means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not [...] ordinarily resident in, the State in which the force is located.”)

us (to the contrary, to a certain extent it even requires us) from attributing weight to this finding.<sup>67</sup>

A proper interpretation of Article 98, paragraph 2, thus means that in order for a person to be covered by it, such a person must be ‘sent’. This is the case if his or her presence on the territory of the requested state is the result of some positive act of the sending state or (if this is not the case) he or she has a sufficiently strong nexus with the very subject of what the sending state ‘sent’ (or in exceptional cases be a family member of such a person).<sup>68</sup> This is certainly true in case of those persons to whom the ‘diplomatic’ conventions or SOFAs apply.<sup>69</sup> The view that Article 98, paragraph 2, only applies to the latter<sup>70</sup> should thus be rejected,<sup>71</sup> as well as the view<sup>72</sup> that it applies to any national of the sending state (regardless of whether that national was sent or not).<sup>73</sup>

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<sup>67</sup> See *supra* paragraph 5.2.1 ‘Section 3 of Part III of the Vienna Convention on the Law of Treaties’.

<sup>68</sup> See, also, M. 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, *supra* note 41, p. 213. The position of the EU Guiding Principles in this regard that “[a]ny solution should cover only persons present on the territory of a requested State because they have been sent by a sending State” (EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, *supra* note 46, p. 9) thus appears to be too narrow. On the other hand, it could be argued that the by using the terms ‘sent’ and ‘sending state’ it the guiding principle also covers the second group of persons.

<sup>69</sup> See, also for example, D. Akande, The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, 1 *Journal of International Criminal Justice* 2003, p. 645.

<sup>70</sup> See, for example, Coalition for the International Criminal Court, Memo on Art. 98 of the Rome Statute and the Bilateral Agreements Proposed by US Government, *supra* note 19, par. 5; Legal Service of the EU Commission, Internal Opinion, *supra* note 14, p. 158; H. 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?, *supra* note 14, p. 106, footnote 58.

<sup>71</sup> See also, for example, C. J. Tan, The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome State of the International Criminal Court, *supra* note 54, p. 1139; D. Akande, The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, *supra* note 69, p. 645.

<sup>72</sup> See, for example, L. Bloomfield, The U.S. Government and the International Criminal Court, Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, New York, 12 September 2003, p. 3. Available via: <http://www.america.gov/st/washfile-english/2003/September/20030917172946samohjt0.8693201.html>; visited 18 September 2008; and J. S. Dietz, Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court With U.S. Article 98 Agreements, *supra* note 19, p. 175.

<sup>73</sup> See also, D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 51, p. 349; J. Crawford *et al.*, 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), *supra* note 16, par. 43.

## Nationality of the person

Another issue regarding the question of who is covered by Article 98, paragraph 2, relates to the nationality of the person. Some authors have argued that it only applies to nationals of the sending state.<sup>74</sup> This view should be rejected. Article 98, paragraph 2, uses the term ‘person of that State’. Several articles of the ICC Statute specifically refer to ‘national of that state’.<sup>75</sup> If Article 98, paragraph 2, were only to apply to nationals of the sending state this term would have been used. Furthermore, an ordinary meaning of the term ‘person of that state’ suggests that the person should for some reason be associated with the sending state. This does not necessarily have to be an association through nationality.<sup>76</sup> To the contrary, when read in context with the term ‘sending state’ the most best interpretation seems to be that such an association follows from the person being ‘sent’ by the sending state.<sup>77</sup>

The EU Guiding Principles are a bit more flexible and provide that “any solution should only cover persons who are not nationals of an ICC State Party.”<sup>78</sup> As a preliminary remark it should be noted that the principle thus implicitly confirms our above finding that Article 98, paragraph 2, applies to non-nationals of the sending state.

That being said, the principle seems to be based on the fact that pursuant to Article 12, paragraph 2, sub b, the ICC has jurisdiction over crimes committed by nationals of the states parties to the ICC Statute. Or as Swart puts it: “Now that the ICC has jurisdiction over crimes committed by nationals of States Parties, nothing seems more natural and self-evident than an unconditional obligation for States Parties to surrender to the ICC their own nationals as well

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<sup>74</sup> See, for example, Coalition for the International Criminal Court, Memo on Art. 98 of the Rome Statute and the Bilateral Agreements Proposed by US Government, *supra* note 19, par. 6. Arguing that “[G]overnments could find themselves in the unimaginable situation of being unable to surrender their own nationals to the ICC.”

<sup>75</sup> See Article 36, paragraph 4, sub b; Article 36, paragraph 7; and Article 107, paragraph 1.

<sup>76</sup> See also, M. 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, *supra* note 41, p. 213.

<sup>77</sup> See also, B. Swart, Report to the International Law Association, cited in International Law Association, Conference Report Berlin 2004, Committee on the International Criminal Court, p. 14. Available via: <http://www.ila-hq.org/download.cfm/docid/7BC51FF0-0B5B-4262-806F3593281F0B66>; visited 26 September 2008. (“[T]raditional agreements on the status of military forces rarely, if ever, distinguish between persons according to their nationality. On the contrary, the decisive factor is whether or not a person “belongs” to, or has any other relevant connection with, a force of the sending State.”)

<sup>78</sup> EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, *supra* note 46, p. 9. *Cf.* also, D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 51, p. 339, footnote 9.

as nationals of other States Parties.”<sup>79</sup> In my view, however, this is flawed reasoning. It implies that because the ICC has jurisdiction Article 98, paragraph 2, may not be invoked. Article 98, however, does not even come into play without jurisdiction. To the contrary, its whole purpose is to provide for an exception to the obligation to cooperate in case the ICC *has* jurisdiction!<sup>80</sup>

Furthermore, it denies that Article 98 is about states not individuals. It protects the rights of states and in this regard nationality is simply not a factor. If anything, what is relevant is whether the state involved is a state party or not.<sup>81</sup> That is not to say, however, that the agreement “pursuant to which the consent of a sending State is required” may not provide for exceptions based on nationality.<sup>82</sup> Perhaps this is what the Guiding Principles intended. *Legally* speaking Article 98, paragraph 2, applies to a ‘non-surrender’ agreement covering nationals of a state party to the ICC Statute, but as a matter of *policy* such an agreement should provide for an exception with respect to those persons.<sup>83</sup>

#### Does the person have to be present with the consent of the requested state?

It has been argued by some authors that paragraph 2 only applies if the presence of the person on the territory of the requested state follows from an international agreement.<sup>84</sup> In other words, the person must be present on the territory of the requested state with its consent. The matter may seem trivial as almost all of the time this will be the case, either directly through an (oral) agreement<sup>85</sup> or indirectly through a SOFA or ‘diplomatic’ convention. What,

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<sup>79</sup> See also B. Swart, Report to the International Law Association, *supra* note 77, p. 14.

<sup>80</sup> See also *supra* paragraph 5.2.3 ‘Article 98, paragraph 2 in context: Part 9 of the ICC Statute’.

<sup>81</sup> See also *infra* paragraph 5.3.5 ‘For whose benefit may Article 98, paragraph 2 be invoked?’

<sup>82</sup> See, for example, Article 44, paragraph 1 of the Convention on Special Missions and Article 39, paragraph 4 of the Vienna Convention on Diplomatic Relations (Relating to the death of a protected person and the right of the family to withdraw the property of that person and to be exempt from succession taxes); Article 38, paragraph 1 of the Vienna Convention on Diplomatic Relations, which provides that “a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.”; and Article I, paragraph 1, sub b of the NATO SOFA which excludes national of non-NATO states or nationals of the receiving state from the definition of ‘civilian component’.

<sup>83</sup> This also seems to be acknowledged by Swart who argues that although the “Guiding Principle of the EU deliberately deviates from existing international practice” such a departure “is warranted by the necessity to support the ICC in its activities”. B. Swart, Report to the International Law Association, *supra* note 77, p. 14.

<sup>84</sup> See, for example, Coalition for the International Criminal Court, Memo on Art. 98 of the Rome Statute and the Bilateral Agreements Proposed by US Government, *supra* note 19, par. 6. (“[T]he individual must be someone who was sent to another country *under some form of international agreement*” (emphasis added))

<sup>85</sup> For example, if a minister is invited and accepts to visit a state.

however, if this is not the case, for example in case of war, in case of secret military operations or in case of a spy?

On the one hand, it seems to follow from an ordinary interpretation of paragraph 2 that it is not the ‘sending relationship’ that has to follow from an international agreement but rather ‘the obligation pursuant to which consent of a sending state is required’. Furthermore, it follows from our interpretation of the term ‘sending state’ that all that is required is that the presence on the territory of the requested state is the result of some positive act of the sending state. This is very well possible without consent.

On the other hand, the corollary of ‘sending state’ is ‘receiving state’. It could be argued that this term implies consent.<sup>86</sup> Furthermore, SOFAs and the ‘diplomatic’ conventions seem to be premised on the fact that consent of the receiving state is required.<sup>87</sup> Also in light of the principle of *exceptio est strictissimae applicationis*, I therefore agree with Benzing that Article 98, paragraph 2, should be interpreted as applying only to persons present on the territory of the requested state with its consent.<sup>88</sup>

#### When does it cease to apply?

As we have seen above, application of paragraph 2 requires that the presence of a person on the territory of the requested state must either be the result of some positive act of the sending state or (if this is not the case) such a person must have a sufficiently strong nexus with the very subject of what the sending state ‘sent’. Reasoning *a contrario*, implies that paragraph 2 no longer applies as soon as that person can no longer be considered to have been ‘sent’. Thus, for example, it no longer applies to a former diplomat or soldier.

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<sup>86</sup> The Oxford dictionary defines ‘receive’ *inter alia* as “accept or take delivery of”. But is not also possible to ‘receive’ a severe beating? One could hardly say this implies consent.

<sup>87</sup> Cf. the preamble of the NATO SOFA, “CONSIDERING that the forces of one Party may be sent, *by arrangement*, to serve in the territory of another party” (emphasis added) and Article 9 of the Vienna Convention on Diplomatic Relations; Article 23 of the Vienna Convention on Consular Relations; and Article 12 of the Convention on Special Missions (allowing for a person to be declared *persona non grata*).

<sup>88</sup> M. 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, *supra* note 41, p. 210. See also, J. Crawford *et al.*, 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), *supra* note 16, par. 43.

It could be argued, however, that whether or not a person is ‘sent’ should not be determined at the time the request (*ex nunc*) for surrender is considered but rather at the time the conduct underlying the request took place (*ex tunc*).<sup>89</sup> This would mean it continues to apply to a former diplomat or soldier. In my opinion, however, such a view should be rejected.<sup>90</sup> Not only is it contrary to the position taken by the ‘diplomatic conventions’<sup>91</sup> and the NATO SOFA,<sup>92</sup> it would also go beyond the ordinary meaning of paragraph 2. Furthermore, such a view is contrary to the general principle of *exceptio est strictissimae applicationis* as it would imply a *permanent* rather than *temporary* ban on the ICC exercising its complementary jurisdiction.

### Extradition and criminal assistance treaties

An issue closely related to a proper interpretation of the term ‘sending state’, is the question of whether Article 98, paragraph 2, also applies to extradition and criminal assistance treaties. It has been argued by several authors<sup>93</sup> and the EU Guiding Principles<sup>94</sup> that this is indeed the case. Furthermore, several recent extradition treaties to which the United States is a party contain a specific provision prohibiting re-extradition to the ICC.<sup>95</sup> This view, however,

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<sup>89</sup> This seems to be the argument of Scheffer (“[F]ormer officials and personnel would be covered for actions they undertook while in the service of the sending state”) (D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 51, p. 352)

<sup>90</sup> See also, J. Crawford *et al.*, 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), *supra* note 16, par. 43-44; H. 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?, *supra* note 14, p. 104.

<sup>91</sup> In this regard, the fact that immunity continues to subsist for former diplomatic agents (*cf.* Article 39, paragraph 2 of the Vienna Convention on Diplomatic Relations; Article 53, paragraph 4 of the Vienna Convention on Consular Relations; and Article 43, paragraph 2 of the Convention on Special Missions) should not be confused with the fact that they can no longer be considered to have been ‘sent’.

<sup>92</sup> *Cf.* the definition of ‘force’ in the NATO SOFA (Article I, paragraph 1, sub a, “personnel *belonging to*” (emphasis added)) and Article III, paragraph 5. In my view it thus clearly excludes former personnel. (See also W. Anderson and F. Burckhardt, Members of Visiting Forces, Civilian Components, Dependents, in Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford University Press, Oxford 2001, p. 52.)

<sup>93</sup> See, for example, B. Swart, Arrest and Surrender, *supra* note 20, p. 1687; K. Prost and A. Schlunck, Article 98, in O. Triffterer (ed.), *The Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlag, Baden-Baden 1999, p. 1133; S. 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, *supra* note 35, p. 124; D. Akande, The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, *supra* note 69, p. 645; S. Wirth, Immunities, Related Problems and Article 98 of the Rome Statute, *supra* note 37, p. 455.

<sup>94</sup> EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, *supra* note 46, p. 9.

<sup>95</sup> See, for example, Article 16, paragraph 2 of the Extradition Treaty Between the United States of America and the Government of the Republic of Estonia, 8 February 2006, Treaty Doc. 109-16. In other cases, the advice and consent of the United States Senate was made subject to the understanding that the article precluding re-extradition to a third state (‘rule of speciality’) also precluded re-extradition to the ICC. See, for example,

should be rejected. Not because a person extradited (or transferred in the framework of an assistance treaty) lacks a sufficient nexus with the sending state (to the contrary, one could very well argue that the presence of such a person on the territory of the requested state was occasioned by a positive act of the sending state, namely the extradition or transfer) but rather because the terminology in such cases is fundamentally different.

Firstly, as we have seen above, the ICC Statute uses the terms ‘requesting state’ and ‘requested state’ in matters related to extradition (Article 90) and criminal assistance (Article 93).<sup>96</sup> Secondly, extradition and criminal assistance treaties use the terms ‘requesting state’ and ‘requested state’.<sup>97</sup> This is the case for such treaties to which the United States is a party<sup>98</sup> as well as the most important model or regional treaties in this regard.<sup>99</sup> In fact, I was unable to find any extradition or criminal assistance treaty that does not use these terms.<sup>100</sup> The notion by Scheffer that “[t]he term ‘sending state’ occurs frequently in US extradition treaties”<sup>101</sup> should thus be rejected. Another argument against including extradition or criminal assistance treaties lies in the context of Article 98, paragraph 2. It could be argued that Article 90 which deals with competing extradition obligations was intended as an exhaustive regulation of the issue. Extending the application of Article 98, paragraph 2, to

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Extradition Treaty Between the United States of America and of the Republic of Peru, 26 July 2001, Treaty Doc. 107-6. A similar approach was used with respect to the criminal assistance treaties. According to Scheffer, the Clinton administration negotiated such clauses “under heavy pressure from the US Senate” (D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 51, p. 341, footnote 13.

<sup>96</sup> See also *supra* paragraph 5.2.3 ‘Article 98, paragraph 2 in context: Part 9 of the ICC Statute’.

<sup>97</sup> See also, L.S. Podger and R.S. Clark, *International Criminal Law: Cases and Materials*, Matthew Bender, New York 2004, p. 403; and R. S. Clark, *Some Challenges Confronting the Assembly of States Parties of the International Criminal Court*, in *Festschrift in Honour of Irene Melup*, Bangkok 11th UN Congress on Crime Prevention and Criminal Justice, April 2005, p. 149.

<sup>98</sup> See, for example, Article 1, paragraph 4 of the Extradition Treaty Between the Government of the United States of America and the Government of Belize, 30 March 2000, Treaty Doc. 106-38; and Article IV, paragraph 5 of the Extradition Treaty Between the United States of America and of the Republic of Peru, 26 July 2001, Treaty Doc. 107-6. Again, the fact that some state parties to the ICC have concluded extradition and criminal assistance agreements providing for an ‘ICC ban’ (and are thus apparently under the impression that such agreements are in covered by Article 98, paragraph 2) is irrelevant (see *supra* paragraph 5.2.4 ‘Article 31, paragraph 3, sub a and c VCLT: subsequent agreement and subsequent practice’).

<sup>99</sup> See, for example, Article 4, paragraph 4 of the Agreement on Mutual Legal Assistance Between the European Union and the United States of America, 25 June 2003, Official Journal L 181/34; Article 4, sub d of the United Nations Model Treaty on Extradition, U.N. Doc. A/RES/45/116; Article 2, paragraph 1 of the European Convention on Extradition, 13 December 1957, European Treaty Series - No. 24; Article 3, paragraph 1 of the Economic Community of West African States Convention on Extradition, 6 August 1994; Article 2, paragraph 3 of the Inter American Convention on Extradition, 25 February 1981.

<sup>100</sup> The only time I was able to discern a different use of terminology (‘surrendering state’) was in Article 17, paragraph 2 of the Extradition Treaty Between the Government of the United States of America and of the Government of the Grand Duchy of Luxemburg, 1 October 1996, Treaty Doc. 105-10.

<sup>101</sup> D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 51, p. 347. See also, *International Criminal Law Society, Press Release: The Latest US-Campaign against the International Criminal Court*, 1 September 2002, p. 2. Available via: <http://www.iccnw.org/documents/9-01-2002ICLS.pdf>; visited 18 September 2008 (The term ‘sending state’ is a term used almost exclusively in [...] extradition treaties.”)

extradition and criminal assistance treaties in this view would be contrary to an interpretation in good faith.

In light of the above and also taking into account the general principle of *exceptio est strictissimae applicationis*, the better view is thus that Article 98, paragraph 2, should be interpreted as not applying to persons extradited or transferred pursuant to an extradition or criminal assistance treaty.<sup>102</sup>

### Surrender v. transit

As a final note, mention should be made of the EU Guiding Principles which state that “[s]urrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute.”<sup>103</sup> In my view this principle is superfluous. I fully agree with Swart that it is “all too obvious that a person [...] of a State not Party to the Statute and whose transit over the territory of a State Party has been requested by the ICC, cannot be considered to enter or to remain on the territory of that State as a consequence of having been “sent” there by the [sending] State”.<sup>104</sup>

### **5.3.2 The relationship between Article 98, paragraph 1 and 2**

As we have seen above, Article 98, paragraph 2, also applies to persons to whom the ‘diplomatic’ conventions apply.<sup>105</sup> Such persons, however, usually also enjoy immunity from the (criminal) jurisdiction of the receiving state by virtue of the provisions of these conventions.<sup>106</sup> It goes without saying, however, that Article 98, paragraph 1 also deals with requests for surrender regarding person who enjoy immunity. At first sight, there is thus a

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<sup>102</sup> See also (although a bit less explicit), J. Crawford *et al.*, 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), *supra* note 16, par. 41-42; and E. M. Wise, E.S. Podgor and R. S. Clark International Criminal Law: Cases and Materials, Teacher’s Manual, Lexis Nexis, New York 2004, p. 66.

<sup>103</sup> EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, *supra* note 46, p. 9.

<sup>104</sup> B. Swart, Report to the International Law Association, *supra* note 77, p. 14-15.

<sup>105</sup> See *supra* paragraph 5.3.1 ‘To whom does it apply?’.

<sup>106</sup> See Article 31 of the Vienna Convention on Diplomatic Relations; Article 43 of the Vienna Convention on Consular Relations; and Article 31 of the Convention on Special Missions.

considerable degree of overlap between paragraph 1 and 2 of Article 98.<sup>107</sup> A further analysis of how paragraph 1 relates to paragraph 2 is therefore required. Doing so, however, requires a short introduction into the law of state and diplomatic immunity.

### State and diplomatic immunity

It is a general rule of international law that given the sovereign equality of states they enjoy immunity from each others jurisdiction (*par in parem imperium non habet*).<sup>108</sup> In a derivative form, this state immunity also covers those individuals that act on behalf of the state.<sup>109</sup> There are two types of derivative immunity: immunity *ratione materiae* (functional immunity) and immunity *ratione personae* (personal immunity).

The first type of immunity attaches to official acts and covers acts performed by any *de jure* or *de facto* state official in pursuit of his or her official tasks. It does not cease at the end of the discharge of official functions by the state official and may be invoked towards any other state.<sup>110</sup> It is generally accepted that as organs of their sending state members of the armed forces also enjoy this type of immunity.<sup>111</sup>

The second type of immunity attaches to a particular office and is enjoyed only by a very limited group of persons such as heads of state, heads of government, foreign ministers and diplomatic agents (in which case we speak of diplomatic immunity).<sup>112</sup> Except in the case of diplomatic agents it may be invoked towards any other state.<sup>113</sup> It applies not only to official

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<sup>107</sup> See also, D. Akende, International Law Immunities and the International Criminal Court, 98 American Journal of International Law 2004, p. 428.

<sup>108</sup> P.H. Kooijmans, Internationaal Publiekrecht in Vogelvlucht [A Bird's-Eye View of International Public Law], Kluwer, Deventer 2002, p. 67.

<sup>109</sup> S. Wirth, Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case, 13 European Journal of International Law 2002, p. 882.

<sup>110</sup> S. Wirth, Immunities, Related Problems and Article 98 of the Rome Statute, *supra* note 37, p. 431 and A. Cassese, When May Senior State Officials be Tried for International Crimes. Some Comments on the *Congo v. Belgium* Case, 13 European Journal of International Law 2002, p. 863.

<sup>111</sup> See, for example, D. Fleck, Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements, 1 Journal of International Criminal Justice 2003, p. 651; E. Rosenfeld, Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute, *supra* note 61, p. 280.

<sup>112</sup> A. Cassese, When May Senior State Officials be Tried for International Crimes. Some Comments on the *Congo v. Belgium* Case, *supra* note 110, p. 864. See also Article 31 of the Vienna Convention on Diplomatic Relations. Article 31 of the Convention on Special Missions also extends immunity *ratione personae* to the persons of the representatives of the sending state in the special mission and the members of its diplomatic staff.

<sup>113</sup> In case of diplomatic agents, it may only be invoked against the receiving state. Third states are only obligated to accord immunities to such a person when passing through their territory "while proceeding to take up or to return to his post, or when returning to his own country." See, Article 40 of the Vienna Convention on Diplomatic Relations. See also Article 42 of the Convention on Special Missions.

acts done on behalf of the state but also in relation to private acts.<sup>114</sup> It encompasses inviolability meaning that persons enjoying this immunity are not liable to any form of arrest or detention.<sup>115</sup> It subsists even when it is alleged that the senior official has committed an international crime, something quite recently confirmed by the House of Lords in the Pinochet case<sup>116</sup> and the International Court of Justice in the *Congo v. Belgium* case.<sup>117</sup> Since the immunity attaches to the office it ceases as soon as the person leaves office. From that moment on, only immunity *ratione materiae* remains.<sup>118</sup>

Perhaps one of the most important developments in international law is the fact that ever since the Nuremberg trials,<sup>119</sup> immunity *ratione materiae* can no longer be invoked as a shield against prosecution for international crimes. Consequently, current and former state officials (enjoying only immunity *ratione materiae*) may be prosecuted abroad for such crimes.<sup>120</sup> The

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<sup>114</sup> D. Akende, International Law Immunities and the International Criminal Court, *supra* note 107, p. 410; and International Court of Justice, Judgement, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 14 February 2002, ICJ Reports 2002, p. 3, par. 55.

<sup>115</sup> See, Institute de Droit International, Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, 26 August 2001, Article 1 and 15. Available via: [http://www.idi-iiil.org/idiE/resolutionsE/2001\\_van\\_02\\_en.PDF](http://www.idi-iiil.org/idiE/resolutionsE/2001_van_02_en.PDF); International Court of Justice, Judgement, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), *supra* note 114, par. 54. See also, Article 29 of the Vienna Convention on Diplomatic Relations; and Article 29 of the Convention on Special Missions.

<sup>116</sup> House of Lords, *Regina v. Bow Street Magistrate, Ex Parte Pinochet*, 24 March 1999, 2. W.L.R. 827, 38 I.L.M. 430. See the opinions of Lord Hutton, Saville Millet and Philips.

<sup>117</sup> International Court of Justice, Judgement, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), *supra* note 114, par. 58. See also D. Akende, International Law Immunities and the International Criminal Court, *supra* note 107, p. 411. It must be noted, however, that the judgement of the ICJ only applies to war crimes and crimes against humanity and not genocide. Wirth argues that Article IV of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, United Nations Treaty Series, Volume 78, p. 277 constitutes an abrogation of the immunity *ratione personae* for genocide. (S. Wirth, Immunities, Related Problems and Article 98 of the Rome Statute, *supra* note 37, p. 452) See also A. Cassese, When May Senior State Officials be Tried for International Crimes. Some Comments on the *Congo v. Belgium Case*, *supra* note 110, p. 872. Personally, I believe this interpretation of Article IV is too far fetched.

<sup>118</sup> S. Wirth, Immunities, Related Problems and Article 98 of the Rome Statute, *supra* note 37, p. 432. See also, Article 43, paragraph 2 of the Vienna Convention on Diplomatic Relations; Article 53, paragraph 4 of the Vienna Convention on Consular Relations; and Article 43, paragraph 2 of the Convention on Special Missions. See, however, *infra* footnote 121.

<sup>119</sup> See, Article 7 of the Statute of the International Military Tribunal, Annex to Agreement between the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Bevans, Volume 3 (1968), p. 1238

<sup>120</sup> S. Wirth, Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium Case*, *supra* note 109, p. 888; S. Zappalà, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghadaffi Case* before the French *Cour de Cassation*, 12 European Journal of International Law 2001, p. 601; D. Akende, International Law Immunities and the International Criminal Court, *supra* note 107, p. 413. See also, for example, ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108bis, A. Ch., 29 October 1997, Klip/ Sluiter, ALC-I-245, par. 41. ("Under these norms, those responsible for such crimes [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity."). See, however, D. Fleck, Are Foreign Military

same applies to persons enjoying immunity *ratione personae* (heads of state, heads of government and foreign ministers) once they have left office.<sup>121</sup>

### The relationship between paragraph 1 and 2

What does this mean for the relationship between paragraph 1 and 2 of Article 98? Firstly, paragraph 1 primarily applies to those persons enjoying immunity *ratione personae*. Since immunity *ratione materiae* cannot be invoked as a shield against international crimes, i.e. the crimes within the jurisdiction of the ICC, persons enjoying this type of immunity are not covered by paragraph 1. This applies to all former government officials (including heads of state, heads of government etc.) as well as current government officials not enjoying immunity *ratione personae*.

The fact that immunity *ratione materiae* can no longer be invoked, however, has no consequences for the application of paragraph 2.<sup>122</sup> As long as such persons can be considered to have been ‘sent’ by the sending state, paragraph 2, applies – i.e. current soldiers, ministers,<sup>123</sup> consuls<sup>124</sup> *etcetera*. Furthermore, Article 98, paragraph 2, applies to persons that

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Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements, *supra* note 111, p. 663 arguing that “there is neither sufficient legal opinion nor applicable state practice for a similar presumption [that custom lifts functional immunity in case of prosecutions for international crimes] in the case of *acting* military officers.” (emphasis in original).

<sup>121</sup> See also, Institute de Droit International, Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, 26 August 2001, *supra* note 115, Article 13 and 16. There is one caveat, however. In the *Congo v. Belgium* case, the ICJ held that a former foreign minister may only be prosecuted for acts committed while in office if such acts were committed in a private capacity (International Court of Justice, Judgement, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), *supra* note 114, par. 60) Immunity *ratione materiae* thus seems to subsist for foreign ministers which would be contrary to the above mentioned principle. This part of the judgement (which can be considered *obiter dictum*) is heavily criticized in the literature and authors have tried hard to square it with customary law on the subject. (See, S. Wirth, Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v. Belgium* Case, *supra* note 109, p. 889-891; A. Cassese, When May Senior State Officials be Tried for International Crimes. Some Comments on the *Congo v. Belgium* Case, *supra* note 110, p. 866-870.) The matter is thus not yet fully resolved. This does not pose a problem for the purposes of this thesis, however, now that former state officials can no longer be considered to have been ‘sent’ (see *supra* paragraph 5.3.1 ‘To whom does it apply?’). Hence, Article 98, paragraph 2, does not apply.

<sup>122</sup> See also, M. 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, *supra* note 41, p. 208.

<sup>123</sup> It seems to be generally accepted that only the foreign minister of a state enjoys immunity *ratione personae*. Consequently, all other ministers enjoy only immunity *ratione materiae*. In 2004, however, the authorities of the United Kingdom took the view that an incumbent minister of defence was entitled to immunity from arrest (i.e. enjoys immunity *ratione personae*) (See, C. McGreal, Sharon’s Ally safe from Arrest in Britain, *The Guardian*, 11 February 2004, p. 19). That being said, it is unclear if it considered this to be the case as a matter of customary international law or since it has signed (but not ratified) the Convention on Special Missions. Clearly, if a state has ratified the Convention on Special Missions, it is obligated to award all persons of the representatives of the sending state in the special mission (and thus ministers) immunity *ratione personae* (Article 29).

never enjoyed immunity (be it immunity *ratione personae* or *ratione materiae*) such as state officials (not being a head of state etc.) acting in a private capacity but also government contractors.<sup>125</sup>

### 5.3.3 ‘Obligations under international agreement’

#### What type of agreement?

It follows from an ordinary interpretation of Article 98, paragraph 2, that the obligation pursuant to which consent of a sending state is required should follow from an international agreement.<sup>126</sup> I agree with Scheffer that “[t]he text of Article 98(2) does not seek to limit the type of international agreement that would prohibit surrender of particular types of persons to the Court.”<sup>127</sup> Accordingly, any agreement including such an obligation is covered by paragraph 2.<sup>128</sup>

#### Existing or (re)new(ed) agreements?

It goes without saying that Article 98, paragraph 2, applies to existing agreements.<sup>129</sup> It has been argued by some authors, however, that it does not apply to (re)new(ed) agreements.<sup>130</sup>

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<sup>124</sup> See, Article 43 of the Convention on Consular Relations.

<sup>125</sup> See also *infra* paragraph 5.1.1 ‘Article A: Persons covered’.

<sup>126</sup> In this regard it should be noted that the term ‘international agreement’ is broader than the term ‘treaty’ and also encompasses oral agreements. (See Article 3 of the VLCT).

<sup>127</sup> D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 51, p. 338.

<sup>128</sup> J. Crawford *et al.*, 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), *supra* note 16, par. 41.

<sup>129</sup> See also, Amnesty International, International Criminal Court: “US efforts to obtain impunity for genocide, crimes against humanity and war crimes, *supra* note 14, p. 9. Referring to Vienna Convention on the Law of Treaties Article 30(4). (“Under classical international law principles, the subsequent Rome Statute could not of itself, override pre-existing obligations of states parties to non-states parties under other treaties.”)

<sup>130</sup> Most prominently, M. 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, *supra* note 41, p. 214-220. See also, for example, K. Prost and A. Schlunck, Article 98, *supra* note 93, p. 1131; H. P. Kaul and C. Kreß, Jurisdiction and Cooperation in the Statute of the International Criminal Court, 1999 Yearbook of International Humanitarian Law, p. 165; R. Chibueze, The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute, 12 Annual Survey of International and Comparative Law 2006, p. 213. The position of the Coalition for the International Criminal Court is slightly different arguing that only new or renewed SOFAs are covered. (Coalition for the International Criminal Court, Memo on Art. 98 of the Rome Statute and the Bilateral Agreements Proposed by US Government, *supra* note 19, par. 2-3). All these authors, however, base their arguments on the intention of the drafters. As we have seen above (paragraph 5.2.1 ‘Section 3 of Part III of the Vienna Convention on the Law of Treaties’), however, the *travaux préparatoires* may only be taken into account in exception circumstance, which as we will see *infra* (paragraph 5.3.6 ‘The *travaux préparatoires* of Article 98’) do not apply in this case.

That view, however, should be rejected in light of the context of Article 98. Contrary to Article 98, paragraph 2, Article 90, paragraph 6 and Article 93, paragraph 3 do contain the adjective ‘existing’. I fully agree with Crawford *et al.* that “[a]gainst that background the claim that bilateral non-surrender agreements are limited to existing agreements is not plausible.”<sup>131</sup>

#### 5.3.4 Impunity prohibited?

An issue closely related to what kind of agreements are covered by Article 98, paragraph 2, is the question of whether this article prohibits impunity – i.e. whether the agreement prohibiting surrender should ensure that persons covered by it are investigated/ prosecuted and do not enjoy impunity. Several authors<sup>132</sup> as well as the EU guiding principles<sup>133</sup> have argued that this indeed the case. Two lines of reasoning can be deduced from these arguments.

First, there are authors that argue that this requirement follows from an interpretation of paragraph 2 in line with the object and purpose of the ICC Statute.<sup>134</sup> Secondly, there are

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<sup>131</sup> J. Crawford *et al.*, 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), *supra* note 16, par. 38. See also, H. 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?, *supra* note 14, p. 100; E. Rosenfeld, Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute, *supra* note 61, p. 277. The debate was perhaps best summarized by a member of the International Law Association: “Whilst many States wished that it be interpreted as applying only to existing agreements, the wording does not rule out agreements made after the fact.” (See International Law Association, Conference Report Berlin 2004, *supra* note 77, p. 18).

<sup>132</sup> See, for example, S. 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, *supra* note 35, p. 114; B. Swart, Report to the International Law Association, *supra* note 77, p. 14; R. Chibueze, The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute, *supra* note 130, p. 215; Coalition for the International Criminal Court, US Bilateral Immunity or So-called “Article 98” Agreements, 18 April 2003, p. 2. Available via: <http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm>; visited 27 September 2008; H. 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?, *supra* note 14, p. 107; D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 51, p. 353; J. Crawford *et al.*, 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), *supra* note 16, par. 46-51.

<sup>133</sup> EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, *supra* note 46, p. 9 (“[A]ny solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and – where there is sufficient evidence – prosecution by national jurisdictions concerning persons requested by the ICC.”)

<sup>134</sup> See, for example, Amnesty International, International Criminal Court: “US efforts to obtain impunity for genocide, crimes against humanity and war crimes, *supra* note 14, p. 2; Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Article 98(2) Agreements, 9 July 2002, p. 29. Available via: [http://www.hrw.org/campaigns/icc/icc\\_article98.pdf](http://www.hrw.org/campaigns/icc/icc_article98.pdf); visited 27 September 2008; C. Eubany, Justice for

authors that argue that this requirement follows from an interpretation of paragraph 2 in line with (customary) international law regarding the prohibition of impunity.<sup>135</sup>

Whatever the merits of both arguments, however, I personally believe that the whole debate is rather superfluous. In my view, application of Article 98, paragraph 2, cannot lead to impunity. First, as we have seen above, as soon as a person loses his qualification of being ‘sent’ he is no longer covered by paragraph 2. Article 98, paragraph 2, thus only provides for a *temporary* bar to surrender. Secondly, application of Article 98, paragraph 2, has no implications for the ability of other states (including the sending and receiving state) to prosecute such persons.<sup>136</sup> Including an obligation to investigate/ prosecute might thus have the effect of ‘expediting’ the prevention of impunity and desirable from a policy perspective, absence of such an obligation certainly does lead to impunity.

That being said, I will nevertheless address both arguments as I do not (fully) agree with them. In this regard it should first be noted that it does not follow from an ordinary reading of the terms of Article 98, paragraph 2, that the international agreement prohibiting surrender should provide for a duty to investigate/ prosecute – i.e. should not provide for impunity. The only possibility for including this requirement would be when interpreting the term ‘international agreement’.

### The object and purpose of the ICC Statute

The first argument is in my view based on a wrong application of the rules on treaty interpretation and should on this basis alone be rejected. As we have seen above, the object and purpose of the ICC Statute is to end impunity for crimes within the jurisdiction of the ICC which is to be achieved through the principle of complementarity.

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Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court, *supra* note 11, p. 125; Coalition for the International Criminal Court, US Bilateral Immunity or So-called “Article 98” Agreements, *supra* note 132, p. 2; J. Crawford *et al.*, 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), *supra* note 16, par. 46-51.

<sup>135</sup> See, for example, S. 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, *supra* note 35, p. 116 and 122; S. V. Ettari, A Foundation of Granite or Sand? The International Criminal Court and United States Bilateral Immunity Agreements, 30 Brooklyn Journal of International Law 2004-2005, p. 205 *et seq.* This argument relies on Article 31, paragraph 3, sub c of the VCLT which requires that when interpreting a treaty account shall be taken of relevant rules of international law. See *supra* paragraph 5.2.1 ‘Section 3 of Part III of the Vienna Convention on the Law of Treaties’.

<sup>136</sup> See also Chapter 4, footnote 43.

It should be noted, however, that this object and purpose is not to be achieved at all costs. The first limitation lies in the jurisdiction of the ICC which – absent a referral by a non state party or the United Nations Security Council – is limited to crimes committed by state party nationals or within the territory of a state party. The second limitation lies in Article 98.<sup>137</sup> Or to put in the words of Crawford *et al.* “the object and purpose of the ICC Statute is, however, subject to limitations which States Parties have accepted. Article 98 identifies two sets of obligations that may lawfully prevent a State Party from acceding to a request to surrender a person to the Court [...] On its own terms, therefore, the ICC Statute limits the possibility of the complete realization of the policy of avoiding impunity by ensuring investigation or prosecution of persons within the territory of a State Party. The general object and purpose of the Rome Statute (to remove impunity) is therefore qualified by Article 98.”<sup>138</sup> When interpreting Article 98, the object and purpose of the ICC Statute is thus not relevant because that very same Article 98 qualifies this object and purpose.<sup>139</sup> (To hold otherwise would in my view amount to invoking the main rule to argue that the exception is not valid!)<sup>140</sup>

Even if this view were not accepted, however, it could be argued that the provisions of Article 98, paragraph 2, are clear and substantive (now that a prohibition on impunity is not explicitly provided for), meaning that they cannot be countered by the object and purpose of the ICC Statute.<sup>141</sup>

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<sup>137</sup> See also, H. 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?*, *supra* note 14, p. 100.

<sup>138</sup> J. Crawford *et al.*, *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)*, *supra* note 16, par. 33-35. Notwithstanding this, however, Crawford *et al.* argue that “a State Party which enters into a new agreement which has (or may have) the effect of immunizing persons within the jurisdiction of the ICC from prosecution at either international or national level contradicts the obligation not to deprive the Statute of its object and purpose.” (*ibid.*, par. 48). In my view this is inconsistent reasoning.

<sup>139</sup> See also, R. K. Gardiner, *Treaty Interpretation*, *supra* note 2, p. 197 (“While, however, the preamble may be used as the source of a convenient summary of the object and purpose of a treaty, both the Vienna Convention (Article 31(2)) and practice make it clear that an interpreter needs to read the whole treaty. Thus the substantive provisions will provide the fuller indication of the object and purpose of the treaty.”)

<sup>140</sup> See also, International Court of Justice, *Judgement (Merits), Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ Reports 1986, p. 14, par. 272. (“[A]n act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself [...] so that it will not constitute a breach of the express terms of the treaty.”)

<sup>141</sup> R. K. Gardiner, *Treaty Interpretation*, *supra* note 2, p. 197. See also, for example, Iran-United States Claims Tribunal, *USA, Federal Reserve Bank v. Iran, Bank Markazi*, Case A28, (2000-02), 36 Iran-US Claims Tribunal Reports 5, par. 58: “Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty’s context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to

### (Customary) international law regarding impunity

As we saw in Chapter 4, as international law currently stands there is no (customary) rule prohibiting impunity for crimes against humanity, war crimes not constituting grave breaches of the Geneva Conventions and grave breaches when committed in a non-international conflict. On the other hand, impunity does not seem to be allowed for genocide, grave breaches of the Geneva Conventions when committed in international armed conflict and torture.<sup>142</sup> If at all, the second argument can thus only be accepted to the extent that ‘international agreement’ should be interpreted as not including an agreement that has the effect of providing impunity for these crimes.

#### **5.3.5 For whose benefit may Article 98, paragraph 2, be invoked?**

Another quite thoroughly debated issue regarding the application of Article 98 relates to the question for whose benefit it may be invoked. In this regard it should be noted that – as we have seen above – Article 98 is about states not individuals.<sup>143</sup> It may thus only be invoked for the benefit of states. That being said, there seem to be three views regarding exactly what states may benefit from its provisions: 1) only state parties to the ICC Statute,<sup>144</sup> 2) only non-state parties to the ICC State;<sup>145</sup> 3) both state and non-state parties to the ICC Statute.<sup>146</sup>

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its text. It follows that, under Article 31 of the Vienna Convention, a treaty’s object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.”

<sup>142</sup> See Chapter 4, paragraph 4.3 ‘Do the ‘non-surrender’ agreements conflict with *jus cogens*?’.

<sup>143</sup> See *supra* paragraph 5.3.1 ‘To whom does it apply?’.

<sup>144</sup> See, for example, Legal Service of the EU Commission, Internal Opinion, *supra* note 14, p. 159; Human Rights Watch, United States Efforts to Undermine the International Criminal Court (Legal Analysis of Impunity Agreements), *supra* note 18, p. 2; B. Swart, Report to the International Law Association, *supra* note 77, p. 15. In this view Article 98 is nothing more than a ‘routing mechanism’, that allows state parties a first chance at prosecuting persons suspected of committing crimes within the jurisdiction of the ICC. If the state for whose benefit Article 98 has been invoked does not itself properly try the perpetrator, the ICC can put a request for surrender directly to this state so that “there is no danger that the perpetrator will ever come outside the jurisdiction of the ICC.” (See, Legal Service of the EU Commission, Internal Opinion, *supra* note 14, p. 159) *Cf.* also, B. Swart, Report to the International Law Association, *supra* note 77, p. 15.

<sup>145</sup> See, for example, D. Akande, International Law Immunities and the International Criminal Court, *supra* note 107, p. 421-429; S. Wirth, Immunities, Related Problems and Article 98 of the Rome Statute, *supra* note 37, p. 452-453.

<sup>146</sup> See, for example, H. P. Kaul and C. Kreß, Jurisdiction and Cooperation in the Statute of the International Criminal Court, *supra* note 130, p. 164; D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 51, p. 337; R. Wedgwood, The Irresolution of Rome, *supra* note 41, p. 204.

The first view should be rejected. First, there is nothing in the ordinary wording of Article 98 that suggests its application should be limited to state parties to the ICC Statute. To the contrary, although the term ‘third state’ (which usually means ‘a state not party to the treaty’, *cf.* Article 2, paragraph 1, sub h of the VCLT) is used, other articles of the ICC Statute use the term ‘state not party to this statute’ (See, for example, Article 87, paragraph 5 and Article 90, paragraph 4 and 6). It could thus very well be argued that ‘third state’ means ‘state other than the requested state’ rather than ‘non state party’.<sup>147</sup> Secondly, I agree with Akande that “[i]f the intent had been to avoid inconsistent obligations only amongst parties to the ICC Statute, Article 98(2) would hardly have been necessary. Without Article 98(2), the provisions of the Statute would have prevailed over any prior inconsistent obligations between parties. Furthermore, the Statute could have made any subsequent agreement concerning transfers between state parties subject to its provisions.”<sup>148</sup>

The better view is thus that application of Article 98 cannot be restricted to state parties. The remaining question is then if it applies to both state and non-state parties to the ICC Statute or only to non-state parties. As we have seen above, an ordinary interpretation of Article 98 seems to hint towards the former. In my opinion, however, Article 98 should be interpreted as applying to non-state parties only.

A first argument to support this view lies in the fact that the jurisdiction of the ICC is based on delegation of criminal jurisdiction by the state parties to the ICC Statute.<sup>149</sup> According to the principle of *nemo dat quod non habet*, these states cannot have transferred a jurisdiction to the ICC that was not limited by the immunities they would have had to observe in national procedures.<sup>150</sup> Furthermore, it goes without saying that since the ICC Statute was adopted in the form of a treaty it cannot abrogate any rights non-state parties enjoy under (customary) international law.<sup>151</sup> These are all indications that Article 98 deals with the position of non-state parties.

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<sup>147</sup> See, for example, H. P. Kaul and C. Kreß, *Jurisdiction and Cooperation in the Statute of the International Criminal Court*, *supra* note 130, p. 164.

<sup>148</sup> D. Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, *supra* note 69, p. 643. See also, Article 30, paragraph 3-4 of the VCLT.

<sup>149</sup> See the authorities cited in footnote 37.

<sup>150</sup> See, D. Akande, *International Law Immunities and the International Criminal Court*, *supra* note 107, p. 421.

<sup>151</sup> See Article 30 of the VCLT. Things could be different, however, if the provisions of the ICC Statute itself were to transition into customary law. As we have seen above, however, it is doubtful if this is currently the case (see Chapter 4, paragraph 4.3 ‘Do the ‘non-surrender’ agreements conflict with *jus cogens*?’). Furthermore, given the fact that Article 98 is part of the ICC Statute, such customary law will be subject to the same limitation laid down therein. See also *supra* paragraph 5.3.4 ‘Impunity prohibited?’.

A second and more conclusive argument lies in the context of Article 98. The question whether Article 98, paragraph 1 may be invoked for the benefit of state parties to the ICC Statute seems to revolve around the question of whether Article 27 ('Irrelevance of official capacity') should be interpreted as a waiver of immunity applying only *vis-à-vis* the ICC or also in relation to states acting at the request of the ICC. I fully agree with Akende that "the removal of immunity from the exercise of the Court's jurisdiction would be nullified in practice if Article 98(1) were interpreted as allowing parties to rely on the same immunities in order to prevent the surrender of their officials to the Court by other states. [...] Since the international law immunities of officials of states parties are removed by the ICC Statute, another state on whose territory such an official is present would not be acting 'inconsistently with its obligations under international law' by surrendering that official to the ICC."<sup>152</sup> Such a view is also in line with the principle of *exceptio est strictissimae applicationis*.

Given the overlap with Article 98, paragraph 1, similar reasoning should apply to Article 98, paragraph 2. Now that the former is limited to non-state parties to the ICC Statute only, this should also be the case for the latter. To hold differently would mean that the limitation of paragraph 1 could easily be avoided by relying on paragraph 2 instead.<sup>153</sup>

### **5.3.6 The *travaux préparatoires* of Article 98**

As we have seen above the VCLT allows for recourse to the preparatory work of a treaty in limited circumstances only: 1) to confirm the meaning resulting from the application of Article 31; or 2) to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.<sup>154</sup> In my view it cannot be argued that the interpretation found above leads to a meaning which is manifestly absurd or unreasonable.<sup>155</sup> Although – given the flexibility of the terms<sup>156</sup> – one can almost always make an argument that an interpretation leaves the meaning found 'ambiguous' or 'obscure', I do not think this can be said of the interpretation

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<sup>152</sup> D. Akande, International Law Immunities and the International Criminal Court, *supra* note 107, p. 422-426.

<sup>153</sup> *Ibid.*, p. 428.

<sup>154</sup> See *supra* paragraph 5.2.1 'Section 3 of Part III of the Vienna Convention on the Law of Treaties'.

<sup>155</sup> *Cf.*, however, Coalition for the International Criminal Court, Memo on Art. 98 of the Rome Statute and the Bilateral Agreements Proposed by US Government, *supra* note 19, par. 4; and Legal Service of the EU Commission, Internal Opinion, *supra* note 14, p. 158.

<sup>156</sup> See *supra* paragraph 5.2.1 'Section 3 of Part III of the Vienna Convention on the Law of Treaties'.

found above. However, given that recourse is always allowed to ‘confirm’ a meaning found, it could nevertheless be helpful to look at the preparatory work of Article 98, paragraph 2.

Unfortunately, little is known about the negotiating history of Article 98, paragraph 2. What is certain is that it was officially introduced at a fairly late stage of the negotiations (13 July 1998).<sup>157</sup> There was no accompanying explanatory memorandum, however, leaving it thus unclear who introduced it or why this was done (some have argued, however, that it was introduced at the behest of the United States<sup>158</sup>). Only very few delegates have spoken out regarding the original intent underlying Article 98, paragraph 2.

According to Kaul and Kreß, both members of the German delegation, “[t]he idea behind the provision was to solve legal conflicts which might arise because of Status of Forces Agreements which are already in place. On the contrary, Article 98(2) was not designed to create an incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the Court.”<sup>159</sup> This is partially confirmed by Clark, a member of the Palauan delegation: “I understood the reference to ‘sending state’ as a term of art that suggested we were dealing here with Status of Forces Agreement”.<sup>160</sup> Prost, a member of the Canadian delegation, acknowledges that paragraph 2 applies to SOFAs, but argues that it was also introduced in recognition of re-extradition clauses in (bilateral) extradition treaties.<sup>161</sup>

Scheffer, the head of the American delegation, has stated that the original aim of the United States during the negotiations of the ICC Statute had been the protection of persons covered

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<sup>157</sup> The current Article 98, paragraph 2 was introduced as Article 90*quater*, paragraph 2 on 13 July 1998 (See, Report of the Working Group on International Cooperation and Judicial Assistance, 13 July 1998, U.N. Doc. A/CONF.183/C.1/WGIC/L.11/Add.2). The current Article 98, paragraph 1 was introduced one week earlier on 6 July 1998, as Article 90*quater* (See, Report of the Working Group on International Cooperation and Judicial Assistance, 6 July 1998, U.N. Doc. A/CONF.183/C.1/WGIC/L.15 and A/CONF.183/C.1/WGIC/L.15/Corr.1) See also, R. S. Clark, Some Challenges Confronting the Assembly of States Parties of the International Criminal Court, *supra* note 97, p. 148.

<sup>158</sup> Legal Service of the EU Commission, Internal Opinion, *supra* note 14, p. 158; Human Rights Watch, United States Efforts to Undermine the International Criminal Court (Legal Analysis of Impunity Agreements), *supra* note 18, p. 2. The Draft Statute prepared by the Preparatory Committee on the Establishment of an International Criminal Court (U.N. Doc. A/CONF.183/2/Add.1), which formed the basis for the negotiations in Rome did not contain a similar provision.

<sup>159</sup> H. P. Kaul and C. Kreß, Jurisdiction and Cooperation in the Statute of the International Criminal Court, *supra* note 130, p. 165.

<sup>160</sup> R. S. Clark, Some Challenges Confronting the Assembly of States Parties of the International Criminal Court, *supra* note 97, p. 149.

<sup>161</sup> K. Prost and A. Schlunck, Article 98, *supra* note 93, p. 1131.

by SOFAs.<sup>162</sup> According to Sheffer, however, “[b]y the time of the Rome Conference, the language for Article 98(2) had developed into a more generic text that covered ‘persons’ of a ‘sending State’, which clearly would cover persons sent officially by a state into a foreign jurisdiction under the authority of the sending State. The US delegation was very comfortable with that progression of text, as it strengthened the safeguard beyond where we had started the discussion in 1995 to incorporate, for example, the US diplomatic corps, Peace Corps workers, officials of the US Agency for International Development, and US civilian and military leaders who travel officially abroad.”<sup>163</sup> Scheffer specifically denies that the intent of the drafters was to limit the application of paragraph 2 to existing agreements.<sup>164</sup>

Even from this limited account of the drafting history, it thus clearly follows that the delegates at the Rome conference had highly diverging views regarding the scope of application of Article 98, paragraph 2. As such, the *travaux préparatoires* of Article 98, paragraph 2, are not helpful in the context of Article 32 of the VCLT, quite simply because they do not provide any clear guidance of what the (correct) interpretation should be.

In this regard it should also be noted that given their limited size, most delegations were not able to participate in the negotiations of each and every part of the ICC Statute.<sup>165</sup> Furthermore, even if they did, the actual negotiations with respect to, for example, Part 9 of the ICC Statute took place in informal sessions.<sup>166</sup> According to Paust, it is unlikely “that much authoritative legislative history exists and that any drafts were considered and agreed

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<sup>162</sup> D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 41, p. 338. In this regard Scheffer also refers to American comments made as early as 1995 with respect to the draft statute for an international criminal court made by the International Law Commission. See, Report of the Secretary General, Addendum (Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court), 31 March 1995, U.N. Doc A/AC.244/1/Add.2, p. 19-20.

<sup>163</sup> D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 41, p. 339.

<sup>164</sup> *Ibid.*, p. 340-341. (“The original US negotiating intent was to provide for a means within the Rome Statute to negotiate future international agreements for non-surrender of US personnel. This was intended to include, in addition to then-existing SOFAs and SOMAs, stand-alone Article 98(2) agreements when necessary and future SOFAs and SOMAs that either would be of amended character or new agreements negotiated from scratch.”)

<sup>165</sup> J. Paust, The Reach of ICC Jurisdiction over Non-Signatory Nationals, 33 *Vanderbilt Journal of Transnational Law* 2000, p. 6, footnote 16.

<sup>166</sup> P. Mochochoko, International Cooperation and Judicial Assistance, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute--issues, Negotiations, Results*, Martinus Nijhoff Publishers, The Hague 1999, p. 315. During the Rome conference Mochochoko chaired the working group on International Cooperation and Criminal Assistance.

upon by the full conference prior to agreement on the full document on July 17<sup>th</sup>.”<sup>167</sup> In these circumstances, the negotiating history therefore seems of very limited value to begin with.<sup>168</sup>

It is important to note, however, that regardless of whether one wishes to invoke the preparatory work to ‘confirm’ or ‘determine’ a meaning, application of Article 32 of the VCLT is not mandatory (“recourse *may* be had” (emphasis added)). In light of the above, the better view thus seems to be to not take into account the preparatory work regarding Article 98, paragraph 2, and instead rely solely on the interpretation found by applying Article 31 of the VCLT.

#### **5.4 Application of this proper interpretation of Article 98, paragraph 2, to the ‘non-surrender’ agreements**

Having established the proper interpretation of Article 98, paragraph 2, we can now move on to applying this proper interpretation to the bilateral ‘non surrender’ agreements.

##### **5.4.1 The preamble**

There is nothing in the preamble that could be considered problematic in terms of Article 98, paragraph 2. Although many authors are of the view that the intention in preambular paragraph 4 to prosecute persons suspected of crimes within the jurisdiction of the ICC only “where appropriate” is insufficient in light of the object and purpose of the ICC Statute,<sup>169</sup> we have seen above that Article 98, paragraph 2, does not require that the agreement provides for a duty to investigate/ prosecute – i.e. should not provide for impunity. These arguments should therefore be rejected.<sup>170</sup>

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<sup>167</sup> J. Paust, The Reach of ICC Jurisdiction over Non-Signatory Nationals, *supra* note 165, p. 6, footnote 16.

<sup>168</sup> See also R.S. Clark, e-mail on file with author: “I have to say it is extremely difficult to apply any principle of interpretation based on trying to figure out ‘intent’. Some parts, like this, were actually negotiated (if at all) by a very small group with all-too-human memories.”

<sup>169</sup> See, for example, Coalition for the International Criminal Court, US Bilateral Immunity or So-called “Article 98” Agreements, *supra* note 132, p. 2; S. 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, *supra* note 35, p. 131; H. 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?, *supra* note 14, p. 104.; Amnesty International, International Criminal Court: “US efforts to obtain impunity for genocide, crimes against humanity and war crimes, *supra* note 14, p. 21-22; D. A. Tallman, Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict, 92 Georgetown Law Journal 2004, p. 1048.

<sup>170</sup> See *supra* paragraph 5.3.4 ‘Impunity prohibited?’. See also Chapter 4, footnote 42.

## 5.4.2 Article A: Persons covered

It goes without saying that by defining ‘persons’ as “current or former Government officials, employees (including contractors), or military personnel or nationals”, Article A of the ‘non surrender’ agreements covers a considerably broader class of persons than allowed by a proper interpretation of Article 98, paragraph 2, now that these persons cannot *per se* be qualified as having been ‘sent’. In this regard it should also be noted that Article B of the ‘non surrender’ agreements does not seem to exclude application in case of persons present on the territory of the requested state without the consent of that state.<sup>171</sup> As we have seen above, however, Article 98, paragraph 2, does not apply in those cases.<sup>172</sup>

Before proceeding, however, it is perhaps useful to divide the definition of Article A into two parts: 1) ‘current or former government officials, employees (including contractors), or military personnel’;<sup>173</sup> and 2) ‘nationals’.

### Current or former government officials

As a preliminary remark it should be noted that the first group may also include non-nationals of the states in question.<sup>174</sup> As we have seen above, however, Article 98, paragraph 2, does not require that persons covered have the nationality of the sending state.<sup>175</sup>

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<sup>171</sup> It simply requires that such a person is “present”. Clearly a person can be present in the territory of the requested state without the consent of that state.

<sup>172</sup> See *supra* paragraph 5.3.1 ‘To whom does it apply?’, subheading ‘Does the person have to be present with the consent of the requested state?’.

<sup>173</sup> In the agreements with Brunei, Egypt, Georgia, Morocco, Nicaragua, Oman, Singapore the United Arab Emirates and Yemen, this first group does not include current or former government officials and employees (including contractors). In the agreements with Algeria, Armenia, Colombia, and Saint Kitts and Nevis on the other hand, this first group is much wider. The first three agreements additionally apply to any person “subject in any manner to the jurisdiction of the sending state.” This provision should be understood as a reference to US Code Collection, Title 10, Subtitle A, Part II, Chapter 47, Sub-Chapter I, Section 802. (*Cf.* also Article A of the agreement with Armenia). This section defines the persons subject to the U.S. Uniform Code of Military Justice and includes, for example, “prisoners of war in custody of the armed forces” (paragraph a, sub 9) and “lawful enemy combatants [...] who violate the law of war” (paragraph a, sub 13). The agreement with Saint Kitts and Nevis additionally applies to persons “who are so deeply connected to the internal affairs of one party that the surrender of such persons might present a clear risk to the national security of that Party.” It goes without saying that unless these persons can be considered to have been ‘sent’, Article 98, paragraph 2 does not apply to them.

<sup>174</sup> *Cf.* also the slightly diverging language of Article A in the agreements with Brunei, Egypt, Georgia, Morocco, Nicaragua, Oman, the Solomon Islands and Yemen: “[persons includes] all U.S. nationals as well as current and former *non-U.S. national* U.S. military personnel with respect to acts or omissions allegedly committed or occurring while they are or were U.S. military personnel.” (emphasis added).

<sup>175</sup> See *supra* paragraph 5.3.1 ‘To whom does it apply?’, subheading ‘Nationality of the person’.

Although the first group is at first sight the most likely candidate for being qualified as ‘sent’, it is still too broad. First, it applies to *former* government officials, employees (including contractors) and military personnel. As we have seen above, however, Article 98, paragraph 2, does not cover such persons as it ceases to apply as soon as the person can no longer be considered to have been ‘sent’.<sup>176</sup> Secondly, it covers these persons regardless of whether they can be considered to have been ‘sent’ or not. As we have seen above, being ‘sent’ in principle means that the presence of the person on the territory of the requested state is the result of some positive act of the sending state. This definition clearly excludes government officials, employees (including contractors) and military personnel present in the requested state in a *private* capacity, for example for business or tourism.<sup>177</sup>

Furthermore, if these persons are recruited locally – i.e. their presence on the territory of the requested state is not the result of some positive act of the sending state – they should have a sufficiently strong nexus with the very subject of what the sending state ‘sent’ (or in exceptional cases be a family member of such a person).

It cannot be said that all persons belonging to one of the groups of persons mentioned in Article A of the ‘non surrender’ agreements (government officials, government employees or military personnel) *per se* enjoy such a sufficiently strong nexus. This has to be established on a group-by-group or even case-by-case basis. For example, such a sufficiently strong nexus exists *inter alia* for a member of the armed forces (but not a member of the civilian component accompanying the armed forces) and a diplomatic agent (but not a member ‘technical and administrative or ‘service’ staff) or consul (but not other members of the consular post).<sup>178</sup> In my view contractors never enjoy such a sufficiently strong nexus and are therefore not covered by Article 98, paragraph 2, if they are locally recruited.<sup>179</sup>

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<sup>176</sup> See also, for example, Amnesty International, International Criminal Court: “US efforts to obtain impunity for genocide, crimes against humanity and war crimes, *supra* note 14, p. 23; J. Crawford, P. Sands and R. 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), par. 44.

<sup>177</sup> See also, for example, J. Crawford *et al.*, 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), *supra* note 16, par. 43-44; H. 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?, *supra* note 14, p. 104.

<sup>178</sup> See *supra* paragraph 5.3.1 ‘To whom does it apply?’, subheading ‘The term ‘sending state’.’

<sup>179</sup> See, also, J. Crawford *et al.*, 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), *supra* note 16, par. 43-44; D. Scheffer, Article 98(2) of the Rome Statute: America’s Original Intent, *supra* note 41, p. 352.

## Nationals

Similar reasoning applies with respect to the second group of persons (nationals of one party). It goes without saying that unless such a person can be qualified as being ‘sent’ (which *de facto* means that this person falls within the first group) he or she is not covered by Article 98, paragraph 2.<sup>180</sup>

### **5.4.3 Articles B-C (Type 1), B-D (Type 2) and B-E (Type 3): Conduct covered**

The core of the ‘non surrender’ agreements is the prohibition laid down in Article B that – absent consent of the sending state – a person may not be surrendered or transferred to the ICC for any purpose (sub a); or be surrendered or transferred to any other entity or third country, or expelled to a third country for the purpose of transfer or surrender to the ICC (sub b). As a preliminary remark it should be noted that sub b is clearly not covered by Article 98, paragraph 2, given the definition of surrender in Article 102 (“the delivering up of a person by a State *to the Court*” (emphasis added)). Sub b, however, deals with situations in which a person is surrendered or transferred to “any other entity or third country”.

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<sup>180</sup> See also, D. A. Tallman, Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict, *supra* note 169, p. 1048; J. Crawford *et al.*, 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), *supra* note 16, par. 44; S. 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, *supra* note 35, p. 129. The rationale for having the ‘non surrender’ agreements apply to all American nationals was explained by Assistant Secretary, Bureau of Political-Military Affairs Lincoln Bloomfield as follows: “The United States is a nation of immigrants; we have familial ties to localities all over the world. Our national interests know no bounds: we have diplomatic representation almost everywhere, and our private businesses and educational institutions are similarly represented far and wide. The United States military is unique in its global presence and operations. Our personnel were found in over 100 countries over the past year. At one point in 2003, more than 400,000 U.S. military personnel were serving outside American territory. By next year, the U.S. will have over 50 treaty alliance commitments to defend the security of countries all over the world. One does not have to hold a view of American exceptionalism to acknowledge the profile and symbolic resonance of the American identity in the world. But let us look further, at other citizens whose presence and involvement could readily be perceived by partisans as influential, even decisive, on one side or another of the violent conflicts that sometimes give rise to war crimes, genocide and crimes against humanity. In Iraq this year, 600 media reporters, mostly American, deployed along with the coalition military forces, embedded in their operations. Non-governmental organizations numbering in the hundreds are, by the nature of their humanitarian mission, on the scene wherever societies are at risk from conflict. American corporations and their executives are posted in resource extraction areas where separatist or competing territorial claims remain unsettled. The point, of course, is that American citizens, many of them educated and well-connected to influential actors abroad, are no less a target for potential resentment by the parties to a violent conflict than officials of the U.S. Government. You will note that Americans taken hostage in Lebanon, Colombia or the Philippines in recent years were evidently singled out not as much for their profession as for their nationality. The potential for accusations giving rise to politically motivated prosecutions cannot neatly be parsed among Americans.” (See, L. Bloomfield, The U.S. Government and the International Criminal Court, Remarks to the Parliamentarians for Global Action, *supra* note 72).

It goes without saying that Article 98, paragraph 2, applies to agreements prohibiting surrender. The use in the ‘non surrender’ agreements of the terms ‘transfer’ in combination with ‘for any purpose’ seems to imply, however, that the ‘non surrender’ agreements prohibit more than just the surrender of a person, for example the transfer of a person for the purposes of testifying. The term ‘transfer’, however, appears in the ICC Statute in the articles dealing with assistance (*cf.* Article 93, paragraph 7 *jo.* paragraph 1, sub f) and as we have seen above, Article 98, paragraph 2, does not apply to a request for assistance.<sup>181</sup> The scope of the ‘non surrender’ agreements is thus too broad in terms of the types of cooperation it prohibits.<sup>182</sup>

In this regard it should also be noted that some authors have argued that Article B of the ‘non surrender’ agreements also prohibits the voluntary surrender/ appearance of the accused.<sup>183</sup> This view should be rejected. In my view the use of the term “*be* surrendered or transferred (emphasis added)” implies active conduct and cannot be interpreted as obligating a state to prevent voluntary surrender/ appearance of a person. However, even if this were the case, as we have seen above, Article 98, paragraph 2, does not apply to voluntary surrender/ appearance.<sup>184</sup>

Article C (and Article D in case of a type 2 and 3 agreement) prohibits the re-extradition of a person to the ICC. As we have seen above, however, Article 98, paragraph 2, does not apply to extradition.<sup>185</sup> These article(s) are therefore not covered by Article 98, paragraph 2.

Article E (in case of a type 3 agreement) prohibits the facilitation of, consent to, or cooperation with, efforts by any third party or country to effect the extradition, surrender, or transfer of a person to the ICC. Taken in context with Article 2 of the ‘non surrender’ agreement it thus applies to forms of cooperation related to surrender other than the surrender

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<sup>181</sup> See *supra* paragraph 5.2.3 ‘Article 98, paragraph 2 in context: Part 9 of the ICC Statute’.

<sup>182</sup> It should be noted, however, that Article 93, paragraph 7, sub a, sub ii requires consent of the requested state. Such a state is thus entitled to refuse to cooperate and it seems irrelevant what the reason for refusal is (i.e. it could be the ‘non surrender’ agreement). Furthermore, Article 93, paragraph 7 *jo.* paragraph 1, sub f applies only to persons in custody of the requested state. It is not entirely clear, however, if the term ‘transfer’ also applies in cases where the requested state facilitates the voluntary appearance of non detained persons as witnesses or experts (*Cf.* Article 93, paragraph 1, sub e)

<sup>183</sup> See, for example, C. J. Tan, *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome State of the International Criminal Court*, *supra* note 54, p. 1142.

<sup>184</sup> See *supra* paragraph 5.2.3 ‘Article 98, paragraph 2 in context: Part 9 of the ICC Statute’.

<sup>185</sup> See *supra* paragraph 5.3.1 ‘To whom does it apply?’, subheading ‘Extradition and Criminal Assistance Treaties’.

itself. In so far as it deals with the efforts of third countries, it is clear that it is not covered by Article 98, paragraph 2, which applies to requests by the ICC.

In addition to third countries, however, Article E also seems to apply to the ICC (“any third party”). In terms of the ICC Statute, this article thus prohibits giving effect to a request for assistance pursuant to Article 93 if such a request may effect the surrender of a person to the ICC (one could think of, for example, searches and seizures (sub h), freezing of his or her assets (sub k), *etcetera*) As we have seen above, however, Article 98, paragraph 2, does not apply to a request for assistance.<sup>186</sup> Also in this case, Article E is therefore not covered by Article 98, paragraph 2.

A similar albeit slightly different matter relates to the fact that Article E should be interpreted as also prohibiting the transit of a person over the territory of the state for the purposes of being surrendered to the ICC. It should be repeated, however, that a ‘request for transit’ is different from a ‘request for surrender’ and a ‘request for assistance’.<sup>187</sup> Furthermore, a person transiting for the purposes of being surrendered to the ICC cannot be considered to have been ‘sent’ by the sending state.<sup>188</sup> Accordingly, insofar as Article E prohibits transit, it is also not covered by Article 98, paragraph 2.

#### **5.4.4 Reciprocal agreements: Type 2 and 3 agreements**

As we have seen above, Article 98, paragraph 2, can only be relied upon for the benefit of non-state parties to the ICC Statute.<sup>189</sup> Type 2 or 3 ‘non surrender’ agreements entered into by state parties to the ICC Statute are therefore not covered by Article 98, paragraph 2, to the extent that they also benefit the state party.<sup>190</sup>

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<sup>186</sup> See *supra* paragraph 5.2.3 ‘Article 98, paragraph 2 in context: Part 9 of the ICC Statute’.

<sup>187</sup> See *supra* paragraph 5.2.3 ‘Article 98, paragraph 2 in context: Part 9 of the ICC Statute’.

<sup>188</sup> See *supra* paragraph 5.3.1 ‘To whom does it apply?’, subheading ‘Surrender v. Assistance’.

<sup>189</sup> See *supra* paragraph 5.3.5 ‘For whose benefit may Article 98, paragraph 2 be invoked?’.

<sup>190</sup> This is the case for the type 2 agreements with Benin, Burkina Faso, Cambodia, Central African Republic, Chad, Comoros, Republic of Congo, Democratic Republic of the Congo, Djibouti, Dominican Republic, the Gambia, Georgia, Ghana, Guinea, Haiti, Honduras, Liberia, Madagascar, the Marshall Islands, Mauritius, Montenegro, Nauru, Nigeria, Panama, Saint Kitts and Nevis, Sierra Leone, Timor-Leste, Uganda and Zambia and the type 3 agreements with Afghanistan Burundi Tajikistan.

## 5.5 Who decides on the applicability of Article 98, paragraph 2?

It is generally accepted that although it is in principle for the states parties to interpret a treaty, a treaty may itself confer such competence on a court or tribunal.<sup>191</sup> Article 119, paragraph 1 provides that “[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.” It clearly follows from the language of Article 98 (“The Court may not proceed”) *jo.* Article 87, paragraph 1, sub a (“The Court shall have the authority to make requests to States Parties for cooperation.”) that application of Article 98 concerns a judicial function of the ICC. It is thus for the ICC to decide whether Article 98, paragraph 2, applies and no state “may substitute its own legal assessment for the Court’s opinion.”<sup>192</sup> This is further confirmed by Rule 195, paragraph 1 of the ICC RPE which obligates a requested state facing a possible ‘Article 98, paragraph 2 problem’ to “assist the Court in the application of article 98.”

I agree with Crawford *et al.* that “[i]t is unlikely that the Court would be willing to make a determination in the abstract, i.e. where a State Party has concluded (rather than sought to apply) a bilateral non-surrender agreement.”<sup>193</sup> The issue will therefore arise when the Pre-Trial Chamber is seized with an application of the prosecutor to issue a warrant of arrest of a person (Article 58, paragraph 1). Article 89, paragraph 5 provides that “[o]n the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.” Article 98, paragraph 2 (or paragraph 1 for that matter) thus only comes into play if the Pre-Trial Chamber is deliberating on application of Article 89, paragraph 5 *jo.* Article 89, paragraph 1.

In this regard it should be noted that Article 98, paragraph 2, is addressed to the ICC. As a rule the ICC should thus assess the possibility of an ‘Article 98, paragraph 2 problem’ *before*

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<sup>191</sup> M. 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, *supra* note 41, p. 199.

<sup>192</sup> S. Wirth, Immunities Related Problems, and Article 98 of the Rome Statute, *supra* note 37, p. 458; See, also, Amnesty International, International Criminal Court: “US efforts to obtain impunity for genocide, crimes against humanity and war crimes, *supra* note 14, p. 16; C. J. Tan, The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome State of the International Criminal Court, *supra* note 54, p. 1127. See, however, Tallman who argues that “opponents of Article 98 agreements should seek an official opinion by the ICC that determines the scope of Article 98(2).” (D. A. Tallman, Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict, *supra* note 169, p. 1053)

<sup>193</sup> J. Crawford *et al.*, 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), *supra* note 16, par. 58-59.

issuing the request for surrender.<sup>194</sup> That being said, it is very well possible that such a problem surfaces only *after* the request has been issued, for example if the ‘non surrender’ agreement was secret. In this case the matter should be resolved under Article 97 *jo.* Rule 195, paragraph 1 of the ICC RPE providing for consultations between the ICC and the requested state. In either case, however, it is – as we have seen above – the ICC that makes the determination on the applicability of Article 98, paragraph 2, not the requested state (or the sending state for that matter).<sup>195</sup> The requested state is bound to comply with the request for surrender if the ICC decides to proceed despite its objections. If a state fails to comply with a request for surrender, the ICC may make a finding to that effect and refer the matter to the Assembly of States Parties (or to the United Nations Security Council in case it has referred the situation to the ICC pursuant to Article 13) (Article 87, paragraph 7).<sup>196</sup>

As a final remark, mention should be made of a possible role of the International Court of Justice (ICJ). It should be stressed, however, that proceedings before the ICJ would not relate to the question of whether or not the ‘non-surrender’ agreements are covered by Article 98 of the ICC Statute (as we have seen above, the final determination in this regard is made by the ICC), “but [to] the distinct question of whether or not the conclusion (or possibly the maintenance) of such an agreement by a State Party [or signatory] was contrary to the ICC Statute.”<sup>197</sup>

Contentious proceedings involving the United States itself are unlikely, given the fact that the US does not recognize the compulsory jurisdiction of the ICJ.<sup>198</sup> An alternative route, however, could be that “two States Parties to the Rome Statute, one of which has signed an

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<sup>194</sup> See also M. Wise, E.S. Podgor and R. S. Clark *International Criminal Law: Cases and Materials*, Teacher’s Manual, *supra* note 102, p. 65. (“the focus is [thus] not so much on whether a State may decline to assist, but on whether the Court should decide that it does not even have power to ask!”)

<sup>195</sup> Under Rule 195, paragraph 1, however, the sending state (or any concerned third state) “may provide additional information to assist the Court.”

<sup>196</sup> *Cf.* ICC, Request for Information from the Democratic Republic of the Congo on the Status of Execution of the Warrants of Arrest, *Prosecutor v. Kony, Otti, Odhiambo and Ongwen*, Case No. ICC-02/04-01/05, Pre T.Ch. II, 21 October 2008, p. 4. The ICC is precluded from making such a finding in case of a non state party to the ICC Statute that has concluded an *ad hoc* cooperation agreement even if the matter has been referred by to the Security Council pursuant to Article 13. Instead, it may only inform the Assembly of States Parties (ASP) or the Security Council in case it has referred the situation pursuant to Article 13. (See, Article 87, paragraph 5, sub b). In all cases, however, the state will incur state responsibility for the failure to cooperate (see Chapter 6, paragraph 6.3.2 ‘State responsibility for *applying* a ‘non surrender’ agreement’).

<sup>197</sup> J. Crawford *et al.*, 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), *supra* note 16, par. 61. See also Chapter 6.

<sup>198</sup> See, List of Declarations Recognizing the Jurisdiction of the Court as Compulsory. Available via: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>; visited 1 November 2008.

Article 98 agreement and of which believes that doing so is a breach of the Rome Statute, [...] submit the question of validity of Article 98 agreements to the Court.”<sup>199</sup> If both states recognize the compulsory jurisdiction of the ICJ, only one state could refer the matter.<sup>200</sup> Another option would be a request for an advisory opinion of the ICJ by the United Nations General Assembly.<sup>201</sup>

## 5.6 Conclusion

A proper interpretation of Article 98, paragraph 2, means that in order for a person to be covered by it, such a person must be ‘sent’. This is the case if his or her presence on the territory of the requested state is the result of some positive act of the sending state or (if this is not the case) he or she has a sufficiently strong nexus with the very subject of what the sending state ‘sent’ (or in exceptional cases be a family member of such a person). Paragraph 2 no longer applies as soon as the person can no longer be considered to have been ‘sent’ (for example, in case of *former* government officials or military personnel). The person must be present on the territory with the consent of the requested state. Persons extradited or transferred pursuant to an extradition or criminal assistance treaty or for the purposes of transit, are not covered by the article.

Article 98, paragraph 2, does not require that persons covered have the nationality of the sending state, but it may only be relied upon for the benefit of non-state parties to the ICC Statute. It applies to any type of agreement prohibiting surrender without the consent of the sending state (existing or (re)new(ed)). It is furthermore not required that this agreement provides for a duty to investigate/ prosecute – i.e. should not provide for impunity.

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<sup>199</sup> D. A. Tallman, Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict, *supra* note 169, p. 1054.

<sup>200</sup> Of those states that have entered into a ‘non-surrender’ agreement and recognize the compulsory jurisdiction of the ICJ, Botswana, Cambodia the Democratic Republic of the Congo, Djibouti, Dominica, the Dominican Republic, Egypt, the Gambia, Georgia, Guinea, Honduras, Lesotho, Liberia, Madagascar, Malawi, Mauritius, Nigeria, Panama, Senegal and Uganda are also state parties to the ICC Statute, whereas Cameroon, Cote d’Ivoire, Guinea-Bissau, Haiti and the Philippines have signed the ICC Statute. (See, List of Declarations Recognizing the Jurisdiction of the Court as Compulsory, *supra* note 197 and Annex II).

<sup>201</sup> See also, International Law Association, Conference Report Berlin 2004, *supra* note 77, p. 18. According to McGoldrick “[a]t the UN General Assembly’s Sixth Committee in October 2002, Sierra Leone stated that with its regional partners it would seek an advisory opinion from the ICJ on Article 98 agreements. No such opinion has yet been requested.” D. McGoldrick, Political and Legal Responses to the ICC, in D. McGoldrick *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Portland 2004, p. 423.

It follows from the application of this proper interpretation of Article 98, paragraph 2, that the 'non surrender' agreements are too broad in several regards. Hence, they are only partially covered by Article 98, paragraph 2. First, they apply to too wide a group of persons regardless of the question of whether such a person can be considered to have been 'sent'. Secondly, they apply to too wide a group of conduct since their scope includes extradition and transfer and in case of a Type 3 agreement assistance and transit. Thirdly, insofar as Type 2 and 3 agreements are concluded by state parties to the ICC Statute they are not covered by Article 98, paragraph 2, to the extent that they also benefit the state party.

It is the ICC that decides on the proper interpretation and applicability of Article 98, paragraph 2, and not the requested state (or the sending state for that matter).

## CHAPTER 6:

### **Treaty conflict and state responsibility for breach of an international obligation: What to do if the ‘non-surrender’ agreements are neither invalid nor (fully) covered by Article 98, paragraph 2?**

#### **6.1 Introduction**

As we have seen in Chapter 4, the ‘non-surrender’ agreements are not invalid under international law and are thus binding on the parties. As we have seen in Chapter 5, however, they are also not fully covered by Article 98, paragraph 2, and hence partially conflict with the ICC Statute.

This poses no problems of course for a ‘non-surrender’ agreement concluded between the United States and a non-state party to the ICC Statute. The provisions of Part 9 of the ICC Statute are simply not binding on a non-state party and as Tallman has rightly noted “[s]uch a country would not be obligated to surrender an American suspect to the ICC in the first place”.<sup>1</sup>

The situation is different, however, if one of the parties to the ‘non-surrender agreement’ is also a party to the ICC statute. Given the fact that the ICC may partially disregard the ‘non-surrender’ agreement when issuing a request for cooperation, the state party to the ICC Statute could thus be confronted with a situation in which it is impossible to simultaneously fulfil its obligation to cooperate with the ICC and its obligation under the ‘non-surrender’ agreement to obtain the consent of the United States before doing so.<sup>2</sup> This raises the question as to which of these two obligations prevails, requiring an analysis and application of the law on treaty conflict.

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<sup>1</sup> D. A. Tallman, Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict, 92 Georgetown Law Journal 2004, p. 1046; H. 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, p. 103. Except of course in case the United Nations Security Council referred the situation to the ICC. See *infra* paragraph 6.2 ‘The law on treaty conflict’.

<sup>2</sup> D. A. Tallman, Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict, *supra* note 1, p. 1051.

## 6.2 The law on treaty conflict

According to Binder, “[t]reaty conflict occurs when a State concludes a treaty that creates international obligations the performance of which would be inconsistent with the performance of an international obligation to a third State [or international organization] under a previously concluded treaty.”<sup>3</sup> The regime for treaty conflict is laid down in Article 30 of the Vienna Convention on the Law of Treaties (VCLT)<sup>4</sup> which provides:

### Article 30

#### Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
  - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
  - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

For this article to be applicable, the successive treaties thus have to relate “to the same subject matter”. It goes without saying that Part 5 and 9 of the ICC Statute and the ‘non-surrender’ agreements relate to the same subject matter, namely “the question under what circumstances a person may be surrendered to the custody of the ICC”.<sup>5</sup>

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<sup>3</sup> G. Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity*, Praeger, New York 1988, p. 7.

<sup>4</sup> On the applicability of the VCLT with respect to non-state parties to it, see Chapter 4, paragraph 4.2 ‘What makes a treaty invalid?: Section 1 and 2 of Part V of the Vienna convention on the Law of Treaties’.

<sup>5</sup> M. 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, p. 223.

It follows from paragraph 1 that the regime laid down in Article 30 of the VCLT is exhaustive and subject only to Article 103 of the United Nations Charter, which provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

It is therefore important to firstly address the conflict between the ICC Statute and the ‘non-surrender’ agreements in case the United Nations Security Council has referred a situation to the ICC pursuant to Article 13.<sup>6</sup> Since the Security Council is acting under Chapter VII of the United Nations Charter, “the obligations arising out of Parts 5 and 9 for States in the matter of arrest and surrender thereby become obligations for all Member States of the United Nations regardless of whether or not they are Parties to the Statute.”<sup>7</sup> The remaining question is then if states parties to the ICC Statute (and non-states parties for that matter!) may still rely on the ‘non-surrender’ agreements. I tend to agree with Swart that pursuant to Article 25 *jo.* Article 103 of the United Nations Charter, the obligations arising out of Parts 5 and 9 “prevail over obligations Member States may have assumed under any other international agreement.”<sup>8</sup> The better view therefore seems to be that ‘non-surrender’ agreements cannot be relied upon (regardless of whether it involves a state party or not to the ICC Statute) in case of a United Nations Security Council referral.

In cases other than a Security Council referral, however, we have to look at the subsequent paragraphs of Article 30 of the VCLT.

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<sup>6</sup> Article 13, sub b provides: “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [...] (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”.

<sup>7</sup> B. Swart, Arrest and Surrender, in A. Cassese *et al.*, The Rome Statute of the International Criminal Court, A Commentary (Volume II), Oxford University Press, Oxford 2002, p. 1677.

<sup>8</sup> *Ibid.* Article 25 of the UN Charter provides that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter” whereas Article 103 provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” *Cf.* also Article 30, paragraph 1 of the VCLT.

I agree with Benzing that despite references in the ‘non-surrender’ agreements to the ICC Statute,<sup>9</sup> it cannot be argued that these constitute a conflict or subordination clause.<sup>10</sup> Paragraph 2 is therefore not applicable. The same applies to paragraph 3 (clearly not “all the parties to the earlier treaty are parties also to the later treaty”) and paragraph 4, sub a (the United States is not a party to the ICC Statute). We are therefore left with paragraph 4, sub b.

Application of this paragraph, however, leads to a rather disappointing conclusion: The ‘non-surrender’ agreement applies between the United States and the state party to the ICC Statute with which it concluded this agreement, whereas the ICC Statute applies between this state party and all the other parties to the ICC Statute. None of the two has priority over the other and instead, both are equally valid. That being said, it clearly follows from paragraph 5 that this does not “relieve any party to a treaty of any international responsibilities it may incur by *concluding* or by *applying* a treaty the provision of which are incompatible with its obligations towards another state under another treaty.”<sup>11</sup>

### **6.3 State responsibility for breach of an international obligation**

It is generally accepted, that a state incurs international responsibility for an internationally wrongful act if that act is: a) attributable to the state under international law; and b) constitutes a breach of an international obligation of the state.<sup>12</sup> Naturally, the conclusion or application of a ‘non-surrender’ agreement is an act attributable to the state.<sup>13</sup> The remaining

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<sup>9</sup> See preambular paragraphs 3 and 5 of the ‘non surrender’ agreements. Furthermore, these paragraphs are absent in the agreements that apply to all international tribunals.

<sup>10</sup> M. 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, *supra* note 5, p. 223.

<sup>11</sup> A. Watts, *The International Law Commission 1949-1998: Volume Two: The Treaties Part II*, Oxford University Press, Oxford 2000, p. 680 (emphasis added).

<sup>12</sup> *Cf.* Article 1 and 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001), p. 43 *et seq.* See also, I. Brownlie, *Principles of Public International Law*, Clarendon Press, Oxford 1998, p. 435 *et seq.*; and International Court of Justice, Judgement (Merits), Case Concerning the Corfu Channel (*United Kingdom of Great Britain and Northern Ireland v. Albania*), 9 April 1949, ICJ Reports 1949, p.4, p. 23; International Court of Justice, Judgement (Merits), Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), 27 June 1986, ICJ Reports 1986, p. 14, par. 226, 283 and 292; International Court of Justice, Judgement, Case Concerning the Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*), 25 September 1997, ICJ Reports 1997, p. 7, par. 47 and 78; International Court of Justice, Judgement, Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), 24 May 1980, ICJ Reports 1980, p. 3, p. 29.

<sup>13</sup> *Cf.* Article 4, paragraph 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government of a territorial united of the State”). See also, for example, International Court of Justice, Advisory Opinion (Difference Relating to

question is then if the mere *conclusion* or *application* of such an agreement constitutes a breach of an international obligation.<sup>14</sup>

### 6.3.1 State responsibility for *concluding* a ‘non-surrender’ agreement

When assessing whether the mere conclusion of a ‘non-surrender’ agreement constitutes a breach of an international obligation, it is important to make a distinction between signatory states and states parties to a treaty.

#### Signatory states

A state that has signed but not ratified a treaty is obviously not (yet) bound by the terms of that treaty.<sup>15</sup> Pursuant to Article 18, sub a of the VCLT, such a state is only under an *interim* obligation “to refrain from acts which would defeat the object and purpose of a treaty”.<sup>16</sup> According to Crandall this obligation means that “neither party may, without repudiating the proposed treaty, voluntarily place itself in a position *where it cannot comply* with the conditions as they existed at the time the treaty was signed.”<sup>17</sup> A similar interpretation is put forward by Aust: “The obligation in Article 18 is only to ‘refrain’ (a relatively weak term) from acts which would ‘defeat’ (a strong term) the object and purpose of the treaty. The signatory state [...] does not have to abstain from all acts which will be prohibited after entry into force. But the state may not do an act which *would* (not merely *might*) invalidate the basic purpose of the treaty.”<sup>18</sup>

The test is thus whether entering into a ‘non-surrender’ agreement puts a signatory state in a position “where it cannot comply” with the ICC Statute once it has entered into force for that

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Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights), 29 April 1999, ICJ Reports 1999, p. 62, par. 62.

<sup>14</sup> According to Article 12 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, “[t]here is a breach of an international obligation when an act of a state is not in conformity with what is required of it by that obligation”. See also, International Court of Justice, Judgement, Case Concerning the Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*), *supra* note 12, par. 57.

<sup>15</sup> See also, T. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge 2000, p. 94.

<sup>16</sup> Article 18, sub a of the VCLT only applies until the signatory state “shall have made its intention clear not to become a party to the treaty”. The United States has clearly expressed its intention not to become a party to the ICC Statute. See Letter from Under Secretary of State for Arms Control and International Security John R. Bolton to United Nations Secretary General Kofi Annan, 6 May 2002, Chapter 2, footnote 47.

<sup>17</sup> S. Crandall, *Treaties: Their Making and Enforcement*, The Law Book Exchange Ltd., New Jersey 2005, p. 343-344 (emphasis added).

<sup>18</sup> T. Aust, *Modern Treaty Law and Practice*, *supra* note 15, p. 94 (emphasis added).

state. What is required is that the act actually (“would”) defeats the object and purpose, not possibly (“might”).<sup>19</sup>

In my view, it is therefore important to make a distinction between the application of an incompatible ‘non surrender’ agreement and the conclusion thereof. The former *actually* defeats the object and purpose of the ICC Statute, the latter *possibly* does so (namely if the former occurs!). To hold otherwise would be to confuse the distinction between the two. In this regard it is also important to note that a state may always choose not to abide by the terms of the ‘non surrender’ agreement. The fact that it incurs state responsibility for doing so does not change that.<sup>20</sup>

Accordingly, a signatory state to the ICC Statute does not breach an obligation under international law (Article 18 of the VCLT) merely by entering into a ‘non surrender’ agreement. Views to the contrary should therefore be rejected.<sup>21</sup>

### State parties

Like signatories, state parties are under an obligation not to defeat the object and purpose of a treaty.<sup>22</sup> As we have just seen, however, a state does not violate the object and purpose of the ICC Statute merely by entering into a ‘non surrender’ agreement. State parties to a treaty, however, are also bound by the principle of *pacta sunt servanda* laid down in Article 26 of the VCLT (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”) Naturally, this means that if a treaty contains a specific provision prohibiting

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<sup>19</sup> See also, J. S. Dietz, Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court With U.S. Article 98 Agreements, 27 Houston Journal of International Law 2004-2005, p. 155.

<sup>20</sup> See *infra* paragraph 6.3.2 ‘State responsibility for *applying* a ‘non surrender’ agreement’.

<sup>21</sup> See, for example, J. Crawford, P. Sands and R. 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), par. 26. Available via: <http://www.amicc.org/docs/Art98-14une03FINAL.pdf>; visited 1 November 2008, par. 55; D. A. Tallman, Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict, *supra* note 1, p. 1050; C. J. Tan, The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court, 19 American University International Law Review, 2003-2004, p. 1132;

<sup>22</sup> See, for example, International Court of Justice, Judgement (Merits), Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), *supra* note 12, par. 275-276; See also, J. Crawford *et al.*, 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), *supra* note 21, par. 24; H. 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, *supra* note 1, p. 103.

the conclusion of an inconsistent treaty, concluding such a subsequent treaty would lead to a violation of the original treaty. No such provision, however, is included in the ICC Statute.<sup>23</sup>

It has been argued by some authors that the obligation to perform a treaty in good faith also includes a prohibition not to enter into a subsequent agreement containing inconsistent obligations. State parties to the ICC Statute that enter into a ‘non surrender’ agreement would thus violate their obligation under Article 26 of the VCLT.<sup>24</sup> This view is highly controversial, however.

In this regard it should first be noted that it is not unusual for states to be subject to potentially conflicting obligations arising out of different treaties.<sup>25</sup> I agree with Crawford *et al.* that it is questionable whether an intention to breach an existing obligation can be inferred from the mere existence of a subsequent agreement containing potentially conflicting obligations.<sup>26</sup>

Secondly, Article 26 of the VCLT applies to the performance of a treaty. As Tallman rightly notes, “[s]igning an Article 98 agreement arguably is not an action taken in the performance of obligations under the Rome Statute and thus may not implicate whether those obligations are being performed in good faith.”<sup>27</sup>

Thirdly and perhaps most importantly, “Article 26 has never officially been interpreted to prohibit a party to a treaty from undertaking inconsistent obligations. Under the law of treaty conflict, it simply is not clear that a party signing an inconsistent treaty necessarily is

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<sup>23</sup> For a treaty that does contain such a provision, see for example, Article 2 of the Treaty Between the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal, Signed at Washington 6 February 1922, League of Nations Treaty Series, Volume 38, p. 281 (“The Contracting Powers agree not to enter into any treaty, agreement, arrangements or understanding, either with one another, or, individually or collectively, with any Power or Powers, which would infringe or impair the principles stated in Article I”).

<sup>24</sup> See, for example, Legal Service of the EU Commission, Internal Opinion, 13 August 2002, reprinted in 23 Human Rights Law Journal 2003, p. 158; International Law Association, Conference Report Berlin 2004, Committee on the International Criminal Court, p. 18. Available via: <http://www.ila-hq.org/download.cfm/docid/7BC51FF0-0B5B-4262-806F3593281F0B66>; visited 26 September 2008.

<sup>25</sup> See, for example, C. Borgen, Resolving Treaty Conflict, 37 George Washington International Law Review 2005, p. 573; J. Crawford *et al.*, 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), *supra* note 21, p. 11, footnote 4.

<sup>26</sup> J. Crawford *et al.*, 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), *supra* note 21, p. 11, footnote 4.

<sup>27</sup> D. A. Tallman, Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict, *supra* note 21, p. 1050.

performing the prior treaty in bad faith because the party would not breach or perform any concrete provision of the prior treaty until such time as conflicting obligations arose.”<sup>28</sup>

Accordingly, a state party to the ICC Statute also does not breach an obligation under international law (Article 26 of the VCLT) merely by entering into a ‘non surrender’ agreement. Views to the contrary should therefore be rejected.<sup>29</sup>

### **6.3.2 State responsibility for *applying* a ‘non surrender’ agreement**

As we have seen above the existence of conflicting obligations, i.e. the possibility of a breach – is not sufficient for a state to incur state responsibility. What is required is that a state actually breaches one of these conflicting obligations. In our case this can only occur if a state party to the ICC Statute that has also concluded a ‘non surrender’ agreement with the United States is indeed confronted with a request for cooperation not covered by Article 98, paragraph 2. If that happens, however, a breach cannot be avoided. As Tallman rightly noted: “[W]hen the ICC calls upon a State Party that has signed an Article 98 agreement to surrender an American suspect, the State Party will be forced to violate one treaty or the other. Whichever decision it makes, the State Party will face consequences under the principle of state responsibility.”<sup>30</sup> This would only be different, of course, if at that stage, the United States or the requested state would decide to prosecute the requested person itself, making the case inadmissible before the ICC by virtue of the complementarity principle.<sup>31</sup>

The possibility of incurring state responsibility for a breach of the ‘non-surrender’ agreements has led Akande to argue that “the agreements entered into by the US with ICC parties will [thus] constitute a source of pressure for such parties not to surrender US nationals to the ICC

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<sup>28</sup> *Ibid.*, p. 1050.

<sup>29</sup> See, for example, R. Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 *Annual Survey of International and Comparative Law* 2006, p. 214-215; C. J. Tan, *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome State of the International Criminal Court*, *supra* note 21, p. 1149.

<sup>30</sup> D. A. Tallman, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, *supra* note 21, p. 1051. *Cf.* also G. H. Fox, *International Organizations: Conflicts of International Law*, 95 *American Society of International Law Proceedings* 2001, p. 183-184. (“Should a state find itself the subject of conflicting obligations, a decision by an international tribunal to apply one of those obligations does not relieve the state of complying with the other. It would still incur state responsibility as a result of failure to perform the other treaty obligation.”)

<sup>31</sup> *Cf.* Article 17 of the ICC Statute. Naturally, the requirements for invoking the complementarity principle (*inter alia* a genuine investigation/ prosecution) should still be fulfilled.

even though those agreements are not consistent with Article 98(2).”<sup>32</sup> Although there is of course a germ of truth in this argument, I do not find it very persuasive. Naturally, it also works the other way around: the possibility of incurring state responsibility as a source of pressure to comply with the ICC Statute.<sup>33</sup>

### **6.3.3 Consequences of incurring state responsibility for (non-)application of a ‘non-surrender agreement**

It would go well beyond the scope of this thesis to deal with the exact consequences of incurring state responsibility. In so far as relevant, however, some brief remarks should nevertheless be made.

First, it is generally accepted that a state that incurs state responsibility is under an obligation to offer appropriate assurances and guarantees of non-repetition of the act for which it incurred responsibility.<sup>34</sup> Secondly, such a state is under an obligation to make full reparation for the injury caused.<sup>35</sup> Such reparation may take the form of restitution, compensation and/ or satisfaction.<sup>36</sup>

Restitution involves re-establishing the situation which existed before the breach.<sup>37</sup> This form of reparation, however, will most likely be inadequate in our case. Naturally, a state that has complied with the incompatible request (i.e. a request prohibited by the ‘non-surrender’ agreement but not covered by Article 98, paragraph 2) will not be in a position to ‘undo’ that compliance. On the other hand, if it has refused to comply, then there is nothing to ‘undo’. In this regard it should be emphasized, however, that incurring state responsibility does not affect the continued duty of the responsible state to perform the obligation breached.<sup>38</sup> In our

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<sup>32</sup> D. Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 *Journal of International Criminal Justice* 2003, p. 646.

<sup>33</sup> In this regard it cannot be emphasized enough that – as Crawford *et al.* have rightly noted – it is not at all certain that “in the event of a particular request that runs counter to a State Party’s obligations under an Article 98 agreement (in circumstances that fall outside the scope of Article 98(2)), the State in question will necessarily choose its obligations under the Article 98 Agreement over those contained in the Rome Statute.” (J. Crawford *et al.*, *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), *supra* note 21, p. 11, footnote 4).

<sup>34</sup> See Article 30, sub b of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>35</sup> *Ibid.*, Article 31.

<sup>36</sup> *Ibid.*, Article 34.

<sup>37</sup> *Ibid.*, Article 35.

<sup>38</sup> *Ibid.*, Article 29.

case, the requested state thus remains under an obligation to comply with the request for cooperation by the ICC.<sup>39</sup>

Compensation will also be inadequate quite simply because the damage resulting from a (refusal to) surrender can hardly be considered ‘financially assessable.’<sup>40</sup>

As a result, we are left with satisfaction, which may consist in, for example, an acknowledgement of the breach, an expression of regret or a formal apology.<sup>41</sup> It goes without saying that in case the requested state has refused to surrender a person to the ICC this is a rather unsatisfactory result.

## **6.4 Conclusion**

A signatory or state party to the ICC Statute that enters into a ‘non surrender’ agreement does not breach any obligation under international law. A state party to the ICC Statute that is also a party to a ‘non surrender’ agreement cannot avoid a breach, however, if it is confronted with an incompatible request (i.e. a request prohibited by the ‘non-surrender’ agreement but not covered by Article 98, paragraph 2) and the United States or the requested state does not prosecute the requested person itself. In such a case it incurs state responsibility and is under an obligation to make full reparation. Given the inadequacy of restitution and compensation, it will most likely be under an obligation to give satisfaction for the breach.

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<sup>39</sup> Of course, this may no longer be possible. The person involved may have been released and has subsequently left the country, he or she may have been transferred to another jurisdiction (for example the United States) *etc.*

<sup>40</sup> *Cf.* Article 36, paragraph 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>41</sup> *Ibid.*, Article 37.

**PART III:**  
**Conclusion and annexes**

**CHAPTER 7:**  
**Conclusion and summary of findings**

The main research question of this thesis was: are the ‘non surrender’ agreements as currently concluded by the United States compatible with international law (in particular the ICC Statute) and if not, what would be the consequences thereof?

Part I of this thesis (Chapter 2 and 3) first provided the relevant factual introduction necessary to put the phenomena of the ‘non-surrender’ agreements into context. In particular, it focussed on the position of the United States towards the ICC prior, during and subsequent to the negotiations of the ICC Statute.

Although the United States in principle supported the establishment of the ICC, it was of the view that the court should not have jurisdiction over US military personnel and officials. American policy under the Clinton administration therefore focussed on obtaining an exemption in this regard, initially in the ICC Statute itself, later via subsequent legal instruments related to the ICC Statute. None of these efforts were successful, however.

Under the Bush administration, this American policy of cautious engagement/ reform from within shifted to active opposition. After the events of 11 September 2001, the ICC was increasingly seen as a political constraint on the use of US military force making its mere existence a threat to American foreign policy. As a first step, the United States therefore successfully pressed for the adoption of Security Council resolutions exempting UN peacekeepers from non-state parties to the ICC Statute (such as the United States) from ICC jurisdiction.

It had always been clear to the Bush administration, however, that these resolutions were at best an *interim* and partial solution. The same day that the first Security Council resolution was passed, the United States therefore embarked on a more comprehensive campaign to obtain an exemption from the jurisdiction of the ICC by concluding bilateral ‘non-surrender’ agreements, in which each state agreed that it would not surrender citizens of the other party

to the ICC without the express consent of that other party. The campaign seemed to have been facilitated by the American Service Member Protection Act (ASPA), which *inter alia* provided for economic sanctions for countries refusing to enter into a ‘non-surrender’ agreement.

As of today the United States has concluded (at least) 104 ‘non-surrender’ agreements. Of these 104 agreements, 95 are known to have entered into force. All agreements are based on a standard agreement and can be divided into three types: non-reciprocal, reciprocal or reciprocal ‘plus’. Furthermore, the agreements either apply solely to the ICC or to all international tribunals.

Part II of this thesis provided a legal analysis of the ‘non-surrender’ agreements and answered the main research question of this thesis.

Chapter 4 argued that the ‘non-surrender’ agreements are not invalid under international law.

As international law currently stands, there is no ground for invalidating a treaty on the basis of a threat or use of military, political or economic coercion. Despite indications that at least some of the ‘non-surrender’ agreements were concluded as a result of economic or political coercion (or threat thereof), this has thus no consequences for their validity. Although the Vienna Convention on the Law of Treaties does provide for a ground to invalidate a treaty if it conflicts with *jus cogens*, the prohibition of impunity has not (yet) acquired this status. Accordingly, even if the ‘non-surrender’ agreements were to provide for impunity (*quod non*), that would not make them invalid under Article 53 of the VCLT.

Chapter 5 argued that the ‘non-surrender’ agreements are only partially covered by Article 98, paragraph 2 and thus not fully compatible with the ICC Statute.

A proper interpretation of Article 98, paragraph 2 means that in order for a person to be covered by it, such a person must be ‘sent’. This is the case if his or her presence on the territory of the requested state is the result of some positive act of the sending state or (if this is not the case) he or she has a sufficiently strong nexus with the very subject of what the sending state ‘sent’ (or in exceptional cases be a family member of such a person). Paragraph 2 no longer applies as soon as the person can no longer be considered to have been ‘sent’ (for

example, in case of *former* government officials or military personnel). The person must be present on the territory with the consent of the requested state. Persons extradited or transferred pursuant to an extradition or criminal assistance treaty or for the purposes of transit, are not covered by the article.

Article 98, paragraph 2, does not require that persons covered have the nationality of the sending state, but it may only be relied upon for the benefit of non-state parties to the ICC Statute. It applies to any type of agreement prohibiting surrender without the consent of the sending state (existing or (re)new(ed)). It is furthermore not required that this agreement provides for a duty to investigate/ prosecute – i.e. should not provide for impunity nor that it contains a sunset clause.

It follows from the application of this proper interpretation of Article 98, paragraph 2, that the ‘non surrender’ agreements are too broad in several regards. Hence, they are only partially covered by Article 98, paragraph 2. First, they apply to too wide a group of persons regardless of the question of whether such a person can be considered to have been ‘sent’. Secondly, they apply to too wide a group of conduct since their scope includes extradition and transfer and in case of a Type 3 agreement assistance and transit. Thirdly, insofar as Type 2 and 3 agreements are concluded by state parties to the ICC Statute they are not covered by Article 98, paragraph 2, to the extent that they also benefit the state party. In the end, it will be the ICC that decides on the proper interpretation and applicability of Article 98, paragraph 2, and not the requested state (or the sending state for that matter).

Chapter 6 assessed the consequences under international law of the findings in Chapter 4 and 5 (i.e. the fact that the ‘non-surrender’ agreements are neither invalid nor fully covered by Article 98, paragraph 2).

It argued that as international law currently stands, a signatory or state party to the ICC Statute that enters into a ‘non surrender’ agreement does not breach any obligation under international law. A state party to the ICC Statute that is also a party to a ‘non surrender’ agreement cannot avoid a breach, however, if it is confronted with an incompatible request (i.e. a request prohibited by the ‘non-surrender’ agreement but not covered by Article 98, paragraph 2) and the United States or the requested state does not prosecute the requested person itself. In such a case it incurs state responsibility and is under an obligation to make

full reparation. Given the inadequacy of restitution and compensation, it will most likely be under an obligation to give satisfaction for the breach.

**ANNEX I:**  
**Article 98 of the ICC Statute**

**Article 98:**  
**Cooperation with respect to waiver of immunity and consent to surrender**

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

**ANNEX II:**  
**Overview of bilateral ‘non-surrender’ agreements concluded<sup>1</sup>**

**AFGHANISTAN (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington September 20, 2002. Entered into force 23 August 2003. KAV 6308 (**Type 3, ICC only**)

**ALBANIA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Tirana May 2, 2003. Entered into force July 7, 2003. KAV 6224 (**Type 1, ICC only**)

**ALGERIA (SIG)**

Agreement regarding the surrender of persons to international tribunals. Effected by exchange of notes at Algiers April 6 and 13, 2004. Entered into force April 13, 2004. KAV 6444 (**Type 2, all tribunals**)

**ANGOLA (SIG)**

Agreement regarding the surrender of persons to international tribunals. Signed at Washington May 2, 2005. Entered into force October 6, 2005. KAV 7420 (**Type 2, all tribunals**)

**ANTIGUA & BARBUDA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Washington September 29, 2003. Entered into force September 29, 2003. KAV 6322 (**Type 1, ICC only**)

**ARMENIA (SIG)**

Agreement regarding the surrender of persons to international tribunals. Signed at Yerevan October 16, 2004. Entered into force March 17, 2005. KAV 7156 (**Type 2, all tribunals**)

**AZERBAIJAN (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington February 26, 2003. Entered into force August 28, 2003. KAV 6310 (**Type 2, ICC only**)

**BAHRAIN (SIG)**

*Unknown title, rumoured to have been signed on 6 February 2003. Not in TIF 2007.<sup>2</sup> Confirmed door State Department Press Release <http://www.state.gov/r/pa/prs/ps/2003/21539.htm>; visited 12 November 2008*  
*(Unknown type)*

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<sup>1</sup> Italics indicates that the ‘non-surrender’ agreement did not yet enter into force or is rumored to exist only. SP indicates state-party to the ICC Statute, NSP non-state party and SIG signatory.

<sup>2</sup> Treaties in Force is prepared by the United States Department of State “for the purpose of providing information on treaties and other international agreements to which the United States has become a party and which are carried on the records of the Department of State as being in force as of its stated publication date, January 1, 2007.” See <http://www.state.gov/s/l/treaty/treaties/2007/index.htm>; visited 12 November 2008.

**BANGLADESH (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington August 18, 2003. Entered into force March 29, 2004. KAV 6435 (**Type 2, ICC only**)

**BELIZE (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Washington December 8, 2003. Entered into force December 8, 2003. KAV 6346 (**Type 1, ICC only**)

**BENIN (SP)**

Agreement regarding the surrender of persons to international tribunals. Signed at Cotonou July 25, 2005. Entered into force August 25, 2005. KAV 7362 (**Type 2, all tribunals**)

**BHUTAN (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington May 2, 2003. Entered into force August 16, 2004. KAV 6705 (**Type 3, ICC only**)

**BOLIVIA (SP)**

*Unknown title, rumoured to have been signed on 19 May 2003. Not in TIF 2007. Confirmed door State Department Press Release <http://www.state.gov/r/pa/prs/ps/2003/21539.htm>; visited 12 November 2008 (Unknown type)*

**BOSNIA AND HERZEGOVINA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Sarajevo May 16, 2003. Entered into force July 7, 2003. KAV 6225 (**Type 1, ICC only**)

**BOTSWANA (SP)**

Agreement regarding the surrender of persons to international tribunals. Signed at Gaborone June 30, 2003. Entered into force September 28, 2003. KAV 6321 (**Type 1, all tribunals**)

**BRUNEI (NSP)**

Agreement regarding the surrender of persons to international tribunals. Effected by exchange of notes at Bandar Seri Begawan February 3 and March 3, 2004. Entered into force March 3, 2004. KAV 6410 (**Type 3, all tribunals**)

**BURKINA FASO (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Ouagadougou October 2 and 5, 2003. Entered into force October 14, 2003. KAV 6330 (**Type 2, ICC only**)

**BURUNDI (SP)**

Agreement regarding the surrender of persons to international tribunals. Signed at Bujumbura July 5, 2003. Entered into force July 24, 2003. KAV 6299 (**Type 3, all tribunals**)

**CAMBODIA (SP)**

Agreement regarding the non-surrender of persons to the International Criminal Court. Signed at Phnom Penh June 27, 2003. Entered into force June 29, 2005. KAV 7266 (**Type 2, ICC only**)

**CAMEROON (SIG)**

Agreement regarding the surrender of persons to international tribunals. Signed at Yaounde December 1, 2003. Entered into force December 1, 2003. KAV 6347 (**Type 1, all tribunals**)

**CAPE VERDE (SIG)**

Agreement regarding the surrender of persons to international tribunals. Signed at Washington April 16, 2004. Entered into force November 19, 2004. KAV 7054 (**Type 2, all tribunals**)

**CENTRAL AFRICAN REPUBLIC (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington and Bangui January 13 and 19, 2004. Entered into force January 19, 2004. KAV 6383 (**Type 2, ICC only**)

**CHAD (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at N'Djamena March 26 and June 30, 2003. Entered into force June 30, 2003. KAV 6217 (**Type 2, ICC only**)

**COLOMBIA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Bogota September 17, 2003. Entered into force September 17, 2003. KAV 6317 (**Type 1, ICC only**)

**COMOROS (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Moroni June 30, 2004. Entered into force June 30, 2004. KAV 6541 (**Type 2, ICC only**)

**CONGO, DEMOCRATIC REPUBLIC OF THE (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington March 19, 2003. Entered into force July 22, 2003. KAV 6296 (**Type 2 ICC only**)

**CONGO, REPUBLIC OF (SP)**

Agreement regarding the Surrender of Persons to the International Criminal Court. Signed at Brazzaville June 2, 2004. Entered into force June 2, 2004. KAV 6491 (**Type 2, ICC only**)

**COTE D'IVOIRE (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Abidjan June 30, 2003. Entered into force October 16, 2003. KAV 6333 (**Type 3, ICC only**)

**DJIBOUTI (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington January 24, 2003. Entered into force July 2, 2003. KAV 6220 (**Type 2, ICC only**)

**DOMINICA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Washington and Roseau May 10, 2004. Entered into force May 20, 2004. KAV 6456 (**Type 1, ICC only**)

**DOMINICAN REPUBLIC (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Santo Domingo September 13, 2002. Entered into force August 12, 2004. KAV 6703 (**Type 2, ICC only**)

**EGYPT (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Cairo February 26 and March 5, 2003. Entered into force March 5, 2003. KAV 6133 (**Type 2, ICC only**)

Agreement extending the agreement of February 26 and March 5, 2003 regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Cairo March 1 and 2, 2005. Entered into force March 2, 2005. KAV 7136

Agreement extending the agreement of February 26, 2003, as extended, regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Cairo February 21 and 26, 2007. Entered into force February 26, 2007; effective March 5, 2007. KAV 7922

**EL SALVADOR (NSP)**

*Unknown title, rumoured to have been signed on 25 October 2002. Not in TIF 2007. Confirmed door State Department Press Release <http://www.state.gov/r/pa/prs/ps/2003/21539.htm>; visited 12 November 2008 (Unknown type)*

**EQUATORIAL GUINEA (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at New York September 25, 2003. Entered into force May 6, 2004. KAV 6454 (**Type 3, ICC only**)

**ERITREA (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington July 8, 2004. Entered into force July 8, 2004. KAV 6546 (**Type 2, ICC only**)

**FIJI (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Suva December 17, 2003. Entered into force December 17, 2003. KAV 6343 (**Type 1, ICC only**)

**GABON (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Libreville February 26 and April 15, 2003. Entered into force April 15, 2003. KAV 6173 (**Unknown type, ICC only**)

**GAMBIA, THE (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Banjul October 5, 2002. Entered into force June 27, 2003. KAV 6213 (**Type 2, ICC only**)

**GEORGIA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Tbilisi February 10, 2003. Entered into force June 26, 2003. KAV 6208 (**Type 2, ICC only**)

**GHANA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Accra April 17, 2003. Entered into force October 31, 2003. KAV 6340 (**Type 2, ICC only**)

**GRENADA (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Washington and New York March 11, 2004. Entered into force March 11, 2004. KAV 6427 (**Type 1, ICC only**)

**GUINEA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Conakry August 23, 2003. Entered into force March 25, 2004. KAV 6434 (**Type 2, ICC only**)

**GUINEA-BISSAU (SIG)**

Agreement regarding the surrender of persons to International Tribunals. Effected by exchange of notes at Kakar and Bissau January 28 and February 2, 2005. Entered into force February 8, 2005. KAV 7365 (**Type 2, all tribunals**)

**GUYANA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Georgetown December 11, 2003. Entered into force May 18, 2004. KAV 6467 (**Type 1, ICC only**)

**HAITI (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Monterrey January 12, 2004. Entered into force January 12, 2004. KAV 6380 (**Type 2, all tribunals**<sup>3</sup>)

**HONDURAS (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at New York September 19, 2002. Entered into force June 30, 2003. KAV 6218 (**Type 2, ICC only**)

**INDIA (NSP)**

Agreement regarding the surrender of persons to international tribunals. Signed at New Delhi, December 26, 2002. Entered into force December 3, 2003. KAV 6485 (**Type 3, all tribunals**)

**ISRAEL (NSP)**<sup>4</sup>

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Jerusalem August 4, 2002. Entered into force November 27, 2003. KAV 6368 (**Type 2, ICC only**)

**KAZAKHSTAN (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at New York September 22, 2003. Entered into force October 7, 2004. KAV 7024 (**Type 2, ICC only**)

**KIRIBATI (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Tarawa March 4, 2004. Entered into force March 4, 2004. KAV 6411 (**Type 3, ICC only**)

**LAO PEOPLE'S DEMOCRATIC REPUBLIC (NSP)**

Agreement regarding the surrender of persons to international tribunals. Signed at Vientiane December 24, 2003. Entered into force December 24, 2003. KAV 6342(**Type 3, all tribunals**)

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<sup>3</sup> Contrary to its title, this agreement applies to all international tribunals.

<sup>4</sup> Israel signed the ICC Statute on 31 December 2000, but informed the United Nations Secretary General on 28 August 2002 that "in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [...] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." See status chart of the ICC Statute. Available via: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=373&chapter=18&lang=en#3>; visited 12 November 2008.

**LESOTHO (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Maseru June 21, 2006. Entered into force June 21, 2006. KAV 7684 (**Type 1, ICC only**)

**LIBERIA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington October 8, 2003. Entered into force November 3, 2003. KAV 6354 (**Type 2, ICC only**)

**MACEDONIA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Skopje June 30, 2003. Entered into force November 12, 2003. KAV 6358 (**Type 1, ICC only**)

**MADAGASCAR (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Antananarivo April 23, 2003. Entered into force August 4, 2003. KAV 6303 (**Type 2, ICC only**)

**MALAWI (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Lilongwe September 23, 2003. Entered into force September 23, 2003. KAV 6320 (**Type 1, ICC only**)

**MALDIVES (NSP)**

Agreement regarding the surrender of persons to international tribunals. Signed at Male and Colombo April 8 and 10, 2003. Entered into force July 8, 2003. KAV 6228 (**Type 3, all tribunals**)

**MARSHALL ISLANDS (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Majuro September 10, 2002. Entered into force June 26, 2003. KAV 6209 (**Type 2, ICC only**)

**MAURITANIA (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at New York September 17, 2002. Entered into force July 6, 2003. KAV 6222 (**Type 3, ICC only**)

**MAURITIUS (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington June 25, 2003. Entered into force June 30, 2003. KAV 6215 (**Type 2, ICC only**)

**MICRONESIA, FEDERATED STATES OF (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington September 24, 2002. Entered into force June 30, 2003. KAV 6216 (**Type 3, ICC only**)

**MONGOLIA (SP)**

Agreement regarding the surrender of U.S. persons to third parties. Effected by exchange of notes at Washington June 6, 2003. Entered into force June 27, 2003. KAV 6212 (**Type 1, all tribunals**)

**MONTENEGRO (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Podgorica April 17 and 19, 2007. Entered into force April 19, 2007. KAV 8023 (**Type 2, ICC only**)

**MOROCCO (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at New York September 24, 2003. Entered into force November 19, 2003. KAV 6355 (**Type 2, ICC only**)

**MOZAMBIQUE (SIG)**

Agreement regarding the surrender of persons to international tribunals. Signed at Maputo June 24, 2003. Entered into force March 2, 2004. KAV 6409 (**Type 2, all tribunals**)

**NAURU (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington February 26, 2003. Entered into force December 4, 2003. KAV 6363 (**Type 2, ICC only**)

**NEPAL (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Kathmandu December 31, 2002. Entered into force July 22, 2003. KAV 6297 (**Type 3, ICC only**)

**NICARAGUA (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Managua June 4, 2003. Entered into force September 12, 2003. KAV 6315 (**Type 3, ICC only**)

**NIGERIA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Abuja June 30, 2003. Entered into force October 6, 2003. KAV 6327 (**Type 2, ICC only**)

**OMAN (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court, with understanding. Effected by exchange of notes at Muscat July 26 and August 1, 2004. Entered into force August 1, 2004. KAV 6709 (**Type 2, ICC only**)

**PAKISTAN (NSP)**

Agreement regarding the surrender of persons to international tribunals. Signed at Washington July 21, 2003. Entered into force November 6, 2003. KAV 6356 (**Type 3, all tribunals**)

**PALAU (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Koror September 13, 2002. Entered into force July 7, 2003. KAV 6226 (**Type 3, ICC only**)

**PANAMA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Panama June 23, 2003. Entered into force November 6, 2003. KAV 6359 (**Type 2, ICC only**)

**PAPUA NEW GUINEA (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington September 30, 2004. Entered into force September 30, 2004. KAV 7022 (**Type 2, ICC only**)

**PHILIPPINES (SIG)**

Agreement regarding the surrender of persons to international tribunals. Effected by exchange of notes at Manila May 9 and 13, 2003. Entered into force May 13, 2003. KAV 6185 (**Type 2, all tribunals**)

**ROMANIA (SP)**

*Agreement between the Government of the United States of America and the Government of Romania regarding the surrender of persons to the International Criminal Court. Signed at Bucharest, 1 August 2002. Did not yet enter into force (Type 1, ICC only)*

**RWANDA (NSP)**

Agreement regarding the surrender of persons to international tribunals. Signed at Washington March 4, 2003. Entered into force July 11, 2003. KAV 6229 (**Type 3, all tribunals**)

**SAINT KITTS AND NEVIS (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Washington January 31, 2005. Entered into force January 31, 2005. KAV 7105 (**Type 2, ICC only**)

**SAO TOME AND PRINCIPE (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Libreville and Sao Tome November 6 and 12, 2003. Entered into force November 12, 2003. KAV 6352 (**Type 2, ICC only**)

**SENEGAL (SP)**

Agreement concerning the surrender of persons to the International Criminal Court. Signed at Dakar June 19, 2003. Entered into force June 27, 2003. KAV 6211 (**Type 1, ICC only**)

**SEYCHELLES (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Victoria June 4, 2003. Entered into force July 17, 2003. KAV 6294 (**Type 2, ICC only**)

**SIERRA LEONE (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Freetown March 31, 2003. Entered into force May 20, 2003. KAV 6189 (**Type 2, ICC only**)

**SINGAPORE (NSP)**

Agreement regarding the surrender of persons to international tribunals. Effected by exchange of notes at Singapore October 17, 2003. Entered into force October 17, 2003. KAV 6334 (**Type 3, all tribunals**)

**SOLOMON ISLANDS (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington September 19, 2003. Entered into force March 17, 2004. KAV 6430 (**Type 1, ICC only**)

**SRI LANKA (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Colombo November 22, 2002. Entered into force July 4, 2003. KAV 6221 (**Type 3, ICC only**)

**SWAZILAND (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Mbane May 10, 2006. Entered into force September 20, 2006. KAV 7766 (**Type 1, ICC only**)

**TAJIKISTAN (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Dushanbe August 26, 2002. Entered into force June 23, 2003. KAV 6205 (**Type 3, ICC only**)

**THAILAND (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Bangkok June 3, 2003. Entered into force June 3, 2003. KAV 6193 (**Type 2, ICC only**)

**TIMOR-LESTE (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Dili August 23, 2002. Entered into force October 30, 2003. KAV 6339 (**Type 2, ICC only**)

**TOGO (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Lome June 13, 2003. Entered into force January 15, 2004. KAV 6382 (**Type 3, ICC only**)

**TONGA (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington March 21, 2003. Entered into force March 24, 2004. KAV 6433 (**Type 3, ICC only**)

**TUNISIA (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Tunis June 5, 2003. Entered into force December 22, 2003. KAV 6361 (**Type 3, ICC only**)

**TURKMENISTAN (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Ashgabat December 25, 2003. Entered into force January 30, 2004. KAV 6386 (**Type 3, ICC only**)

**TUVALU (NSP)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Suva and Funafuti September 19, 2002 and January 9, 2003. Entered into force February 3, 2003. KAV 6367(**Type 2, ICC only**)

**UGANDA (SP)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington June 12, 2003. Entered into force October 23, 2003. KAV 6338 (**Type 2, ICC only**)

**UNITED ARAB EMIRATES (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Effected by exchange of notes at Abu Dhabi January 27 and February 15, 2004. Entered into force February 15, 2004. KAV 6392 (**Type 2, ICC only**)

**UZBEKISTAN (SIG)**

Agreement regarding the surrender of persons to the International Criminal Court. Signed at Washington September 18, 2002. Entered into force January 7, 2003. KAV 6120 (**Type 2, ICC only**)

**YEMEN (SIG)**

Arrangement regarding the surrender of persons to international tribunals. Effected by exchange of notes at Washington and Sanaa December 10 and 17, 2003. Entered into force December 17, 2003. KAV 6344 (**Type 2, all tribunals**)

**ZAMBIA (SP)**

Agreement regarding the surrender of persons to international tribunals. Signed at Lusaka July 1, 2003. Entered into force July 2, 2003. KAV 6219 (**Type 2, all tribunals**)

**ANNEX III:  
Standard bilateral ‘non-surrender’ agreement**

**Preamble**

The Government of the United States of America and the Government of X, hereinafter “the Parties”

**REAFFIRMING** the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

**RECALLING** that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,<sup>1</sup>

**CONSIDERING** that the Parties have each expressed their intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,

**BEARING IN MIND** Article 98 of the Rome Statute,<sup>2</sup>

**HEREBY AGREE AS FOLLOWS:**

**Article A**

For purposes of this agreement, “persons” are current or former Government officials, employees (including contractors), or military personnel or nationals of **the United States (Type 1) / one Party (Type 2)**.

**Article B**

Persons of **the United States (Type 1) / one Party (Type 2)** present in the territory of the other shall not, absent the expressed consent of the **Government of the United States (Type 1) / first Party (Type 2)**,

- (a) be surrendered or transferred by any means **to the International Criminal Court / any international tribunal** for any purpose, **unless such tribunal has been established by the UN Security council** or
- (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to **the International Criminal Court / any international tribunal unless such tribunal has been established by the UN Security council**.

**Article C**

When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to **the International Criminal Court / any international tribunal unless such tribunal has been established by the UN Security council** by the third country, absent the expressed consent of the Government of X.

**Article D**

When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the **International Criminal Court / any international tribunal unless**

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<sup>1</sup> This preambular paragraph is absent in the agreements that apply to all international tribunals.

<sup>2</sup> *Ibid.*

such tribunal has been established by the UN Security council by the third country, absent the expressed consent of the Government of the United States.

#### **Article E**

Each Party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal Court.

#### **Article F**

This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

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