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Justice for Some - U.S. Efforts under Article 98 to Escape the Jurisdiction of the International Criminal Court

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Introduction

In April 2002, ten countries ratified the Rome Statute of the International Criminal Court and deposited their instruments with the United Nations. These actions brought the International Criminal Court (ICC or the Court) into force with over sixty ratifications. A month later, the United States declared that it no longer intended to pursue ratification of the treaty and asked to remove its signature from the statute. The United States then launched a campaign to ensure that its nationals would not fall within the jurisdiction of the Court.

The U.S. campaign is to secure control over a narrow area where it shares jurisdiction with the ICC. The Rome Statute lists the ways in which the ICC can have jurisdiction over a matter. Because the United States is not a party to the treaty, the ICC’s jurisdiction will not apply to it most of the time. The United States is concerned, however, about a situation where a U.S. national is accused of a crime in the territory of a state that is a party to the Rome Statute. In such a situation, the state (where the crime occurred) is obligated to surrender the U.S. national to the ICC if the state is unable or

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unwilling to prosecute the matter. This obligation applies even when
the accused is a national of a state that is not a party to the Rome
Statute. This means that the ICC potentially has jurisdiction over the
nationals of non-state parties, a major concern for the United States.

To ensure that the ICC does not gain jurisdiction over its
nationals under any circumstance, the United States is currently
seeking "non-surrender" bilateral agreements with other states. The
United States justifies these agreements based on its interpretation of
Article 98(2) of the Rome Statute. These bilateral agreements will
allow the United States, and potentially other countries, to opt out of
the ICC's jurisdiction.

The ICC was designed to address some of the most egregious
wrongs, especially wrongs committed by those who would hide
behind the color of authority. If given a chance to operate as
intended, the Court may serve as an effective deterrent to such
heinous crimes. The danger of U.S. bilateral agreements under
Article 98(2) is that they could undermine the legitimacy of the new
Court, and these agreements may effect the Court's potential to
become an effective institution for redressing wrongs. U.S. efforts to
avoid the Court's jurisdiction may also threaten its own legitimacy as
an international leader in bringing to justice the perpetrators of war
crimes and crimes against humanity.

This note will discuss how U.S. bilateral agreements will effect
the legitimacy of the ICC. It will first trace the development of the
ICC. Next, it will examine the U.S. position on the ICC in order to
gain some insight into U.S. animosity towards the Court. Finally, the
note will trace U.S. efforts to secure immunity from the Court,
focusing on the U.S. interpretation of Article 98(2) of the Rome
Statute.

I. History

The idea of establishing an international forum to prosecute
gross violators of human rights norms dates back as far as 1899. In
that year, the First Hague Convention for the Pacific Settlement of

3. See Rome Statute of the International Criminal Court, United Nations
Diplomatic Conference of Plenipotentiaries on the Establishment of an International
4. M. Cherif Bassiouni & Christopher L. Blakesley, The Need for an
International Criminal Court in the New International World Order, 25 VAND. J.
International Disputes was convened. At the end of World War I, these ideas resurfaced and there was a movement to establish an international criminal tribunal. In fact, the 1919 Treaty of Versailles called for an international tribunal to prosecute Kaiser Wilhelm for crimes against morality. And the 1923 Treaty of Sevres between the Allies and Turkey called for a tribunal to prosecute those responsible for the deaths of more than a half million Armenians. Although the international tribunal never came to fruition, these efforts illustrate the growing need and pressure to create a forum to try those who violate international norms.

Unfortunately, due to the political climate, there was no real progress in the movement towards an international criminal tribunal after World War I; although Kaiser Wilhelm was tried, the charges were subsequently dismissed. However, the international community was ready to make great strides in the pursuit of a permanent court after World War II.

A. The Nuremberg and Tokyo Tribunals

The gross violations of human rights and the countless war crimes committed in World War II motivated the international community to create an ad hoc international criminal tribunal. In 1945, at the end of the war, the Allies promulgated the London Charter that established the International Military Tribunal at Nuremberg. This was a significant step towards establishing a permanent court for several reasons. First, it recognized that individuals could be held accountable on an international level. Second, it limited the use of traditionally accepted defenses such as

5. Id.
8. Peter, supra note 6, at 181 (Kaiser Wilhelm sought asylum in the Netherlands, which refused to extradite him because the charges were politically motivated. The Allies never prosecuted Turkish officials. The Allies feared the possibility of Turkey becoming communist and opted instead for closer relations).
10. Id.
11. Id. at 304-05.
the superior orders defense and the Act of State defense. The superior orders defense allowed a government official to assert that he was merely following orders and therefore could not be held accountable for his actions. The Act of State defense allowed a party to claim immunity under the theory that the action was an act of a sovereign state, which another country or international tribunal could not judge. Third, the tribunal was significant because it codified norms, violations of which would result in prosecution. The definition of crimes against humanity used by the Nuremberg Tribunal has been incorporated by subsequent tribunals.

Similarly in Japan, a tribunal was established to try Japanese officials for war crimes and crimes against humanity. Although the Tokyo Tribunal was created by the declaration of General Douglas MacArthur, rather than by a commission consisting of allied states, it had international support and its judges represented a variety of nations.

The Nuremberg and Tokyo Tribunals were able to successfully prosecute accomplices for war crimes and crimes against humanity, but the tribunals sustained criticism and were referred to as the “victor’s vengeance.” Many criticized the tribunals because they were inconsistent. In contrast to Nuremberg, which tried high-ranking Nazis, Emperor Hirohito received immunity from prosecution in Tokyo. The general standard of proof used to convict war criminals in both tribunals was low. In addition, critics argued the Allies were applying laws ex post facto. This was partially due to the fact that the international community failed to codify norms

12. Id. at 304.
13. Id.
14. Id.
15. Id. at 303 (the London Charter defined three categories of crimes: war crimes; crimes against humanity; and crimes against peace).
18. Id.
20. Griffin, supra note 17, at 412-20.
21. Id. at 415-19 (asserting that the inconsistencies between Nuremberg and Tokyo were a result of the different political climates. While Germany surrendered unconditionally, Japan refused to do so, preferring instead to fight for every island until the United States agreed to grant immunity to Emperor Hirohito.).
proscribing crimes against humanity after World War I.23

Regardless of its flaws, both the Nuremberg and the Tokyo
Tribunals made significant headway in the journey to a permanent
international criminal court.

B. The Cold War: A Few Steps Back

Unfortunately the Cold War stymied further progress in
establishing a permanent criminal court.24 While the international
community under the auspices of the United Nations created a
permanent court for state-to-state disputes (the International Court of
Justice), there was no similar tribunal created to try individuals for
war crimes and crimes against humanity.25 As a result, various
atrocities occurred unchecked.26 The civil war in Nigeria, for
example, saw gross violations of human rights, mass murder and war
crimes, yet the actors were never punished.27

The international community did take steps to create a
permanent international criminal tribunal, however these efforts were
stymied by political considerations. In 1948, the United Nations
General Assembly adopted the Convention on the Prevention and
Punishment of the Crime of Genocide.28 The convention called for an
international penal tribunal to prosecute individuals who violate the
convention.29 Subsequently, the General Assembly asked the
members of the International Law Commission to research the
possibility of establishing an international penal tribunal. However,
due to opposition from states, the Commission’s work toward
creating this penal tribunal was halted in order to clarify the
definition of “aggression.”30 The issue of establishing an international
criminal tribunal would not be addressed again until after the Cold
War.

In 1989, the notion of a permanent court returned to the
foreground when Trinidad and Tobago made an appeal to the United

23. Id.
24. Peter, supra note 6, at 183.
25. Id. at 184.
26. See id. (pointing to the atrocities that occurred in Cambodia under the Khmer
Rouge and Iraq under Saddam Hussein).
27. Bassiouni, supra note 7, at 7.
29. See Peter, supra note 6, at 184.
30. Id.
Nations. Trinidad was having a difficult time prosecuting individuals for international drug trafficking and sought an international criminal court. In response, the United Nations asked the International Law Commission to develop a draft statute. The draft statute would not be completed and returned to the General Assembly until 1994. In the interim, two cataclysmic events—the conflicts in former Yugoslavia and Rwanda—forced the international community to forge ahead with plans to create ad hoc tribunals similar to Nuremberg.

C. International Criminal Tribunals for Yugoslavia and Rwanda

The struggles for independence in Yugoslavia between 1991 and 1992 saw so many atrocities—euphemistically termed “ethnic cleansing”—that the international community felt compelled to bring the violators to justice. “Murders, beatings, rapes, concentration camps, confiscation of property, and the burning of villages” became a widely practiced government policy. In response, the United Nations created an ad hoc tribunal called the International Criminal Tribunal for Yugoslavia (ICTY). The court was created pursuant to a provision of the U.N. Charter that gives the Security Council the authority to take appropriate measures to respond to a breach of peace or threat to peace. Although it was criticized, the ICTY was a sign that the international community was ready to discuss creating a forum to prosecute genocide, war crimes and crimes against humanity.

In 1994, a year after the ICTY was established, a civil war in Rwanda resulted in approximately 800,000 deaths. In an effort to consolidate his rule and homogenize the nation, President Habyarimana set into motion the systematic killing of minority Tutsis. Upon his death, Habyarimana’s plan was carried out with deadly accuracy by all levels of Hutu society, who singled out and

31. Id. at 185.
32. Id.
33. Id. at 186.
34. Rancilio, supra note 9, at 322.
35. See Griffin, supra note 17, at 422.
36. Id. at 425.
37. Id. at 426.
39. Griffin, supra note 17, at 421.
40. Id. at 429.
slaughtered the Tutsis, as well as the Hutus who sympathized with them. In response, the United Nations established an ad hoc tribunal in Rwanda to try individuals for genocide war crimes and crimes against humanity.

D. The Rome Statute and the International Criminal Court

The ad hoc tribunals in Yugoslavia and Rwanda motivated the General Assembly to promote the idea of an international criminal court. Accordingly, the General Assembly established a Preparatory Committee to finalize a draft statute and present it before the Convention for the International Criminal Court. On July 17, 1998 an overwhelming majority of states present at the Convention voted in favor of establishing a permanent international criminal court. The Court came into force in April 2002, when the sixtieth state deposited its ratification of the Rome Statute.

II. U.S. Opposition to the ICC

The U.S. position on the International Criminal Court changed remarkably over the years. The United States played an instrumental role in the events leading up to the Rome Conference of 1998. They even sent delegations to help develop the Elements of Crimes and Rules of Procedure and Evidence that would be used by the Court. The United States withdrew its support once it became apparent that it would not be able to control the Court's docket. Although the United States became a signatory to the Rome Statute under President Clinton's administration, in May 2002, John Bolton, Under Secretary of State for Arms Control and International Security, sent a letter to the United Nations announcing that the United States was going to "unsigned" the treaty. Even though it was a signatory to the Rome Statute, the United States was not bound by it because a two-

41. Id. at 430-31.
42. Id. at 422.
44. Id. at 535.
45. Rancilio, supra note 9, at 323.
47. Id.
48. Id. at 879.
49. See Fact Sheet, supra note 2.
thirds majority in the Senate had not ratified the treaty. Signing onto a treaty therefore, can be a political tool used by states to show support for a proposal without putting the proposal into effect. Here, the process of "unsigned" the treaty had a dramatic effect, signaling that the United States no longer supported the ICC.

Even though the United States "unsigned" the Rome Statute, the U.S. subsequent actions are against the object and purpose of the treaty. Pursuant to Article 18 of the Vienna Convention on the Law of Treaties (Vienna Convention), once a country has signed a treaty it may not act in a manner that defeats the object and purpose of the treaty. Yet the United States, by concluding Article 98 agreements and signing into law the American Servicemembers' Protection Act, has apparently acted in ways deliberately calculated to defeat the Rome Statute's object and purpose.

A. The United States' Position

U.S. officials put forth three main reasons why the United States opposes the International Criminal Court. Officials argue that the ICC violates accepted treaty law, that the Rome Statute runs counter to the U.S. Constitution (Constitution), and that the Court will be a forum to harass U.S. nationals in the hopes of frustrating U.S. efforts abroad. These concerns are briefly addressed below in order to provide an overview of the methods the United States is using to undermine the Court.

The United States argues that the ICC departs from traditional international law because it binds states that are not parties to the Rome Statute. The Vienna Convention states that a treaty cannot create obligations for non-party states. Therefore, the United States claims, the ICC is in violation of the Vienna Convention to the extent that it creates obligations for the United States as a non-party state.

The Rome Statute enumerates three circumstances under which
the ICC has jurisdiction to hear a case: \(^5\) (1) if a case is referred by a state that is a party to the treaty (State Party); \(^6\) (2) if a case is referred by the U.N. Security Council; \(^7\) and (3) if the ICC prosecutor initiates an investigation of a crime within the Court’s competence. \(^8\)

The Rome Statute further limits the ICC’s jurisdiction to cases where at least one state is a party to the treaty, unless the U.N. Security Council refers the matter. \(^9\) The ICC has jurisdiction if a crime falling within the Rome Statute occurs in the territory of a State Party to the treaty. \(^10\) In such instances, the ICC has jurisdiction even if the accused is a national of a non-party state. Also, the ICC has jurisdiction if the accused is a national of a State Party. \(^11\) Accordingly, if a war crime occurs in the territory of a State Party, or the person accused is a national of a State Party, then the Court has jurisdiction to hear the case. \(^12\) Ostensibly, a state that is not a party to the Rome Statute can be bound if the state’s national commits a war crime in the territory of a State Party.

For example, if a person is accused of systematic torture constituting a crime against humanity while within the territory of State X, and State X is a party to the Rome Statute, then State X can refer the matter to the ICC regardless of whether the accused is a national of a state that is a party to the treaty. Similarly, if a war crime is committed within the territory of State X by an individual who is a national of a State Party, then the ICC prosecutor can refer the case to the Court regardless of whether State X is a party to the statute or not. \(^13\) Also a state can specially accept the Court’s jurisdiction over a situation, even if it is not a party. \(^14\) This raises many concerns for the United States.

Furthermore, proponents of the position that the ICC violates accepted treaty law argue that by binding the United States, a non-party state, the ICC is defining criminal law for all Americans. \(^15\) This,
in turn, is problematic because the Court is not directly accountable to the American people.\textsuperscript{66}

The next category of U.S. arguments comes under the rubric of constitutional law. Opponents of the Rome Statute argue that the Court runs counter to the Constitution. Specifically, they point to constitutional provisions that are in conflict with the Rome Statute, including rights guaranteed to the accused and immunity of elected officials.\textsuperscript{67}

Because the ICC precludes official immunity and the Constitution grants qualified immunity, many argue that the two systems are incompatible.\textsuperscript{68} Proponents of this view argue that, in a worst-case scenario, a U.S. president may have to stand trial in the ICC for his actions in his capacity as the head of state. This procedure would be deemed contrary to U.S. law.

Furthermore, critics of the ICC argue that the ICC does not follow some of the procedural safeguards afforded the accused domestically, as enumerated in the Constitution and interpreted by the judiciary. The U.S. legal system guarantees the right to a jury trial; it does not allow the prosecutor to appeal an adverse ruling; and it has protections against unreasonable searches and seizures.\textsuperscript{69} The ICC, in contrast, does not offer a trial by jury; it allows the prosecutor to appeal; and it does not specifically offer protections against unreasonable searches and seizures.\textsuperscript{70}

The United States has also expressed concerns that the ICC may be used by other states to harass U.S. nationals. Because any state can file a complaint with the prosecutor for the ICC to redress crimes within the Court’s competence,\textsuperscript{71} the United States fears its nationals will find themselves before the Court defending frivolous claims against them. The United States argues that it is a prime target for this type of abuse because, as the last surviving superpower, it has troops and service personnel stationed around the world. The North Atlantic Treaty Organization’s (NATO) actions during the Kosovo

\textsuperscript{66} Id.

\textsuperscript{67} For a thorough discussion of the constitutional debate, see Diane Marie Amann, \textit{The United States of America and the International Criminal Court}, 50 AM. J. COMP. L. 381 (2002).

\textsuperscript{68} Id. at 392-93.

\textsuperscript{69} Id. at 395-96.

\textsuperscript{70} Id.

\textsuperscript{71} See Rome Statute, \textit{supra}, note 3, art. 12 (stating that a non party state can have access to the Court by submitting to its jurisdiction).
incursion, for example, were often characterized as war crimes.\textsuperscript{72} In fact, Serbia filed suit against NATO before the ICTY.\textsuperscript{73} Among its claims, Serbia alleged that NATO was responsible for wanton environmental destruction—a war crime—because it knowingly armed its airplanes with depleted uranium shells.\textsuperscript{74} This increases a bomb’s penetration capabilities but also leaves a radioactive trail on the environment that can be toxic.\textsuperscript{75}

Although the prosecutor for the ICTY decided not to litigate this matter, the United States argues that the Serbia suit is illustrative of the sort of abuse U.S. officials will face in the ICC. As a result, the United States will be slower to react in situations that require swift and decisive action for fear that its officials could be subject to an indictment by the ICC prosecutor.\textsuperscript{76}

\textbf{B. Criticisms of the U.S. Position}

Proponents of the ICC make three main arguments in response to the United States’ position. First, supporters argue that the ICC does not violate treaty law because it does not in fact bind non-party states. Second, they maintain that although it is not a perfect fit, the Rome Statute can coexist comfortably with the Constitution such that the spirit of both documents is respected and followed. And last, proponents assert that there are sufficient safeguards in the system to alleviate concerns that a state would use the ICC as a forum for harassing U.S. officials.

Supporters contend that the Rome Statute does not violate the Vienna Convention because it does not actually bind non-party states.\textsuperscript{77} Under the Rome Statute, nationals of a non-party state may be subject to the ICC’s jurisdiction if they are accused of a crime that took place in the territory of a State Party.\textsuperscript{78} However, this does not attach any new obligations to the non-party state, because individuals are already subject to the laws of a state they are in, regardless of

\begin{itemize}
  \item \textsuperscript{72} Arnaut, \textit{supra} note 43, at 557.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Joe Sills et al., \textit{Environmental Crimes in Military Actions and the International Criminal Court (ICC)—United Nations Perspectives}, Army Environmental Policy Institute (April 2001), available at <www.iccnow.org/html/aepi200104.doc>.
  \item \textsuperscript{75} Id. at 20.
  \item \textsuperscript{76} Arnaut, \textit{supra} note 43, at 559.
  \item \textsuperscript{78} Id.
\end{itemize}
their nationality.\textsuperscript{79}

Second, critics of the U.S. position maintain that the ICC is not substantially contrary to the Constitution in areas concerning official immunity or criminal procedure. Although the U.S. Supreme Court has interpreted the Constitution to grant immunity to officials while in office, it does not grant absolute immunity for criminal activity.\textsuperscript{80} The Constitution prescribes impeachment for misconduct by the government officials. Subsequent to impeachment, a criminal trial may follow where the former official may be tried and sentenced accordingly.\textsuperscript{81} In addition, some argue that impeachment and prosecution are two separate processes, and the Constitution does not expressly prohibit the prosecution of a sitting president.\textsuperscript{82}

Moreover, proponents of the ICC point out that the Constitution does not always guarantee a right to a trial by jury. In a court-martial, for example, the accused stands before a military judge and five service members but without a jury.\textsuperscript{83} Also, the proponents argue that the Sixth Amendment guarantees the right to a jury only for crimes that occur within the United States.\textsuperscript{84} Therefore, prosecuting a U.S. national before the ICC for crimes committed outside of the United States would not violate the Constitution.

Last, supporters of the ICC call attention to the safeguards designed to prevent using the Court as a forum for harassment. The complimentariness principle precludes the ICC from investigating a matter concurrently with a state.\textsuperscript{85} The ICC prosecutor must defer to a state that would normally have jurisdiction over the matter.\textsuperscript{86} If the United States is willing to investigate and prosecute its nationals for war crimes, genocide or crimes against humanity, if warranted, the U.S. would not have to submit to the jurisdiction of the ICC. The Court was designed to supplement pre-existing national legal institutions in instances where those institutions are so lacking in their ability or willingness to investigate a matter that their actions, in

\begin{flushleft}
\textsuperscript{79} Id.
\textsuperscript{80} Amann, \textit{supra} note 67, at 393.
\textsuperscript{81} See U.S. CONST. art. II, § 4.
\textsuperscript{82} See Amann, \textit{supra} note 67, at 394.
\textsuperscript{83} Id. at 397.
\textsuperscript{84} Id. (quoting the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”).
\textsuperscript{85} See Arnaut, \textit{supra} note 43, at 548.
\textsuperscript{86} See Rome Statute, \textit{supra} note 3, art. 18(1), (2).
\end{flushleft}
effect, allow violators to commit crimes with impunity.\textsuperscript{57} The ICC was not designed to take priority over functioning, pre-existing legal systems. Therefore the United States, with its highly sophisticated legal system, would be likely to retain jurisdiction over a matter to the exclusion of the ICC.

Moreover, because of the high threshold required to categorize actions as constituting genocide, crimes against humanity or war crimes, it is likely that the United States would investigate the matter should such a claim be made. A crime against humanity, for example, requires the commission of an act such as extermination "as part of a widespread or systematic attack directed against any civilian population."\textsuperscript{58} If a U.S. action rises to the level of a crime against humanity, it is likely that the United States will already be investigating the matter, precluding the ICC from conducting a similar investigation.

Also, there is a procedural mechanism that will filter out frivolous claims. Before a case can go forward, the pre-trial chamber can review the allegations and all the evidence surrounding a case to decide whether to issue a warrant against the accused or not.\textsuperscript{89} This added safeguard will allow the pre-trial chamber to screen out claims that do not rise to a level warranting prosecution.

Despite the criticisms, the United States is moving forward with a plan to secure immunity from the Court by signing bilateral agreements pursuant to Article 98 of the Rome Statue to prevent extradition of U.S. nationals.

\textbf{III. Article 98}

As a non-party state, the United States is not required to surrender accused persons to the ICC for prosecution, nor is it required to comply with requests to turn over evidence. Its main

\begin{itemize}
\item \textsuperscript{57} Gerard E. O'Connor, \textit{Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court}, 27 \textit{HOFSTRA L. REV.} 927, 963-64 (1999). Impunity should be distinguished from immunity in that the former refers to freedom from punishment while the latter refers to freedom from charge. Impunity as used in this piece has a negative connotation, implying that although a rule of law applies to a person, he can escape punishment for violating that law. Immunity, by contrast, means that the law itself does not apply to the person. In addition, while immunity is granted to a select group, impunity can apply generally, especially if there is a defect in the legal system. As a result, impunity potentially has a wider scope than immunity.
\item \textsuperscript{58} \textit{Rome Statute}, supra note 3, art. 7.
\item \textsuperscript{89} \textit{Id.} art. 58(1).
\end{itemize}
concern, however, is that a State Party to the Rome Statute may surrender a U.S. national to the ICC. For this to occur, a U.S. national would have to commit a crime falling within the Rome Statute in the territory of another state. And both the aggrieved state and the United States would have to be unable or unwilling to prosecute the matter. Although this is a remote possibility, the United States is taking steps to ensure it never occurs. To attain this objective, the United States has sought to use a loophole in the Rome Statute and to create a blanket exemption in the Rules of Procedure and Evidence. Pursuant to the former objective, the United States signed bilateral agreements with countries to preclude the surrender of U.S. nationals. Pursuant to the latter objective, the United States inserted a procedural requirement into the Rules of Procedure and Evidence that would have the effect of giving U.S. nationals a blanket exemption from the ICC's reach.

A. Interpreting Article 98(2)

Article 98 of the Rome Statute is entitled "Cooperation with respect to waiver of immunity and consent to surrender." Article 98(2) reads as follows:

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

Interpretation of this provision must conform to accepted principles of international law. Accordingly, the legislative history of the provision does not have as much weight as an interpretation derived from an ordinary reading of the provision.

A treaty must be interpreted according to the ordinary meaning

91. John R. Schmertz & Mike Meier, United States Has Persuaded Two Individual States Parties to Statute of International Criminal Court to Enter into Bilateral Arrangements with it Under Article 98(2) of Statute Whereby Party Agrees not to Turn Over American Service Members to ICC Without U.S. Consent, 8 INT'L L. UPDATE 116 (2002).
92. Keitner, supra note 90, at 242-44.
93. Rome Statute, supra note 3, art. 98.
94. Id.  art. 98(2).
95. Vienna Convention, supra note 52, art 32.
of the terms used. The terms of the treaty must be viewed as a whole so that each individual term is interpreted within the context of the entire provision. In addition to the actual provision, the term must be interpreted in the context of the entire treaty including the preamble and annexes. Last, the interpretation of the terms must be in light of the object and purpose of the treaty. The object and purpose of the Rome Statute is to ensure that those responsible for the most egregious crimes are tried according to the rule of law.

Using the "ordinary meaning of the term," Article 98(2) precludes the ICC from requesting the surrender of an accused within State A's custody if State A has a prior agreement with State B regarding the surrender of State B's nationals. In that situation, the ICC must first obtain the consent of State B before State A can release the accused. A closer look at the provision shows that it was not supposed to apply to any type of agreement between states but to a specific type of agreement.

Many argue that Article 98(2) applies to Status of Forces Agreements (SOFAs) between states. SOFAs are bilateral agreements between states that permit one state to deploy troops to the territory of the other state. These agreements allow the sending state to maintain jurisdiction over its military and civilian personnel while on foreign territory.

SOFAs allow the sending and receiving states to negotiate in what instances they will have jurisdiction over military personnel. Both states have an interest in the deployment of military personnel. The sending state gains access to strategic points in the world that act as staging grounds for troop deployment. In addition, the sending state has a place in which it can replenish supplies and make

96. Id. art. 31(1).
97. Id.
98. Id. art. 31(2).
99. Id. art. 31(1).
101. Id. at 6.
necessary repairs.\textsuperscript{104} The receiving state gains the added security of having additional military, and the SOFA helps to strengthen bonds between allies. Furthermore, the receiving state gains a commercial advantage from receiving military personnel.\textsuperscript{105}

There is a possibility of a conflict between a SOFA and the Rome Statute because a state may be under a SOFA obligation to return an accused to his home state as well as a concurrent obligation under the Rome Statute to surrender the accused to the ICC. To avoid this potential conflict, Article 98(2) was created. It requires the permission of the sending state before surrendering an accused to the ICC.

Because the preparation history of the Rome Statute cannot be given much weight, an interpretation of Article 98(2) must be based on the ordinary reading of the provision.\textsuperscript{106} An ordinary reading shows that the provision indeed refers to SOFAs. The term "sending state," as it is used in the article is one that is commonly used in SOFAs between states.\textsuperscript{107} "Sending state" is, in fact, a term of art used to denote a state that is deploying troops.\textsuperscript{108} Because this term is mostly used in SOFAs, it is likely that the use of this term in Article 98(2) was a reference to a Status of Forces Agreement.

Although it cannot be given much weight, the preparatory history of a treaty can be used as a supplemental means of interpretation.\textsuperscript{109} As such, it can be used to confirm the meaning derived from the ordinary reading of the provision.\textsuperscript{110} The drafters of Rome Statute were concerned the new treaty might conflict with pre-existing SOFAs.\textsuperscript{111} Although this account alone is not conclusive evidence of the meaning of Article 98(2), it helps to confirm the plain meaning of the provision.

The above interpretation is consistent with the object and purpose of the treaty.\textsuperscript{112} It ensures that a person accused of an

\textsuperscript{104} \textit{The Handbook of the Law of Visiting Forces} 12 (Dieter Fleck ed., 2001).
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} Vienna Convention, \textit{supra} note 52, art. 32.
\textsuperscript{107} Amnesty Report, \textit{supra} note 100, at 7.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} Vienna Convention, \textit{supra} note 52, art. 32.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{See Memorandum from the NGO Coalition for the International Criminal Court, at }<\text{www.icnnow.org/html/ciccart98memo20020823.pdf}> (Aug. 23, 2002) [hereinafter CICC Memo].
\textsuperscript{112} \textit{See Rome Statute, \textit{supra} note 3, pmbl. (professing that the purpose of the
egregious crime is tried either by a national court or by the ICC—if the national court is unable or unwilling to perform its duties. Where there is a SOFA involved and the ICC is unable to demand the surrender of the accused without the consent of the sending state, the SOFA provides for a trial either by the state where the crime was committed or the accused’s state of nationality.

B. U.S. Bilateral Agreements Under Article 98(2)

In May 2002, Undersecretary of State John Bolton sent a letter to the United Nations saying that the United States no longer supported the ICC. The United States then commenced a worldwide campaign to ensure that, as a non-party state, its nationals would not be subject to the jurisdiction of the Court. To further this goal, the United States drafted bilateral agreements pursuant to Article 98(2). These agreements were circulated among party and non-party states alike. The goal of the bilateral agreements was to obligate a state to surrender U.S. nationals to the United States instead of the ICC. However, this has been an uphill battle, and the United States has met opposition both from states and from non-governmental organizations (NGOs) that favor the ICC. Proponents of the ICC question the legality of these “so-called bilateral agreements.”

The United States negotiates three types of bilateral agreements depending on a state’s relationship to the ICC. If a state is a party to the Rome Statute, the United States negotiates either a reciprocal or a non-reciprocal agreement. In reciprocal bilateral agreements, both states agree not to deliver each other’s nationals to the ICC. In non-reciprocal agreements, the state agrees not to surrender United States nationals to the ICC; however, the United States is not under the same obligation. If a state is not a party to the Rome Statute, the United States negotiates a bilateral agreement that also prevents the state from sending U.S. nationals to third party states

Court is to guarantee enforcement of international justice as it is complementary to national law).

113. See Fact Sheet, supra note 2.
115. Amnesty Report, supra note 100, at 19.
116. Id. at 19-20.
117. Id. at 20.
118. Id.
that are party to the ICC.\footnote{Id.} This prevents the non-party state from surrendering a U.S. national to a state that can then surrender the national to the ICC.

Reciprocal bilateral agreements can potentially increase the number of individuals that can escape the jurisdiction of the court and escape prosecution altogether. In a reciprocal bilateral agreement, each state agrees not to surrender nationals of the other to the Court. Specifically, U.S. bilateral agreements preclude participating states from surrendering American nationals to the ICC, and place similar obligations on the United States to preclude the surrender of the participating states' nationals to the Court. However, these nationals might not escape prosecution entirely if they can be tried in a domestic forum. A national of a state that has conducted a bilateral agreement with the United States is generally less likely to escape justice in the United States than a U.S. national in that country's domestic courts. Any national of the bilateral agreement signatories may escape justice if the state in which he is detained is "unable" to prosecute the matter. But as a practical matter, the United States is almost always willing and able to handle even complex cases, such as those involving charges of crimes against humanity. Given the countries with which the United States has concluded bilateral agreements, a U.S. national is likely to be detained in a country with a less-developed legal system, and has a correspondingly greater chance of escaping prosecution because of that country's inability to try him. U.S. nationals may, therefore, be able to escape both ICC jurisdiction and domestic prosecution.

The issue can be further exacerbated if other states decide to emulate the United States and enter into reciprocal bilateral agreements with one another. This will increase, exponentially, the number of individuals who can escape the jurisdiction of the court.

Imagine a scenario where State A and State B have signed a reciprocal bilateral agreement with each other that prevents either state from surrendering the other's nationals to the ICC. Assume further that State B is not a party to the Rome Statute. If a national of State B commits crimes against humanity on the territory of State A and State A is "unable" to prosecute the matter, State A will also be barred from surrendering the accused to the ICC because of the agreement. State A may have to surrender the national to State B who can conduct an insufficient investigation, or no investigation at
all, and dismiss the claim against its national. As a result, the accused may escape punishment for his conduct. If the U.S. bilateral treaty campaign develops into a trend, it is possible that other countries will follow suit and commence similar campaigns. This may increase the number of individuals who can escape the jurisdiction of the court.

These reciprocal bilateral agreements are also potentially problematic to the legitimacy and effectiveness of the ICC. The more countries that gain immunity from the jurisdiction of the Court, the less prestige the Court will have and the less the Court will be seen as a vehicle for international justice. These reciprocal agreements, therefore, have the potential of reducing the ICC to the status of a paper tiger. Should other states follow the United States' lead and conclude reciprocal agreements with one another, it will have a detrimental effect on the legitimacy of the Court. In order for the Court to effectively act as a vehicle for justice, it must have teeth capable of biting anyone who would violate international norms. Or, it must be perceived as having such teeth. Once states become immune to the bite, the Court will lose its ability to act as a deterrent. Once this is lost, even more countries will try to opt out of the Court's jurisdiction.

At the time this note went into publication, the United States had successfully negotiated bilateral agreements with sixty-five countries.120 These countries include: Afghanistan; Albania; Antigua & Barbuda; Azerbaijan; Bahrain; Bangladesh; Bhutan; Bolivia; Bosnia & Herzegovina; Botswana; Cambodia; Colombia; Congo; Djibouti; Dominican Republic; East Timor; Egypt; El Salvador; Gabon; Gambia; Georgia; Ghana; Guinea; Honduras; India; Israel; Ivory Coast; Kazakhstan; Kuwait; Liberia; Macedonia; Madagascar; Malawi; Maldives; Marshall Islands; Mauritania; Mauritius; Micronesia; Mongolia; Morocco; Mozambique; Nauru; Nepal; Nicaragua; Nigeria; Pakistan; Palau; Panama; Philippines; Romania; Rwanda; Senegal; Seychelles Islands; Sierra Leone; Solomon Islands; Sri Lanka; Tajikistan; Thailand; Togo; Tonga; Tunisia; Tuvalu; Uganda; Uzbekistan; and Zambia.121 Of these agreements, fourteen

120. See Washington Working Group on the International Criminal Court, Countries With Bilateral Immunity Agreements, at <www.wfa.org/issues/wicc/article98/tableofbias.html> (Oct. 29, 2003) (listing countries that have signed bilateral agreements with the United States) [hereinafter Bilateral Agreements].

121. Id.
are known to be reciprocal bilateral agreements.\textsuperscript{122}

\textbf{C. The Stick Used to Encourage Bilateral Agreements}

On August 2, 2002, President Bush signed the American Servicemembers’ Protection Act (ASPA or Act)\textsuperscript{123} into law. The Act gives the United States substantial leverage in its campaign to conclude non-surrender bilateral agreements. This act will have a resounding negative effect on other countries, on the United Nations and ultimately, on the legitimacy of the ICC. In essence, the ASPA severely limits U.S. cooperation with the ICC to instances where the president specifically deems it necessary to aid the Court.\textsuperscript{124} The ASPA also takes the additional step of limiting U.S. participation in peacekeeping and peace enforcing operations under the auspices of the United Nations.\textsuperscript{125} And the ASPA allows the United States to withhold military assistance to states that have ratified the Rome Statute.\textsuperscript{126}

The ASPA may have the effect of limiting international organizations, including the United Nations, from collaborating with the ICC. This will compromise the effectiveness of the ICC and its legitimacy will further plummet. Section 7425(b) of the ASPA prevents the United States from giving information to the United Nations that relates to a matter that is under investigation by the ICC, unless there are assurances that the information will not be made available to the Court.\textsuperscript{127}

The implication of this provision is that the United Nations may not be able to collaborate or share information with the ICC. The United States, as a common practice, may require assurances from the United Nations before it turns over any information. For example, if the United States is involved in collecting information for a U.N. agency, the United States may first require the agency to sign an agreement not to release the information to the ICC, should the

\begin{itemize}
\item \textsuperscript{122} \textit{id.} (listing reciprocal bilateral agreements with Azerbaijan, Bangladesh, Georgia, India, Israel, Nepal, Pakistan, Philippines, Rwanda, Seychelles Islands, Sierra Leone, Sri Lanka, Tajikistan and Uganda).
\item \textsuperscript{123} The American Servicemembers’ Protection Act was proposed as an amendment to the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, 22 U.S.C. §§ 7421-7432 (2003).
\item \textsuperscript{124} \textit{id.} § 7430.
\item \textsuperscript{125} \textit{id.} § 7424.
\item \textsuperscript{126} \textit{id.} § 7426.
\item \textsuperscript{127} \textit{id.} § 7425(b).
\end{itemize}
information become relevant to an investigation by the Court. Such a provision would greatly limit the resources of the ICC and would require the Court to conduct duplicative inquiries.

Similarly, section 7429 of the ASPA allows the United States to withhold funds earmarked for the United Nations and any other international organization.\textsuperscript{128} Ostensibly, such funds will be withheld if used to support the ICC, creating a fear among U.N. officials that the United States will use this provision as an excuse to further withhold U.N. funds. This would give the United Nations greater incentive not to collaborate with the ICC, which, in turn, would erode the legitimacy of the Court.

In addition to withholding information and funds from the United Nations, the ASPA will limit U.S. participation in peacekeeping and peace enforcing operations to instances where: the U.N. Security Council exempts U.S. armed forces, the ICC lacks jurisdiction over the state where the forces are deployed, the state requiring U.N. forces has signed non-surrender bilateral agreements with the United States, or U.S. national interests compel U.S. participation.\textsuperscript{129}

The ASPA will also exponentially increase the pressure on other states to sign bilateral agreements with the United States. Under the ASPA, the United States must withhold military assistance from states that are a party to the Rome Statute.\textsuperscript{130} This provision, however, can be waived if: it is in U.S. national interest to offer military assistance; the state has concluded non-surrender bilateral agreements with the United States; or the state is a member of NATO, a major non-NATO ally or Taiwan.\textsuperscript{131} In those cases the president must explicitly exempt the state from the ASPA so that it may receive military funds.

Withholding military assistance can be particularly devastating to a state because U.S. military aid comes in many forms including monetary aid, military training, and military education.\textsuperscript{132} A state that cannot qualify for a waiver, and consequently is faced with losing these privileges, may be driven by its concerns for national security to

\begin{itemize}
  \item \textsuperscript{128} \textit{id.} § 7429.
  \item \textsuperscript{129} Sean D. Murphy, \textit{American Servicemembers' Protection Act}, 96 Am. J. Int'l L. 975, 976 (2002).
  \item \textsuperscript{130} 22 U.S.C. § 7426.
  \item \textsuperscript{131} \textit{id}.
  \item \textsuperscript{132} Lilian V. Faulhaber, \textit{American Servicemembers' Protection Act of 2002}, 40 Harv. J. On Legis. 537, 547 (2003).
\end{itemize}
sign a non-surrender bilateral agreement with the United States. This will create further hardship for the Court, as more and more states will feel obligated to extend exemptions to U.S. nationals. Thus far, the United States has withheld millions of dollars in military assistance from states party to the Rome Statute pursuant to the ASPA.\textsuperscript{133}

The most devastating blow to the legitimacy of the ICC comes from the ASPA provision that allows the president to "use all means necessary and appropriate to bring about the release" of U.S. nationals.\textsuperscript{134} Dubbed the "Hague Invasion Act,"\textsuperscript{135} this provision contemplates the use of force to remove a U.S. national held before the ICC in the Netherlands. Although it is not likely that the United States will invade the ICC in the Hague, the provision manifests a level of disrespect for the ICC.

D. Criticism of U.S. Bilateral Agreements

Some NGOs understand the potential impact U.S. bilateral agreements will have on the ICC. In the midst of the U.S. offensive to secure non-surrender agreements, these groups are launching a powerful counter-offensive against the United States.\textsuperscript{136} The NGOs argue that U.S. bilateral agreements are illegal and have the effect of giving U.S. nationals impunity.\textsuperscript{137} Accordingly, these U.S. bilateral agreements are derogatorily referred to as "impunity agreements."\textsuperscript{138}

Critics argue that U.S. bilateral treaties exempt more people than Article 98(2) intended.\textsuperscript{139} Because Article 98(2) was drafted to account for SOFAs between states, subsequent agreements pursuant to the Article must meet the criteria of a SOFA. SOFAs generally


\textsuperscript{134} 22 U.S.C. § 7427.

\textsuperscript{135} Faulhaber, \textit{supra} note 132, at 546.


\textsuperscript{137} \textit{See}, e.g., Amnesty Report, \textit{supra} note 100.


\textsuperscript{139} Amnesty International, \textit{supra} note 100, at 23.
apply to current members of the military and related civilians. In contrast, U.S. bilateral agreements include as persons within the purview of the agreement: "former government officials, employees (including contractors), . . . or nationals of one party."

In addition, critics argue U.S. bilateral agreements allow U.S. nationals to act with impunity, in violation of the object and purpose of the Rome Statute. U.S. bilateral agreements only commit the United States to prosecute matters within the ICC’s jurisdiction “where appropriate.” Ostensibly, the United States will be able to request the surrender of its nationals accused of a crime against humanity and decide, in bad faith, that it is not appropriate to adjudicate the matter. The Rome Statue was created to ensure that individuals are held responsible for their atrocities, either in a national or an international court. Allowing the United States to opt not to prosecute a serious crime violates that purpose, and this will have a resounding effect on the ICC.

Because the United States is not a party to the Rome Statute, the provisions of the treaty do not bind it. Moreover, because the United States has “unsigned” the Rome Statute, it is no longer obligated to uphold the object and purpose of the treaty. The issue of the object and purpose of the treaty, however, becomes pertinent when the United States negotiates a bilateral agreement with a state that is bound by the treaty. There, the state must be careful that its agreement conforms to the object and purpose of the treaty. In legal systems where the treaty becomes a part of the national law of a state, a State Party’s decision to sign a bilateral agreement with the United States can be challenged in court. This may explain why the European Union (EU) did not consider signing U.S. bilateral agreements until it explored their implications.

140. *Id.*
142. *See Rome Statute, supra note 3, pmbl.*
144. *See Rome Statute, supra note 3, pmbl.*
146. *See id.* The United States began its non-surrender agreement campaign in May 2002. The EU did not make a common declaration on the matter until late September 2002.
States soon joined the opposition campaign launched against U.S. bilateral non-surrender agreements. The EU spoke with one voice on the matter. Its decision came after months of pressure on the EU as a whole and on individual member states.147 Although the EU ultimately left the decision up to individual member states, it set out general principles to guide each state's decision.148 These general principles prohibit states from signing non-surrender agreements with the United States that grant immunity.149 Agreements with the United States will have to specify that the United States will prosecute its citizens that are accused of crimes on foreign territory. The EU also prohibits reciprocal agreements.150 Therefore, if a member of the EU signs a bilateral agreement prohibiting the surrender of U.S. nationals, the state cannot require the United States to refuse to surrender the state's nationals to the Court. Lastly, the EU limited the scope of bilateral agreements.151 While the U.S. non-surrender agreements encompass past and present military officials and other nationals under any circumstances, the EU limited its agreements to U.S. nationals sent abroad, as the term is used in SOFAs.152 This means that the agreements will only apply to current military officials and others who are specifically sent by the United States.

The EU decision can be seen as a victory in the campaign against U.S. bilateral agreements. Although the EU gave in to pressure by allowing member states to negotiate bilateral agreements with the United States, its guiding principles are so restrictive that the United States gains little ground on the matter. In addition, several member states of the EU have openly expressed their opposition to U.S. non-surrender agreements.153

While the EU decision can be hailed as a victory for the

147. Id.
149. Id.
150. Id.
151. Id.
152. Id.
International Criminal Court, it is a victory of one battle at best. Meanwhile the larger war for international support—either of the ICC or the United States—continues. It will be waged in countries throughout the world, and the United States has already claimed sixty-five allies.\(^{154}\) Victory for the United States could sound the death knell for the ICC, especially if other countries, inspired by the United States, seek ways to escape the Court’s jurisdiction. On the other hand, because of the difficulty the United States is having trying to negotiate these bilateral agreements\(^{155}\) and the amount of pressure that the United States is placing on countries to sign the agreements, other countries may not have the political clout to conduct similar anti-ICC campaigns.\(^{156}\) Only time will tell how successful the United States will be in negotiating non-surrender agreements and whether other countries will follow suit.

IV. A Blanket Exemption: Another Way to Escape ICC Jurisdiction

Before the United States set out on its agenda to create bilateral agreements pursuant to Article 98(2), it sought to create a blanket exemption for U.S. nationals. As members of the ICC Preparatory Committee neared the June 2000 deadline for drafting the Rules of Procedure and Evidence and the Elements of Crimes (Rules and Elements), the U.S. delegation craftily added a rule that would apply in conjunction with Article 98(2). While Article 98(2) precludes a State Party from surrendering accused persons to the ICC in situations where it violates international agreements with other states,\(^{157}\) the U.S. addition to the Rules and Elements would preclude the surrender where it violates international agreements between the

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154. See Bilateral Agreements, supra note 120.

155. See Impunity Agreements, supra note 153.

156. The American Servicemembers’ Protection Act allows the United States to withhold military aid to countries that do not sign the non-surrender agreements. It can now use military aid to induce countries to sign bilateral agreements. For a discussion of the Act, see Washington Working Group on the International Criminal Court, American Servicemembers’ Protection Act of 2002, at <www.wfa.org/issues/wicc/aspafinal/aspahome.html>; see also Keva Lightbourne, Bahamas May be Torn Between Caricom, U.S., THE NASSAU GUARDIAN, Mar. 1, 2003, available at <www.amicc.org/doc/march1_03.pdf> (discussing threats by the United States to withhold military aid from the Bahamas if they do not sign the bilateral agreement).

157. Rome Statute, supra note 3, art. 98(2).
ICC and other states.  

The proposed addition would permit the ICC to conclude agreements directly with states to exclude their nationals from the Court’s jurisdiction. The addition was the first step of a two-step plan by the United States to achieve exemption from the Court’s jurisdiction. Step one would allow states or other organizations such as the United Nations to actively make international agreements with the Court. These agreements would require the Court to respect the immunity agreements between states and between the Court and individual states or the Court and other organizations. This was a way to widen the scope of Article 98(2) to encompass a wider range of agreements. Step two, which ultimately failed, attempted to create an agreement between the ICC and the United Nations whereby U.S. nationals as well as the nationals of other non-party states would be excluded from the jurisdiction of the Court. The proposed addition was included in the Rules and Elements draft, but the United States was forced to shelve the agreement between the United Nations and the ICC.

The attempt at the Preparatory Committee shows the U.S. resolve. The two-step plan would have opened the floodgates and allowed each country to negotiate exemption agreements with the ICC. If such a plan had come to fruition, the legitimacy of the ICC would have been defeated before the election of the Court’s judges. This indicates that the United States plans to ultimately remove the teeth from the ICC and compromise its legitimacy. If the Rome Statute were to have created a blanket exemption for U.S. nationals, the Court would never be taken seriously. Instead it would be viewed as another institution controlled by the world’s last standing superpower.

**Conclusion**

It is likely that the United States will eventually find total exemption from the ICC. As a non-party state, the instances where the United States will fall under the ICC’s jurisdiction are already limited. Further, the principle of complimentarity will ensure that if

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159. *Id.*
160. *Id.*
161. *Id.* at 616.
the United States adjudicates a matter sufficiently, the ICC will lose its jurisdiction. What remains is a very narrow sphere where the United States and the ICC share jurisdiction, and in the overlapping area the United States will likely have safeguards in place to ensure that it retains control. At the moment, the United States is pursuing bilateral agreements as its safeguard. The United States has a lot of political influence on the international stage. It funds programs in various countries and has troops stationed in countries around the world. It is likely that in time the United States will be able to persuade enough countries to sign non-surrender agreements. It is also likely that U.S. exemption will effect the legitimacy of the Court. If the most powerful nation in the world does not participate in the Court, it will send a signal to other countries that will also seek to gain immunity from the Court. This will inevitably cause the Court to lose prestige. The fact that states are signing reciprocal bilateral agreements is evidence that others are taking cues from the United States. Avoiding the jurisdiction of the Court is also bad for the United States because it may sacrifice its voice in the human rights realm as an advocate for holding perpetrators of war crimes, crimes against humanity and genocide accountable to the rule of law. In the wake of a U.S. war on terrorism, losing this voice may prove detrimental to U.S. interests.

Although chances of a U.S. national succumbing to the jurisdiction of the ICC are remote even without the United States pursuing bilateral agreements, the world must oppose U.S. efforts as a matter of principle. The ICC is in its infancy. As such, its success will be determined by whether it is perceived as a legitimate institution applying international norms equally or whether it is perceived as another tool of western countries to bludgeon their lesser-developed counterparts into compliance.