Comment, Crafting the International Criminal Court Trials and Tribulations in Article 98(2)

Chimene Keitner
UC Hastings College of the Law, keitnerc@uchastings.edu

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This Comment explores the tension between "consistency" and "consensus" in international treaty-making by focusing on negotiations surrounding the International Criminal Court. It traces the controversy over a particular jurisdictional provision in the ICC's founding treaty, the Rome Statute, during the Fifth meeting of the ICC's Preparatory Commission. When the text of the Rome Statute was approved in 1998, the Preparatory Commission was created to propose guidelines for the ICC's implementation and operation, including the Elements of Crimes and the Rules of Procedure and Evidence. Although the Preparatory Commission's mandate required it to conform at all times to the parameters established in the Rome Statute, the PrepCom meetings nevertheless witnessed attempts by countries not satisfied with the agreement reached at Rome to

* D.Phil. in International Relations, Oxford University, 2001; J.D. candidate, Yale Law School. The author is grateful to Indira Rosenthal, Richard Dicker, and Brigitte Suhr for their guidance and support, and for the opportunity to attend the Fifth ICC PrepCom, and to the Schell Center for International Human Rights at Yale for generous financial assistance. Many thanks to Indira Rosenthal, W. Michael Reisman, and to Gabor Keitner for helpful comments on an earlier draft, and to the JILFA Chief Comments Editor. All views expressed in this Comment, and any errors or omissions, are entirely the author's own.
try and modify certain provisions of the Statute. One example of this tactic was the effort by the United States to create a rule that would have placed further restrictions on the ICC's ability to try an individual from a State not Party to the Rome Statute for committing war crimes, genocide, or crimes against humanity on the territory of a State Party.

The goals of this Comment are threefold: first, to provide a descriptive account of the negotiations surrounding the U.S. Rule; second, to offer a legal analysis of the U.S. Rule that was ultimately adopted and show why this rule cannot be interpreted as creating an additional loophole for avoiding ICC jurisdiction; and third, to advance a normative argument about the U.S.'s attitude towards and involvement with the future ICC. The crux of this normative argument is that making allowances for the preeminent position of the U.S. in international politics should not entail creating exceptions for U.S. citizens from international standards, not just because of principle (universality of the obligation to refrain from committing war crimes, genocide, and crimes against humanity), but also because of pragmatic concerns (maintaining U.S. credibility and legitimacy as a team player in the international arena). This Comment ultimately warns against the dangers of excessive emphasis on achieving consensus in international treaty-making by accommodating the demands of intransigent states at the expense of consistency with human rights and humanitarian standards, thereby threatening to undermine the creation of a robust and effective international legal system.

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I. INTRODUCTION

The dilemma of building agreement among State Parties without diluting core principles often colors the process of international treaty-making. This challenge can be conceptualized as a trade-off between achieving consistency and building consensus. The tension between consistency and consensus in international treaty-making is arguably becoming more pronounced, particularly in international human rights law and in the growing field of international criminal law. This may be so in part because those who violate humanitarian and human rights standards are becoming increasingly vulnerable to prosecution at the national and international levels.¹

In this evolving international environment, concepts such as State inviolability and sovereign immunity, which were formerly taken for granted in international relations and international law, are increasingly subject to scrutiny and to contextual qualification. True, States still drive the elaboration and entrenchment of international

legal standards. However, the "expansion of international society"2 and the penetration of domestic legal and political systems by international norms3 have influenced the negotiating environment in which State delegations operate, leading to coalition-building among traditionally less powerful countries as well as greater potential participation by non-State actors, such as Non-Governmental Organizations (NGOs). Thus, in both formal and informal negotiations, State players now face a new game or, at least, a less predictable one.

Just how new and unpredictable a game this is, is being discovered and determined by negotiations such as those for the Rules of Procedure (Rules) and the Elements of Crimes (Elements) for the International Criminal Court (ICC). The ICC is a permanent international court established to try individuals for war crimes, genocide, and crimes against humanity. Like the existing International Court of Justice (ICJ), the ICC will be based in the Hague; however, unlike the ICJ, the ICC is not an organ of the United Nations.4 Furthermore, while the ICJ's mandate is to arbitrate disputes between States, the ICC will be charged with trying individuals for the most serious international crimes, when States that have jurisdiction are unwilling or unable to conduct a fair and genuine trial. Because it is the product of an international agreement, the ICC is not a "foreign" court, but rather an independent judicial body composed of legal experts from member States and governed by rules and procedures that member States elaborate and monitor.5

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2 This phrase is borrowed from the title of The Expansion of International Society (Hedley Bull & Adam Watson eds., 1984).
4 Despite the common perception that the ICC is a UN Court, the ICC is an independent judicial organization, unlike the International Court of Justice (a principal organ of the UN), or the ad hoc tribunals (special organs created by the Security Council under chapter VII of the UN Charter). The ICC will be funded in part by UN contributions, but it will not otherwise be connected to or dependent upon the UN, except to the extent that certain forms of cooperation, such as sharing personnel, information, or resources, prove mutually beneficial.
5 This observation accounts in part for the difference between "surrender" of an individual to the ICC and "extradition" to a foreign country. See infra note 27.
The founding treaty for the ICC is the Rome Statute,\textsuperscript{6} which was adopted at an international conference in Rome in July 1998. The adoption of the Statute for the ICC seemed to mark the end of a long process that began as early as 1948, when the idea of a permanent court with jurisdiction over the most serious international crimes was introduced.\textsuperscript{7} In fact, Rome was just the beginning. Since then, six meetings of the ICC Preparatory Commission (PrepCom) have been held to formulate the Rules of Procedure and Evidence and the Elements of Crimes that will guide ICC judges and personnel. The way in which these documents are formulated, and the understandings with which they are adopted, will ultimately give the ICC's judges more or less discretion in interpreting their own jurisdiction and capacities.

The tension between consistency and consensus has colored the crafting of the ICC in many ways. The PrepCom's mandate requires that its results conform to the Rome Statute, which defines the jurisdiction of the ICC in fairly certain terms.\textsuperscript{8} All Rules and Elements for the ICC must be consistent with the Statute.\textsuperscript{9} However, despite this legal requirement of consistency with the Statute, the PrepCom negotiations are also subject to another, sometimes contradictory...


\textsuperscript{7} On December 9, 1948, the General Assembly, "[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity, and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required," adopted the Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 2601111), U.N. GAOR, 3rd Sess., pt. 1, at 174, U.N. Doc. A/810 (1948), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Article I of the convention characterizes genocide as "a crime under international law," and Article VI provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." \textit{Id}

\textsuperscript{8} Rome Statute, \textit{supra} note 6, arts. 11-13.

\textsuperscript{9} This point was emphasized by Chairman Philippe Kirsch in his opening Address to the Fifth PrepCom (June 12, 2000). This requirement of consistency, and the authoritativeness of the Statute in cases of conflict with the Rules or Elements, is codified in the Rome Statute, \textit{supra} note 6, art. 51(5).
The desire for consensus during the PrepCom negotiations has fueled efforts to accommodate the demands of particular States, arguably at the expense of consistency with human rights and humanitarian principles. The PrepCom plays an important role in setting the stage for the ICC in a number of ways beyond the simple production of documents. First, the PrepCom meetings provide a forum for delegations to send signals to each other about their respective attitudes towards the ICC, with the potential for bolstering or circumscribing general support for this institution. Second, the PrepCom negotiations and their outcomes have an important demonstration effect for national capitals, both symbolically and substantively, as countries move towards ratifying and implementing the Rome Statute, a process that will culminate in the creation of the ICC.¹⁰

The Bureau of the PrepCom has made achieving the broadest possible consensus in the negotiations on Rules and Elements a high priority. It has done so in part with a view to the longer-term goal of creating and maintaining a successful ICC. During the Fifth PrepCom, this desire for consensus involved preserving a much wider margin of appreciation in interpreting the Rome Statute (so that certain delegations’ proposals could be construed as consistent with it) than many observers and participants seemed to feel was warranted.¹¹ True, a strong Court may be one with the largest number of States Parties. However, this will only be the case if gaining the support of parties does not involve sinking to the lowest common denominator of principles. In particular, as will be explored below, the ever-present “threat” of calling a vote to resolve disagreements proved a powerful

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¹¹ The willingness of delegations to voice their hesitation was somewhat tempered by U.S. Ambassador David Scheffer’s response to the first round of comments on the proposed U.S. rule to article 98(2). Ambassador Scheffer referred to those countries that had expressed concerns simply by saying: “I know who you are.” David Scheffer, Intervention in the ICC PrepCom Working Group on Rules of Procedure and Evidence (June 23, 2000). The weightiness of this seemingly offhand comment during the working group meeting testifies to the tremendous diplomatic presence of the U.S. in the PrepCom negotiations.
lever for certain States to strong-arm proposals that might not otherwise have been accepted. Allowing a few intransigent States to exploit the aversion to voting (a process considered divisive despite its democratic credentials) to foist their preferences on a reluctant but conciliatory majority could ultimately result in the creation of an ICC with severely curtailed powers to indict, secure custody of, and try individuals responsible for serious international crimes that national courts are unwilling or unable to prosecute— an institution far from that envisaged and agreed upon at Rome.

This potentially dangerous dynamic was particularly evident in the Fifth PrepCom’s negotiations on the Rules of Procedure. Thirteen States had ratified the Rome Statute by the end of the Fifth PrepCom, meaning that the majority of delegations to the meeting were from States that had not yet ratified—in fact, one of the most vocal delegations was from a State that had not yet signed: the United States. In the end, the United States did sign the Rome Statute, a few hours before the signature deadline on December 31, 2000. (While signing prohibits a country from doing anything to undermine the Rome Statute, only ratification would make the U.S. a party to the Statute, and hence a member of the ICC.) Once the Rome Statute goes into effect (shortly after the sixtieth ratification), negotiations will move to the Assembly of States Parties. Until that time, all States participating in the PrepCom are working to influence the shape of the future Court, with more or less regard for the principles and parameters established at Rome.

In the meetings of the Working Group on Rules during the Fifth PrepCom, the attention of State delegations engaged in negotiations, and NGOs observing and seeking to inform the debates, focused largely on one provision: a proposed rule put forth by the U.S. delegation to clarify its interpretation of article 98(2) of the Rome Statute relating to international agreements. The proposed rule, which was adopted in modified form by the PrepCom, forms part of an

12 These negotiations took place at the UN headquarters in New York on June 12-30, 2000
avowed and ongoing U.S. campaign (despite the U.S. signature) to ensure that no U.S. national will be subject to the ICC’s jurisdiction as long as the U.S. remains a non-Party to the Statute.

The U.S. has a complex relationship to the ICC. The U.S. has traditionally been an enthusiastic proponent of the international prosecution of war criminals, most recently in its backing of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. However, this enthusiasm is decidedly uni-directional: while the U.S. has, in many instances, supported institutions involving some form of international jurisdiction (for example, the two ad hoc criminal tribunals, and the innovative Scottish tribunal convened in the Hague to try the two Libyans accused of bombing PanAm flight 103), the Pentagon and the Senate Foreign Relations Committee in particular have expressed vehement opposition to any exercise of international jurisdiction over citizens of the United States. This Comment argues that continued attempts by the U.S. to exercise moral leadership in international affairs will be compromised severely by perceptions by other States and international actors that the U.S. will not subject itself to the standards and enforcement mechanisms it imposes on others. While the last-minute signing of the Rome Statute by the United States is a step in the right direction, continued political opposition to the ICC and plans to thwart the ICC’s effective operation are contrary to the U.S. interest in maintaining its own credibility, and to the broader goal of ensuring a minimum degree of individual accountability for the most serious international crimes.

The process of adopting the proposed U.S. rule to article 98(2) during the Fifth PrepCom illustrates the frequent difficulty in international treaty negotiations of avoiding polarization while creating a meaningful and encompassing international legal regime. In this way, the conundrum of “consistency vs. consensus” poses a

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15 See infra notes 50-53 and accompanying text.
16 For example, Senator Jesse Helms has maintained the position that any Statute for the ICC that does not include a veto for Washington on the exercise of jurisdiction over U.S. citizens will be “dead on arrival” if submitted for ratification to the Senate. James Bone, US seeks to limit war crimes court, TIMES (London), March 30, 1998, available in LEXIS, News Group File, All. See also infra notes 74-77 and accompanying text (discussing U.S isolationism).
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continuing challenge to the development and enforcement of a meaningful regime of international criminal law. This Comment explores the negotiations over the proposed U.S. rule, suggesting the implications of a preoccupation with consensus (as opposed to some form of supermajority principle) for the effectiveness of the ICC. It cautions that short-term accommodation of the demands of intransigent States should not be privileged at the expense of longer-term viability, since an effective ICC is ultimately more likely to secure continuing support and cooperation from States than an unduly curtailed one -- an insight relevant both to future PrepCom meetings and to the Assembly of States Parties. In addition, this Comment anticipates potential arguments for avoiding accountability before the ICC based on the rule to article 98(2), and it indicates the appropriate legal responses to such attempts.

The argument proceeds in five parts. Part II analyzes the provisions in the Rome Statute relating to “competition” between a request by a State for the extradition of an individual and a request by the ICC for the surrender of the same individual. The proposed U.S. rule seeks to impose restrictions on the ability of the ICC to request the surrender of an individual beyond those envisaged in the Rome Statute. Part II sets out the relevant statutory provisions as a backdrop for examining and evaluating the U.S. rule. Part III presents the U.S. position and discusses the motivations and objectives underlying the proposed rule. It addresses the domestic political context in the United States and shows how the proposed rule exemplifies the paradoxical U.S. desire to be actively involved in shaping the ICC while keeping its citizens and soldiers firmly beyond the reach of the ICC’s jurisdiction. Part IV provides an account of the negotiations over the proposed rule during the Fifth PrepCom, both as part of an

17 The Assembly of States Parties will set the budget for and oversee the work of the ICC. See Rome Statute, supra note 6, at pt. 11. Criticisms of the perceived ineffectiveness of the ad hoc tribunals, and especially of the ICTR, reinforce the idea that a stronger, not a weaker, ICC is ultimately more likely to earn respect and support. See, e.g., Jean Baphte Kayigamba, Rwanda – Human Rights: Not Much Love for the Arusha Tribunal, INTER PRESS SERV., Oct. 18, 1996, available in LEXIS, U.S. News, Combined File (explaining disillusionment of Rwandans with slowness of ICTR); Betsy Pisik, World tribunal vs sovereignty: Lacks support to bring to trial foreign suspects, WASH. TIMES, Oct. 26, 1998, at A15 (recording frustration at ineffectiveness caused by non-cooperation of States with international tribunals).
attempt to document the travaux involved in developing this rule, and as an illustration of the give-and-take created by the dual imperatives of consistency and consensus. The Conclusions emphasize that the excessive privileging of consensus over consistency is a problematical strategy, even as part of an attempt to secure U.S. participation in international legal institutions such as the ICC.

II. NATIONAL VS. INTERNATIONAL ACCOUNTABILITY: COMPETING REQUESTS FOR EXTRADITION OF A PERSON OR SURRENDER TO THE ICC

A central question facing the drafters of the Rome Statute was the scope of the ICC's jurisdiction. On the one hand, an international criminal court with excessively limited jurisdiction would have little power to deter and punish war crimes, genocide, and crimes against humanity. On the other hand, since there is no international government or international police force, international law depends on the voluntary compliance of States (with incentives for compliance shaped by a range of political, economic, and military factors). Even though the crimes defined in the Rome Statute are a subject of individual, rather than State, accountability, the structure of the international legal system is such that any given individual is primarily protected and controlled by his or her State of citizenship. In addition, since a State's political and military personnel will often have the greatest opportunity to perpetrate the enumerated crimes on a large scale or with particular severity, the actions for which individuals will be tried by the ICC will, at times, have been committed under color of State authority. It is clear under the current state of international law that certain heinous actions (such as torture) cannot form a legitimate part of State policy or benefit from the protections generally accorded
to official acts of State. Nevertheless, part of the political sensitivity surrounding the creation of the ICC is the worry that this international institution will encroach upon other traditional areas of State discretion and control.

The Rome Statute embodies a carefully crafted compromise between a State-centered idea of jurisdiction, and a more inclusive international vision. The State-centered idea, in its extreme manifestation, would uphold a State’s exclusive jurisdiction to prosecute and try its own citizens for war crimes, genocide, and crimes against humanity, and to prosecute and try citizens of other States who commit such acts on the territory of the forum State. An inclusive vision would promote the idea of universal jurisdiction, whereby individuals of any nationality could be tried for certain crimes by any State acting on behalf of humanity as a whole. The ICC follows a middle path. The Rome Statute assigns primary jurisdiction to the ICC’s member States. However, in ratifying the Rome Statute and becoming members of the ICC, States agree that, if they are unwilling or unable to carry out their obligation to investigate and prosecute these crimes, the ICC has “complementary” jurisdiction to do so in their stead. U.S. opponents to the ICC worry that a U.S. citizen accused of committing an enumerated crime on the territory of a State Party to the Rome Statute might be subject to ICC jurisdiction, even if the U.S. itself is not a Party. In other words, they are afraid that a State Party will refuse to extradite a U.S. citizen accused of war crimes, genocide, or crimes against humanity to the U.S. for trial, and will instead surrender that citizen to the ICC.

This section explores the jurisdictional regime of the ICC in cases of potentially competing requests between the ICC and a State to try the same individual for war crimes, genocide, or crimes against humanity. It suggests that the U.S. concern, while understandable, is largely unfounded, and it sets out some preliminary arguments about why the U.S. rule to article 98(2) is either redundant (if interpreted in accordance with the Rome Statute) or inoperative (if extended to

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create a barrier to jurisdiction that the Statute does not envisage or permit).

A. Protections Afforded to States and to Defendants by the ICC

Although certain American observers have expressed concern that the ICC's trial procedures are not identical to those employed in U.S. courts, the ICC aspires to the highest standards, rather than the lowest common denominator. It offers extensive procedural protections to defendants, victims, and witnesses.19 The Statute also contains provisions to account for potential national security concerns in the investigation of conduct and the presentation of evidence.20 The fair trial standards guaranteed by the Rome Statute exceed those of many foreign tribunals to which criminal defendants are extradited.21 In this sense, the ICC actually gives a State party an "insurance policy" against unfair trials of its citizens in the domestic courts of another

19 For example, see the Rome Statute arts. 67 (rights of the accused) and 68 (protection of the victims and witnesses and their participation in the proceedings). Rome Statute, supra note 6, at 1004-05.
20 Id. art. 72, at 1043-44.
21 The international fair trial standards guaranteed in the Rome Statute include: the right to be informed promptly, in detail, and in a language one understands, of the nature and cause of the charge, see arts. 55(2)(a) (investigation), 60(1) (initial proceeding), and 67(1)(a)(trial); the right during detention to be treated humanely and with respect for the inherent dignity of the human persons, see arts. 55(1)(b) & 106(1); the right to a hearing without undue delay, see arts. 60(4), 61(1), 64(2), and 67(1)(c); the right to a public hearing, see arts. 64(7) and 67(1); the right to a fair hearing by a competent, independent and impartial tribunal established by law, see arts. 40 and 67(1); the right to be presumed innocent until proved guilty according to law, see arts. 66 and 67(1)(i); the right to defend oneself and to effective legal representation of one's own choosing, without payment if one does not have sufficient means to pay for it, see arts. 55(2)(c), 63, and 67(1)(d); the right to have adequate time and facilities for the preparation of a defense, see art. 67(1)(b); the right to obtain the attendance and examination of witnesses, see art. 67(1)(e); the right not to be compelled to testify or to confess guilt, see arts. 55(1)(a), 65(1)(b), and 67(1)(g); the right not to be charged with or held guilty of any criminal offense for an act or omission not constituting a criminal offense under national or international law at the time it was committed, see art. 22; the right to appeal the judgment to a higher administrative authority, a judicial tribunal, or both, see art. 81; and the right not to be tried or punished again for an offense of which one has already been finally convicted or acquitted, see art. 20. Rome Statute, supra note 6.
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State that is unwilling to extradite the citizen (in cases where extradition is not required by a pre-existing agreement), but that would agree to surrender that individual to the ICC.\(^2\)

While the idea that an individual may be extradited from one State to face trial in another is commonplace, the grounds on which such extraditions and trials may be conducted are evolving with the development of international criminal law. The concept of universal jurisdiction, the basis for the Nuremberg trials,\(^2\) represents one step toward preventing State boundaries from acting as barriers to accountability for perpetrators of atrocities such as war crimes, genocide, and crimes against humanity. Universal condemnation can only begin to serve as an effective deterrent if supported by a credible framework of universal jurisdiction. The extradition proceedings against General Pinochet in the United Kingdom,\(^2\) the arrest of Hissein Habre in Senegal,\(^2\) and the service of Radovan Karadzic with process in a civil suit in a New York federal court\(^5\) provide examples of the range of actions already available to States and individuals seeking to curtail the free movement and indefinite impunity of international criminals.

With or without the ICC, States can and should enact domestic legislation that enables them to take advantage of their universal jurisdiction to try the most serious international crimes. However, because the political will and institutional capacity to implement and act on universal jurisdiction may not always be present, the ICC enables States to pool resources and cooperate in promoting and ensuring international accountability in practice, and not just in theory. Within this framework, the principle of complementarity provides the cornerstone for the ICC's jurisdictional regime. The complementarity

\(^2\) Indira Rosenthal helpfully suggested this point.

\(^2\) See Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280; see also infra note 50


\(^2\) Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).
regime of the ICC recognizes the primary role of individual States in enforcing international criminal law. ICC investigations and prosecutions are intended as a back-up to the exercise of national criminal jurisdiction over war crimes, genocide, and crimes against humanity (jurisdiction derived from the relevant national laws creating personal, territorial, and/or universal jurisdiction over these crimes). The result is a multi-layered jurisdictional regime that is intended to ensure, first, that international criminals do not enjoy impunity based on the unavailability of judicial remedies at the national level, and second, that individuals who are investigated and prosecuted for international crimes are tried by an impartial tribunal with adequate due process guarantees.

B. Statutory Provisions Addressing Competing Requests

As noted above, this section will examine, in particular, what happens when a State party to the ICC receives two contradictory requests: a request from the ICC to surrender an individual, and a request from another State (especially a State not party to the Rome Statute) to extradite the same person. This situation is governed primarily by Article 90 and Article 98 of the Rome Statute, which fall under Part 9, dealing with “International Cooperation and Judicial Assistance.”

1. Article 90

Article 90 on “competing requests” addresses the possibility that a State Party (the requested State) might receive a request from the ICC and from a State not Party to the Statute (the requesting State) for surrender of the same person.\(^27\) Requests are “competing” if fulfilling

\(^27\) Rome Statute, art. 102 on “Use of terms” stipulates: (a) “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute; (b) “extradition” means the delivering up of a person by one State to another as provided by treaty, convention, or national
one would prevent a State from fulfilling the other: a State cannot simultaneously extradite a person to another State and surrender that same person to the ICC. Despite the potential for a State to receive mutually exclusive requests along these lines, not all competition is deemed problematic under article 90. In particular, certain apparently mutually exclusive requests may in fact come under the heading of "false competitions"—that is, situations involving no real conflict among a requested State's existing obligations, and thus no real competition.

There are two possible instances of false competition. The first arises when a requested State has no existing international obligation to extradite a given person to the requesting State, and the ICC has deemed the case admissible. Under the Rome Statute, the ICC’s request receives priority in this scenario. A false competition also arises if the ICC has not yet determined that the case is admissible, in which event "the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State," but the requested State may not actually extradite the person to the requesting State until the ICC has ruled on admissibility.

Simultaneous requests by the ICC and a requesting State may create a true competition if and when the ICC determines that the case is admissible. A true competition also exists when there is an existing international obligation to extradite a person to the requesting non-State Party and the ICC has deemed the case admissible. In this situation, the requested State must decide whether to surrender the person to the ICC or to extradite the person to the requesting State. The Rome Statute indicates that the requested State’s decision whether to extradite the person to the requesting State or to surrender him or

legislation. Rome Statute, supra note 6, at 1016. Since the ICC is not a foreign jurisdiction, surrender procedures must be no more burdensome and should, if possible, be less burdensome than those applicable to requests for extradition "taking into account the distinct nature of the Court." Id. art. 91(2)(e), at 1054.

28 This terminology has been adapted loosely from approaches to conflicts of law that distinguish between "true" and "false" conflicts. See LEX BRILMAYER, CONFLICT OF LAWS 62-65 (2d ed. 1995).

29 Rome Statute, supra note 6, art. 90(4).

30 Id. art. 90(5).

31 See id. art. 90(3); Kimberly Prost, Competing Requests, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1031, 1087 (Otto Triffterer ed., 1999).
her to the ICC should be guided by "all relevant factors, including but not limited to: (a) the respective dates of the requests; (b) the interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and (c) the possibility of subsequent surrender between the Court and the requesting State." 32

If extradition of an individual to the requesting State and surrender to the ICC are not sought for the same conduct, then the ICC’s request has priority if the requested State has no existing international obligation to extradite the person to the requesting State (a false competition). 33 If extradition and surrender are sought for the same conduct (a true competition), then the requested State must make a decision based on factors included but not limited to those enumerated above, "but [the requested State] shall give special consideration to the relative nature and gravity of the conduct in question." 34 The goal of the regime set out in article 90 is not to ensure that all persons responsible for international crimes are tried before the ICC. Rather, it is to ensure that they are tried before a competent court and are subject to protections and penalties that meet international standards.

The following table illustrates the totality of possible competing requests and obligations upon a requested State with respect to the surrender of a person under article 90:

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32 Rome Statute, supra note 6, art. 90(6).
33 Id. art. 90(7)(a).
34 Id. art. 90(7)(b).
<table>
<thead>
<tr>
<th>Requests relate to same conduct. Case has been determined admissible by ICC.</th>
<th>Requested State must decide whether to extradite or to surrender based on &quot;all relevant factors.&quot; Article 90(6). (true competition)</th>
<th>Request from ICC has priority. Article 90(4). (false competition)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requests relate to same conduct. Case has not been determined admissible by ICC.</td>
<td>Requested State may proceed with request for extradition, but may not extradite until admissibility has been determined by ICC. (unprovided-for case unless/ until case determined admissible by ICC)*</td>
<td>Requested State may proceed with request for extradition, but may not extradite until admissibility has been determined by ICC. Article 90(5). (false competition unless/ until case determined admissible by ICC)*</td>
</tr>
<tr>
<td>Requests relate to different conduct.</td>
<td>Requested State must decide whether to extradite or to surrender based on &quot;all relevant factors&quot; giving &quot;special consideration to the nature and gravity of the conduct in question.&quot; Article 90(7)(b). (true competition)</td>
<td>Request from ICC has priority. Article 90(7)(a). (false competition)</td>
</tr>
</tbody>
</table>

35 A SOFA or "Status of Forces Agreement" is an agreement negotiated among States setting out the legal conditions governing the operations of the military personnel of one State Party on the territory of the other State(s) Party.
*Under article 90(8), if the ICC has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the ICC of this decision so that, according to rule 186, the Prosecutor may act in accordance with article 19(10) and submit a request for a review of the decision on admissibility.

In sum, under article 90, impunity is anathema; complementarity is key, and the good-faith exercise of national jurisdiction to investigate and prosecute serious international crimes is both necessary and encouraged.

2. Article 98

Article 98, entitled "Cooperation with respect to waiver of immunity and consent to surrender," contemplates a hypothetical situation in which the ICC seeks cooperation from a State Party (again referred to as the "requested State") in the form of the surrender of a person or property of a third State when such action on the part of the requested State would conflict with its obligations under international law. In particular, article 98(1) contemplates a situation in which the ICC seeks surrender or assistance that "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." Article 98(2) addresses a special instance of true competition: a situation in which a request for surrender from the ICC overlaps with a pre-existing obligation that the requested State has under an international agreement with a third State to extradite the same individual.

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37 Rome Statute, art. 98(1) reads: "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 co-operation of that third State for the waiver of the immunity." Rome Statute, supra note 6.
More specifically, article 98(2) envisages the possibility that a member of a non-State Party’s armed forces present in the territory of a State Party might be subject to a request for surrender by the ICC that conflicts with the requested State’s treaty obligation not to extradite the person under a State-to-State agreement, typically a SOFA, between the requested State and the non-State Party 38 (referred to in this article of the Statute as the “sending State,” because it has sent the individual in question onto the territory of a State Party, for example as part of a military operation). Article 98(2) provides:

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. 39

The reference to the third State in this scenario as the “sending State” (as opposed to “State not Party to this Statute,” the term used in the other provisions of Part 9) indicates that the drafters of the Rome Statute were concerned with a particular scenario in article 98: the possible interference by the ICC with operations conducted by the armed forces or personnel of a non-State Party in the territory of a State Party. Note, however, that this “interference” would presumably consist of deterrence, investigation, and, if necessary, prosecution of

38 The forces of a State Party would be subject to ICC jurisdiction under the Rome Statute, arts. 12(1) and 12(2). The forces of a non-State Party would be subject to ICC jurisdiction if the Security Council referred a “situation” to the Prosecutor pursuant to Rome Statute, art. 13(b), or if a non-State Party’s forces committed war crimes, genocide, or crimes against humanity on the territory of a State Party, art. 12(2)(a), or a non-State Party that has accepted jurisdiction, art. 12(3). Absent a Security Council referral, crimes may be investigated by the ICC following a request by a State Party, arts. 13(a) and 14(1), or on the initiative of the Prosecutor with the approval of the Pre-Trial Chamber, arts. 13(c) and 15. Id.

39 Id. art. 98(2). Article 97(c) also refers to instances in which executing a request for cooperation from the ICC “would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.” Article 97 does not bar such requests from the ICC; instead, it obligates the requested State to “consult with the Court without delay in order to resolve the matter,” which may include finding alternative means of compliance. Id. art. 97.
war crimes, genocide, and crimes against humanity in cases where the sending State or the requested State was itself unwilling or unable to investigate or prosecute.  

What does article 98(2) contemplate in concrete terms? Let's say that State A has a SOFA with State B that gives State A primary jurisdiction over certain crimes that a soldier from State A might commit on State B's territory while stationed there as part of a military exercise or operation. State A sends troops onto the territory of State B. While in the territory of State B, several soldiers from State A engage in a systematic campaign of rape against women of a particular ethnicity in several remote villages. State B is a Party to the Rome Statute, and it wants the ICC to try these State A soldiers for crimes against humanity. State B prefers to surrender the soldiers to the ICC because State B does not have the institutional capacity to try the soldiers itself, but it is afraid of the domestic political consequences of extraditing the soldiers back to State A for trial. State A is not a party to the Rome Statute. In this situation, in order for the ICC to proceed with a request for State B to surrender these individuals to the ICC, the ICC would first have to secure the cooperation of State A for the giving of consent to surrender, since the SOFA between States A and B assigns State A primary jurisdiction over the systematic rapes committed by its own troops on State B's territory.

Because the ICC has the power to indict and try military personnel, there are concerns that its existence will create excessively burdensome limits on military discretion. This is why article 98(2) codifies a certain deference to State-to-State agreements such as SOFAs, which are drafted and adopted to facilitate military operations by one State in the territory of another. A UN publication entitled "Setting the Record Straight" further addresses this concern. Although it is simply a public information document, and therefore not legally authoritative, this publication corroborates the validity of a common-sense reading of the language of article 98(2) as referring to State-to-State agreements, and in particular SOFAs, as opposed to any

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40 The ICC's jurisdiction is complementary to national criminal jurisdictions. Id. art. 1. This means that the ICC will only investigate and prosecute a case when a State is unwilling or unable genuinely to investigate or prosecute the case itself. Id. art. 17.
other type of international agreement. It makes three important points: (1) Worries that the ICC will not afford adequate due process guarantees to defendant soldiers are not a valid objection to its jurisdiction, as the ICC’s standards will most likely be equal to or higher than those of national civil or military courts; (2) Objections to jurisdiction on any basis other than the requested State’s own willingness to investigate and prosecute the crimes in question constitute a breach of the requested State’s existing obligations under international law; and (3) Under the ICC regime, the deployment of a non-State Party’s troops on the territory of a State Party would continue to be governed by existing agreements under which the sending/contributing State retains criminal jurisdiction over its own soldiers on such missions. This arrangement is a feature of, not a limit on, the ICC’s complementary jurisdiction: the ICC would only request cooperation or surrender of a person if those States also possessing jurisdiction proved unwilling or unable to exercise it.


43 In the event of hostilities, the Contracting Parties to a SOFA will generally review the jurisdictional provisions, and may also exercise the right to suspend the application of any of the provisions of the SOFA. See, e.g. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. 15, 4 U.S.T. 1792.

44 See Rome Statute, supra note 6, art. 17.
3. Synthesis of Articles 90 and 98

A notorious pitfall of drafting by committee is that the obvious sometimes remains unsaid. The above discussion illustrates the kinds of concerns and situations that Article 98(2) was intended to address in the context of Part 9 of the Statute. The use of the term “international agreements” in article 98(2) should not be construed as in any way expanding the kind of agreement envisaged as falling within the scope of this provision: that is, State-to-State agreements such as SOFAs. The sentence, “[I]nternational agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court” in article 98(2) refers solely to international agreements between the sending State and the requested State that create international obligations for the requested State. If such an agreement exists between the sending State and the requested State giving rise to such an obligation on the requested State, then the ICC may not proceed with a request for surrender of a person “unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”45 This provision is designed to reduce the incidence of competing obligations upon the requested State, or at least to establish a procedure for addressing potential conflicts when these do arise. It is not meant, and cannot legally be read, to hinder the surrender by a State Party of a person to the ICC because of any obligations other than those existing between the sending State and the requested State that are themselves consistent with customary and conventional international law. Any other interpretation of article 98(2) would contradict the spirit and purpose of the Rome Statute, and would defy common sense.

The concerns associated with the deployment of one State’s troops in the territory of another are understandable: a State has a moral and political obligation to protect its citizens, a fortiori those it deliberately sends into hazardous situations. If SOFAs are designed to guarantee immunity from prosecution for the most serious international crimes, then they may be deemed invalid as violating jus cogens norms that

45 Id. art. 98(2).
prohibit war crimes, genocide, and crimes against humanity. If, as is more plausible, they are designed to ensure that a State’s soldiers will be protected from the potentially biased or unfamiliar standards and procedures of a foreign court (in the requested State), but not from prosecution and punishment by the sending State, then they are acceptable, as long as the sending State fulfills its international obligation to prosecute such crimes itself.

The complementary jurisdiction of the ICC enhances international criminal accountability by enabling the ICC to function as a carrot and a stick: a carrot to entice national courts to exercise their domestic and universal jurisdiction to prosecute and punish the most serious international crimes, and a stick to enforce international criminal law when national courts are unwilling or unable to do so themselves. In particular, surrendering a suspect to the ICC may be an alternative to prosecution by the requested State when the sending State is unwilling or unable to prosecute. If the sending State is willing and able to prosecute, then the principle of complementarity will, in most cases, support the genuine exercise of national jurisdiction by the sending State over the exercise of jurisdiction by the ICC. In other words, if the United States does not want a U.S. citizen to be tried by the ICC, it need only demonstrate its willingness and ability to try the person itself.

The principle of complementarity on its own does not create an absolute exemption from jurisdiction for the citizens of any particular State, since the ICC can always make a well-founded determination that the State is not genuinely committed to investigating and prosecuting a particular alleged crime. Furthermore, any blanket exemption for the citizens of one State would seriously undermine the

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47 U.S. Secretary of Defense William Cohen, while insisting on a U.S. exemption from ICC investigations and prosecutions, has nevertheless acknowledged: “We have demonstrated over the years wherever there is an allegation of abuse on the part of a soldier we have a judicial system that will deal with it very effectively. As long as we have a respected judicial system then there should be some insulation factor [for the United States].” Pamela Hess, "Pentagon takes strong exception to UN [sic] criminal court," UPI, June 12, 2000, available in LEXIS, U.S. News, Combined File.
moral legitimacy of the ICC as an institution committed to promoting and upholding international justice and accountability. As explored below, the proposed U.S. rule to article 98(2) was intended as the first step towards creating a blanket exemption for U.S. citizens to the jurisdiction of the ICC by circumventing the common-sense reading of article 98(2) as referring to prior obligations of the requested State towards the sending State under an agreement such as a SOFA. This Comment argues that any interpretation of the U.S. rule that enables it to act as such a step is not only illegal (because inconsistent with the Rome Statute), but also against the longer-term interest of the United States in preserving its international credibility and promoting a more encompassing system of individual accountability for the most serious international crimes.

III. THE U.S. POSITION

The contradictory posture of the U.S. as both a driving force behind the construction of some type of international criminal court, and a vociferous opponent to the Rome Statute, is a product of both structural and psychological factors. On a structural level, the political, military, and economic strength of the United States in the global arena means that the U.S. is particularly exposed to politically-motivated attacks by other States; any new international institution can thus be viewed, in one perspective, as a possible new forum for such attacks. On a psychological level, the American psyche historically has exhibited a peculiar combination of missionary zeal and isolationist retrenchment. The U.S. attitude towards the ICC exemplifies this split mentality. This section describes one manifestation of this attitude: the U.S. strategy during the Fifth PrepCom to take the first step towards carving out a blanket exemption for U.S. citizens from the ICC’s jurisdiction, as long as the U.S. remains a non-Party to the Rome Statute.
A. Background to the U.S. Proposal

The U.S. has a long history of support for international criminal tribunals. While Churchill “wanted the top 70 Nazis shot on sight” after World War II, President Truman supported U.S. Supreme Court Justice Jackson, who argued for a dispassionate hearing to determine the guilt or the innocence of the accused: “Nuremberg created the international law precedent for punishing war crimes and crimes against humanity, irrespective of the national sovereignty protecting their perpetrators.” Later, U.S. Secretary of State Laurence Eagleburger helped drive the creation of the International Criminal Tribunal for the Former Yugoslavia. In fact, Secretary Eagleburger insisted that Slobodan Milosevic, at that time President of Serbia, be tried for war crimes long before Madam Justice Louise Arbour, then Chief Prosecutor of the ICTY, took the step of indicting Milosevic. In advocating the indictment and prosecution of Milosevic and others in 1992, Secretary Eagleburger emphasized the importance of ensuring command responsibility, holding individuals (and especially soldiers and commanders) accountable for acts and omissions that violate international law, precluding sovereign immunity for war crimes, and applying and enforcing international standards to conduct that occurs outside of international armed conflict.

U.S. officials have continually affirmed the need to create a fair and effective international criminal court. In the words of David Scheffer, the U.S. Ambassador-at-large for War Crimes,

Impunity and retribution are the enemies of our future. Only through international justice can these scourges be overcome.... Our common challenge is to ensure that the enforcement of international criminal law in the 21st century fulfills the expectations of both those who codified it in this century, and the survivors of Ntarama.

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48 Geoffrey Robertson, Comment & Analysis America won't help The U.S. is opposed: a new court that could try the world's mass murderers, GUARDIAN (London), July 18, 2000, at 17.
Despite these declarations, the U.S. was one of only seven countries to vote against the Statute for the ICC at the Rome diplomatic conference. In addition, even though the U.S. signed the Rome Statute on December 31, 2000, U.S. officials continue to refuse to accept the possibility that a U.S. citizen could ever be haled before the ICC.

While the possibility that a U.S. citizen could be haled before the ICC as long as the U.S. does not ratify the Rome Statute is extremely remote, the possibility does, in theory, exist. Since the Rome Statute


52 The seven countries that voted against the Statute have been identified as: China, Iraq, Israel, Qatar, Sri Lanka, Sudan, and United States of America. International Service for Human Rights, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 44 HUM. RTS. MONITOR (1998) http://www.igc.apc.org/icc/html/ishr199810.html (last visited Feb 24, 2001). Some commentators have emphasized that "[a]lthough the United States voted against the statute, its vote ... does not signal U.S. opposition to an international criminal court as such, but, rather, concern that certain features of the statute produced by the Rome Conference may undermine the achievement of other international goals that the United States believes are no less critical for world order and the international protection of human rights." Developments in International Criminal Law: Forward, 93 AM. J. INT'L L. 1, 1 (1999).

53 See, e.g., Associated Press, War-crimes Treaty Flawed Bush Spokesman Says, TELEGRAPH HERALD (Dubuque, IA), Jan. 3, 2001, at A2; Joan Smith, Hypocrite to the last. The US president has suddenly signed up to the plan for an international war crimes tribunal, GUARDIAN (London), Jan. 3, 2001, at 17 (quoting Senator Jesse Helms as saying: "Well, I have a message for the outgoing president. This decision will not stand."); Senator Jesse Helms, Chairman, Senate Foreign Relations Committee, Towards a Compassionate Conservative Foreign Policy, Address at the American Enterprise Institute (Jan. 11, 2001), available at http://www.uci.org/past_event/confD10111.htm. ("First, the Bush Administration should simply un-sign the Rome Statute. I mean, quite literally, that the Administration should instruct someone at the U.S. Mission in New York to walk across the street to the UN, ask to see the treaty document, and then take out a pen and draw a line through Ambassador Scheffer's name. I think that will send a clear message."). In his recent Senate confirmation hearing, Secretary of State Colin Powell indicated that "[W]e have no plans to ask for ratification of the treaty," to which Jesse Helms responded, "Well, we'll send somebody down there to strike the signature of that ambassador." Senate Foreign Relations Committee, Confirmation Hearing for Secretary of State-Designate Colin Powell, 106th Cong. (Jan. 17, 2001), available in LEXIS, News Group File, All.
Crafting the International Criminal Court

empowers the ICC Prosecutor to investigate a case without the prior approval of the UN Security Council\(^4\) (although the Security Council may vote to suspend an investigation for up to twelve months at a time\(^5\)), the United States would not have a veto on ICC investigations and prosecutions. A U.S. citizen who committed a war crime, genocide, or a crime against humanity on the territory of a State Party to the Rome Statute that a competent national tribunal was unwilling or unable to prosecute itself could, in theory, be surrendered by the State Party for trial before the ICC.\(^6\)

The possibility that a U.S. servicemember might be prosecuted in a foreign court is not a new concern for U.S. Department of Defense officials.\(^7\) To reduce the likelihood of this eventuality, the United States has negotiated SOFAs with countries in which its troops are deployed. The SOFA between the United States and the North Atlantic Treaty Organization (NATO), for example, sets out provisions for jurisdiction over visiting forces. Under the NATO SOFA, a U.S. servicemember may be tried in a foreign country for conduct that violates the law of that country but does not violate the Uniform Code of Military Justice. Conversely, U.S. courts-martial retain exclusive jurisdiction over conduct that violates U.S. military law but not the law of the host country. If conduct violates both sets of laws, then there is concurrent jurisdiction, with the United States having the primary right to exercise jurisdiction in enumerated cases, including over crimes arising out of actions taken "in the performance of official duty," and with consideration for U.S. claims in other cases where the United States views its own exercise of jurisdiction to be of

\(^{54}\) Rome Statute, supra note 6, art. 15(1).
\(^{55}\) Id. art. 16.
\(^{56}\) Id. arts. 12(2)(a) (jurisdiction) and 17 (admissibility). In fact, the U.S. citizen in question might well prefer an ICC trial to a trial in the United States, as the ICC does not apply the death penalty. Compare id. art. 77(b) (maximum penalty of life imprisonment) with 10 U.S.C. § 818 (giving general courts-martial composed of a military judge and five members jurisdiction to adjudge the death penalty for specified offenses).
\(^{57}\) See generally Robinson Everett, American Servicemembers and the ICC, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT (Sarah B. Sewall & Karl Kaysen, eds., forthcoming).
Civilian dependents and employees who accompany visiting armed forces remain under the jurisdiction of the host country, since they cannot be tried by a U.S. court-martial. In its current form, the NATO SOFA does not contemplate the possibility of competing claims for jurisdiction by an international tribunal and a U.S. court-martial; as such, NATO forces in the former Yugoslavia are well within the jurisdiction of the ICTY. The ICTY is meant to deter and punish war crimes, genocide, and crimes against humanity, including those that might be perpetrated against the peacekeepers themselves.

B. The U.S. and the ICC

The "fundamental objective" of the U.S. in the ICC negotiations has been, and remains, "to prevent, unless certain conditions are met, the surrender to 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." This sought-after exemption would even preclude a non-party national from surrendering voluntarily to the ICC, an unprecedented restriction on

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58 Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. 7, 4 U.S.T. 1792.
60 This does not preclude the regular jurisdiction of courts-martial, as seen last summer in the case of Staff Sgt. Frank J. Ronghi, a member of a U.S. peacekeeping force who pleaded guilty to raping and murdering an 11-year-old Albanian girl while on duty in Kosovo. See US soldier pleads guilty to killing girl in Kosovo, UPI, July 28, 2000, available in LEXIS, Wire Service Stories File; Kosovo Murder Case Referred to Court-Martial, FED. DEP'T & AGENCY Docs., June 7, 2000, available in LEXIS, Wire Service Stories File.
the possibility of self-surrender. The U.S. seeks openly to create this exemption through "a provision in the UN/ICC relationship agreement and a Rule to Article 98 of the Rome Statute." This is a two-step strategy, relying for its acceptance by other States on the tacit reassurance that the United States will not actively oppose the ICC if this exception is granted. The U.S. position relies on a fundamental distinction between "responsible" states and "rogue" states or, in more recent State Department terminology, "states of concern." The stated U.S. goal is to create a system in which "responsible nations [can] maintain or restore international peace or security and [can] undertake humanitarian missions" while making it "extremely difficult for individuals from rogue states to act with impunity." It is troubling

62 Ambassador Scheffer insisted: "The intent of Article 98(2) would be circumvented if efforts were undertaken, by whomever, to negate the relevance of the ICC's request for surrender to the requested State with an operation that resulted in the person's arrival in The Hague by other means, either voluntarily or forcibly." David Scheffer, US Statement on Proposed Rule 9.19(2) at 2 (June 19, 2000) (on file with author). It stretches the imagination to infer that the drafters of the Rome Statute sought to prevent the voluntary appearance of suspects before the ICC. See, e.g., Informal German discussion paper, US Proposal on Article 98 as contained in DP.4: A legal analysis of the proposal and options for a compromise formula in the light of the debate in the Working Group on Friday, 23 June 2000 A contribution by Germany for the group of like-minded States at 4 (June 25, 2000). It is ironic that the main opposition to delivery of a person to the ICC "by means other than by action of the requested State," Scheffer, supra at 2, came from a country with judicial precedents including United States v. Alvarez-Machain, 504 U.S. 655 (1992) (forcible abduction of respondent from Mexico does not prohibit his criminal trial in a court in the United States)

63 Albright, supra note 61. The Rome Statute provides for the Assembly of States Parties to conclude a relationship agreement between the ICC and the UN. Rome Statute, supra note 6, art. 2.

64 During the March 2000 PrepCom, the United States floated these steps as two parts of a single proposal: the "Proposed Text to Supplemental Document to the Rome Treaty," (which the U.S. planned to introduce as part of the Relationship Agreement between the UN and the ICC in the November PrepCom) and the "Proposed Text of Rule to Article 98 of the Rome Treaty," included together under the heading US Proposal to the Preparatory Commission for the International Criminal Court (March 2000) (on file with author). This stands in sharp contrast to Ambassador Scheffer's statement in the June PrepCom denying the connection between the two parts of the US plan. Scheffer, supra note 62, at 2.

65 Albright, supra note 61. The U.S. proposal for achieving this goal by carving out an exemption for U.S. nationals is clearly incompatible with the spirit and letter of the Rome Statute. John Bolton confirms: "On the subject of the [ICC's] jurisdiction over Americans, the Clinton administration negotiated very hard in Rome to try and carve out exemptions from the [ICC's] jurisdiction so that states that did not sign the Rome statute could not have their
that in this picture, it seems to matter less what an individual does than what country he or she is from.

The Rome Statute also contains elements of a "double standard," but one that operates in the other direction: only nationals of State Parties or individuals who commit war crimes, genocide, or crimes against humanity on the territory of a State Party are subject to the ICC's jurisdiction (although all individuals remain susceptible to domestic laws prohibiting these crimes, and to relevant provisions enabling national courts to exercise their universal jurisdiction). What makes a State a "responsible" one under the ICC regime (in contrast to the U.S. model) is that State's willingness to become a Party to, and to cooperate with, the ICC.

Philip Reeker, Deputy Spokesman for the U.S. State Department, has insisted that "[t]he United States seeks a properly constituted ICC that would not place at risk those individuals from countries that accept the responsibility of pursuing the noble goals [of maintaining or restoring peace and security as well as pursuing humanitarian missions]." Assuming that members of peacekeeping and humanitarian missions are more likely to be the victims of atrocities than the perpetrators of them, failure to join the ICC would in fact place a State's own peacekeeping forces at much greater "risk" than would becoming a State Party.

The possibility of "politically motivated" and, by implication, unfounded, prosecutions by the ICC is minimal given the pre-trial checks and balances, due process guarantees, and stringent selection procedures for judges and prosecutors. Since the UN Security Council is charged with determining threats to international peace and security, and since the Security Council retains the power to suspend ICC investigations in a given situation, international-law-abiding participants in good-faith peacekeeping operations are highly unlikely personnel subjected to the jurisdiction of the International Criminal Court. It was an issue that was explicitly raised. It was explicitly rejected." The International Criminal Court and U.S Military Personnel: Hearing Before the House Comm. On Int'l Relations, 106th Cong. (July 25, 2000) (statement of John R. Bolton, Senior Vice President, American Enterprise Institute), available in LEXIS, News Group File, All.

Reeker, supra note 61.

67 See Rome Statute, supra note 6, arts. 36 (qualifications, nomination, and election of judges) and 42 (qualifications, nomination, and election of the Prosecutor).
to face spurious or unfounded prosecution for war crimes, genocide, or crimes against humanity before the ICC. While suggestions to the contrary may simply be the product of misunderstanding or misinformation, they reinforce a dangerously strident view that the only appropriate U.S. response to the ICC is resistance and even outright hostility.

C. The Domestic Political Context

If the ICC's complementarity regime and built-in checks and balances really do offer strong protections against unwarranted prosecutions and unfair trials, why are some U.S. politicians so vehemently opposed to joining the ICC, or to supporting its work in any way? Even the Clinton administration, which was, at least in principle, supportive of an international criminal court, refused to accept the slightest possibility that a U.S. citizen might be subject to the ICC's jurisdiction as long as the U.S. remains a non-State Party. President Clinton's statement upon signing the Rome Statute emphasized that "Court jurisdiction over U.S. personnel should come only with U.S. ratification of the Treaty." Arguments for why the U.S. should join the ICC have been elaborated in detail elsewhere, and will not be repeated here. However, appreciating the nature of U.S.

68 For example, the American Servicemembers Protection Act of 2000, S. 2726/H.R. 4054, introduced by Senator Jesse Helms (R-NC) and others on June 14, 2000, would prohibit any U.S. governmental entity from cooperating with the ICC in any respect.

69 See David J. Scheffer, Developments in International Criminal Law: The United States and the International Criminal Court, 93 AM. J. INTL L. 12, 12 (1999). Ambassador Scheffer repeated in a recent congressional hearing: "We all share the same minimum objective, namely to ensure that members of the U.S. armed forces and U.S. government officials are not prosecuted before the International Criminal Court when it is established." The International Criminal Court: Hearings Before the House Int'l Relations Comm., 106th Cong (July 26, 2000) (statement of David Scheffer, Ambassador-at-large for War Crimes), available in LEXIS, News Group File, All.

70 Clinton Statement on Signature of the International Criminal Court Treaty, supra note 13.

concerns helps to clarify, if not to justify, the U.S. goal of creating a blanket exemption from ICC jurisdiction, and suggests why some other countries try so hard to accommodate what seems to be a clearly unacceptable U.S. position.

The core U.S. objection to the ICC is that it will unjustly inhibit U.S. ability to conduct peacekeeping and defense operations around the world. This objection, though articulated in different ways by different critics, tends to be characterized by two major themes. The first is a broad, historically entrenched strand of isolationism that sees American interests as fundamentally threatened by "the stupidity and ineptitude of old men in the chancelleries of Europe," be they European political leaders and diplomats or "wigged judges in The Hague." The second is a persistent inability to conceive of U.S. actions as bound by international standards or susceptible to international scrutiny. For example, the ICTY's jurisdiction over war crimes in the Balkans was assumed by some Americans to be limited to jurisdiction over Balkan war criminals, leading "a lot of members of Congress [to be] quite surprised that this tribunal that was supposedly set up to try Balkan war criminals had actually been investigating NATO." In this narrow perspective, international tribunals exist to mete out sentences to pre-determined outlaws, not to judge those who are above the law, or at least above the tribunals' interpretation and application of it.

Highlighting the biases and blind spots of U.S. objections to the ICC does not negate the depth of resistance to the idea that a U.S.

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72 "It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize." Scheffer, supra note 69, at 18.


74 See, e.g., The International Criminal Court: Hearing Before the House Comm. on Int'l Relations, 106th Cong. (July 26, 2000) (statement of U.S. Representative Christopher H. Smith, R-NJ), available in LEXIS, News Group File, All. ("[A]bout this willingness to cede sovereignty. The Europeans have no problem with that, it seems, but obviously we do.").

75 Bolton, supra note 65.

76 Id.
citizen might one day be subject to trial by an international criminal court. The most salient U.S. objection relates to an inevitable feature of the complementarity regime, namely that "the ultimate decision about the ICC's authority is the ICC itself."\(^7\) Giving the ICC the final word on jurisdiction is necessary in order to avoid the possibility that show trials or sham proceedings will be used either to shield individuals from criminal accountability, or to deprive them of due process protections. However, this provision requires a certain faith in the checks and balances built into the ICC that the U.S., despite its strong influence on the design of the Rome Statute in general and the complementarity regime in particular, cannot muster.\(^7\)

The U.S. has made it clear that it is not yet prepared to make the leap into "a Rome Statute world."\(^7\) The question is: can the U.S. preserve its credibility in an evolving international society while continuing to play exclusively by its own rules? For how long can the U.S. continue to avoid, and even to undermine, the international standards for individual conduct and mechanisms for accountability agreed by a majority of other sovereign States?

\(^7\) Id.

\(^7\) Walter Slocombe, Undersecretary of Defense for Policy, has explained: "[O]ur concern - - the United States military, through the United States Military Justice System, prosecutes, and prosecutes vigorously, well-founded allegations that American military personnel have violated the law of war. We do not need the International Criminal Court to deal with that problem. So that is a non-problem. Our concern is not that there will be valid prosecutions of American military personnel. Our concern, rather, is that, as I said, and as we have said in -- repeatedly, our concern is with politically motivated prosecutions based not really on serious allegations of war crimes, but on disagreement with U.S. or other alliance policies, of which I think the rejected allegations with respect to Kosovo are a good example." *The International Criminal Court: Hearing Before the House Comm on Int'l Relations*, 106th Cong. (July 26, 2000) (statement of Walter Slocombe, Undersecretary of Defense for Policy), available in LEXIS, News Group File, All.

IV. THE FIFTH PREPCOM AND ITS IMPLICATIONS

The Fifth PrepCom for the ICC was charged with developing draft texts for the Rules and Elements to be submitted for approval to the Assembly of States Parties, the body that will oversee the functioning of the ICC once the Rome Statute goes into effect. The United States saw the drafting of the Rules of Procedure as a potential opening for continued attempts to ensure that no U.S. citizen could be haled before the ICC for crimes committed on the territory of a State Party to the Rome Statute. In particular, the U.S. delegation focused on article 98(2) as a hook for an expanded interpretation of what kinds of "international agreements" might act as limits on the ICC's ability to request the surrender of an individual, without first attempting to secure the consent of that person's State of citizenship. While such an expanded interpretation would have constituted an impermissible modification of the Rome Statute, the desire for consensus in the PrepCom meant that a tremendous amount of time and energy was spent trying to accommodate some aspects of the U.S. position. This section offers an overview of these efforts and an analysis of their results through the lens of the tension between consistency and consensus.

A. The Proposed U.S. Rule

Given that the PrepCom faced a June 30th deadline for finalizing the procedural Rules for the ICC, the June meeting was the U.S. delegation's final opportunity to include its proposed rule to article 98. The U.S. proposed rule read as follows: "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 international agreements applicable to the surrender of the person.\textsuperscript{83} On the surface, this seems like an unnecessary restatement of article 98(2), which, it may be recalled, provides:

\begin{quote}
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.\textsuperscript{82}
\end{quote}

By distancing the requirement of compliance with international agreements from the intended scenario of a SOFA governing jurisdiction over the forces of a sending State, the proposed U.S. rule sought to open the door to the next step of the U.S. exemption strategy: shaping the Relationship Agreement between the UN and the ICC to create an effective U.S. veto over the ICC’s exercise of jurisdiction over any U.S. national.

Up until the Fifth PrepCom, the United States had consistently presented the rule to article 98(2) as one part of a package that would create an exemption for U.S. nationals to the jurisdiction of the ICC.\textsuperscript{35} However, during this PrepCom, Ambassador Scheffer, the head of the U.S. delegation, strategically emphasized that the proposed rule to article 98 (rule 9.19) was independent and separate from the larger U.S. package deal.\textsuperscript{84} This approach was necessary in order for the

\textsuperscript{82} Rome Statute, supra note 6, art. 98(2). Article 97(e) also refers to instances in which executing a request for cooperation from the ICC “would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.” Article 97 does not bar such requests from the ICC; instead, it obligates the requested State to “consult with the ICC without delay in order to resolve the matter,” which may include finding alternative means of compliance. Id.
\textsuperscript{83} See, e.g., supra note 64.
\textsuperscript{84} Ambassador Scheffer stated: “[T]his proposal for Rule 9.19(2) ... should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the ICC or by any other international organization or State.” Scheffer, supra note 62, at 1.
United States to have a chance of succeeding in having the rule adopted, since virtually no delegation was amenable to the U.S. package. In addition, however, Ambassador Scheffer made it clear when he advanced the rule that he had a larger underlying agenda.\(^{85}\) This underlying agenda or "fundamental requirement" was, and remains, obtaining a guarantee that no U.S. citizen will be subject to ICC jurisdiction under any circumstances as long as the U.S. remains a non-Party to the Rome Statute.

As part of an exemption strategy, the U.S. proposed rule is inconsistent with the intended scope of article 98(2), and with the spirit of the Rome Statute. Exempting the nationals of any country from the jurisdiction of the ICC stands in fundamental opposition to the ideals of international justice and to the affirmation of universal jurisdiction over the most serious international crimes.\(^{86}\) The PrepCom's mandate explicitly forbids inconsistency with the Rome Statute. The Statute prevails in cases of conflict with the Rules or the Elements,\(^{87}\) and the Rules and Elements will have to be approved by the Assembly of States Parties before becoming guidelines for the ICC.\(^{88}\) Discussions during the June PrepCom's formal and informal sessions centered on how to accommodate U.S. concerns without adopting language inconsistent with the Rome Statute. Were it not for the perceived importance of consensus, the imperative of consistency would likely have prompted rejection of the U.S. proposal outright.

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\(^{85}\) For example, he noted: "Regarding the means to accommodate our fundamental requirement, as well as the common concerns raised about it, we are flexible." \(Id.\) at 2 (emphasis added).


\(^{87}\) Rome Statute, \textit{supra} note 6, art. 51(5).

\(^{88}\) \textit{Id.} art. 112(2)(a).
B. Reactions to the U.S. Proposal

Initial reactions to the U.S. rule were voiced at a formal session of the working group on the Rules of Procedure and Evidence on the afternoon of Friday, June 23, 2000. A compilation of delegates' remarks prepared by the Coalition for an International Criminal Court (CICC) tabulated that, out of forty-five countries that expressed views on the U.S. proposal, thirty-nine countries (eighty-seven percent) raised concerns about the incompatibility of the rule with the Rome Statute. While this would technically make the rule unacceptable (since the PrepCom has a statutory obligation to ensure that the rules remain within the bounds of the Statute), the desire for consensus prompted many countries that objected to the rule to attempt to find a compromise formulation, instead of rejecting it out of hand.

The U.S. proposal was examined and debated extensively by delegations after the June 23rd session. In essence, the majority of States agreed that article 98(2) was intended to address a limited scenario in which a sending State has an agreement with a requested State that requires the prior consent of the sending State before its citizen is surrendered to the ICC. Nevertheless, despite the widespread agreement that the U.S. rule was contrary to the spirit, and even the letter, of the Rome Statute, delegations to the PrepCom were

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69 Coalition for an International Criminal Court, NGO Draft "Non-Table" Breakdown of Concerns Raised by States on Proposed Rule for Article 98(2) by Issue and Country (June 2000) (on file with author).
69 See, e.g., statements of South Africa, Portugal, and CANZ (Canada, Australia, New Zealand) in working group on Rules of Procedure and Evidence (June 23, 2000) (on file with author).
91 The German delegation stated: "It has emerged clearly from this debate [in the working group] to what extent the proposal in DP.4 is inconsistent with article 98, paragraph 2 of the Statute, and the relevant legal arguments have been clearly spelled out by numerous delegations." Informal German discussion paper, supra note 62, at 1.
hesitant to come out against the proposal for fear of alienating the United States. Although few expect the United States to ratify the Statute in the foreseeable future, the possibility of active U.S. hostility towards the ICC provides an incentive for accommodation of the U.S. position to the full extent permitted by the Rome Statute.

Through informal consultations, the proposal for Rule 9.19.2 was modified to read as follows:

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.

The debate over the rule came to a head on the afternoon of Thursday, June 29, the day before the Rules and Elements were due to be adopted. The Coordinator of the working group, Phakiso Mochochoko of Lesotho, suggested incorporating a statement in connection with rule 9.19.2 in the proceedings of the PrepCom indicating that the rule "should not be interpreted as requiring or in any way calling for" provisions in any particular agreement. The delegates were assured that this statement would suffice to record their understanding (upon which their acceptance of the rule was based) that the U.S. would not use the rule as a springboard for a blanket exemption, as the U.S. had previously indicated it would.\textsuperscript{93} The wording of this "proposed understanding" was sufficiently vague to avoid objection by the United States.

However, not all members of the working group were amenable to adopting the revised version of the U.S. rule, even with the proposed understanding. The representative of the Côte d’Ivoire asked for the floor, apparently with the intention of requesting a vote on the rule. This move would have called to account the many countries that had expressed their disagreement with the U.S. rule, but that were willing to sacrifice (or, at least, to finesse) consistency on the altar of

\textsuperscript{93} Informal German discussion paper, \textit{supra} note 62.
consensus. After a series of mishaps and machinations, the U.S. rule was finally adopted by the working group without a vote during its June 29 session. Consensus was achieved, in the sense of reaching putative agreement without recourse to potentially divisive voting procedures, and thus with a (somewhat strained) inference of unanimity. Consistency with the principles of the Rome Statute was, and remains, mandatory, so the rule to 98(2) does not and cannot limit the ICC’s jurisdiction beyond what was envisaged and agreed upon at Rome. For this reason, clarifying and documenting the circumstances under which this rule was adopted now is an important step towards avoiding confusion, and potentially unwarranted impunity, in the future.

C. Analysis of Reactions

During the PrepCom discussions, the German delegation prepared a summary of issues that emphasized the limited intent of article 98(2), namely, to apply only to state-to-state agreements such as SOFAs. While U.S. Ambassador Scheffer rejected the commonsense view that article 98(2), and thus the U.S. rule, would apply “only ‘where an agreement exists between the requested State and the

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94 Serendipitously, the Ivorian delegate’s microphone did not work. The Coordinator called for a halt in the proceedings, and took the highly unusual step of converting the formal session into an informal session, thereby excluding NGO observers from the ensuing discussion. The tension was palpable. To the general surprise of the NGO representatives, who had assumed they would effectively be barred from the rest of the debates, the formal session was reconvened within a fairly short time. In an apparent attempt to enable discussion to proceed beyond the Côte d’Ivoire’s intervention, France voiced its concern that the French translation of the U.S. proposal was not in accordance with the English text. Tunisia, perplexed, responded that it saw no difference between the two versions, and asked France to explain what the problem was. The Coordinator took this opportunity to call on the Francophone delegations thus diverted, the Coordinator announced that he took it to be the wish of the working group that the rule be adopted for submission to the plenary session on June 30. No vote took place.

95 Informal German discussion paper, supra note 62, at 1. The paper emphasizes that article 98(2) was intended to apply strictly to status of forces agreements and similar state-to-state agreements, not to agreements concluded by the ICC. Id at 2-3.
sending State," equating this allegedly inaccurate characterization with a "narrow" view of article 98 as relating only to "bilateral agreements,\textsuperscript{96}" he misunderstood the crux of the "narrow" view, which correctly specifies the type of obligation contemplated in article 98(2) (an obligation on a State) while recognizing that either a bilateral or a multilateral agreement might give rise to such an obligation. Article 98 acknowledges the possibility that an international agreement of whatever character (bilateral or multilateral) may place an obligation on a requested State not to surrender the national of a sending State to the ICC without the consent of the sending State. This is made clear in the plain language of article 98(2), which specifies that "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.\textsuperscript{97}" The pronoun "its" refers to obligations of the requested State, a point made even clearer by the fact that the term "the ICC" is repeated elsewhere in the article to avoid confusion.\textsuperscript{98}

This point was also clarified by the German delegation's analysis, which lists the elements of the U.S.' proposed rule that are consistent and inconsistent with the Statute. The only element deemed consistent with the statute was the U.S. assertion that article 98(2) "does not contain language which would restrict its application to bilateral agreements. The concrete example which has been given for a multilateral agreement which may come within the scope of article 98, paragraph 2, of the Statute, that is the NATO's status of force agreement, is pertinent.\textsuperscript{99}" It is a standard principle of international law that treaties cannot be binding on third parties without their consent.\textsuperscript{100} The "international agreements" must therefore be between the sending State and the requested State. The international legal personality of the ICC may allow it to enter into certain agreements (including, most notably, its Relationship Agreement with the UN, or specific agreements for

\textsuperscript{96} Scheffer, \textit{supra} note 62, at 1.

\textsuperscript{97} Rome Statute, \textit{supra} note 6, art. 98(2) (emphasis added).

\textsuperscript{98} \textit{See} Informal German discussion paper, \textit{supra} note 62, at 2 (supporting this interpretation).

\textsuperscript{99} \textit{Id}

\textsuperscript{100} Vienna Convention, \textit{supra} note 46, art. 34.
cooperation with non-States Parties as envisaged by the Statute). However, in the absence of a statutory provision contemplating that the ICC would enter into an agreement with a non-State Party limiting its capacity to request surrender of a person from a State Party, there is no clear legal basis for inferring such a power.\textsuperscript{101}

If the U.S. wishes to preclude the surrender of one of its nationals to the ICC from a requested State, it will have to have a SOFA with that State that so provides (which it most likely will have), or it will have to be willing to investigate and provide a fair trial of alleged war crimes, genocide, and crimes against humanity committed by its nationals on the territory of a State Party to the Rome Statute. Ambassador Scheffer's own goal of "eliminating potential confusion in the implementation of Article 98" in deciding which international agreements it refers to will best be realized by the correct interpretation of the article as referring to obligations on the requested State arising from international agreements to which it is a Party.\textsuperscript{102}

The Samoan delegate, Professor Roger Clark, made a post-adoption statement during the working group meeting on June 29 that further highlighted the imperative of construing article 98(2) as referring exclusively to SOFA-type agreements.\textsuperscript{103} In particular, he emphasized: "I am comforted by the proviso, which provides that this rule is not in any way -- two words -- requiring or calling for, and does

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\textsuperscript{101} See Ian Brownlie, \textit{Principles of Public International Law} 691 (4th ed. 1990). The flawed inclusion of agreements entered into by the ICC in the category of agreements envisaged under article 98(2) is illustrated by Ambassador Scheffer's own enumeration of multilateral treaties creating bilateral obligations, all of which are treaties among States: "the 1925 Geneva Gas Protocol, the 1949 Geneva Conventions, the 1977 Protocols, the Chemical Weapons Convention, the Ottawa Land Mines Treaty, the Biological Weapons Convention, the 1954 Hague Cultural Property Convention, and the 1980 Conventional Weapons Convention." Scheffer, \textit{supra} note 62, at 2.

\textsuperscript{102} Scheffer, \textit{supra} note 62, at 2.

\textsuperscript{103} Professor Clark stated:

This has been a creative way to postpone certain very complicated legal issues. The preamble to the Rome Statute contains lofty language about the most serious crimes of concern to the international community as a whole. Article 98(1) and (2) sits awkwardly with these lofty ideals.... So Article 98 should be strictly construed, not extended by analogy. Its reference to the \textit{sending} State suggests limitations on the kinds of agreement allowed.

Roger Clark, Intervention in the Working Group on Rules of Procedure and Evidence (June 29, 2000) (transcribed by the author based on her own detailed notes from this session).
not authorize, permit, or empower a wide range of such agreements to be decided on another day." It is precisely the potential for an "other day" to provide an occasion for renewed attempts to undermine the Rome Statute that NGOs and those who support an effective and credible ICC fear. Future PrepCom meetings must not be used to exploit further the desire for consensus and to erode the delicate balance between state sovereignty and universal justice negotiated at Rome and enshrined in the ICC.

Despite extensive statutory protections against unwarranted prosecutions by the ICC, and the opportunities for national investigations and prosecutions under the complementarity regime, U.S. efforts to carve out a blanket exemption for the actions of its citizens will not abate. Delegates to the ICC PrepComs are firm in their resolve to resist attempts to undermine the Rome Statute in principle, but their best intentions may reward intransigence in practice. Those committed to ensuring an independent and effective ICC should remain especially mindful of this tendency during future PrepComs. The parameters of the Rome Statute are legally binding and cannot be altered except by official amendment by the Assembly of States Parties. However, the diplomatic and political compromises reached at future PrepComs can either facilitate or hinder the future work of the Assembly and the ICC. Delegates cannot sacrifice consistency, and they should resist the temptation to compromise clarity in the name of short-lived comfort or illusory consensus.

David Scheffer warned in a 1997 address given in his capacity as U.S. Ambassador-at-large for war crimes:

For all of the theory and jurisprudential underpinnings of each International Tribunal, however, which make these institutions so intellectually challenging for international and criminal lawyers, there are operational issues which needlessly hamper the Tribunals' efficient operations. Unless these issues are resolved, the theory and precedent essential to a lasting jurisprudence risks being buried under the weight of bureaucracy.

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104 Id.
105 Scheffer, supra note 51. Ambassador Scheffer further insisted in a speech otherwise critical of the Rome Statute that: "Lofty rhetoric about justice in the future lacks credibility if"
The unnecessary hindering of international justice may be a concern of the U.S. delegation; however, too often during the Fifth PrepCom, it seemed instead to be the core U.S. objective. The U.S. has a mottled record in this respect: it enacted the Torture Victims Protection Act while insulating U.S. agents from its reach;\[^{106}\] and it has called for the trial of Saddam Hussein and others as war criminals while refusing to support the ICC.\[^{107}\] The sensitivities of the U.S. Defense Department may be understandable, but they are excessive. The complementarity regime of the ICC, its checks and balances, and its fair trial standards make ICC-phobia unwarranted and counterproductive. If the U.S. hopes to be successful in its foreign policy, from peace-brokering (as in the Middle East) to peace-keeping (as in Bosnia), it will have to play by its own rules, or at least try harder to create the impression of attempting to behave with regard for international standards. This is both a strategic question of credibility and legitimacy in U.S. foreign policy, and a moral question of diplomatic honesty, integrity, and reciprocal good faith.

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\[^{106}\] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (establishing a civil action against an individual who commits torture or extra-judicial execution under color of law of any foreign nation). President Bush noted expressly: "I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement operations ... which are always carried out under the authority of United States law." President George Bush, STATEMENT ON SIGNING THE TORTURE VICTIM PROTECTION ACT OF 1991 (March 12, 1992), reprinted in BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 271, 271 (1996)

D. The End of the PrepCom and its Aftermath

The PrepCom’s final plenary session, at which the Rules and Elements were to be adopted, took place on Friday, June 30, 2000. The day’s triumphant atmosphere was noticeably marred by the U.S. debacle. Chairman Philippe Kirsch opened the session by outlining the adoption procedures: he would present the documents for adoption and, after action had been taken on them, open the floor to statements from delegations.

The Ivoirian delegate presented his concerns regarding the PrepCom proceedings, especially with regard to the rule to article 98(2). The U.S. rule, he insisted, was “ni plus ni moins qu’une modification, sinon un amendement, au Statut” -- no more nor less than a modification, or even an amendment, of the Statute. He

108 The pretense that the U.S. rule was intended to stand alone, as stated by Ambassador Scheffer and stipulated in the proposed understanding, was shattered on the final morning of the PrepCom. An Associated Press story released on the night of Thursday, June 29, 2000 confronted readers with the headline: “U.S. Takes War Crimes Exemption Step.” Edith Lederer reported from the UN: “The United States said Thursday it has negotiated a key first step toward an exemption for U.S. citizens from prosecution by the world’s first permanent war crimes tribunal. U.S. Ambassador David Scheffer, the ambassador-at-large for war crimes issues, said he is hoping to win final agreement from more than 100 countries when the commission preparing for the court’s operation holds its next meeting in November. “We know the larger part of our proposal is awaiting debate in November and December, he said .... Scheffer expressed satisfaction that a rule agreed to by delegates on Thursday would provide “a gateway” for the United States in November to seek an exemption for the surrender of U.S. citizens through an agreement with the court.” Edith M. Lederer, U.S. Takes War Crimes Exemption Step (June 29, 2000) available at http://dailynews.yahoo.com/h/ap/20000629/us/un_international_court_2.html (last visited Feb. 24, 2001). The awkwardness created by this shattered illusion of a successful compromise was palpable among the delegates. Nevertheless, many were reluctant to revisit the wording of the text yet again on the final day of the conference. “PrepCom fatigue” had set in.

109 The Côte d’Ivoire questioned this inverted procedure, which Chairman Kirsch insisted was simply a suggestion, but one that he maintained was the best way to proceed. After the presentation of the Elements document by the Netherlands, Chairman Kirsch asked the Côte d’Ivoire if it had anything to add. While the Ivoirian delegate noted that his comments pertained more to the Rules than to the Elements, he agreed to take the floor at this juncture.

110 Delegate from the Côte d’Ivoire, Intervention in the plenary session of the ICC PrepCom (June 30, 2000) (as recorded by the author). See Summary of statements, supra note 92.
repeated that article 98(2) does not contemplate that all surrenders of individuals to the ICC will be subject to the consent of the sending State, but only requests from the ICC that call on the requested State to violate an agreement with the sending State. After making several further observations, the Ivoirian delegate concluded by repeating that rule 9.19 was nothing less than an amendment to the Rome Statute, and should be voted on as such.

The Rules document was then introduced by the Argentine delegation. Australia moved to suspend the meeting so that consultations could take place before a vote. Ambassador Scheffer made calls on his mobile phone while delegates clustered around the like-minded States that had spearheaded the compromise formulation to decide what to do next. By the time the meeting was reconvened, the Ivoirian delegate had been persuaded to retract his motion for a vote "in the spirit of cooperation" and with a view to expediting the work of the PrepCom. Given that the "proposed understanding" would form part of the official record of the PrepCom, and that article 51(5) of the Statute makes clear that the Statute prevails in all cases of conflict with the Rules or the Elements, the Ivoirian delegate agreed to forego a vote. The rule was adopted without further discussion.

111 The Ivoirian delegate also insisted that the "proposed understanding" cobbled together at the last minute did not sufficiently address his concern. Rule 9.19, according to the Ivoirian delegate, is a "de facto amendment" of the Statute. He insisted that delegates not create "une parapluie de l'impunité" — an umbrella of impunity — for certain individuals based on semantic or grammatical sophistry, as rule 9.19 attempts to do.

112 The group of "like-minded" States was formed during the preparatory work leading up to the Rome Conference by Western European and Latin American States committed to establishing an independent and effective Court. The "like-minded" group has grown steadily (by the end of the Rome Conference, it numbered sixty-seven members). It comprises countries from all regions, including Australia, Argentina, Belgium, Canada, Chile, Denmark, Egypt, Germany, Guatemala, Jordan, New Zealand, South Africa, Trinidad and Tobago, and the United Kingdom.

113 The delegate also insisted that the fairness of the ICC depends on the non-discriminatory exercise of the ICC's competence: It must not always be the same people who are the judges and the same people who are the accused.

114 The proposed text of rule 9.19.2 was adopted as rule 195(2) in the Finalized Draft Text of the Rules of Procedure and Evidence, PCINCC/2000/INF/3/Add.1, at 89, available at http://www.un.org/law/icc/statute/rules/rulefra.htm (last visited Feb. 24, 2001). At this point in the proceedings, a number of countries intervened to place on record their understanding...
The "Proposed understanding in connection with Rule 9.19, for incorporation into the Proceedings of the Preparatory Commission" reads: "It is generally understood that rule 9.19 should not be interpreted as requiring or in anyway [sic] calling for the negotiation of provisions in any particular international agreement by the ICC or by any other international organization or State." This statement is best understood as an expression of the explicit understanding and condition upon which the adoption of rule 9.19 by the PrepCom was based: namely, that only obligations created by agreements between the requested State and the sending State are contemplated by article 98(2) and within the scope of the rule. The United States cannot in good faith continue to negotiate the "second stage" of the proposed exemption of its citizens from the jurisdiction of the ICC.

The modified U.S. rule adopted by the Fifth PrepCom has been labeled rule 195(2) in the Finalized Draft Text of the Rules of Procedure and Evidence. Recording and understanding the implications of this rule in conjunction with its drafting history will prove especially important if a non-State Party ever attempts to use this rule to shield its citizens from the ICC's jurisdiction when they have committed genocide, war crimes, or crimes against humanity on the territory of a State Party. The discussions of rule 195(2) during the Fifth PrepCom served to clarify the nature, scope, and purpose of article 98(2), an article that had not previously been a focus of attention.

The travaux of rule 195(2) and the form in which it was adopted lead to the following conclusions:

that rule 9.19 would not in any way expand or modify the compromise already reached at Rome in article 98(2), as reinforced by rule 9.19's explicit reference to article 98(2). These included New Zealand, Cuba, Nigeria, Niger, and Portugal on behalf of all 15 members of the EU. See Summary of statements, supra note 92.


116 Otto Triffterer's extensive commentary on the Rome Statute only contains three pages on Article 98. The commentary notes that the article as agreed "recognizes protections flowing from international obligations relating to diplomatic or state immunity [not including immunity based on official capacity or national law] and those arising from an agreement such as Status of Forces agreements." Kimberly Prost & Angelika Schlunck, Cooperation with respect to waiver of immunity and consent to surrender, in Commentary on the Rome Statute of the International Criminal Court 1131, 1131 (Otto Triffterer ed., 1999).
(1) Rule 195(2) was accepted on the condition that it stands alone - that is, not only that it would be evaluated “on its own merits” in the context of the PrepCom, but also that it will not form the platform for, a precursor to, or a portion of, any subsequent expansion of the scope or purpose of article 98(2), especially for any ends or purposes inconsistent with those of the Rome Statute.

(2) In cases of doubt or ambiguity, any conflicts or tensions will be resolved in favor of the Rome Statute, as required by article 51(5).

(3) Article 98(2) refers only and exclusively to agreements between States that place an obligation on the requested State to obtain the consent of the sending State before surrendering a person to the ICC. Article 98(2) also leaves open the possibility for the ICC to approach the sending State to obtain its cooperation and consent for a surrender, meaning that such surrenders are not precluded under the Statute.

(4) The voluntary appearance of any individual before the ICC is not prohibited under any circumstances.

(5) The observation that article 98(2) itself seems in tension with the purpose of the Statute does not make it a hook for amending, modifying, or otherwise undermining the ICC: to the contrary, it requires a very narrow reading of this provision to keep it within the bounds of the Statute, as required by law.

(6) None of the stipulations provided by the June PrepCom supplants or erodes the principle of complementary jurisdiction, by which a competent national court is encouraged to try serious international crimes to the full extent of its domestic and universal jurisdiction.

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117 In addition, “Article 98(2) ... does not expressly prohibit the requested state from giving priority to the ICC’s request.” Amnesty International, The International Criminal Court: Checklist for Effective Implementation 24 (June 2000).

118 Rome Statute, supra note 6, art. 98(2).

119 With relation to article 98(2), “[s]tates which have signed or ratified the Statute should not enter into such agreements and should seek to renegotiate existing agreements. If the ICC is precluded by such an agreement from proceeding with the request, then the requested state should exercise jurisdiction over the case or extradite the person to another state able and willing to do so in fair proceedings.” Amnesty International, supra note 117, at 24. Article 18 of the Vienna Convention on the Law of Treaties establishes that signatory States are under an obligation of good faith to refrain from acts calculated to defeat the object of the treaty.
(7) The rule to article 98(2) is consistent with the Statute as long as it is read strictly in conjunction with the article itself, and with the prevailing understanding of the nature of the agreements at issue accepted at Rome and clarified during the PrepCom (that is, agreements between the sending State and the requested State, creating an international obligation on the requested State). If these requirements are adhered to, then rule 195(2) constitutes an acceptable, if somewhat superfluous, contribution to the Rules of Procedure and Evidence for the ICC. To the extent that the emphasis on consensus during the Fifth PrepCom managed to keep the U.S. involved in the discussions without sacrificing consistency, it served a useful purpose. However, participants in the work of the future ICC will have to remain vigilant to make sure that States are not allowed to interpret rule 195(2) as a hook for illegal exemptions to ICC jurisdiction.

V. CONCLUSIONS

The PrepCom negotiations for the Rules and Elements of the ICC, and especially the debate over the proposed U.S. rule to article 98(2), illustrate the interplay between the legal imperative of consistency and the political imperative of consensus in the development of an international institution. The precariousness of enforcement mechanisms in international law means that the effectiveness of a given international rule or institution will depend largely on its voluntary and widespread acceptance by States. However, it does not

until they have made their intention clear of not becoming parties. Vienna Convention, supra note 14. This may, in fact, prohibit any of the 139 signatory States of the Rome Treaty from entering into agreements calculated to restrict the jurisdiction of the ICC. The observation that this reading of the rule, the only one compatible with the Statute and thus permitted by it, gives the rule little, if any, independent value (since the rule simply reaffirms article 98(2)) further belies Ambassador Scheffer's insistence to delegates at the PrepCom that the rule was intended to stand alone, rather than to serve as a gateway for a blanket U.S. exemption from the ICC. See supra note 62.
follow that attempts to create a binding regime of international
criminal law must sink to the lowest common denominator.
Consensus purchased at the cost of consistency with the particular
provisions of the Rome Statute and with the general principle of
universal accountability is cold comfort for those committed to the
development of a truly effective system of international justice. The
political positions and constraints of powerful states cannot naively be
ignored, but nor should they be allowed excessively to restrict the
progressive development of international standards that promote and
protect human dignity and other core human values.

The ICC will provide an indispensable backup to national
jurisdictions in deterring, investigating, and prosecuting serious
international crimes. The momentum behind the ICC testifies to the
increasing realization by countries that international norms may
require international enforcement mechanisms, especially where
individual perpetrators beyond the reach of their own domestic courts
are concerned. The frequent observation that an individual who
commits one murder may face life imprisonment, but another who
murders thousands may enjoy impunity, has driven efforts to rectify
this incongruity, especially insofar as it constitutes a by-product of an
international system of sovereign states.

Signing, ratifying, and implementing the ICC provides States with
an opportunity to review their existing criminal procedures, and to
ensure that these comport with international standards such as those
relating to due process, the protection of victims and witnesses, and
jurisdiction over internationally recognized crimes. The ICC will
provide important incentives and support for domestic efforts in future
cases, and it will eliminate the need to create additional ad hoc
international tribunals when domestic legal systems lack the will or
ability to investigate and prosecute these crimes themselves.

One of the most striking features of the ICC is its overwhelming
endorsement by members of the international community.121 Neither
moral relativism nor military might ought to justify double standards
when individual criminal conduct has been identified as such by
almost all States in the world. In particular, the “leader of the free

121 See supra note 6.
world” cannot justifiably and in good conscience exempt its citizens from the internationally recognized code of conduct embodied in the Statute of the ICC.

The curious coupling of internationalism and isolationism that has characterized U.S. foreign policy since America gained independence from Britain, and the preeminent role of the U.S. military in many parts of the world today, make the position of the United States unique in some respects. But uniqueness should not be used to justify immunity. For too long, the United States has assumed that it alone has the prerogative of defining who is “in” and who is “out” of the club of “responsible” countries. The U.S. would be well-advised to rethink its posture towards other countries and to recognize that, in order to lead effectively, one must also be prepared to cooperate and, at times, to follow.

The ICC, although not perfect, represents a significant step towards the vision of a united international community committed to deterring and punishing war crimes, genocide, and crimes against humanity. President Clinton noted upon signing the Rome Statute that this action “sustains [the U.S.] tradition of moral leadership.”\(^\text{122}\) It would be dangerous to interpret this position of leadership as a license for the U.S. to resist international cooperation on any terms other than its own. Instead, the U.S. should focus on leading by example, by facilitating the domestic prosecution of international crimes, and by bolstering, rather than undermining, the credibility and legitimacy of the ICC.

\(^{122}\) Clinton Statement on Signature of the International Criminal Court Treaty, supra note 13.