

# THE ICC AND THE US BILATERAL AGREEMENTS: IMPUNITY AGREEMENTS?

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## Introduction

¶1 The International Criminal Court (ICC) was established by the Rome Statute of the International Criminal Court on July 17, 1998, when the 120 states participating in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" adopted the Statute.<sup>2</sup> This was the first permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished.

¶2 The United States of America is the only state actively opposed to the International Criminal Court.<sup>3</sup> US opposition to the Court initialized during the adoption of the Rome Statute of the International Criminal Court (Rome Statute) in 1998, where the US was one of only seven states to vote against its adoption.<sup>4</sup>

¶3 The Bush Administration cited four main concerns if the proposed Rome Statue was ratified: absence of checks and balances for the power held by the prosecutor of the ICC, the possibility of politicized prosecutions, the limited role of the Security Council regarding the ICC, and the potential prosecution of nationals from non-party states.<sup>5</sup> To deal with these concerns, the US Government took three measures: adoption of the Security Council

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<sup>2</sup> See *Establishment of an International Criminal Court*, G.A. Res. 160, U.N. GAOR, 52d Sess., 72d plen. mtg., Supp. No. 32, U.N. Doc. A/RES/52/160 (1997) [hereinafter *Establishment of ICC*], available at <http://www.un.org/ga/documents/gares52/res52160.htm>; see also Roy S. Lee, *Introduction: The Rome Conference and Its Contributions to International Law*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 1, 4, 26 (Roy S. Lee ed., 1999).

<sup>3</sup> See WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 18 (2d ed. 2004).

<sup>4</sup> *Id.*; see *infra* text accompanying notes 25-29.

<sup>5</sup> See *infra* Chapter 3.

Resolution 1422, adoption of American Service-Members' Protection Act of 2002 and signing Article 98 Agreements.<sup>6</sup>

¶4 The present article will analyze US government measures to limit ICC power in an effort to understand the justifications for its concerns and validity of these measures, especially in relation to Article 98 Agreements. These agreements establish that signing states will not surrender or transfer American nationals to the ICC without the consent of the US Government, if they are accused or investigated for committing crimes under the jurisdiction of the ICC.<sup>7</sup> This US policy has resulted in criticism and varied reactions from the International Community, NGO's and public opinion. The US Department of State and the Council of the European Union have made public statements defending their respective positions on determining the real scope for the application of Article 98 of the Rome Statute and its consequences.<sup>8</sup>

¶5 This article will try to establish the relevant points that must be taken into consideration in determining what the precise interpretation of Article 98 of the ICC Statute should be, and if the interpretation given by the US Government and the wording of the proposed text of Article 98 Agreements may lead into the situation the ICC was created to combat impunity.

## 1. THE NEGOTIATIONS IN ROME: DISCUSSIONS FOR THE ADOPTION OF ARTICLE 98 OF THE ROME STATUTE

### 1.1. THE SITUATION AFTER THE SECOND WORLD WAR

¶6 Since the end of the Second World War, many innocent civilians have died in a large number of armed conflicts around the world. The world witnessed the Holocaust during the Second World War, armed struggles in Asia and Africa for independence from colonial powers, civil wars, and military coups, among other armed conflicts. In each conflict, many crimes have been committed in clear violation of the Geneva Conventions as well as the international human rights treaties signed after the Second World War.

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<sup>6</sup> See SCHABAS, *supra* note 2, at 22-24; *see infra* Chapters 3-4.

<sup>7</sup> *See infra* Chapter 4.

<sup>8</sup> *See id.*

¶7 During past decades, many international treaties and customary practices among States have produced a number of international laws and norms prohibiting such atrocities as genocide, war crimes and crimes against humanity.<sup>9</sup> In practice however, States have not fully applied these laws in regards to the investigation, prosecution and punishment of the perpetrators of these crimes. For example, Latin American states like Chile and Argentina have experienced multiple tortures and forced disappearances their national jurisdiction has never fully investigated despite ratification of international treaties. It is in the best interest of dictatorial governments to maintain a culture of impunity among their armed forces, mostly to maintain their power by means of intimidation of the population.

¶8 Few perpetrators of egregious violations have faced national justice for committing their crimes, and thus in many ways a culture of impunity exists today. The international community sadly has observed this situation with indifference for many decades. During the Cold War, both Soviet and American blocks overtly and covertly supported armed groups fighting for their interests without condemning excess committed during these actions. After the end of the Cold War the Security Council has not paid sufficient attention to important conflicts where these did not further the Council's economic or geopolitical interests, such as in Rwanda and Sierra Leone in the early 90s.

¶9 One could say the majority of conflicts seem to be product of failures of justice, where the wounds of past crimes have not healed. One example is Rwanda, where many human rights violations were committed by the Tutsi minority for decades. This situation, fuelled with additional ingredients such as manipulation of resentment and mistrust, led to the genocide of 1994. The ghost of future violence is born with mistrust of the justice system. When national jurisdictions fail to punish the perpetrators of human rights violations, this mistrust transforms into an overwhelming desire for vengeance. As such, accountability for perpetrators of these crimes is a critical factor in building and maintaining peace.

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<sup>9</sup> See SCHABAS, *supra* note 2, at 26-27.

1.2. UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES  
ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT,

15 June-17 July 1998 (Rome Conference)

¶10 In December 1997, the UN General Assembly created the “United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court”, to be held in Rome, Italy, between June 15<sup>th</sup> and July 17<sup>th</sup> of 1998.<sup>10</sup> The UN General Assembly also invited inter governmental organizations and NGO’s to participate in the work of the Conference.<sup>11</sup>

¶11 During the Diplomatic Conference of 1998, the Draft presented over 1700 brackets inserted during the Preparatory Committee held between 1996 and 1998 to the 160 States participating in the Conference .<sup>12</sup> Each bracket represented a disagreement that needed further discussion.<sup>13</sup> To make things more complicated, 200 additional written proposals were submitted.<sup>14</sup> The adoption of the Rome Statute seemed an insurmountable task.<sup>15</sup>

¶12 During the first weeks, the provisions of the Statute were adopted by “general agreement” (read “without a vote”) in the working groups that discussed specific issues.<sup>16</sup> The working groups were forwarding their “progress reports to the Committee of the Whole, indicating the provisions that had already met with agreement.”<sup>17</sup> The Drafting Committee, “chaired by Professor M. Cherif Bassiouni, for terminological and linguistic coherence,” subsequently examined these provisions.<sup>18</sup>

¶13 As the weeks passed, three key issues remained unsettled: the role of the [UN] Security Council, the list of ‘core crimes’ over which the court would have inherent jurisdiction, and the scope of its jurisdiction over persons who were not nationals of Party States.<sup>19</sup> These

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<sup>10</sup> See *Establishment of ICC*, *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> See Lee, *supra* note 1, at 13.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> SCHABAS, *supra* note 2, at 17.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

issues were not assigned to the working groups.<sup>20</sup> Philippe Kirsch of Canada, the chair of the Committee of the whole, handled these matters personally.<sup>21</sup> He sent his proposal on July 17<sup>th</sup>, the day the Conference was planned to finish.<sup>22</sup> The delegates expressed their support for the “package”, thus allowing the proposal to go on without any alteration or adjustment.<sup>23</sup> However, the United States tried unsuccessfully to block the approval<sup>24</sup> and demanded a vote be taken.<sup>25</sup> “The result was 120 in favour, with twenty-one abstentions and seven votes against.”<sup>26</sup> The United States, whose delegation was important in the development of the Statute through the Preparatory Committee and the Rome Conference, was one of the 7 countries that voted against the treaty.<sup>27</sup>

¶14 The position of the US during the Rome Conference was clearly articulated by David J. Scheffer, Head of the U.S. Delegation to Rome Conference, before the Committee on Foreign Relations of the U.S. Senate on July 23<sup>rd</sup>, 1998.<sup>28</sup> He emphasized the US delegation’s valuable contributions during the whole drafting process, such as an improved regime for the complementarity principle, a list of due process protections for defendants and suspects, definitions of war crimes and crimes against humanity (including the incorporation into the statute of elements for these offenses), recognition of gender issues, and provisions for command responsibility and superior orders.<sup>29</sup> Sheffer also highlighted important reasons the US delegation rejected the draft statute made in Rome on July 17<sup>th</sup> 2002.<sup>30</sup> The crucial reason for refusal was the US delgation’s desire to grant the Security Council power to authorize the investigations and further prosecutions undertaken by the ICC. The majority of delegates did

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 18.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 4 n.9 (2002) (stating that no vote was recorded so it is uncertain which States voted along the U.S. lines, but after some discussion with the delegates, it seems likely that China and Israel voted no with the U.S).

<sup>28</sup> *Is a U.N. Int’l Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int’l Operations of the Comm. on Foreign Relations U.S. Senate*, 105<sup>th</sup> Cong. 10-15 (1998) (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues) [hereinafter Scheffer], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105\\_senate\\_hearings&docid=f:50976.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:50976.pdf).

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *Id.* at 12-15.

not accept this,<sup>31</sup> because the Security Council is a political arm of the UN and has minimal involvement with the purposes and objectives of the ICC: to end impunity for the perpetrators of “atrocities that deeply shock the conscience of humanity”.<sup>32</sup>

¶15 David J. Scheffer gave the following reasons for rejecting the draft statute in Rome before the Committee on Foreign Relations of the U.S. Senate few days after the Rome Conference finished:<sup>33</sup>

- “Official actions of a non-party state should not be subject to the Court's jurisdiction” in cases where a country is not a party to the treaty, except by means of Security Council action.<sup>34</sup> The US delegation supported the right of the Security Council to refer situations to the ICC with compulsory effect, making a non-party state unable to deny the court's jurisdiction under any circumstances.<sup>35</sup> For the US delegation this was the only way to impose the court's jurisdiction on a non-party state, and this was rejected.<sup>36</sup>

- The prosecutor of the court should not be able to initiate investigations on his or her own authority, even with two consenting judges.<sup>37</sup> The US delegation was also opposed to the fact that the prosecutor could start “investigations and prosecutions without referral to the Court . . . by a government that is party to the treaty or by the Security Council.”<sup>38</sup>

- The crime of aggression should not have been included in the statute.<sup>39</sup> The U.S. Delegation opposed inclusion of the crime of aggression because it was going to be defined by future amendment to be adopted seven years after the treaty's entry into force.<sup>40</sup> The crime of aggression had not been “defined under customary international law for purposes of individual criminal responsibility.”<sup>41</sup> In addition, the US delegation argued there were no

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<sup>31</sup> *Id.* at 14.

<sup>32</sup> *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/9, pmbl. ¶ 2 (1998) [hereinafter *Rome Statute*].

<sup>33</sup> Scheffer, *supra* note 27, at 13.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 14.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

guarantees in the statute that the Security Council will take part in the discussions of the definition of the crime of aggression in 2009.<sup>42</sup>

- Finally, reservations to the statute should be permitted.<sup>43</sup> Mr. Scheffer recognized that “there were certain provisions of the treaty, particularly in the field of state cooperation with the Court, where domestic constitutional requirements and national judicial procedures might require an opportunity for reservations” without going against purpose of the treaty.<sup>44</sup>

## 2. THE ROME STATUTE’S COMPLEMENTARY NATURE

¶16 During the negotiations, the delegations agreed to give the ICC a “complementary” nature.<sup>45</sup> In that sense, cases will be only admissible before the ICC when parties are “unable” or “unwilling” to exercise national jurisdiction in investigating or prosecuting the crimes<sup>46</sup> contained in the Rome Statute: genocide, crimes against humanity, war crimes and the crime of aggression as defined in 2009.<sup>47</sup>

¶17 This principle is innovative, because it differs from the one established in the statutes of the ad-hoc International Tribunals, like the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which have a “concurrent” nature as regards jurisdiction.<sup>48</sup>

### 2.1. CONCURRENCE IN THE AD-HOC TRIBUNALS

¶18 During the establishment of the ICTY and the ICTR, the Security Council was faced with the fact that “in the former Yugoslavia, there was an unwillingness to investigate and prosecute effectively those responsible for international crimes and in Rwanda there was

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Id.*

<sup>45</sup> See Lee, *supra* note 1, at 27.

<sup>46</sup> *Id.*

<sup>47</sup> See Rome Statute, *supra* note 31, art. 5(1); Scheffer, *supra* note 27, at 14.

<sup>48</sup> STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA art. 9(2) (1993) [hereinafter ICTY]; STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA art. (8)(2) (1994) [hereinafter ICTR].

inability to do so.”<sup>49</sup> The Security Council’s solution to this problem was to assign both ad-hoc International Tribunals “concurrent jurisdiction.”<sup>50</sup> These statutes granted the ad-hoc international tribunals jurisdiction over national courts.<sup>51</sup> The main reason for establishing this concurrent jurisdiction was “there were serious concerns that any proceedings initiated [before the national] courts” in the former Yugoslavia would attempt to shield the suspects from the jurisdiction of the ICTY.<sup>52</sup> In Rwanda, the judicial system was destroyed, and important international assistance was required to rebuild the entire judicial infrastructure “before the country could begin to prosecute those responsible.”<sup>53</sup> Granting jurisdiction to ad-hoc international tribunals attempts to circumvent perpetrators escaping prosecution as a result of national instability.

¶19 The Ad-hoc International Tribunals were a creation of the Security Council,<sup>54</sup> acting under Chapter VII of the UN Charter, and all the Party States were obliged to observe decisions under article 25 of the UN Charter.<sup>55</sup> On the other hand, the Rome Statute was created after long multilateral negotiations, with international politics involved in its drafting.<sup>56</sup> No State wanted to jeopardize their sovereignty in their national criminal jurisdiction. The solution to this concern was the adoption of the complementarity principle in the ICC Statute.<sup>57</sup>

## 2.2. THE PRINCIPLE OF COMPLIMENTARITY IN THE ICC: DEFINITION OF INABILITY AND UNWILLINGNESS

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<sup>49</sup> John T. Holmes, *Complementarity: National Courts versus the ICC*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 669 (Antonio Cassese et al. eds., 2002).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; see also ICTY, *supra* note 47, art. 9(2); ICTR, *supra* note 47, art. 8(2).

<sup>52</sup> Holmes, *supra* note 50, at 668.

<sup>53</sup> *Id.* (citing VIRGINIA MORRIS & MICHAEL P. SCHARF, I THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 309-10 (1998)).

<sup>54</sup> The ICTY was created by Security Council Resolution 808, of February 22, 1993. S.C. Res. 808, U.N. SCOR, 3175<sup>th</sup> mtg. at 2, U.N. Doc. S/RES/808 (1993). The ICTR was created by Security Council Resolution 955, of 8 November 1994. S.C. Res. 955, U.N. SCOR, 3453d mtg. at 2, U.N. Doc. S/RES/955 (1994).

<sup>55</sup> Sharon A. Williams, *Article 17: Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 383, 394 (Otto Triffterer ed., 1999).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 384.

¶20 The principle of complementarity was finally established in the Preamble, Articles 1 and 17 of the Rome Statute of the ICC.<sup>58</sup> The final version of this principle in the Rome Statute established the ICC as complementary to national criminal systems, therefore placing primary responsibility for trying a case that may come within the ICC’s jurisdiction on the state.<sup>59</sup> The ICC will exercise its complementary jurisdiction only if a State is “unwilling or unable genuinely to carry out the investigation or prosecution”<sup>60</sup> of persons responsible for committing genocide, crimes against humanity and war crimes.<sup>61</sup> “The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness “because States will have better access to ‘evidence and witnesses and the resources to carry out proceedings.’”<sup>62</sup>

¶21 The tenth paragraph of the Preamble and Article 1 of the Rome Statute established the principle of complementarity in the ICC.<sup>63</sup> Paragraphs four to six of the Preamble of the ICC Statute<sup>64</sup> established the most serious crimes of concern to the international community must be punished in order to put end to impunity for the perpetrators.<sup>65</sup> The States also have the duty to prosecute those responsible for these crimes.<sup>66</sup> Thus, it can be interpreted from the Preamble of the Rome Statute that the crimes within the jurisdiction of the ICC are crimes that must be prosecuted by the States, and they are obliged to do so.

¶22 Article 17 of the ICC Statute establishes that as long as national criminal courts of State Parties are “able and willing to genuinely investigate and prosecute the matter [that] has come

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<sup>58</sup> See *Rome Statute*, *supra* note 31, pmb. ¶ 10, arts. 1, 17; Lee, *supra* note 1, at 42; Holmes, *supra* note 48, at 667-68; Williams, *supra* note 54, at 384..

<sup>59</sup> Williams, *supra* note 54, at 384-85.

<sup>60</sup> *Rome Statute*, *supra* note 31, art. 17(1)(a).

<sup>61</sup> *Id.* art. 5(1).

<sup>62</sup> ICC-OTP, *Informal Expert Paper: The Principle of Complementarity in Practice* ¶ 1 (2003) [hereinafter *Informal Expert Paper*], at <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>.

<sup>63</sup> See *Rome Statute*, *supra* note 31, pmb. ¶ 10, art. 1.

<sup>64</sup> See *id.* pmb. ¶ 4-6.

<sup>65</sup> See *id.* pmb. ¶ 4-5.

<sup>66</sup> See *id.* pmb. ¶ 6.

to the Court’s attention,” the ICC has no jurisdiction.<sup>67</sup> The term “genuinely” captured the concerns of some delegations during the discussions, and is related to the concept of good faith, as stated before.<sup>68</sup>

¶23 In that sense, the ICC must defer a case to the States if: “(i) ‘the case is being investigated or prosecuted’; (ii) ‘has been investigated ... and the State has decided not to prosecute’; (iii) ‘the person concern has already been tried’ ... ; or (iv) ‘the case is not of sufficient gravity to justify further action by the Court’.”<sup>69</sup>

¶24 It is clear from the analysis of Article 17 of the Rome Statute that the presence of at least the “unwillingness” or the “inability” criteria will be enough for the ICC to determine the jurisdiction of a case.<sup>70</sup>

¶25 Article 17 (2) deals with “unwillingness”. To make this subjective determination, the Rome Statute establishes one or more of the following requirements must occur in the national proceedings: (i) the proceedings have the purpose of shielding a person from criminal responsibility; (ii) there is an unjustified delay during the proceedings inconsistent with the purpose of bringing the responsible person to justice; (iii) the proceedings were not conducted independently or impartially and were not conducted to bring the person concerned to justice.<sup>71</sup>

¶26 The concept of “shielding” referenced in Article 17 (2) (a) is related to the manipulated investigations by a State in order to fake a fair trial. Such a trial does not provide for any due process and attempts to create the presumption the perpetrator has been tried lawfully and in accordance to the rules of due process.<sup>72</sup> It is very difficult to prove such a presumption, because the Prosecutor of the ICC must show a State’s “devious” intention when it is contrary to State’s apparent actions.<sup>73</sup> The criteria in Article 17 (2) (b) relate to an unjustified delay when similar procedures are shorter in the same courts, as well as taking into account the

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<sup>67</sup> Morten Bregmsmo, *Preamble, Paragraph 10: Complementarity*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1, 15 (Otto Triffterer ed., 1999).

<sup>68</sup> Holmes, *supra* note 48, at 674.

<sup>69</sup> *Id.* at 673 (citing *Rome Statute*, *supra* note 31, art. 17(1)(a)-(d)).

<sup>70</sup> *Id.* at 675.

<sup>71</sup> *Id.*; *Rome Statute*, *supra* note 31, art. 17(2)(a)-(c).

<sup>72</sup> See Holmes, *supra* note 48, at 675-76; Williams, *supra* note 54, at 393.

<sup>73</sup> Williams, *supra* note 54, at 393 .

good faith as stated before.<sup>74</sup> Article 17 (2) (c) relates to the absence of independence and impartiality in the proceedings, intending to shield the accused.<sup>75</sup> Although the first and third criteria may overlap,<sup>76</sup> the original intent of the inclusion of this section was to relate the issue to procedural fairness and due process. As a result, the ICC can make a distinction in its jurisprudence where trials conducted in good faith may still be admissible if other aspects of the proceedings seriously affect independence or impartiality.<sup>77</sup>

¶27 Article 17 (3) deals with “inability”, which addresses the collapse of the State’s institutions, including the judicial system, so as to render it impossible to bring perpetrators before national courts.<sup>78</sup> To determine what constitutes a total or partial collapse, the court must consider whether at least one of these factors exists: (i) “the State is unable to obtain the accused;” (ii) the State is unable to obtain evidence and testimonies; or (iii) the State is “unable to carry out its proceedings.”<sup>79</sup>

### 2.3. THE PRINCIPLE OF COMPLIMENTARITY IN PRACTICE: OBJECTIVES

¶28 Luis Moreno Ocampo made the following statement during the ceremony of undertaking for the Chief Prosecutor of the ICC (June 16, 2003): “As a consequence of complementarity, the number of cases that reach the court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”<sup>80</sup>

¶29 Such a statement demonstrates the ICC prosecutor’s objective not to struggle against States for jurisdiction, but to guarantee there will not be impunity for the perpetrators.<sup>81</sup> The complementarity regime will serve to encourage States to observe their primary responsibility: the investigation and prosecution of the crimes outlined in the Rome Statute.<sup>82</sup>

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<sup>74</sup> Holmes, *supra* note 48, at 676.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 677.

<sup>79</sup> *Id.* at 678; *see Rome Statute, supra* note 31, art. 17(3).

<sup>80</sup> *Informal Expert Paper, supra* note 61, at 3.

<sup>81</sup> *Id.* ¶ 2.

<sup>82</sup> *Id.*

“Where States fail to genuinely carry out proceedings,”<sup>83</sup> the Prosecutor must be ready to investigate and prosecute according to the provisions of the Rome Statute.

¶30 In that sense, the States Parties of the Rome Statute must take measures regarding the complementarity principle by implementing national legislation to enable their judicial authorities to properly prosecute the crimes established in the Statute.<sup>84</sup> The complementarity principle will induce the States Parties to preserve their primary right to investigate and prosecute the crimes under the Rome Statute and “to avoid being declared ‘unable’.”<sup>85</sup> This term is applied to situations of at least two situations: destroyed logistical capacity pursuant to armed conflict,<sup>86</sup> and substantial unavailability of States’ national judicial systems as a result of absent or inadequate substantive legislation to prosecute the crimes.<sup>87</sup> Complementarity will also stimulate the review of domestic law, where applicable.<sup>88</sup> Contrary to other kind of international human rights treaties, the Rome Statute is silent about express obligations of the Party States to implement the Statute.<sup>89</sup> However, paragraph four of the Preamble of the ICC Statute establishes that the “effective prosecution [of crimes under the Statute] must be ensured by taking measures at the national level” and by putting into practice national cooperation.<sup>90</sup> Without actions carried out by the States, the ICC would become a replacement instead of a complement to national jurisdictions.<sup>91</sup>

#### 2.4. DIFFERENCES BETWEEN THE “EXTRADITION” AND THE “SURRENDER” PROCEDURES

¶31 Although these two concepts are very similar, there are important differences that have to be pointed out. Article 102 of the Rome Statute makes a distinction between the terms “surrender” and “extradition”. This article establishes that the term “extradition” means the

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<sup>83</sup> *Id.*

<sup>84</sup> Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 88 (2003).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 89.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 90-91.

<sup>90</sup> *Id.* at 92.

<sup>91</sup> *See id.* at 93 (the ICC serves to complement but not replace the national jurisdictions).

transfer of “a person by one State to another,” under the provisions established in a “treaty, convention or national legislation.”<sup>92</sup> On the other hand, “surrender” means the delivering of a person from one State to the ICC in accordance with the provisions of the Rome Statute.<sup>93</sup> The extradition procedure will be the regular practice between two States for delivering persons from the sending State to the requesting State for the exercise of criminal jurisdiction.<sup>94</sup> Surrender, alternatively under the Rome Statute, will be the delivery of a person from one State to the ICC for the exercise of international criminal jurisdiction.<sup>95</sup> This distinction is critical due to the necessity of the surrender procedure to prevail over possible constitutional obstacles from States, such as a prohibition on “extradition” in a respective state constitution.<sup>96</sup>

¶32 In the negotiations during the Rome Conference, many countries among Latin America, Continental Europe and the Arab world pointed out legal (in most countries, constitutional) limitations or prohibitions on extraditing their own nationals to foreign courts.<sup>97</sup> The negotiations became very difficult, because there was no possibility of refusal to surrender an individual in the Rome Statute.<sup>98</sup> This situation could obviously compromise the complementary nature of the ICC.<sup>99</sup> These terminological mechanisms differentiating between surrender and extradition were a secret of success during these negotiations, because it established States which do not accept extraditions of their nationals in general could accept such obligation only under the framework of surrender to the ICC. This allowed each State the option to cooperate fully with the Court.<sup>100</sup>

### 3. US POLICIES TOWARDS THE ICC

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<sup>92</sup> *Rome Statute*, *supra* note 31, art. 102(b).

<sup>93</sup> *Id.* art. 102(a).

<sup>94</sup> See Claus Kreß, *Article 102: Use of Terms*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1157 (Otto Triffterer ed., 1999).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1157-58.

### 3.1. US OFFICIAL POSITION TOWARDS THE ICC

¶33 On May 6, 2002, John R. Bolton, the then US Under-Secretary of State for Arms Control and International Security, sent a letter to UN Secretary General Kofi Annan.<sup>101</sup> In this letter the US Government argued since they did not intend to become party to the ICC, no legal obligations arose from the US signature on December 31, 2000.<sup>102</sup>

¶34 On the same day, the US Secretary of Defense, Donald Rumsfeld, made an official statement explaining the reasons behind this communication.<sup>103</sup> The US Department of Defense justified this position on the basis of the perception the ICC would be a threat to current and future US military personnel.<sup>104</sup> Mr. Rumsfeld also stated the US would consider any attempt by the ICC or States Parties to apply the jurisdiction of the ICC to American citizens illegitimate.<sup>105</sup>

¶35 Among the objections, Rumsfeld mentioned “the lack of adequate checks and balances [over the] powers [given to] the ICC prosecutors and judges” by the Rome Statute, the diminishing of the authority of the Security Council “over international criminal prosecutions,” and the lack of “mechanisms to prevent politicized prosecutions over American [servicemen] and officials.”<sup>106</sup> According to Rumsfeld, the flaws of the ICC were even more critical during the so-called war on terrorism and the military activities that the US military personnel engaged in during the war.<sup>107</sup>

¶36 The US Secretary of State also declared a strong belief that the ICC would not respect the US decision to stay out of the ICC because treaty provisions may allow the ICC to prosecute members of the U.S. armed forces although they are not bound by the Rome Statute.<sup>108</sup> Rumsfeld also realized that this situation would “complicate U.S. military cooperation with

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<sup>101</sup> Press Release, John R. Bolton, Under Secretary of State for Arms Control, U.S. Department of State, to U.N. Secretary General Kofi Annan (May 6, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

<sup>102</sup> *Id.*

<sup>103</sup> See Press Release, Donald H. Rumsfeld, U.S. Secretary of Defense, U.S. Department of Defense Statement on the ICC Treaty (May 6, 2002) [hereinafter Rumsfeld], *available at* [http://www.defenselink.mil/news/May2002/b05062002\\_bt233-02.html](http://www.defenselink.mil/news/May2002/b05062002_bt233-02.html).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

countries that are parties” to the Rome Statute, because they would now follow the treaty obligation of surrendering US nationals to the ICC in spite of US objections and claim that this action is illegitimate.<sup>109</sup> In the statement, the US Secretary of Defense also pointed out a solution to this last issue: the US Government would seek the proper mechanisms within the Statute to work on a bilateral basis with other States to prevent the ICC from exercising its jurisdiction over US citizens and avoid complicating military cooperation.<sup>110</sup>

### 3.2. US ACTIONS FOR DEALING WITH THE CONCERNS SUPPOSEDLY PRODUCED BY THE ICC

¶37 Since the entry into force of the Rome Statute, the Bush Administration has started a campaign to undermine the role of the ICC. The US Government has tried to protect their nationals from the jurisdiction of the ICC by the following mechanisms that undermine the work and objectives of the ICC in the fight against impunity for the commission of the most serious crimes contained in the Rome Statute: the Security Council Resolution 1422,<sup>111</sup> the American Service-Members’ Protection Act of 2002<sup>112</sup> and the Article 98 Agreements<sup>113</sup>.

#### 3.2.1. SECURITY COUNCIL RESOLUTION 1422 of 2002

¶38 One of the major concerns of the US Government was that its overseas military personnel would fall under ICC jurisdiction.<sup>114</sup> Once the Rome Statute entered into force in 2002, the US Government reacted immediately to find a way to keep their military missions abroad exempt from ICC jurisdiction.<sup>115</sup>

¶39 Peacekeeping operations help countries that have suffered armed conflict create conditions for peace. UN peacekeepers are “soldiers and military officers, civilian police

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See S.C. Res. 1422, U.N. SCOR, 4572d mtg., U.N. Doc. S/RES1422 (2002) [hereinafter S.C. Resolution 1422], available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement>; see *infra* pp. 13-18.

<sup>112</sup> See American Servicemembers’ Protection Act of 2002, Pub. L. No. 107-206, § § 2002-2015, 116 Stat. 899-909 (codified as amended at 22 U.S.C. § § 7421-7432 (2002) [hereinafter ASPA]; see *infra* pp. 18-20.

<sup>113</sup> See *Rome Statute*, *supra* note 31, art. 98; see *infra* pp. 20-31.

<sup>114</sup> See ASPA, *supra* note 113, § 2002; see Rumsfeld, *supra* notes 104-111 and accompanying text.

<sup>115</sup> See *supra* notes 102-111 and accompanying text.

officers and civilian personnel from many countries [that] monitor and observe peace processes”<sup>116</sup> set in “post-conflict situations and [to] assist ex-combatants to implement the peace agreements they have signed.”<sup>117</sup> Taking into account the UN Charter “gives the UN Security Council the power and responsibility to take collective action to maintain international peace and security,” UN members usually ask the UN Security Council to “authorize peacekeeping operations.”<sup>118</sup> “Most of these operations are established and implemented by the United Nations itself with troops serving under UN . . . command.”<sup>119</sup> In other cases, the Security Council authorizes regional organizations such as NATO or “coalitions of willing countries to implement certain peacekeeping or peace enforcement functions.”<sup>120</sup>

¶40 During the Security Council’s meetings in 2002, the US delegation applied strong pressure to pull out Council peacekeeping forces, specifically forces deployed to Bosnia.<sup>121</sup> The US emphasized their right to veto future UN peace keeping operations<sup>122</sup> if there were no guarantees that the ICC would not have jurisdiction over them. This brought a strong reaction from the international community. Richard Dicker, director of Human Rights Watch’s International Justice Program, declared: “By threatening to end peacekeeping operations in Bosnia and holding the people of Sarajevo and Srebrenica hostage, the U.S. has stooped to a new low in its efforts to undermine the court and the rule of law . . . Security Council members need to continue to stand their ground in the face of such bullying and pressure.”<sup>123</sup> However, as a result of this US pressure, controversial Security Council Resolution 1422 (2002) was adopted.<sup>124</sup> In this Resolution, the Security Council requested that the ICC avoid investigating or prosecuting UN established or authorized operations for a period of twelve

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<sup>116</sup> *United Nations Peacekeeping: What is Peacekeeping?*, United Nations, at <http://www.un.org/Depts/dpko/dpko/faq/q1.htm>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 EUR. J. INT’L L. 85, 85-87, 86 n.4 (2003), available at <http://ejil.oxfordjournals.org/cgi/reprint/14/1/85>; see also *U.S. Veto Betrays the Bosnian People, but U.S. Attack on War Crimes Court Thwarted – For Now*, Human Rights Watch, [hereinafter *U.S. Veto Betrays Bosnian People*], at <http://www.hrw.org/press/2002/07/icc070102.htm>.

<sup>122</sup> See Stahn, *supra* note 121, at 85-86.

<sup>123</sup> *U.S. Veto Betrays Bosnian People*, *supra* note 121.

<sup>124</sup> See Stahn, *supra* note 121, at 86.

months, commencing July 1, 2002.<sup>125</sup> By the adoption of this Resolution, UN established or authorized missions involving States, not parties, to the Rome Statute would be exempt from the jurisdiction of the ICC. This Resolution was made under the requirements of Article 16 of the Rome Statute, which establishes:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.<sup>126</sup>

The term “controversial” applies because many aspects of the Resolution are still debatable.

¶41 First, one of the conditions established in Article 16 of the Rome Statute for the deferral of investigation by request of the Security Council is that the Security Council Resolution must be adopted under Chapter VII of the UN Charter.<sup>127</sup> Article 39 of the UN Charter establishes the requirements for determining the existence of a threat to peace and security for application of the measures established in Chapter VII:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.<sup>128</sup>

¶42 The Security Council did not state in Resolution 1422 the prosecution of peacekeepers by the ICC would be a threat to peace and security,<sup>129</sup> but paragraph 7 of the preamble of the Resolution mentions a key factor in maintaining international peace and security is facilitating the Member States’ contribution for achieving Security Council authorized missions. Paragraph 7 of the preamble of Resolution 1422 states:

*Determining further* that it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorized by the United Nations Security Council . . . .<sup>130</sup>

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<sup>125</sup> S.C. Resolution 1422, *supra* note 112; *see also* Stahn, *supra* note 121, at 85.

<sup>126</sup> *Rome Statute*, *supra* note 31, art. 16.

<sup>127</sup> *See id.*

<sup>128</sup> U.N. CHARTER art. 39.

<sup>129</sup> *See* Stahn, *supra* note 121, at 86-87.

<sup>130</sup> S.C. Resolution 1422, *supra* note 112, pmb. ¶ 7.

¶43 The Security Council did not give a specific conflict or a concrete situation of a threat to peace under Article 16 of the Rome Statute. In fact, the council established the generic possibility the unwillingness of States and consequent lack of personnel for the UN authorized mission would be a threat to peace.<sup>131</sup>

¶44 Articles 13, 14 and 15 of the Rome Statute state that investigations can be initiated by the ICC Prosecutor as a result of case referral by a Party State, Security Council or at the Prosecutor's own initiative.<sup>132</sup> The fact that Article 16 was inserted after Articles 14 and 15 suggests that the deferral "request was not conceived as an instrument of preventive action," and requires "the initiation of a specific ICC proceeding."<sup>133</sup> Nevertheless, the Security Council could have seen a threat to peace in the US's potential use of its veto powers<sup>134</sup> to prevent the adoption of any Security Council resolution establishing or authorizing UN operations. If the Council's decisions are paralyzed, the task of maintaining peace and security would be impossible, thus exposing abuse of US veto power as a problem for the maintenance of peace and security.<sup>135</sup> This is arguable<sup>136</sup> in light of the fact the Security Council has broad discretion in determining which situations are peace-threatening.<sup>137</sup>

¶45 Nevertheless, the ICC will have the last word in considering whether a deferral request made by the Security Council is consistent with Article 16 of the Rome Statute or not.<sup>138</sup> In fact, it is possible to state that "the ICC is not legally bound" by the decisions of the Security Council, because the ICC can analyze this deferral decisions to determine consistency with

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<sup>131</sup> See Stahn, *supra* note 121, at 87.

<sup>132</sup> *Id.* at 90.

<sup>133</sup> *Id.*

<sup>134</sup> Salvatore Zappala, *The Reaction of the US to the Entry Into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 J. INT'L CRIM. JUST. 114, 118 (2003); *see id.* at 86. In the Security Council, its five permanent members, US, Russia, France, UK and China, have the power of veto. If any of these countries votes against a proposal it is rejected, even if all 14 of the other member countries vote in favor. *See* U.N. CHARTER arts. 23-32.

<sup>135</sup> See Zappala, *supra* note 134, at 118-19.

<sup>136</sup> Many States, like Canada and Germany, firmly established the case-by-case character of Article 16 of the Rome Statute since the moment it was drafted. *See U.N. Security Council Open Debate on the Situation in Bosnia-Herzegovina*, (2002) (statement of Paul Heinbecker, Ambassador and Permanent Representative of Canada to the U.N.; and statement of Hanns Schumacher, Ambassador of Germany to the U.N.) available at <http://iccnow.org/documents/statements/governments/CanadaOpenSC10July02Eng.pdf>, and <http://iccnow.org/documents/statements/governments/GermanySCDebate10July02.pdf>.

<sup>137</sup> See Zappala, *supra* note 134, at 118-19.

<sup>138</sup> *See id.* at 119-20.

the UN Charter and Rome Statute.<sup>139</sup> The ICC can also decide whether threats to peace and security justifications are vague or lack a specific scenario.<sup>140</sup> Since the Rome Statute refers to specific investigations, it can be “logical to argue that the reason[s] for . . . suspension” must also be specific and consistent with the Statute.<sup>141</sup> In that sense, the ICC will defer the investigation only if it is convinced that the investigation or prosecution of the personnel of the UN operation from a non-party State to the Rome Statute “may lead to a specific threat to peace.”<sup>142</sup> These would be the “only admissible grounds for [the] suspension of [the] proceedings” under the Rome Statute.<sup>143</sup>

¶46 Another very controversial debate regarding UN Security Council Resolution 1422 is the intention to renew the deferral every twelve months as long as may be necessary.<sup>144</sup> In fact, this Resolution was renewed in 2003 by UN Security Council Resolution 1487 (2003) on the same terms as the previous one.<sup>145</sup> There is no limit to the number of times it can be renewed, which leaves open the possibility of constant renewals.

¶47 This decision brought strong criticism from the international community. The Parliamentary Assembly of the Council Europe considered in its Resolution 1336 (2003)<sup>146</sup> that Security Council Resolution 1422 and its renewal in 2003 constituted an interference with the work of the ICC.<sup>147</sup> According to the Parliamentary Assembly of the Council Europe, Resolution 1422 was legally questionable for two main reasons:<sup>148</sup>

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<sup>139</sup> *Id.* at 119.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 120.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (citing Villalpando Condoronelli, *Referral and Deferral by the Security Council*, in II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1372-73 (Antonio Cassese et al. eds., 2002)).

<sup>144</sup> See S.C. Resolution 1422, *supra* note 112, ¶ 2.

<sup>145</sup> See S.C. Res. 1487, U.N. SCOR, 4772d mtg., U.N. Doc. S/RES1487 (2003) [hereinafter S.C. Resolution 1487], available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement>.

<sup>146</sup> See *Threats to the International Criminal Court*, Eur. Parl. Ass., 20<sup>th</sup> Sess., Res. 1336 (2003), available at <http://assembly.coe.int/Documents/AdoptedText/TA03/ERES1336.htm>.

<sup>147</sup> *Id.* ¶ 7.

<sup>148</sup> See *id.*

1. No legal basis exists for the Security Council Resolution 1422 according to Chapter VII of the UN Charter, i.e., there is no “existence of a present threat to international peace and security.”<sup>149</sup>
2. Security Council Resolution 1422 and its renewal violate Articles 16 and 27 of the Rome Statute. The Assembly believes that Article 16 does not provide any kind of immunity for unknown or future situations. In addition, Article 27 “prohibits making distinctions on the basis of official capacity,” and that this should also apply to UN peacekeepers, without taking into account their nationality.<sup>150</sup>

¶48 Fortunately, Resolution 1422 was not renewed for a third consecutive year. On June 23, 2004, the Deputy U.S. Representative to the UN, Ambassador James B. Cunningham, made a public statement declaring that the US would not proceed with further consideration and action on the draft to renew Resolution 1422 “to avoid a prolonged and divisive debate” among the Security Council’s members.<sup>151</sup> However, the US was still concerned with the role of the ICC, and stated that it would continue to sign agreements consistent with Article 98.<sup>152</sup> A week before this declaration, UN Secretary General Kofi Annan declared that an extended Resolution would damage the credibility of the Security Council and the UN.<sup>153</sup> Mr. Annan stated, “I think it would be unfortunate for one to press for such an exemption [for the U.S.], given the recent reports of prisoner abuse in Iraq . . . blanket exemption is wrong. It is of dubious judicial value, and I don’t think it should be encouraged by the Council.”<sup>154</sup> After the episodes mentioned by Mr. Annan, the phase of questions made regarding the representation of the Security Council (mentioned in part 3.2.2 of this article) and the weak position before the international community of the US in their “war against terror”, the decision of the US Government seems to be the most prudent one. Fortunately, the US Government did not

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Press Release, James B. Cunningham, Ambassador and Deputy U.S. Representative to the United Nations, U.S. Department of State, to U.N. Security Council Stakeout (June 23, 2004) [hereinafter Cunningham], available at [http://www.un.int/usa/04\\_111.htm](http://www.un.int/usa/04_111.htm).

<sup>152</sup> *Id.*

<sup>153</sup> See Secretary-General of the U.N. Kofi Annan, Press Encounter upon Arrival at UNHQ, (June 17, 2004) (unofficial transcript available at <http://www.un.org/apps/sg/offthecuff.asp?nid=596>).

<sup>154</sup> *Id.*

pressure the Security Council to renew the resolution again, but the US intended to continue shielding its military personnel, as Ambassador Cunningham stated, by negotiating more bilateral agreements under Article 98.<sup>155</sup>

### 3.2.2. AMERICAN SERVICE MEMBERS PROTECTION ACT (ASPA) OF 2002

¶49 Another measure taken by the US Government to weaken the role of the ICC was the adoption of the American Service Members Protection Act (ASPA) of 2002 by the US Congress.<sup>156</sup>

¶50 The ASPA failed to pass on the first attempt in 2000. The American Congress finally passed this Act as Title II in the Supplemental Appropriations, FY2002 bill for the fiscal year ending, on September 30, 2002.<sup>157</sup>

¶51 The US had four major concerns to be addressed in adopting ASPA: first, possible ICC prosecution of American armed forces operating overseas when the US is not a party state of the Rome Statute.<sup>158</sup> Second, the risk the US President and other senior members of the US Government could be prosecuted by the ICC. Third, the possibility the crime of aggression would be defined without taking into account the Security Council's prerogative under Article 39 of the UN Charter to determine when a case of aggression arises.<sup>159</sup> Fourth, the US Congress when American nationals are prosecuted by the ICC, they will be denied their right to a trial by jury which is a right protected in the Bill of Rights of the US Constitution.<sup>160</sup> For these reasons, the ASPA of 2002 establishes the right of the US Armed Forces and the senior officials of the US Government to be free from the risk of prosecution by the ICC.<sup>161</sup>

¶52 These concerns are not justified. The possibility of prosecution of US troops abroad takes into account the relation between the passive criminal jurisdiction (the right of the State where the offence has been committed to prosecute the suspect), and the fact that there is no

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<sup>155</sup> See Cunningham, *supra* note 152.

<sup>156</sup> See ASPA, *supra* note 120.

<sup>157</sup> See H.R. Res. 4775, 107<sup>th</sup> Cong. (2002) (enacted).

<sup>158</sup> ASPA, *supra* note 113, § 2002(5).

<sup>159</sup> *Id.* § § 2002(9)-(10).

<sup>160</sup> *Id.* § 2002(7).

<sup>161</sup> See *id.* § 2002(9).

rule of international law that prohibits a State from voluntarily delegating its sovereign right to prosecute to the ICC. This rule cannot be justified. Of course, if there is responsibility that can be attached to a head of State or any member of its government, Article 27(1) of the Rome Statute will apply:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.<sup>162</sup>

¶53 The US position regarding this issue is misleading, as this would indicate a deep concern inside the US Government that there is a high ranked US official linked directly to the commission of one of the outrageous crimes contained in the Rome Statute. Many analogous countries (troops deployed overseas for peace-keeping operations, are party states of the Rome Statute and the Security Council, e.g., UK and France) do not share the same concerns with the US. Article 39 of the UN Charter mentions the Security Council shall determine the measures to be taken in conformity with Article 41 and Article 42 of the UN Charter in determining the existence of an act of aggression.<sup>163</sup> The role of the ICC regarding the undefined crime of aggression is completely different and not in conflict with the Security Council's mandate established in Chapter VII the UN Charter and its ability to authorize a military intervention or an embargo.<sup>164</sup> On the other hand, the ICC has the power to determine if a crime of aggression has been committed by trying the persons responsible. The definition of the crime of aggression will be established in 2009 and will have to be consistent with the UN Charter.<sup>165</sup> As such, the US concern seems exaggerated since the crime of aggression has not yet been defined and will certainly not conflict with the Security Council prerogatives set in Chapter VII of the UN Charter.

¶54 The measures adopted in ASPA of 2002 to address the U.S. Government's concerns regarding the Rome Statute has sparked concerns in the international community. The

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<sup>162</sup> *Rome Statute*, *supra* note 31, art. 27(1).

<sup>163</sup> U.N. CHARTER art. 39.

<sup>164</sup> Compare U.N. CHARTER arts. 39-51, and *Rome Statute*, *supra* note 31, art. 5(2).

<sup>165</sup> *Rome Statute*, *supra* note 31, art.5(2).

measures reflect an American foreign policy of complete unilateralism, with no respect for other States' sovereignty and for international institutions.

¶55 First, the ASPA of 2002 prohibits every American court or state office or entity from cooperating in any way with the ICC.<sup>166</sup> It also limits the US participation in UN peacekeeping operations with four exceptions: the US President certifies to the American Congress that the Security Council exempts members of the US armed forces in a resolution similar to Resolution 1422, certifying the ICC would not have jurisdiction over the U.S.'s peacekeeping operations in other countries, those countries have signed Article 98 Agreements, or justification of participation by "US national interest".<sup>167</sup>

¶56 Section 2006 of the ASPA also prohibits the transfer of classified US security information to the ICC.<sup>168</sup> Section 2007 prohibits the US military assistance to the Party States of the Rome Statute, unless it is determined that there is an important national interest in a specific country or if there is an Article 98 agreement signed with a particular country.<sup>169</sup>

¶57 The most concerning provision of the ASPA of 2002 is Section 2008. This provision authorizes the US President "to use all means necessary and appropriate to bring about the release" of specific US personnel and authorizes legal assistance for such persons.<sup>170</sup>

¶58 American intrusive foreign policy is reflected in the signature of Article 98 Agreements with small and poor countries that require both economic and military assistance, making this almost compulsory signature very similar to blackmail. In addition, the authorization given by the American Congress to the US President in the ASPA, in the sense of taking all the measures necessary to release US personnel from the ICC seems like a dangerous threat to the sovereignty of the Netherlands, the ICC's host State, and a threat to the international security. The possibility of military intervention without the authorization of the Security Council rejects the principles of international security embodied in Chapter VII of the UN Charter.

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<sup>166</sup> ASPA, *supra* note 113, § 2004.

<sup>167</sup> *Id.* § 2005.

<sup>168</sup> *Id.* § 2006.

<sup>169</sup> *Id.* § 2007. Section 2007 (d) of the ASPA of 2004 makes the exemption to the NATO members, major non-NATO allies (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); and Taiwan. *Id.*

<sup>170</sup> *Id.* §2008.

## 4. ARTICLE 98 AGREEMENTS

### 4.1. SCOPE OF THE PROPOSED TEXT OF ARTICLE 98 AGREEMENTS

¶59 At the time the US refused to ratify the Rome Statute, the US Department of State declared its intent to sign bilateral agreements with as many States as possible in the light of Article 98 (2) of the Rome Statute (Article 98 Agreements).<sup>171</sup> As stated in part 3.2.1 of this article, this position was reaffirmed in 2004 by Ambassador James B. Cunningham, Deputy U.S. representative to the UN, after the decision to not renew the Security Council Resolution 1422.<sup>172</sup> The purpose of signing these agreements was to relieve in some way the US concerns regarding the jurisdiction of the ICC over its nationals, although the US Government did not ratify the Rome Statute.

¶60 To avoid the prosecution of US nationals before the ICC, the US Government began a worldwide campaign to sign these bilateral agreements with party states and non parties of the Rome Statute.<sup>173</sup> The purpose of these agreements is to force the signatory States not to send American nationals to the ICC if the latter asks for their surrender.<sup>174</sup> The wording of proposed texts of the Article 98 Agreements is as follows:

- A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,
- B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,
- C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,
- D. Bearing in mind Article 98 of the Rome Statute,
- E. Hereby agree as follows:
  - 1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
  - 2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,

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<sup>171</sup> See Cunningham, *supra* note 152.

<sup>172</sup> See *id.* and accompanying text.

<sup>173</sup> See Cunningham, *supra* note 152.

<sup>174</sup> *Id.* It is important mention that the signature of Article 98 Agreements was a sort of presidential obligation set by the Congress in the ASPA of 2002: the signature of these agreements is an essential requirement for sending American troops overseas in UN peace keeping and peace enforcement operations. See ASPA, *supra* note 113, §2007.

- (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
  - (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.
  4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
  5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.<sup>175</sup>

¶61 There has been open discussion<sup>176</sup> about the compatibility of Article 98 Agreements with the obligations the party states assumed in the Rome Statute and whether the Agreements have been drafted to seek impunity of the US personnel deployed overseas.<sup>177</sup> It must be considered that Article 98 Agreements were drafted in the light of Article 98 (2) of the Rome Statute.<sup>178</sup> This provision allows party states to respect obligations assumed by the signature of bilateral agreements with other States regarding the surrender of their nationals.<sup>179</sup> In that sense, these agreements will contain obligations regarding the surrender of persons to the ICC if there is consent of the third State, in this case the US.<sup>180</sup> Of course, these agreements should respect all the provisions and the purposes of the Rome Statute: the end of impunity for the

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<sup>175</sup> Proposed Text of Article 98 Agreements with the United States (July 2002) [hereinafter Proposed Text of Article 98 Agreements], at [www.globalsolutions.org/programs/law\\_justice/icc/bias/sampleagreement.pdf](http://www.globalsolutions.org/programs/law_justice/icc/bias/sampleagreement.pdf).

<sup>176</sup> Open discussion has been between NGO's like Amnesty International, Coalition for the ICC and Human Rights Watch, among other organizations and States. See *International Criminal Court: U.S. Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes*, Amnesty International [hereinafter *U.S. Efforts to Obtain Impunity*], at <http://web.amnesty.org/library/index/engior400252002> (Sept. 2, 2002); *United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements*, Human Rights Watch [hereinafter *U.S. Efforts to Undermine ICC*], at <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm>.

<sup>177</sup> See *U.S. Efforts to Obtain Impunity*, *supra* note 179; *U.S. Efforts to Undermine ICC*, *supra* note 179.

<sup>178</sup> See *U.S. Efforts to Undermine ICC*, *supra* note 179.

<sup>179</sup> See *id.*; see also *Rome Statute*, *supra* note 31, art. 98.

<sup>180</sup> See *Rome Statute*, *supra* note 31, art. 98(2); Zappala, *supra* note 134, at 122.

perpetrators of international crimes.<sup>181</sup> To correctly interpret Article 98 (2), all the obligations assumed by the party states of the ICC that arise from the same Rome Statute, international law and any agreement that is consistent with Article 98 (2) of the Rome Statute must be taken into account.<sup>182</sup> Article 98 (2) of the Rome Statute establishes the following:

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.<sup>183</sup>

¶62 One of the key issues that must be given deference in solving compatibility of Article 98 Agreements with the obligations that the Party States assumed with the Rome Statute is to determine if Article 98 (2) covers agreements signed after or before the enter into force of the Rome Statute.<sup>184</sup> Some commentators argue the scope of Article 98 is determined by its text, drafting history, and resulting views and actions taken by the Party States.<sup>185</sup>

#### 4.2. STATES' REACTIONS TOWARDS ARTICLE 98 AGREEMENTS

¶63 The reaction of some States towards the Article 98 Agreements can be summarized in two positions: acceptance of the signature of these agreements and complete rejection.<sup>186</sup> The former group includes such States as Australia, UK and Italy.<sup>187</sup> The latter group consists of such countries as Germany, Canada and New Zealand.<sup>188</sup> It is important to consider the declarations made by organizations like the European Union and the Council of Europe regarding the compatibility of Article 98 Agreements with the obligations that the Party States assumed by the Rome Statute. States like the UK, France and Russia (the last one only in the Council of Europe) are not only members of these Regional Systems, but are also permanent

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<sup>181</sup> See Zappala, *supra* note 134, at 122.

<sup>182</sup> *See id.*

<sup>183</sup> *See id*; Rome Statute, *supra* note 31, art. 98(2).

<sup>184</sup> See Zappala, *supra* note 141, at 141.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 126.

<sup>187</sup> *Id.* n.38.

<sup>188</sup> *Id.* n.39.

members of the Security Council. France and the UK are also party states of the Rome Statute.

#### 4.2.1. REACTION OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE TOWARDS ARTICLE 98 AGREEMENTS IN 2002

¶64 The Parliamentary Assembly of Council of Europe<sup>189</sup> set forth its position in its Resolution 1300 (2002),<sup>190</sup> which supported the commitment of all its members to embrace the organization and work of the ICC as well as preserve the integrity of the Rome Statute.<sup>191</sup> The Parliamentary Assembly also showed its concern for the actions taken by some States to undermine the integrity of the ICC by signing “bilateral agreements aimed at exempting their officials, military personnel and nationals from the jurisdiction of the [ICC]” (in clear reference to the US).<sup>192</sup> The Assembly stated these agreements were not acceptable under international treaty laws (eg. Vienna Convention on the Law of Treaties), according to which States must desist from actions that would conflict or be inconsistent with the objectives and aims of a treaty.<sup>193</sup> In this Resolution, the Assembly took a strong stance by considering these agreements were not consistent with the Party States’ obligations established in the Rome Statute, such as the duty to cooperate with the ICC during its investigation,<sup>194</sup> and the Statute must be “applie[d] equally to all persons without any distinction based on official capacity.”<sup>195</sup>

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<sup>189</sup> According to the web page of the Council of Europe, the Parliamentary Assembly of the Council of Europe “can be considered the oldest international parliamentary Assembly with a pluralistic composition of democratically elected members of parliament established on the basis of an intergovernmental treaty. The Assembly is one of the two statutory organs of the Council of Europe, which is composed of a Committee of Ministers (the Ministers of Foreign Affairs, meeting usually at the level of their deputies) and an Assembly representing the political forces in its member states.” *The Framework of The Parliamentary Assembly of the Council of Europe*, Council of Europe, available at [http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE\\_framework.htm](http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_framework.htm).

<sup>190</sup> See *Risks for the Integrity of the Statute of the International Criminal Court*, Eur. Parl. Ass., 29<sup>th</sup> Sess., Res. 1300 (2002), available at

<http://assembly.coe.int/Documents/AdoptedText/TA02/ERES1300.htm>.

<sup>191</sup> See *id.* ¶¶ 2-7.

<sup>192</sup> *Id.* ¶ 9.

<sup>193</sup> *Id.* ¶ 10.

<sup>194</sup> *Id.* ¶ 11 (citing *Rome Statute*, *supra* note 31, art. 86).

<sup>195</sup> *Id.* ¶ 11 (citing *Rome Statute*, *supra* note 31, art. 27).

¶165 This declaration shows a position of strong rejection of US Article 98 Agreements. Article 98 Agreements may violate the obligations set in Article 86 and Article 27 of the Rome Statute, as well as the Vienna Convention on the Law of Treaties,<sup>196</sup> as discussed below.

#### 4.2.2. REACTION OF THE COUNCIL OF THE EUROPEAN UNION TOWARDS ARTICLE 98 AGREEMENTS

¶166 In September 2002, the Council of the European Union (Council of the EU)<sup>197</sup> made some conclusions<sup>198</sup> regarding the consequences of Article 98 Agreements for the ICC. In the annex of this document, the Council of the EU took a middle position without rejecting the agreements and instead set a number of guiding principles to be respected by a Party State to the Rome Statute and the US to maintain the legitimacy of Article 98 Agreements and to preserve the integrity of the Rome Statute.<sup>199</sup> The principles are the following:

- According to this European body, the agreements already in effect (like the SOFA's mentioned below) must be respected.<sup>200</sup>
- The Council of the EU established also the proposed text of Article 98 Agreements is inconsistent with the obligations assumed by the party States under the Rome Statute, mentioning Part 9 of the Rome Statute in the sense of cooperating fully with the ICC in its investigation and prosecution of crimes falling within its jurisdiction.<sup>201</sup>

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<sup>196</sup> See *infra* Chapters 4.2.4-4.4.

<sup>197</sup> The Council of the European Union is the EU legislative body; for a wide range of Community issues, it exercises that legislative power in co-decision with the European Parliament. The Council is composed of one representative at ministerial level from each Member State, who is empowered to commit his Government. Council members are politically accountable to their national parliaments. See *The Council*, The Council of the European Union, available at [http://ue.eu.int/cms3\\_fo/showPage.asp?id=426&lang=en](http://ue.eu.int/cms3_fo/showPage.asp?id=426&lang=en). "The European Council brings together the heads of state or government" of the Member States of the EU and the President of the European Commission. See *European Council*, The Council of the European Union, available at [http://ue.eu.int/cms3\\_fo/showPage.asp?id=429&lang=en&mode=g](http://ue.eu.int/cms3_fo/showPage.asp?id=429&lang=en&mode=g). The principal role of the European Council is described as follows in Article 4 of the common provisions of the Treaty on European Union: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof." CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION, Dec. 24, 2002, art. 4, O.J. (C 325) 11 (2002) [hereinafter TREATY ON EUROPEAN UNION], available at [http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002M/pdf/12002M\\_EN.pdf](http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002M/pdf/12002M_EN.pdf).

<sup>198</sup> See *Conclusions of the Council of the European Union on the ICC*, Equipo Nizkor and Derechos Human Rights (Sept. 30, 2002), at <http://www.derechos.org/nizkor/icc/council30sep.html>.

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

- The Council of the EU also found the fact impunity must be firmly denied and any agreement made similar to the Article 98 Agreements must contain specific provisions to guarantee the investigation and prosecution of suspects by their national jurisdictions.<sup>202</sup>
- A clear distinction must be made between persons who enjoy immunity under international law in accordance with Article 98(1) and those who are covered under Article 98 (2) of the Rome Statute.<sup>203</sup>

¶67 It can be concluded this European body accepted the fact the Article 98 Agreements are a reality and many States around the world have signed them. Consequently, the Agreements must be adjusted as much as possible to respect the aims and objectives of the Rome Statute and the Vienna Convention on the Law of Treaties (1969). Unfortunately, the Council of the EU did not take any clear position on the possibility that Article 98 Agreements can be signed after the entering into force of the Rome Statute.

#### 4.2.3. REACTION OF THE PARLIAMNETARY ASSEMBLY OF THE COUNCIL OF EUROPE TOWARDS ARTICLE 98 AGREEMENTS IN 2003

¶68 In June 2003, the Parliamentary Assembly of the Council Europe took again a common position in respect to the Article 98 Agreements by adopting Resolution 1336.<sup>204</sup> In this resolution, the Assembly again showed its concern towards the US campaign to convince party states to the Rome Statute of the ICC to enter into bilateral agreements.<sup>205</sup> The Assembly also considered the Article 98 Agreements breached Article 27, Article 86 and Article 98 (2) of the Rome Statute.<sup>206</sup> In specific circumstances, Article 98 Agreements also violated Article 18 of the Vienna Convention on the Law of Treaties (1969) because States must avoid any conduct that would become inconsistent with the object and purpose of an

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<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> *See Threats to the International Court, supra* note 147.

<sup>205</sup> *See id.* ¶¶ 1, 8.

<sup>206</sup> *Id.* ¶ 9.

international treaty.<sup>207</sup> According to its point of view, the Assembly stated Article 98 (2) is applicable only within the framework of Status of Force Agreements (SOFA).<sup>208</sup>

¶69 The Parliamentary Assembly condemned the US pressure applied to member States of the Council of Europe to sign the Article 98 Agreements.<sup>209</sup> The Parliamentary Assembly considered States should be “left free to decide on their stance *vis-à-vis* the ICC on the basis of considerations of principle alone.”<sup>210</sup> In addition, the Parliamentary Assembly considered it is possible for Article 98 Agreements to be interpreted narrowly, putting strict conditions on their application.<sup>211</sup> The Parliamentary Assembly mentioned key factors in this decision were two-fold: the credible guarantee that persons suspected of crimes contained in the Rome Statute will be prosecuted by the US, and the guarantee “the scope of persons covered by the agreement is consistent with the text of Article 98 [(2)]” of the Rome Statute.<sup>212</sup> In this, the Parliamentary Assembly rejected again the validity of Article 98 Agreements, but allowed members of the Council of Europe who signed and ratified the agreement the possibility for signatories to adjust specific provisions of the agreements to guarantee respect for the Rome Statute and international law.<sup>213</sup>

#### 4.2.4. REMARKS ABOUT THE SCOPE OF ARTICLE 98 (2) OF THE ROME STATUTE AND THE LEGALITY OF ARTICLE 98 AGREEMENTS PROPOSED BY THE US

¶70 As stated in point 4.2 of this article, the two strong positions towards Article 98 Agreements are complete acceptance or complete denial.<sup>214</sup> A third, but weaker, position is a hybrid position like the one taken by the Council of the EU and later by the Parliamentary Assembly of the Council Europe. This position accepts the Agreements, but also make Article 98 Agreements conform to the Rome Statute under certain conditions.

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* ¶ 10.

<sup>210</sup> *Id.*

<sup>211</sup> *See id.* ¶ 11.

<sup>212</sup> *Id.*

<sup>213</sup> *See id.* ¶ 12(iii)(c).

<sup>214</sup> *See supra* notes 189-91, and accompanying text.

¶71 In analyzing a document written by Amnesty International (AI) regarding Article 98 Agreements, it is apparent this institution defends the point of view that Article 98 (2) of the Rome Statute will only be applicable in relation to Status of Forces Agreements (SOFAs)<sup>215</sup> and other similar agreements such as the extradition treaties signed before the ICC entered into force and their respective extensions. For AI, Article 98 Agreements seek only the impunity of US nationals.<sup>216</sup> SOFAs are agreements signed by two or more countries when the military personnel of one country are located or operating in the territory of another one.<sup>217</sup> This is the case when NATO personnel are operating in a territory of a foreign NATO country and the criminal jurisdiction of the foreign personnel will be exercised by the national State to which they belong and not by the State where they are deployed.<sup>218</sup>

¶72 A similar position was taken by the American NGO Human Rights Watch (HRW), which published a legal analysis regarding the US Article 98 Agreements stating that “Any State That Has Ratified the Rome Statute May Not Lawfully Sign an Agreement Providing Immunity from ICC Prosecution with a State that Has Repudiated or Has Not Signed the Rome Statute; To Do So Would Violate the Rome Statute.”<sup>219</sup>

¶73 The position established by organizations like AI and HRW is not determinate and is open to discussion. Analyzing the discussions held in regard to the drafting of Article 98 (2) reveals the intention of the delegations was to maintain the previous agreements signed under international law. However, many States take the public position that future agreements would also be under the scope of Article 98 (2).<sup>220</sup> The situation gets more controversial after a careful reading of Article 98 (2) of the Rome Statute, because it does not clearly exclude the

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<sup>215</sup> See *U.S. Efforts to Obtain Impunity*, *supra* note 179.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Zappala, *supra* note 134, at 122 n.28 (citing Kimberly Prost and Angelika Schulunk, *Article 98: Cooperation with Respect to Waiver of Immunity and consent to surrender*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1132 (Otto Triffterer ed., 1999)). See also *U.S. Efforts to Obtain Impunity*, *supra* note 179.

<sup>219</sup> *U.S. Efforts to Undermine ICC*, *supra* note 179.

<sup>220</sup> Zappala, *supra* note 134, at 122-23.

possibility of future agreements.<sup>221</sup> In addition, the text of Article 98 Agreements respects entirely the wording and conditions set in Article 98 (2) for this kind of agreement.<sup>222</sup>

¶74 After analyzing the proposed text of Article 98 Agreements, it does not conflict directly with any provisions set in the Rome Statute; in fact, the Statute is explicitly named in the preliminary paragraphs.<sup>223</sup> The Preamble of the proposed text of Article 98 Agreement states it is very important to try those who commit the crimes under the Rome Statute (Part A).<sup>224</sup> It also mentions the Rome Statute, the principle of complementarity and the American intention to investigate and prosecute “where appropriate” (a broad concept) acts under the ICC’s jurisdiction (Parts B and C).<sup>225</sup>

¶75 As stated in Section 4 of this article, Article 98 (2) was drafted considering the already existing SOFA’s, taking into account that the State of the perpetrator would be the one in charge of the investigation and prosecution.<sup>226</sup> However, since Article 98 (2) does not make any clear decision about the possibility of accepting bilateral agreements signed after the entering into force of the Rome Statute, it seems that these Article 98 Agreements will be compatible with it if they do not conflict with its objective: end of impunity.<sup>227</sup>

¶76 Considering Article 98 (2) of the Rome Statute does not allow the ICC to request for the surrender of nationals of a third State in a mission abroad,<sup>228</sup> the Article implies that a person will be investigated and prosecuted in their own State or in the State of the Party State.<sup>229</sup> Article 98 Agreements will be valid only if the suspects face justice for the alleged crimes.<sup>230</sup> This is the core condition for applying Article 98 (2) of the Rome Statute, both with SOFAs and extradition agreements.<sup>231</sup> In that sense, if this assumption is accepted then agreements signed after the entering into force of the Rome Statute would be valid, they will only be valid

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<sup>221</sup> *Id.* at 123.

<sup>222</sup> *Id.*

<sup>223</sup> *See id.* at 123-24.

<sup>224</sup> *See Proposed Text of Article 98 Agreements, supra note 178; and Zappala, supra note 134, at 123*

n.30. <sup>225</sup> *See Proposed Text of Article 98 Agreements, supra note 178; and Zappala, supra note 134, at 123*

n.30. <sup>226</sup> *See Zappala, supra note 141, at 124.*

<sup>227</sup> *See id.*

<sup>228</sup> *See Rome Statute, supra note 31, art. 98(2).*

<sup>229</sup> *See Zappala, supra note 141, at 124.*

<sup>230</sup> *See id.*

<sup>231</sup> *See id.*

if they provide either the territorial State (the US) or the sending State will exercise jurisdiction.<sup>232</sup> This condition is implicit in the proposed texts of Article 98 Agreements, but it should be included as an express provision in future agreements.<sup>233</sup>

#### 4.3. CONDITIONS FOR ACCEPTING ARTICLE 98 AGREEMENTS

¶77 Article 98 Agreements are already a reality, and some ICC's party states are convinced the Agreements are compatible with Article 98 (2) of the Rome Statute.<sup>234</sup> However, before being accepted certain conditions must be accomplished. These conditions were pointed out by the Council of the EU in 2002 and the Parliamentary Assembly of the European Council in 2003.

¶78 The current form of the Article 98 Agreements have two main inconsistencies with the Rome Statute:<sup>235</sup>

- The Agreements are overbroad because it is not specified if the American citizens covered by Article 98 Agreements are only the ones sent abroad on an official mission on behalf the US Government.<sup>236</sup> The reference to “persons” is also overbroad.<sup>237</sup> This person could be any US contractor who can be national of a party State of the Rome Statute.<sup>238</sup>
- The proposed texts of Article 98 Agreements are unclear regarding the consequences of an US refusal of the authorization to send its nationals to the ICC.<sup>239</sup>

¶79 It is important to clarify in the proposed text of Article 98 Agreements whether an American national, must be prosecuted in the US or in the territory of the requesting State if he or she is not transferred to the ICC.<sup>240</sup> A clear statement about the application of a proper

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<sup>232</sup> *See id.*

<sup>233</sup> *See id.* at 124-25.

<sup>234</sup> *See id.* at 126.

<sup>235</sup> *Id.* at 130.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*; *see also* Proposed Text of Article 98 Agreements, *supra* note 178.

<sup>238</sup> Zappala, *supra* note 134, at 130.

<sup>239</sup> *Id.*

<sup>240</sup> *See id.* at 131.

investigation and prosecution must be asserted to eliminate any possibility of impunity.<sup>241</sup> If the US does not prosecute because they are “unable” or “unwilling” it will have to give a detailed justification to the other party of the Article 98 Agreement.<sup>242</sup> The ICC party State will subsequently inform the Court.<sup>243</sup> Article 98 Agreements must eliminate all possibilities for impunity.

#### 4.4. ARTICLE 98 AGREEMENTS AND THE PROVISIONS OF THE ROME STATUTE

¶80 States and organizations that outright reject the validity of Article 98 Agreements also violate Article 27, Article 86 and Article 98 (2) of the Rome Statute. There is, in principle, no *a priori* direct violation of such articles. The problem arises afterwards if the aforementioned provisions are not applied. The current Agreements are incompatible with the Rome Statute, but these Agreements will only constitute a violation if the vague or broad concepts are used in a misleading way by the US and the State parties in not sending the US suspects into trial.

Article 27, which relates to the “[i]rrelevance of official capacity,” states the following:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>244</sup>
- 3.

¶81 As stated before, Article 98 Agreements are drafted in a way that follows all the conditions set in Article 98 (2) of the Rome Statute.<sup>245</sup> In that sense, the US Government and the Party State are aware that no room exists for impunity. However, as previously stated, a need exists for a specific provision in these agreements to make clear the US Government will investigate and prosecute the suspect, or that suspect will be returned to the Party State for

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Rome Statute, supra* note 31, art. 27.

<sup>245</sup> *See* Zappala, *supra* note 134, at 122-23; *see infra* note 226 and accompanying text.

prosecution if there is no authorization for surrender to the ICC.<sup>246</sup> Of course, if there is no proper investigation and prosecution (exemption of criminal responsibility), this article will be violated openly and these agreements will be against the aims and objectives of the Rome Statute.

¶82 The same reasoning must be applied regarding Article 98 (2) and Article 86 of the Rome Statute. Article 86 establishes the following: “Party States shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>247</sup>

¶83 Article 98 Agreements are currently very likely to be incompatible with the Rome Statute, so the Party States that are willing to sign Article 98 Agreements must seek to add express provisions to compel the US to exercise its jurisdiction over the suspects and clarify Article 98 Agreements will not cover any American citizen in a foreign territory.<sup>248</sup>

¶84 In the event Party States have already signed Article 98 Agreements as currently drafted, there are two considerations that have to be taken as implicit because of the explicit reference to Article 98 (2) in these agreements:<sup>249</sup>

- a. Either the Party State or the US must “investigate or prosecute;”
- b. Article 98 Agreements will “not extend to all American citizens;”
- c. For future agreements, specific provision must guarantee that the US will exercise its jurisdiction or the possibility that the ICC can determine if the US is unable or unwilling to do so.

¶85 The last ICC authority is very important for one reason: it must be guaranteed the US will respect the aims of the Rome Statute in Article 98 Agreements. As stated in Chapter 3 of this article, the position of the US towards the ICC is very negative and full of misconceptions.<sup>250</sup>

The most concerning position is the US believes no external jurisdiction must be applied to their citizens, and the later authorization for the US President, practically, to invade the ICC’s

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<sup>246</sup> See *supra* note 239-47 and accompanying text.

<sup>247</sup> *Rome Statute*, *supra* note 31, art. 86.

<sup>248</sup> Zappala, *supra* note 134, at 133.

<sup>249</sup> Zappala, *supra* note 134, at 133.

<sup>250</sup> See *infra* Chapter 3.

office to free their nationals. After the adoption of the Security Council Resolution 1422 (2002), the then US Ambassador before the UN John Negroponte declared:

We will not permit that balance to be overturned by the imposition on our citizens of a novel legal system they have never accepted or approved, and which their government has explicitly rejected. We will never permit Americans to be jailed because judges of the ICC, chosen without the participation of those over whom they claim jurisdiction, so decide. We cannot allow that Americans who have been acquitted of accusations against them in the United States shall be subject to prosecution for the same acts if an ICC prosecutor or judge concludes that the American legal proceedings were somehow inadequate.<sup>251</sup>

¶86 Apparently, the US Government considers the right to prosecute as exclusive of the State of the nationality of the suspect. It is also a prerogative of the territorial State, which is the State where the crime has been committed and its legal order violated. When an individual is abroad, the national State has no more jurisdiction over him. In addition, under International Law, the diplomats and senior office of State have immunity, and Article 98 (1) of the Rome Statute safeguards this situation. This serious misconception can be dangerous and yet must be resolved to trust that the US will respect an improved version of Article 98 Agreements.

¶87 In any case, many of the issues regarding the compatibility of Article 98 Agreements with the obligations that the Party States assumed in the Rome Statute will not only depend on the qualifications mentioned before. It will also depend on the US position towards the objectives of the Statute. If the US does not want to surrender, it must guarantee the exercise of jurisdiction over the suspect. When a case arises, it will be decided by the ICC whether a specific application of an Article 98 Agreement is violating the Rome Statute. In these months the world will witness US policy for dealing with international crimes like the ones committed in Iraq's Abu Graib prison. The willingness of the US Government to prosecute will be proved during these investigations. If it fails to exercise justice, the international community will be very reluctant about Article 98 Agreements and then the Party States of the Rome Statute will seriously consider prosecuting the American citizen in their territory for not allowing impunity.

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<sup>251</sup> Press Release, John D. Negroponte, U.S. Permanent Member to the United Nations, U.S. Department of State, to U.N. Security Council Stakeout (July 12, 2002), available at [http://www.un.int/usa/02\\_098.htm](http://www.un.int/usa/02_098.htm).

## 5. CONCLUSIONS

¶88 The US was opposed to the creation of an international criminal court from the court's inception. Although they made important contributions during the Preparatory Committee of 1996, the US was always in strong disagreement with the role of the Security Council and the ICC, seeking for the latter to act only by the referral of the Security Council, which would transform the court into a political tool.

¶89 The main reason for rejecting the draft made in the Rome Conference was that the US delegation tried to give the Security Council, of which the US is a permanent member with veto powers, the authority to approve the investigations and further prosecutions taken by the ICC. The majority of delegations did not accept this proposal, because the Security Council, as a political arm of the UN, had nothing to do with the purposes and objectives of the ICC: to end impunity for the perpetrators of atrocities that deeply shock the conscience of humanity.

¶90 The importance given by the US to giving a main role to the Security Council is based in the fact that the ICC Prosecutor will be accountable to no particular national or international official, and its work will be without any public scrutiny. The US representatives forget that one of the major characteristics of the national prosecution services in both adversarial and inquisitorial systems around the world is the impartiality and the independence they have from the executive power and the central government. That is why the intervention of an external political organ like the Security Council will be a serious limitation on the ICC prosecutor's discretionary powers. The checks and balances on the ICC prosecutor and judges have to come from inside the ICC structures, a position that is in concordance with the inquisitorial and adversarial systems around the world. There are control mechanisms over the ICC prosecutor in the Rome Statute, but they are exercised by the Court's own structures to avoid external pressures jeopardizing the independence of the ICC and following the standards of independence of any national judicial system.

¶91 The complementary nature of the ICC will make the Party States responsible for exercising jurisdiction over the international crimes listed in the Rome Statute. If the ICC has

jurisdiction over the crimes, the Party States will be in charge of facilitating evidence and suspect participation during trials. It is very unlikely that a Party State will collaborate with the work of the ICC if it perceives that there is political prosecution going on, where the rule of law and the fair trial will not be fully respected. It is exactly the absence of external intervention in the ICC prosecutor's job the key element for avoiding the politicized prosecutions.

¶192 The fact that the ICC would have jurisdiction over nationals from non party States motivated the US government to take the three actions previously described in this article: The Security Council Resolution 1422 (2002), the American Servicemen Protection Act (2002) and the Article 98 Agreements.

¶193 Although the Security Council Resolution 1422 (2002) was not renewed for a third consecutive year, the ICC is not legally bound by the decisions of the Security Council because the ICC can analyze the deferral decisions in order to determine if they are consistent with the UN Charter and the Rome Statute. The ICC can consider that the threats to peace and security justifications are vague or lack of a specific scenario. Since the Rome Statute refers to specific investigations, it is logical to argue the reasons for suspension must be specific and consistent with the Statute. In that sense, the ICC will defer the investigation only if it is convinced the investigation or prosecution of UN personnel and operation from a non party State to the Rome Statute may lead to a specific threat to peace. These would be the only admissible grounds to for the suspension of proceedings under the Rome Statute.

¶194 The major concerns with the adoption of the ASPA are mentioned in Section 2002: the possibility of prosecution of American armed forces operating overseas by the ICC (even though the US is not a party State of the Rome Statute), worries the US President and other senior members of the US Government could be prosecuted by the ICC, and the possibility of defining the crime of aggression without taking into account the Security Council prerogative to determine when a case of aggression arises. These concerns are not justified. The possibility for the prosecution of US troops abroad is too broad to thoroughly examine in this article, but, simply stated, there is a delicate balance between the passive criminal jurisdiction

(the right of the State where the offense has been committed to prosecute) and the fact that no rule of international law exists prohibiting a State from voluntarily delegating its sovereign ability to prosecute to the ICC. Of course, if there is responsibility that can be attached to a head of State or any member of its government, article 27 (1) of the Rome Statute will apply. The role of the ICC regarding the not yet defined crime of aggression is completely different and does not conflict with the Security Council mandate established in Chapter VII the UN Charter and its authority to make a military intervention or an embargo. On the other hand, the ICC has the power to determine if a crime of aggression has been committed in trying the persons responsible. However, the definition of the crime of aggression will be established in 2009, and it will have to be consistent with the UN Charter. The US concerns seem exaggerated because it has not been defined yet and obviously will not conflict with the Security Council prerogatives set in Chapter VII of the UN Charter.

¶95 Finally, Article 98 Agreements apparently do not directly conflict with any provisions set in the Rome Statute, but instead actually names the Statute in the preliminary paragraphs. The Preamble of the proposed text of Article 98 Agreement states it is very important to try those who commit crimes under the Rome Statute (Part A). It also mentions the Rome Statute, the principle of complementarity and the American intention to investigate and prosecute “where appropriate” (a broad concept) acts under the ICC’s jurisdiction (Parts B and C). As stated in Chapter 4 of this article, Article 98 (2) was drafted considering the already existing SOFAs, taking into account the State of the perpetrator would be in charge of the investigation and prosecution. However, since Article 98 (2) does not make any clear statement about the possibility of accepting bilateral agreements signed after the entering into force of the Rome Statute, it seems these Article 98 Agreements will be compatible if objectives do not conflict.

¶96 Considering Article 98 (2) of the Rome Statute allows the ICC to desist in asking for the surrender of nationals of a third State in a mission abroad, it implies a surety this person will be investigated and prosecuted in their own State or in the State of the State Party. Then, Article 98 Agreements will be suitable only if the suspects face justice for the alleged crimes. This is the core condition for applying Article 98 (2) of the Rome Statute, both with SOFAs

and extradition agreements. In that sense, if it is assumed agreements signed after the entering into force of the Rome Statute would be valid, they will only be valid if they specifically provide either the territorial State (the US) or the sending State will exercise jurisdiction. This condition is implicit in the proposed texts of Article 98 Agreements, but it must be articulated in an express provision.

¶197 States and organizations outright rejecting the validity of Article 98 Agreements also violate Article 27, Article 86 and Article 98 (2) of the Rome Statute. There is, in principle, no *a priori* direct violation of such articles. The problem arises afterwards if the principals are not applied. As they are currently drafted, the Agreements are incompatible with the Rome Statute, but will only constitute a violation if the vague or broad concepts in the Agreements are used in a misleading way by the US and party states in failing to send US suspects to trial. Article 98 Agreements are drafted in a way that follows all the conditions set in Article 98 (2) of the Rome Statute. In that sense, the US Government and the party State are aware there is no ground for allowing impunity. However, as stated previously, there is a need for a specific provision in these agreements to make clear that the US Government will investigate and prosecute suspects, or that he or she will be returned to the Party State for prosecution if there is no authorization for surrender to the ICC. Of course, if there is an absence of a proper investigation and prosecution (exemption of criminal responsibility), this article will be violated openly and these agreements will become against the aims and objectives of the Rome Statute.