Supplementary Agreements in International Law: A Case Study of Bilateral Immunity Agreements under the Statute of the International Criminal Court

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DECLARATION

This project is my original work and has not been submitted for another Degree in any other University.

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Dedication

To all those who have fought gallantly for the maintenance of human rights and dignity in the world

Abstract

This study examines the key issues associated with the creation of the ICC and the behaviour of the US vis-à-vis the ICC. The study examines the legality of the BIAs in international law and analyses whether an ICC party can enter into a BIA with the USA. The study concludes that the BIAs as currently drafted is inconsistent with the object and purpose of the ICC Statute and international law in general.

The study relies on both primary and secondary data. The primary data include text of the ICC Statute, BIAs and *travaux preparatoires* of the Rome Conference, official sources of information including face to face interview with the relevant individuals in Kenya who are concerned in one way or the other with the issue and the known official policies of the United States on the matter accessed through the library and the Internet. Primary data will be useful in the study by providing the record of what transpired during the negotiations of the ICC Statute and the intention of the parties during the process.

Secondary data was obtained from the available books, commentaries, journals and general sources on the subject as documented by various non-governmental organizations concerned with the issue.

Chapter 1
Background of the study

Introduction

Since the end of the Cold War, the United Nations has created four international criminal courts at various periods. These courts are the International Criminal Court (ICC), the two ad hoc International Criminal Tribunal for Yugoslavia and International Criminal Tribunal for Rwanda, and the special court for Sierra Leone. While there was some discussion of international criminal prosecution of German leaders after World War I, movement in that direction was thwarted.[1] it was only after World War II that the first international criminal proceedings took place in Nuremberg and Tokyo where only the losing leaders of World War II were tried. At Nuremberg twenty-two German leaders were prosecuted at Nuremberg in the first round of trials, nineteen of whom were convicted, with twelve of these being executed. Similar proceedings were held at Tokyo for Japanese leaders, through the direction of the US military command.[2]

The debate over the effects of Nuremberg and Tokyo on the subsequent thinking in Germany and Japan is inconclusive. However it is widely acknowledged that it marked an important phase in the emphasis on individual criminal responsibility in international war. In numerous situations between the end of World War II and the end of the Cold War international criminal proceedings proved impracticable as most international armed conflicts ended inconclusively without unconditional surrender thus preventing the trial of those

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[1] James ,F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War,* Greenwood ((Westport, CT: 1982)

[2] David, P. Forsythe: *Human Rights in International Relations,* Cambridge University Press, (Cambridge: 2002) pp.84-86.

not in custody who were suspected of violations of international humanitarian law.

As for the crime of genocide and crime against humanity before the 1990s, only the French and Israelis held national trials involving individual responsibility for war crimes. The French trials involved charges against French citizens accused of aiding in the holocaust while for the Israelis, the trial of Eichmann in Jerusalem after being seized in Argentina and accused of the massacre of a number of Egyptian prisoners of war during the 1956 Middle East war stands out prominently. These national trials were pursued amidst political difficulties including jurisdictional matters and whether justice could be seen to be done. Until the mid 1990s after the events in Bosnia and Rwanda did the international community create *ad hoc* United Nations tribunals to try individuals for genocide, war crimes and crimes against humanity.

Of the 120 states represented at the conference in Rome, 7 voted against and 21 abstained from adoption of the ICC Statute. The United States played an influential role in supporting the concept of such a court,[3] and in December 2000 the US signed the resulting 1998 Rome Statute, albeit with some concerns which could not be expressed as reservations since article 120 of the Statute does not allow reservations.

The traditional rule regarding reservations to treaties was that a state could not make a reservation to a treaty unless the reservation was accepted by all the states, which had signed but not necessarily ratified or adhered to the treaty. However, this rule was undermined by the advisory opinion of the

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[3] John R. Bolton, 'Courting Danger: What's Wrong With the International Criminal Court' *The National Interest,* Winter (1998/99) p.61.

International Court of Justice in the *Genocide* case when it observed that the traditional theory was of undisputed value, but was not applicable to certain types of treaty, more specifically to the Genocide Convention, which sought to protect individuals, instead of conferring reciprocal rights on the contracting states.[4] With this ruling it is now settled that reservations are not applicable to treaties falling under this broad category such as the four Geneva Conventions dealing with the amelioration of the condition of the wounded and sick members of the armed forces in the field and ship wrecked, treatment of prisoners of war and the protection of civilian persons in times of war.

Statement of the research problem

Although on 31 December 2000 U.S. Ambassador David Scheffer signed the Rome Statute on behalf of the U.S. government during the Clinton administration, on 6th May 2002 the Bush administration revoked the signature. Article 54 of the Vienna Convention on the Law of Treaties provides that the termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty or at any time by consent of all the parties after consultation with the other contracting states. This provision is further elaborated by article 56 of the Vienna Convention on the Law of Treaties that provides that a right of denunciation or withdrawal may be implied by the nature of the treaty meaning that certain types of treaty such as those dealing with the protection of individuals are binding on all states. Article 125 of the ICC Statute indicates that the Statute is subject signature, ratification, acceptance, approval or accession thus implying that states may withdraw their treaty actions subject to the

[4] Jernej Letnar Černič, 'Crossing the Rubicon: Enforcing the international legal responsibility of transnational corporations for *ius cogens* human rights violations', University of Lund, March 2005.

procedure provided in Article 127 of the Statute of notifying the UN Secretary-General.

Primary US concerns for the revocation included immunity for United States peacekeepers and soldiers from prosecution,[5] the role of the independent prosecutor, and fears of the ICC being used in politically motivated circumstances against US personnel or high-ranking officials. The United States also expressed concern about the iCC's intended universal jurisdiction and the risk that it would usurp the authority of the United Nations Security Council. Thereafter, the US, purportedly relying on Article 98(2) of the ICC Statute embarked, on the conclusion of Bilateral Immunity Agreements (BIA) with several countries that are parties and non-parties of the ICC. Article 98 (2) of the ICC Statute states that

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of the State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender."[6]

US-Proposed Article 98 agreement template provides that:

> A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,
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> 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,
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> 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

[5] Samantha Power, *A Problem From Hell: America and the Age of Genocide,* Basic Books (New York, 2002) p. 491

[6] The Rome Statute on the International Criminal Court, 17 July 1998 Art. 98(2).

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,

(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.

An additional paragraph is included in BIAs intended for countries that are not parties or signatories to the Rome Statute, where each party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a citizen of the other party to the ICC.[7]

[7] Human Rights watch available at http://hrw.org/campaigns/icc/docs/art98analysis.htm

The BIAs are designed to ensure that the parties to them will not surrender their nationals to the ICC. The scope of persons covered by the BIAs is broad and includes both military and non-military personnel of the US and the concerned countries. The question has been whether a state party to the ICC signing a BIA with the US, is in violation of both its obligations declared in the ICC Statute and of Article 18 of the Vienna Convention on the Law of Treaties, which provides that:

> "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
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> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."[8]

Another fundamental question has been whether the US, having signed the Rome Statute, which already obliges it not to defeat the object and purpose of the treaty can behave in a totally inconsistent way after revocation of its signature.

This study principally examines the situation of a state which is already a party to the Rome Statute and which is called on by the United States to enter into a bilateral non-surrender agreement in the terms set out above.

Justification of the study

The US has been concluding BIAs with several countries that are ICC parties arguing that it is permitted by article 98 of the ICC Statute. Several ICC state parties including Kenya have on the other hand not signed BIAs despite US

[8] The Vienna Convention on the Law of Treaties. 23 May 1969 Art. 18.

pressure. There are also divergent opinions on whether the signing of BIA by ICC parties contravenes the ICC Statute and international law particularly the Vienna Convention on the Law of Treaties. The justification for the study is that there are divergent views of BIAs. This study endeavours to examine and determine the issues surrounding the BIAs with a view of analysing their legality vis-à-vis the Rome Statute and international law.

Objectives of the study

The purpose of the study is to investigate (the) whether BIAs between the US and ICC state parties are in compliance with the ICC Statute and international law. The objective is to determine whether the conclusion of bilateral immunity agreements between the US and ICC state parties is consistent with the objective of the ICC Statute and international law.

Literature review

The United States approaches international treaties and institutions from a vantage position of influence and as such enjoys a remarkable amount of autonomy in its policy-making with regard to the United Nations.[9] As noted by Layne, a hegemonic power like the United States today has overwhelming hard, especially military power especially and indeed there is no state or coalition with commensurate power capable of restraining the United States from exercising that power.[10] This disparity of power between the United States and the rest of the world has led to the characterization of American policy as strongly unilateralist as the rest of the world endeavours to seek multilateral solutions to contemporary challenges.

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[9] Jason T. Monaco, *Oceans Apart: The United States, European Union, and the International Criminal Court,* Naval Postgraduate School (Monterey: 2003).

[10] Christopher Layne, 'Rethinking American Grand Strategy: Hegemony or Balance of Power in the 21st Century' *World Policy Journal*, Vol.15 1998 pp 1-26.

This perception of the United States forms most of the scholarly debates on the US attitude towards the ICC as exemplified by pressure for states to sign the BIA. Any state becoming a contracting party to the BIA is obliged to surrender all of the affected persons present in its territory to the authorities of the parties concerned instead of to the ICC.[11]

The United State's unilateralism

Critics view the pursuit of BIAs by the US as typical of US unilateralism. Stewart discusses the irony of American unilateralism and observes that the US has never been very comfortable with the constraints and obligations of multilateralism. Stewart observes that indeed a hallmark of US foreign relations is that it has been the world's leading champion of multilateral cooperation and, paradoxically, one of the greatest impediments to such cooperation. No other country has done so much to create international institutions, yet few have been so ambivalent about multilateralism, so well positioned to obstruct it, or so tempted to act unilaterally. Stewart concludes that this ambivalence reflects three features of the American experience: the US singular political culture, its domestic institutional structure and its global dominance.[12]

United States unilateralism is manifested in multilateral issues such as arms control agreements, the United Nations, and the ICC where it has pursued its interest often opposed to the approach adopted by most of the states. A powerful US with enormous freedom of action throughout the world feels little pressing interest in new mechanisms that might curb that freedom. The US

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[11] Text of Article 98 Agreements with the United States. Art B-C. www.iccnow.org/documents/otherissues/impunityart98/USArticle98Agreement1Ang02.pdf Date of downl.:14 February 2006.

[12] Patrick Stewart, Multilateralism and its Discontents: The Causes and Consequences of US Ambivalence' in Stewart Patrick and Shepard Forman (eds.), *Multilateralism and US Foreign Policy: Ambivalent Engagement,* Lynne Rienner (Boulder, Colorado: 2002) pp.2-7.

perceives the policy of unilateralism in ethical terms, depicting it as a moral imperative transcending secondary international obligations; as the only means to preserve its identity and values; as a last resort, taken after exhaustive efforts to reach consensus; as a contribution to the general welfare rather than narrow US interests or as a form of leadership to overcome inertia, mobilize a coalition, create an international standard, or enforce an international agreement. In this sense, the US perceives that in discharging its obligations as the ultimate custodian or guarantor of global order, it cannot afford to be hamstrung by rules and institutions binding on others.[13]

The United States has criticized the ICC on a number of jurisdictional, procedural, and constitutional concern. The US argument is that in violation of the Vienna Convention on the Law of Treaties, article 12 of the Rome Statute would allow the ICC to exercise jurisdiction over non-member states.[14] The U.S. delegates at the Rome Convention objected that the ICC's jurisdiction was too broad,[15] and that holding a state to a treaty it did not sign violates a fundamental principle of international law that a treaty does not create either obligations or rights for a third state without its consent. The US was also concerned that the Rome Statute does not allow states reservations: the ratifying state must accept the Rome Statute in its entirety.[16]

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[13] Patrick Stewart, 'Beyond coalition of the willing: Assessing US multilateralism', *Ethics & International Affairs.* Vol 17 no.1 (New York: 2003)

[14] Rome Statute article 12.

[15] Pisik, Betsy, Again, 'U.S. Voices Opposition to Structure of Proposed Court', *Washington Times*, Oct. 22, 1998, p A13.

[16] John R. Bolton, The United States and the International Criminal Court: The Risks and Weaknesses of the International Criminal Court from America's Perspective, 41 *Virginia Journal of International Law* (2000) p 186.

United Nations Security Council mandate and weaknesses in the ICC Statute as perceived by the US

As one of the "principal organs" of the United Nations, the Security Council has the "primary responsibility for the maintenance of international peace and security" and "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."[17] The US has argued that the Rome Statute conflicts with this mandate because the ICC could circumvent the U.N. Security Council's authority by investigating and taking action against violations of international law.[18]

Regardless of this, critics argue that the United States potentially has already subjected its citizens to ICC jurisdiction. The U.S. Army Field Manual on the Law of Land Warfare promotes the concept of individual responsibility for war crimes.[19] In addition, the United States has indicated its support of this tenet of international law through ratification of the Nuremberg, International Criminal Tribunal for former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) Charters. Finally, the United States has indicated that it will prosecute foreign citizens "for transgressions of customary international law under a theory of universality."[20] Other states and the ICC could consider these combined U.S. actions to be sufficient state practices to conform to *opinio juris*

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[17] UN Charter art. 39.

[18] Diane Marie, Amann & M.N.S. Sellers, 'The United States of America and the International Criminal Court', 50 *American Journal of Comparative Law* (2002) p. 381, 386.

[19] U.S. Dep't Of The Army, Field Manual, The Law of Land Warfare, paras. 498, 510-11 (1956). "Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."

[20] Diane Marie, Amann & M.N.S. Sellers, 'The United States of America and the International Criminal Court', 50 *American Journal of Comparative Law* (2002) pp 381; 386.

about ICC's jurisdiction over crimes provided in its Statute. This would subject U.S. citizens to ICC jurisdiction, regardless of U.S. treaty obligations.[21]

In critiquing the final version of the Rome Statute, the United States objected to the seven-year opt-out provision for war crimes jurisdiction. Article 121 of the ICC Statute provides that after the expiry of seven years from the entry into force of the Statute, any party may propose amendments to articles 5-8 dealing with the crimes covered by the Statute. Any such amendments will enter into force for those parties, which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a party, which has not accepted the amendment, the ICC shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by party's national or on its territory. However if an amendment has been accepted by seven-eighths of the parties, any party which has not accepted the amendment may withdraw from the Statute with immediate effect by giving a notice no later than one year after the entry into force of such amendment. Because a state may opt out of war-crimes jurisdiction after seven years once it ratifies the Rome Statute, the US contends that the ICC holds a larger jurisdiction over non-members than members. States could theoretically ratify the Rome Statute and escape criminal liability, while non-members would remain open to ICC prosecution.[22]

The criticism against the ICC is that it is arguably too weak to enforce its jurisdiction. Internal conflicts resulted in instances of terrible atrocities during the

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[21] Henry T. King & Theodore C. Theofrastous, 'From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy', 31 *Case Western Reserve Journal of International Law* (1999) pp 47, 52.
[22] David Marcella, 'Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law', 20 *Michigan Journal of International Law* (1999) pp 337, 341, 346-49.

twentieth century. Examples include humanitarian violations in countries such as Iraq and Cambodia. Leaders of non-member states who committed atrocities within their own states would never voluntarily submit to ICC jurisdiction. In the absence of referral by the UN under chapter VII of its Charter, the ICC would not have an adequate prosecutorial and enforcement mechanism against non-member states, rendering it ineffective in such cases.[23]

The United States considers that states hostile it to could file wrongful, frivolous, or politically motivated charges against government officials, military officers, and peacekeepers. Such hostile states may attempt to show that American military actions were criminally disproportionate uses of force. The U.S. delegation at the Rome Conference argued that only member states and the U.N. Security Council should be able to refer cases to the ICC. This to the US, would safeguard American citizens and its policy, and ensure that adequate enforcement mechanisms through UN resolutions existed prior to ICC prosecution. The US felt that its proposal would also guarantee that it has the international community's political support any time the ICC took up a case.[24]

The ICC's mechanisms for initiating investigations did not escape its critics either. David Scheffer (Ambassador-at-Large for War Crimes Issues) head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court admitted, "we just don't accept a presumption that a prosecutor would be totally apolitical."[25] The United States also questioned whether ICC judges could be relied on to act free of political bias

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[23] Theodor Meron, 'The Court We Want', *Washington Post*, October 13, 1998, p A15.
[24] David J. Scheffer, 'U.S. Policy on International Criminal Tribunals', 12 *Laiden Journal of International Law* (1999) p.6.
[25] Ibid p.355.

or pressure. In addition, the United States expressed concerns regarding the prosecutor's ability to investigate matters referred by an individual or NGO. The contention is that individuals and NGOs may be used as proxies by their countries of domicile to file charges against other states. This could subject the ICC to "frivolous and politically-motivated complaints" or turn it into a "human rights ombudsman," constantly dealing with "complaints from well-meaning individuals in organizations that will want the court to address every wrong in the world." [26]

Essentially, the United States supported mandatory approval by either a defendant's home state or the U.N. Security Council in order for a case to come before the ICC. Critics of the US viewed this stand as giving the United States the power to quash investigations of its citizens or troops by not signing the Rome Statute, or by vetoing action through its permanent Security Council position.

Constitutional perspective of the US opposition to the ICC

The US opposition to the ICC also had a constitutional perspective such as lack of due process. ICC critics have stated that allowing a foreign court to have jurisdiction over U.S. citizens for actions performed within the United States would be unconstitutional, especially because the ICC does not contain the safeguards provided in the Bill of Rights because U.S. citizens are guaranteed a trial by jury for all crimes, which the ICC does not embrace.[27] However, the US Supreme Court has suggested that a foreign court could possibly trigger the Bill of Rights when prosecuting a U.S. citizen.[28] Specifically, an exception might exist

[26] Ibid pp.355-56.
[27] U.S. Constitution. art. III, section 2, clau
[28] *U.S. v. Balsys*, 524 U.S. 666-67, 698 (19-

if the United States relinquished its jurisdiction to a foreign tribunal on a case involving "offenses of an international character." Should this occur, the Supreme Court acknowledged that the foreign court would essentially prosecute the accused as a substitute of the United States; therefore, the defendant would merit Bill of Rights protections.[29] The United States has extradited its citizens and allowed them to be tried in foreign courts without Bill of Rights protections.[30] This usually occurs, however, when the crime was committed either outside U.S. territory or within U.S. territory with the intent to create criminal effect abroad.[31]

In addition, in the case of *Missouri v. Holland*, it was held that the federal government may only enter a treaty that "does not contravene any prohibitory words to be found in the Constitution." [32] This may preclude the United States from ever adopting the Rome Statute. Ratification would mean that the United States, as a member, was partially responsible for administering and amending a judicial body, which was acting "on behalf of the United States".

The United States, given its permanent veto power in the UN Security Council, seeks a court that is ultimately subordinate to the UN Security Council while most of the countries of the world in a weaker positions seek a court that is entirely independent of the veto power of the permanent UN Security Council members and thus be able to avoid what they consider undue coercion by China, France, Russia, the United Kingdom or the US.[33] This study will adopt the latter

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[29] Ibid p 698-99.
[30] Scott W. Andreasen, 'The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?', 85 *Iowa Law Review* (2000) p 729.
[31] *Neely v. Henkel*, 180 U.S. 109, 110-11 (1901); see also *U.S. v. Melia*, 667 F.2d (2d Cir. 1981) pp300, 303-04.
[32] *Missouri v. Holland*, 252 U.S. (1920) pp 416, 433.
[33] Jason T. Monaco, Oceans Apart: The United States, European Union, and the International Criminal Court, Naval Postgraduate School (Monterey: 2003)

stand while holding the view that a court cannot be subordinate to another organ as suggested by the US, not even in the US since it will offend the principle of separation of powers.

BIAs and the developing countries

Aid from the US that various countries especially developing countries receive is one of the motivating factors for signing a BIA. Any country signing a BIA with the US has subsequently received substantial increase in US bilateral aid. States such as Kenya and Tanzania declining to sign BIA have had a substantial slash in the US bilateral aid. According to the US State Department, Kenya lost an estimated US$ 23 million in foreign military financing and economic support assistance for the period 2004/05. In the long term it is projected that Kenya stands to lose US assistance in support of various programmes ranging from governance, environmental management, HIV/AIDS, education, water and sanitation to trade and investment.[34]

Faced with poverty and the need for aid, 36 African countries signed BIAs as of 2005 according to the US State Department.[35] On the other hand states make choices to sign a BIA because they are seeking more abstract goals like the support of the US in various issues that would assist such a state to extract resources from multilateral institutions such as the World Bank/IMF for its development.[36]

Certain governments in Africa have declared openly that they believe signing a BIA would violate their obligations as state parties under the Rome

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[34] www.state.gov/r/pa/ei/2004.

[35] Thuita Mwangi, Relevance of ICC to Kenya: Interpretation of Article 98 of Rome Statute, Kenya National Commission on Human Rights. (Nairobi: 2004)

[36] Wylie Lana, 'Prestige versus Pressure over the International Criminal Court: Response of the Caribbean States', Paper Presented at the Annual General Meeting of the Canadian Political Science Association, University of Manitoba, Winnipeg Manitoba June 2-5 (2004) p 3.

Statute. This is especially true of South Africa and Tanzania, which have both been very vocal in espousing their reluctance to signing a BIA as it would undermine the ICC. Another example is Benin that sent the BIA to their Supreme Court for a legal analysis in order to get the feedback on whether the BIA was consistent with domestic legislation with regard to its obligation under the Rome Statute.[37] The Supreme Court held that violation of obligations under the Rome Statute prevents Benin from signing a BIA along with its obligations as a party to the Vienna Convention on the Law of Treaties.[38]

European common position on the ICC and the BIAs

After the adoption of the ICC Statute the European parliament adopted resolutions including on EU Council Common Position to encourage states to ratify the statute so that it could enter into force as quickly as possible. In these documents the Council requested the member states to make every effort to further this process in negotiations or political dialogues with third states, groups of states or relevant regional organisations.[39] These documents reflect the EU's opinion that universal accession to the Rome Statute is essential for the full effectiveness of the Court. This position is totally against any special international agreement, which could undermine the integrity of the Statute.

Dietz observes that BIAs prohibit transfer of the accused to the ICC but do not require extradition to the US. Therefore, the BIAs does not take advantage of the protection that Article 90 might otherwise provide. While Article 90 imposes obligations on parties, Article 98 imposes an obligation on the court, not on the

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[37] Deborah Helen Cotton, 'The Power of the Weak State: Domestic Determinants Concerning Africa's Response to US Article 98', *George State University* (2005) pp16-20.
[38] Francis Dako, 'Benin: A Model for Cooperation between Government and Civil Society', *The ICC Monitor*, June 2004.
[39] Eszeter Kirs, 'Reflection of the European Union to the US Bilateral Immunity Agreements', *Miskolc Journal of International Law* Vol. 1, no.1 (2004) pp 19-24.

parties, still less on the other states. The obligation under Article 98 prevents the ICC from proceeding with a request for surrender when the request would conflict with existing international obligations. Dietz argues that when the ICC requests the surrender of the US person from a party, then the state must transfer the US person to the ICC. When the US and a party have an agreement pursuant to Article 98, then the ICC should not request the surrender of the individual to the ICC.[40]

Opponents of BIA argue that the real aim of BIA is not to protect the national jurisdiction but to avoid the procedure of the ICC and to undermine its integrity. The opinion of the European Union related to BIAs was clearly declared immediately after the first requests of the government of US for concluding such agreements. The European parliament stated in its resolutions that no special agreement may ever make possible the impunity of any individual accused of war crimes, crimes against humanity or genocide. In the view of the EU, ratifying such an agreement is incompatible with the membership of the EU.[41] The US allies in the North Atlantic Treaty Organization (NATO) have been exempted by the US from signing the BIA in accordance with the power granted to the US President by the provisions of the American Servicemen Protection Act (ASPA). This exemption is for strategic reasons in order not to antagonise its allies within NATO.

Scheffer notes that the proper interpretation of Article 98(2) of the Rome Statute of the ICC should draw from the rules of Articles 31 and 32 of the Vienna

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[40] Jeffrey S. Dietz, ' Protecting the Protector: Can the United States Succesfully Exempt US Persons from the International Criminal Court with US Article 98 Agreements', *Houston Journal of International Law*, Vol. 27 (Houston: 2004).

[41] European Parliament opinion or resolution. 24 October 2002 RSP/2002/2592. wwwdb.europarl.eu.int/oeil/oeil.Res112 Date of downl.: 10 February 2006.

Convention on the Law of Treaties. Although the United States has not become a party of the Rome Statute, and therefore is not a 'party' that falls within the guidelines for interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, its intensive participation in the negotiation and drafting of the Rome Statute, the Rules of Procedure and Evidence, and the UN-ICC Relationship Agreement is relevant in terms of what parties understand to have been the original intent behind particular provisions, notably Article 98(2). That understanding is also relevant to signatory states that have yet to ratify the Rome Statute or non-signatory states that have yet to accede to it. Article 32 of the Vienna Convention on the Law of Treaties permits recourse to the preparatory work of the negotiating states regardless of their current status under the treaty.[42]

The ability to influence possessed by the US continues to play an important role in multilateral cooperation in various issues of international concern including war crimes, genocide and crimes against humanity hence its ability to procure BIAs with other states. Nye advocates that the US should exercise soft power that emphasises attractiveness of the country's culture, political ideals and policies. When US policies appear legitimate in the eyes of the rest of the world, the more American soft power is enhanced. However hard power still remains crucial in a world of states guarding their independence but soft power will become increasingly important in dealing with the transnational issues that require multilateral cooperation for their solution.[43] Bass concedes that at a minimum, long-run deterrence of war crimes would require a relatively

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[42] Anthony Aust, *Modern Treaty Law and Practice,* (Cambridge University Press: 2000) p 334.

[43] Joseph S. Nye, Jr., 'US Power and Strategy After Iraq', *Foreign Affairs,* Vol.82, no.4 (Washington: 2003) pp 66-70.

credible threat of prosecution that no potential mass murderer could confidently say that he would avoid punishment. The ICC would likely help, but only if it somehow receives political support from the same great powers which have largely neglected the *ad hoc* UN tribunals for former Yugoslavia and Rwanda for so long.[44] Perceived American unilateralism may undermine American claims of benevolent hegemony, if other countries see the US as pursuing policies without regard for their opinions, bypassing multilateral regimes, or holding its self above international norms.[45]

Article 98 of the ICC Statute and individuals to be surrendered

There were two major themes that resulted in some of the problems the United States had. One was that the US needed to make sure that the treaty did not impede its ability, and that of other actors in the world, to enforce international peace and security. The other was to ensure that the treaty does not impede the ability of states to enforce human rights; in other words, to use military force if necessary, to stop genocide, or the commission of crimes against humanity.[46]

The argument by the US is that BIAs are nothing more than an obligation by the country not to turn U.S. persons over to the ICC without permission from the U.S. government. For that matter the BIAs do not absolve the U.S. of its obligation to investigate and prosecute alleged crimes or constrain the other state's ability to investigate and prosecute crimes committed by an American person within its jurisdiction. Further, the US contends that BIAs do not constrain the ability of an international tribunal established by the Security Council to

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[44] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals,* Princeton University Press (New Jersey: 2000) p. 295.
[45] Stewart Patrick, 'Don't Fence me In', *World Policy Journal* (New York: 2001) pp 3-5.
[46] David Scheffer, 'The US perspective on the ICC', *Mc Gill Law Journal,* Vol. 46 (2000).

investigate or prosecute crimes committed by American persons. For that matter, BIAs simply prevent U.S. persons from being turned over to an international legal body that does not have jurisdiction recognized by the U.S.[47] The US perceives the limited nature of the BIAs to be entirely consistent with Article 98 (2) of the ICC Statute, that:

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of the State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender."[48]

Article 31 of the Vienna Convention on the Law of Treaties indicates that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[49] When considering the context of the treaty, interpretations may include the text and any agreement or practice by all the parties made in connection with the treaty.[50] It is argued from the US perspective that in looking at only the text of Article 98 to determine the ordinary meaning, the term "sending state" does not indicate that the person must be present in the territory of the requested party on official government business. [51] Therefore, if the U.S. person must be "sent," then the requested party does not have to be the state where he was sent for official duty.

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[47] Brett D. Schaefer, 'The Bush Administration's Policy on the International Criminal Court Is Correct', Heritage Foundation (2005) available at http://www.heritage.org/Research/InternationalOrganizations/bg1830.cfm

[48] The Rome Statute on the International Criminal Court, 17 July 1998 Art. 98(2).

[49] Vienna Convention on the Law of Treaties article 31(1).

[50] Ibid. art. 31(2)-(4) 1155 U.N.T.S. at 340.

[51] Rome Statute, article 98

According to Crawford, Sands and Wilde, Article 98 of the Rome Statute applies when a party has an international agreement that would conflict with an ICC surrender request.[52] The sending state is the party whose consent for surrender creates the conflict.[53] According to them, article 98 only calls for an agreement requiring the sending state's consent for surrender of the accused and nothing more. [54]

This study will support the view of Crawford, Sands and White and demonstrate that BIAs as presently drafted, are inconsistent with the Rome Statute and therefore contrary to international law. This study examines the issue in a multi-disciplinary manner encompassing law, international relations and diplomacy, an approach that the available literature neglects since they concentrate on a single approach of analysis.

Theoretical framework

This study adopts the concept of good faith encompassing three different theories of interpretation.The first is the restrictive textual approach of interpretation which bases itself on the ordinary meaning of the text of the treaty. The second is a subjective approach which considers the idea behind the treaty; treaties in their context, what the drafters intended when they wrote the text. A third approach bases itself on interpretation in the light of its object and purpose; the interpretation that best suits the goal of the treaty, also called effective interpretation. Having regard to the object and purpose of a treaty is for the

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[52] Ibid article 98(2)(preventing the ICC from requesting surrender when the request would conflict with a Party State's "obligations under International agreements").
[53] Ibid. art. 98(2), 2187 U.N.T.S. at 148 ("international agreements pursuant to which the consent of a sending State is required to surrender").
[54]James Crawford SC, Philippe Sands QC and Ralph Wilde, 'In the Matter of The Statute of The International Criminal Court and In the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute', *Joint Opinion* (London:2003) pp 20-21.

purpose of arriving at an appropriate interpretation. The concept of good faith is relevant to this study in the sense that if the conclusion of BIAs between the US and ICC state parties arises out of interpretation of the object of the ICC Statute and such interpretation is incompatible with the object and purpose of a treaty, it may well be wrong.

While it is true that article 26 of the Vienna Convention on the Law of Treaties requires good faith adherence to the treaty, a subsequent agreement that contains potentially conflicting obligations with respect to the original treaty does not necessarily conclusively indicate that a party has an intention to breach the treaty especially if the treaty contemplates such an act and provides that the treaty does not preclude the act.

The best approach of interpretation leads to a general rule that a treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision; read in their context, that the object and purpose of the parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usually be sought.[55]

Additionally, the various elements contained in article 31 of the Vienna Convention on the Law of Treaties, such as context, object and purpose, instruments made in connection with the BIAs, must be applied as a whole. The elements of article 31 of the Vienna Convention on the Law of Treaties are to be

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[55] Appellate Body report on *United States, Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R 6 November, 1998.

viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.[56]

An important corollary of article 31, which also reflects the good faith element conditioning the interpretation of treaties, is the principle of effective treaty interpretation, according to which a treaty should not be interpreted in such a way as to lead to a result, which is manifestly absurd or unreasonable. One of the corollaries of the "general rule of interpretation" in the Vienna Convention on the Law of Treaties is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or in capable of being utilised.

Hypotheses

The following hypotheses will be tested in this study:

(i) BIAs are permitted by Article 98(2) of the Statute of the ICC.

(ii) BIAs are in contravention of the ICC Statute and the Vienna Convention on the Law of Treaties and hence contrary to international law.

(iii) BIAs are instruments used by the US to continue its international military intervention without the threat of its citizens being held accountable for any atrocities that may arise from such intervention.

Methodology

The study relies on both primary and secondary data. The primary data include text of the ICC Statute, BIAs and *travaux preparatoires* of the Rome

[56] Panel report on United States, Sections 301-310 of the trade Act of 1974. WT/DS152/R 27 January 2000. par.7.22

Conference, official sources of information including face to face interview with the relevant individuals in Kenya who are concerned in one way or the other with the issue and the known official policies of the United States on the matter accessed through the library and the Internet. Primary data will be useful in the study by providing the record of what transpired during the negotiations of the ICC Statute and the intention of the parties during the process.

Part of the secondary data especially on the views informing divergent opinions on the BIA issue were obtained from the available books, commentaries and journals on the subject. Secondary data is important to this study, as it provides in depth analysis of the different views on the subject and the theoretical foundations of the various views.

The study also evaluates general sources on the BIA as documented by various non-governmental organizations concerned with the issue. This study combines elements of all these sources examining the issues surrounding the BIAs.

Chapter Outline

Chapter One provides the background to the study. It outlines the hypotheses, the theoretical framework and literature review. Chapter Two traces the history of a permanent International Criminal Court and the different international events surrounding its formation. Chapter Three outlines the US attitude towards the creation of the ICC and outlines it's reservations on the role of the ICC and in particular, the courts universal jurisdiction. Chapter Four examines the United States interpretation of Article 98 of the ICC Statute and its relations with BIAs, while Chapter Five critically analyses the theme of the study

including the relevant provisions of the ICC Statute, Bilateral Immunity Agreements, applicable international law and practice. The chapter makes recommendation on how to make the BIAs comply with international law. Chapter Six contains the conclusions of the study.

Chapter 3

Attitude of the United States to the International Criminal Court

Introduction

The first two chapters have provided the background, objectives of the study, the research question, the hypotheses, justification of the study and the evolution of the ICC and the US concerns with the Statute of the ICC.

This Chapter now examines the attitude of the US towards the ICC pointing out what the US perceives as flaws in the ICC statute. The advent of the American Service Members Protection Act (ASPA) and Nethercutt amendment as tools for securing Bilateral Immunity Agreements (BIAs) is examined as a method of the campaign against the ICC by the USA.

Controversy on the Rome Statute and ICC

To understand BIAs it is important to reflect on the controversy over the Rome Statute and the International Criminal Court, which began during the negotiations and the subsequent US actions and attitude towards the ICC. While the controversy actually originated before the Rome Statute was even formed, with "Helm's Standard" and other lines of similar thinking, it was not until the final draft of the Rome Statute had been produced, that the US began to voice its concern very publicly about certain troubling issues that were not addressed in the final document.[1]

The US attempted to persuade the UN that the document lacked changes that were necessary for it to sign the treaty, most of which consisted of certain

[1] Jennifer Elsea, *International Criminal Court: Overview and Selected Legal Issues*, New York: Novinka Books 2003 p. 67.

procedural guidelines that would limit the power of the ICC and its institutions. The most substantial of these changes was the request that all subsequent ICC prosecutions be sanctioned by the UN Security Council before proceeding with the case. The UN voted on whether to adhere to the US advice and make these changes or leave the document as it was. The changes proposed by the US were rejected in a majority vote of 120-7.[2] Subsequently, the US signed the Rome Statute on December 31, 2000 but on May 6, 2002 notified the UN that it would not become a party to the treaty and effectively withdrew its signature to the treaty.

The US involvement and contribution to the drafting of the Rome Statute indicates that it supports the court's substantive jurisdiction. Scheffer notes that the US negotiated procedures and definitions of crimes consistent with US constitutional and military practice.[3] Bassiouni observes that the articles dealing with procedure and with definition of crimes were substantially as the US wanted.[4] Yet the notion of an international institution trying an American for crimes without US sanction still sound exceedingly unacceptable to the US. Critics of the US observe that the ICC Statute resembles or exceeds the extent of detail in American Criminal Code. Newton believes that in a very real sense, the proscriptions against genocide, crimes against humanity, and violations of the laws and customs of war contained in Article 5 of the Rome Statute embody the

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[2] Brett D. Shafer, 'The Bush Administration's Policy on the ICC is Correct', *Backgrounder* No. 1830 March 8, 2005 p. 3.
[3] .David J. Scheffer, 'A Negotiator's Perspective on the International Criminal Court', 167 *Military Law Review* 1, 12 (2001).
[4] M.Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court',32 *Cornel International Law Journal* (1999) pp. 443,457.

highest ideal of all legal systems that the law can replace raw power as the defining norm of international relations.[5]

The flaws in the ICC Statute as perceived by the US

Yet, to the US, the court's flaws are basically, substantive and structural. As to the former, the ICC's authority is vague, excessively elastic and most emphatically not a court of limited jurisdiction since crimes can be added subsequently that go beyond those included in the Rome Statute. Article 121 of the ICC Statute provides that after the expiry of seven years from the date of entry into force of the Statute, any party may propose amendments to the statute including to articles 5, 6, 7 and 8 listing the ICC crimes.

Although a party which has not accepted the amendment may withdraw from the Statute one year after notification to the UN Secretary-General, article 127 of the ICC Statute provides that it shall not be discharged by reason of its withdrawal from obligations arising while it was a party. Parties to the Statute are subject to these subsequently added crimes only if they affirmatively accept them, but the Statute is silent on the status of nationals of non-parties in relation to the added crimes. This has been construed to mean that nationals of non parties are automatically within the purview of any such new crimes added to the statute.[6] That being the case, the critics of the ICC Statute argue that it violates

[5] Lt. Col. Michael A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', 167 *Military Law Review* 20, 24 (2001).

[6] Marc Grossman US Undersecretary for Political Affairs, Remarks to the Centre for the Strategic and International Studies, Washington D.C 6th May 2002.

a fundamental principle of international law that a treaty does not create either obligations or rights for a third state without its consent."[7]

The US perceives apparent flaws the ICC institutions and the possible effects these institutions might have. Troubling to the US is the ICC's substantive and jurisdictional problems found in the court's main structures such the office of the prosecutor. The US considers the prosecutor to possess a powerful and necessary element of the executive power of law-enforcement. Opposition to the ICC notes that never before has the United States been asked to place any of that power outside the complete control of the national government.[8]

With reference to jurisdiction, the US argues that it was always envisaged that the ICC would complement national justice systems, not replace them. There are both practical reasons and concerns of principle that militate against an ICC role independent of the states that imbue it with authority. From a utilitarian perspective, there is a legitimate concern that universal jurisdiction would simply overwhelm the court because of the potential numbers of human rights violators. The US concerns also stem from the jurisdiction of the ICC over parties and non-parties. The ICC has jurisdiction over crimes that are committed by citizens of parties and non-parties. Despite the fact that ICC is basically a human rights institution, its critics point out that it violates the principle of treaty law that provides that the treaty is binding only to parties to it.[9] The principle of complementarity has not escaped the critics either. The mechanism which allows

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[7] Gerard E. O'Connor, 'The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court, 27 *Hofstra Law Review* (1999) pp 927, 938.

[8] M.Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court',32 *Cornel International Law Journal* (1999) pp 443-469.

[9] John R. Bolton, Under Secretary for Arms Control and International Security Remarks at the Aspen Institute Berlin, Germany September 16, 2002.

the ICC to prosecute even if a country has decided not to leaves almost no discretion up to the individual countries because the ICC could intervene at any juncture, if they believed that justice was not being properly served and proceed with prosecution. Thus the court would have jurisdiction for enumerated crimes alleged against U.S. nationals, including U.S. service members, in the territory of a party, even though the U.S. is not a party.[10]

The US concern also stem from the possibility of addition of new crimes to the jurisdiction of the ICC. A state party to the treaty can opt out of crimes added by amendment to the Statute, thereby exempting its nationals from the ICC's jurisdiction for these crimes.[11] The concern for the US is that a prosecutor who may be politically motivated, and under the guise of allegedly committing a war crime, target for indictment a US citizen who might have violated US laws and values .[12]

Part of the US opposition to the ICC, concerns the definitions of its four prosecutable crimes: genocide, crimes against humanity, war crimes, and aggression. Any country signing the Rome treaty reserves the right to opt out of any definition or part of a definition that they find to be unacceptable[13] however, no country has attempted to do this. Since this right is not provided for non-parties, the citizens of any country that has not signed the treaty are susceptible to prosecution under all of the definitions provided for these crimes.

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[10] Allison Marston Danner, 'Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel', *Stanford Law Review* Vol: 55. Issue: 5. (2003) P 1633.
[11] Rome Statute Article 121.
[12] Robert Cryer, Prosecuting *International Crimes: Selectivity and the International Criminal Law Regime*, New York: Cambridge University Press, 2005.
[13] Rome Statute article 121.

Another problem with the definitions of these crimes pertains to the crime of aggression, which the court shall exercise jurisdiction over, once a provision is adopted setting out the conditions for exercise of such jurisdiction.[14] There is no definition provided for the crime of aggression in the Rome Statute due to sharp differences on its elements during the drafting process.[15] Therefore the crime of aggression is included within the court's jurisdiction, but has not been defined. Once the parties adopt provisions setting out the elements of the crime of aggression, the statute will be amended to define this crime and specify the conditions for the exercise of jurisdiction over it. Only parties to the treaty can opt out of the jurisdiction of the court over the crime of aggression in accordance with article 121of the ICC Statute. Article 121 provides that after the expiry of seven years from the entry into force of the Statute, any party may propose amendments to it.

The argument is that conditions for the exercise of jurisdiction by the ICC could bring the court into conflict with the UN Security Council mandate under Chapter VII of the UN Charter.[16] Apart from the primary responsibility for the maintenance of international peace and security, Chapter VII of the UN Charter provides that the UN Security Council has and 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.[17]

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[14] Ibid. article 5 (2)
[15] John R. Bolton, 'Courting Danger: what's wrong with the International Criminal Court.' *The National Interest*, Winter (1998) p 28
[16] Mauro Politi and Giuseppe Nes (ed.), *The International Criminal Court and the Crime of Aggression*, Burlington: Ashgate/Dartmouth 2004 xil, p.193
[17] UN Charter. at art. 39.

The office of the prosecutor is cited by the US as the structure that may be abused by the occupier. That office is an independent one within the ICC, and it controls the indictments/prosecutions of war criminals. The US reservation with regard to the office of the prosecutor revolves around the idea that this independence does not allow for a system of checks and balances on this office, which could be offered by the UN. The prosecutor is elected by secret ballot by an absolute majority of the members of the assembly of parties to the Rome Statute. The deputy prosecutors are elected in the same way from a list of candidates provided by the prosecutor.[18] The prosecutor is therefore not responsible to an elected body or to the UN Security Council. According to the US, this arrangement does not make the prosecutor politically accountable, and hence can proceed with a politically motivated investigation on his own initiative under article 15 of Rome Statute. While the Security Council has the power to veto an act of the prosecutor, the US argues that this still leaves most of the unsupervised power in the hands of the prosecutor. The UN Security Council by a resolution adopted under Chapter VII of the UN Charter prevents the court from commencing or proceeding with an investigation or prosecution as provided in article 16 of the Rome Statute.[19]

The Rome Treaty does not permit states to make reservations.[20] Based on the principle of complementarity, the ICC is required to defer to the national prosecution unless the court finds that the state is unwilling or unable to carry out

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[18] Rome Statute Article 42 (4).
[19] John R. Bolton, 'Courting Danger: What's Wrong With the International Criminal Court', *The National Interest*, Winter (1998/99).
[20] Rome Statute Art.120.

the investigation or prosecution.[21] By leaving this decision ultimately to the ICC, the US considers that there is nothing that prevents the ICC from reviewing or rejecting a sovereign state's decisions not to prosecute, or its decisions of not guilty or dismissal.[22]

The US perceives a potential clash between the ICC Statute with its constitution and current legal practices. For example, the ICC does not give accused persons the right to a trial by jury.[23] However if each state was to highlight this potential conflict of laws, it would mean that there would never be an operational international criminal law in the first place. Nevertheless, the absence of a system of jury trial by the ICC is cited as contradicting one of the key aspects of American legal standards. Another problem is the lack of a constitutional structure that delineates how laws are made, adjudicated, and enforced, subject to popular accountability and structured to protect liberty.

The question of the death sentence is mentioned by critics in the US as another subject that highlights the differences between the ICC Statute and the US constitution. The US constitution permits the death sentence although some states in the US have outlawed it. The ICC statute on the other hand does not have provisions that permit the death sentence and prohibition against double jeopardy. This means that an individual may in fact be retried for a crime they have already been tried for.[24]

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[21] Ibid Ar.7.
[22] Fact Sheet, US Department of State, Bureau of Political-Military Affairs Washington, DC August 2, 2002 available at http://www.state.gov/t/pm/rls/fs/2002/23426.htm
[23] Philip Lagassee, 'The International Criminal Court and the foreign policies of the United States', *International Journal* Vol 59 2004 p 429-443
[24] Roy S. Lee (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law*, New York: Transnational Publishers, (2005)

American Service Members Protection Act (ASPA) and Nethercutt amendment

Arising out of these concerns Napper observes that it is a misconception that the United States wants to use BIAs to undermine the ICC. Napper argues that although the United States is not a party to the ICC because it is concerned that its soldiers and government officials could be subjected to politicised prosecutions, the United States is proceeding in its relations with ICC in a manner specifically contemplated by the Rome Statute itself. The main tools for securing BIAs have been the American Service Members Protection Act (ASPA) passed by the US Congress on 2nd August 2002. and Nethercutt amendment."[25]

The US proposed the American Service Members Protection Act (ASPA), three days after it withdrew its signature to the Rome Statute and announced that the ICC would be regarded as illegitimate by the US. The ASPA was proposed as an amendment to the Supplemental Appropriations Act of 2002. The ASPA restricts military assistance to any country that is a party to the ICC, unless the president believes that cooperation would be in the US's "best interests".[26] There are exceptions to this restriction such as NATO members, major non-NATO allies, and Taiwan.

The strongest tool that the US has used to "convince" these countries to sign BIA's is the threat of economic sanctions. The US has threatened to cut the economic aid if these countries do not sign BIAs. The Nethercutt Amendment, which was proposed in July 2004, takes these threats one step further. The

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[25] Ambassador Larry Napper, head of the U.S. delegation, Address to the Human Dimension Implementation Meeting in Warsaw, Poland 10th Dec.2004.
[26] Global Policy Forum 'The ASPA: an overview', June, 21 2001 pp.1-4.

Nethercutt Amendment proposes that the US imposes economic sanctions on any party to the ICC refusing to sign a BIA with the US.[27]

The US campaign against the ICC

The US has implemented many policies that would further hinder the prosecutions of the ICC. These policies range from internal legislation to protect American service-members, to policies protecting US service-members from the reach of the ICC. The US began its attack on the ICC in 2002, when it withdrew its signature to the Rome Statute and expressed its disapproval with the ICC. This was the first step in an intricate campaign against the ICC, and to exclude the US from its jurisdiction.

The US campaign and policy attacks on the ICC are done not only in the US itself but also at the level of the UN and individual states. On July 12, 2002, under diplomatic pressure from the US, the United Nations Security Council passed Resolution 1422, which requested the International Criminal Court to defer an investigation or prosecution for 12 months for personnel from non-ICC parties for acts or omissions relating to U.N. established or authorized operations in order for the US to participate in the UN sponsored peace enforcement in the former Yugoslavia territory of Bosnia-Herzegovina. One year later, UN Security Council Resolution 1487 extended the protection for another year. But after that resolution had expired in 2004, the UN voted not to renew the resolution, which would leave the US soldiers in the Balkans susceptible to prosecution by the ICC. These resolutions were necessitated by the action of the US to veto on 30 June 2002, extension of the mandate of UN peacekeeping mission in Bosnia-

[27] Citizens for Global Solutions 'Nethercutt Amendment: Cutting off our nose to spite our face' www.globalsolutions.org July 23, 2004.

Herzegovina (UNMIBH) fearing its personnel would be subject to the ICC's jurisdiction.

Paradoxically according to the US, the danger of the ICC may lie in its potential weakness rather than its potential strength. ICC critics cite the mistaken belief that the ICC will have a substantial deterrent effect against the perpetration of crimes against humanity. Recent history is replete with cases where even strong military force or the threat of force failed to deter aggression or gross abuses of human rights. This can be witnessed in the case of Northern Uganda and Darfur region of Sudan where the Lord's Resistance Army and the Janjaweed militia respectively have been involved in gross violation and abuse of human rights despite threat of prosecution and military action by the international community.

But deterrence ultimately depends on perceived effectiveness. The US argues that the ICC's authority is far too attenuated to make the slightest bit of difference either to the war criminals or to the outside world. In cases where the international community in particular has been unwilling to intervene militarily to prevent crimes against humanity as they were happening, a potential perpetrator cannot be deterred by the mere possibility of future legal action. A weak and distant Court will have no deterrent effect on the leaders most likely to commit crimes against humanity.[28]

According to Bolton, in order to protect US citizens, the US is negotiating bilateral agreements with the largest possible number of states, including non-parties. These Article 98 agreements, as they are called, provide American citizens with essential protection against the court's purported jurisdiction claims,

[28] Ibid.

and allow the US to remain engaged internationally with its friends and allies. Article 98 Agreements have been the backbone of the US offensive against the ICC since this article has allowed the US to pursue these agreements with ICC state parties.[29]

The US favours intervention by the international community through the UN Security Council, consistent with the UN Charter. It argues that despite their critics, Ad hoc international mechanisms may be created under the auspices of the UN Security Council, as was done to establish the International Tribunals for the former Yugoslavia and Rwanda, or hybrid courts consisting of international participants and the affected state, as in the case of Sierra Leone. According the US, the clearest deterrent to widespread violation of the law is found in state domestic law, the disciplinary codes and judicial systems of the various armed forces hence there is no need to subject citizens to another jurisdiction.[30]

[29] John R. Bolton, Under Secretary for Arms Control and International Security Remarks at the Aspen Institute Berlin, Germany September 16, 2002.
[30] Philipp Meisner, The International Criminal Court Controversy: An Analysis of the United States' Major Objections Against the Rome Statute, New Jersey: Transaction Publishers 2005.

Chapter 4

The United States' interpretation of Article 98 of the ICC Statute and its relations with the BIA

Introduction

Chapter three examined the attitude of the US towards the ICC pointing out what the US perceives as flaws in the ICC statute. The Chapter identified the American Service Members Protection Act (ASPA) and Nethercutt amendment as tools for securing Bilateral Immunity Agreements (BIAs) by the USA in its campaign against the ICC.

This Chapter examines article 98(2) of the ICC Statute and the US interpretation of the article as a basis of the current controversy surrounding the BIAs. The chapter also focuses on the agreements contemplated under article 98(2) if the ICC statute and the significance of the term "sending state" as used in the article.

Article 98 of the ICC Treaty

The controversy surrounding the BIAs is found in the interpretation of Article 98 of the ICC Statute entitled "Cooperation with respect to waiver of immunity and consent to surrender".[1] The article contemplates two situations in which a request for cooperation by ICC may conflict with a state's obligations under international law. First, under Article 98 (1), the ICC may not proceed with a request for cooperation or surrender of an individual if that request will conflict with the state's obligations to honour the diplomatic immunity of that individual.

[1] ICC Statute art. 98.

Article 98(2), which contains the second situation, is the starting point for the present controversy surrounding the BIAs. Article 98(2) states that:

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements 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 giving of consent for the surrender."[2]

International agreements contemplated by article 98

At the centre of the debate is whether Article 98(2) of the Rome Statute was meant to address only the relationship between a state party's obligations to the ICC and any obligations it might have to states under other treaty agreements, such as extradition treaties or status of forces agreement (SOFAs). The other view supported by the US is that article 98(2) of the ICC Statute was meant to permit agreements such as BIAs. A SOFA is an agreement governing the legal status of members of armed forces of one state (the sending state) stationed in another state (the receiving state) pursuant to that agreement.[3] These agreements also explain which state has the primary duty to investigate and, if there is sufficient evidence, prosecute members of armed forces from the sending state who were suspected of committing crimes on the territory of the receiving state.

An assembly of state parties to the ICC Statute is established under article 112, composed of one representative of each party who may be accompanied by alternates and advisers. Each party has one vote in the assembly. Other states which are signatories to the statute may be observers in the assembly. Under

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[2] Ibid. art. 98(2).
[3] Chimene Keitner, 'Crafting the Internatioinal Criminal Court: Trials and Tribulations in Article 98(2)', 6 University of California, *Los Angeles Journal of International law & Foreign Affairs* pp 215, 232-35 (2001).

Part 4 of the ICC Statute entitled "Composition and Administration of the Court" the assembly of state parties is designed to oversee the presidency, the rest of the judges on the court, the prosecutor, and the registrar.[4] The Assembly examines the ICC's budget, the rules of procedure and evidence, and the number of judges. It can remove judges, the prosecutor and registrar from office if a decision to this effect is made in accordance with article 46(2), in cases where that person:

> (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
>
> (b) Is unable to exercise the functions required by this Statute.

The power of the removal of a prosecutor has been argued to be a system of political accountability which the US claims is lacking because the prosecutor is not answerable to a UN body. If a state party fails to comply with a request to cooperate, the assembly also decides how to address the situation, including whether the matter should be referred to the UN Security Council if the case was initially referred to the ICC by the Security Council. The Assembly may also amend the Rome Statute subject to two-thirds majority in cases where consensus cannot be reached as provided in article 121 of the ICC Statute. Any state party may propose an amendment after seven years have passed from 1st July 2002 which is the date of inception of the court. Such an amendment is adopted by a two-thirds majority of the Assembly votes in favour, but does not enter into force until one year after seven eighths of the states parties ratify the amendment. A state party that does not accept the amendment may withdraw

[4] Rome Statute, article 112.

from the Statute with immediate effect by giving notice within a year after the amendment.[5]

The US delegation to the Rome Statute negotiations contemplated in its discussions on article 98(2) that particular international agreements either already in force or that would be negotiated and ratified in the future may establish jurisdictional responsibilities on national courts. Such jurisdiction will include for investigating and prosecuting criminal charges against certain individuals. For that reason, such agreements could be used to avoid the surrender of particular types of suspects to the ICC.

The Rome Statute appears on first impression to present a clash of principles. Article 27 prohibits exempting any official of a government from the jurisdiction of the ICC, despite immunities or special procedural rules that may attach to the official capacity of the person under national or international law.[6] Article 89(1) requires state parties to comply with the court's requests for arrest and surrender.[7] In Part IX (Cooperation) of the Rome Statute, however, article 98 sets the exceptions to the rule of surrender but it does not seek to deny the Rome Statute's core purpose of fighting impunity. Rather, article 98 invites strategies that remain faithful (to the extent that international law permits) to such a purpose.[8]

The US Congress and the administration determined through the American Servicemen Protection Act (ASPA) and the Nethercutt amendment that

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[5] Ibid article 121.
[6] D.J. Scheffer, 'How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction', 2 *Journal of International Criminal Justice* (2004), p. 26-34
[7] D.J. Scheffer, 'Staying the Course with the International Criminal Court', 35 *Cornell International Law Journal* (2001, 2002), pp 54-72, 77-82 and 86-100.
[8] D.J.Scheffer, 'The Future of Atrocity Law ', 25 *Suffolk Transnational Law Review* (2002), p. 393 - 420.

protecting U.S. persons from the claims of ICC jurisdiction is an American priority. The US Congress has also determined that this concern generally supersedes other foreign aid priorities, but has provided a waiver to the president for any exceptions. The United States seeks to exempt U.S. persons from the ICC for actions undertaken in an official capacity, and expects the immunity to exist even while the person is not on official duty. Under Article 98 of the Rome Treaty, the US believes sovereign arrangements between states are given preference. In other words, an American accused of a crime would not automatically be handed over to the ICC for trial; rather, the United States could choose to seek extradition of the American and try him or her in the United States. The U.S. government also has the option to permit the American to be tried by the ICC.[9]

USA view on Bilateral Immunity Agreements

The US view is that BIAs are specifically contemplated under Article 98 of the Rome Statute and thus provide U.S. citizens with essential protection against the Court's purported jurisdictional claims. The US notes that its decision to seek these bilateral agreements originated during the open debate in the U.N. Security Council on Resolution 1422. A number of ICC proponents, including European Union (EU) members, encouraged the US not to resolve these issues in the Security Council, but rather to do so on a bilateral basis. Following this, the US began in late 2002 to seek article 98 agreements as an arrangement that would

[9] Lincoln P. Bloomfield, Jr., US Assistant Secretary of State for Political-Military Affairs, Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law United Nations, New York September 12, 2003 available at http://useu.usmission.gov/Article.asp?ID=B432E423-8B0A-4DD1-AA87-FE58599E87D

satisfy their concerns, but at the same time fall within the Rome Statute provisions.[10]

The argument for the US is that BIAs are nothing more than an obligation by the country not to turn U.S. persons over to the ICC without permission from the U.S. government. This is the crux of the matter that the US counters by arguing that as a general rule in BIAs, the United States makes clear its intention to bring to justice those who commit genocide, crimes against humanity, and war crimes. This is also the goal of the ICC. However, it may be observed that this intention of the US to bring justice against the perpetrators of these crimes is not under the international law or its institutions. According to the US, the BIAs therefore do not absolve the US of its obligation to investigate and prosecute alleged crimes or constrain the other state's ability to investigate and prosecute crimes committed by an American person within its jurisdiction. Further, the agreements do not constrain the ability of an international tribunal established by the Security Council to investigate or prosecute crimes committed by American persons.[11]

The US argues that the limited nature of article 98 agreements is entirely consistent with international law, which supports the principle that a state cannot be bound by a treaty to which it is not a party. Moreover, BIAs are consistent with the Rome Statute itself, which permits such agreements in Article 98 of the treaty. It is worth noting that in his argument, the US has completely failed to appreciate that the ICC Statute is a human rights treaty and for that matter is of

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[10] Ibid.

[11] Brett D. Schaefer, 'The Bush Administration's Policy on the International Criminal Court Is Correct', Heritage Foundation (2005) available at http://www.heritage.org/Research/InternationalOrganizations/bg1830.cfm

universal application just like others regardless of whether one is a party to or not.[12]

Article 31 of the Vienna Convention on the Law of Treaties indicates that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[13] When considering the context of the treaty, interpretations may include the text and any agreement or practice by all the parties made in connection with the treaty.[14] Looking at only the text of article 98 of the ICC statute to determine the ordinary meaning, the term "sending state" does not indicate that the person must be present in the requested state party on official government business. In this case, the receiving state not important. Article 98 refers to the requested state party [15] and not the receiving state. Therefore, the requested state party does not have to be the state where the individual was sent for official duty.

According to the US, article 98 applies when a party to the ICC has an international agreement that would conflict with an ICC surrender request.[16] The sending state is simply the party whose consent for surrender creates the conflict.[17] Article 98 only calls for an agreement requiring the sending state's consent for surrender of the accused. Nothing in article 98 or the Rome Statute

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[12] Ibid.
[13] Art. 31(1Vienna Convention,), 1155 U.N.T.S. at 340.
[14] Ibid. art. 31(2)-(4), 1155 U.N.T.S. at 340.
[15] Rome Statute, art.98, 2187 U.N.T.S. at 148.
[16] Rome Statute, art. 98(2), 2187 U.N.T.S. at 148 (preventing the ICC from requesting surrender when the request would conflict with a Party State's "obligations under international agreements").
[17] Ibid. art. 98(2), 2187 U.N.T.S. at 148 ("international agreements pursuant to which the consent of a sending State is required to surrender").

indicates that the person must be present in the territory of the requested ICC state party in an official governmental capacity.[18]

Status of Forces Agreements in the BIA issue

Status of Forces Agreements (SOFAs) in the view of the US, are not agreements made by all the parties to the Rome Statute and therefore cannot aid in the interpretation according to Article 31 of the Vienna Convention on the Law of Treaties. Rather, SOFAs indicate how opponents of BIA concluded that a person must be present in the territory of state party to the ICC for official duty in order to trigger article 98 of the Rome Statute. At the time of negotiations for the Rome Statute, the US advocated the inclusion of article 98 with SOFAs in mind. The SOFA among NATO members defines "sending state" as "the contracting party to which the force belongs.[19] It defines "force" as members of the armed forces "of one contracting party when in the territory of another contracting party ... in [connection] with their official duties." The SOFA definitions of "sending state" and "force" combine to suggest, that in article 98 of the Rome Statute, "sending state" means the contracting party responsible for the accused and that the accused is in the territory of the requested ICC state party for official duty. However, this interpretation would also indicate that the accused may only be a member of the armed forces or present in connection with the armed forces.

The US therefore considers that the link to SOFAs explains the choice of language in article 98, but does not limit its application only to members of the

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[18]James Crawford SC, Philippe Sands QC and Ralph Wilde, 'Joint Opinion In the Matter of The Statute of The International Criminal Court and In the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute", (London:2003) p 20-21.

[19] Jeffrey S. Dietz, 'Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court with U.S. Article 98 Agreements?', *Houston Journal of International Law.* Vol. 27 issue: 1. (Houston: 2004). P. 37.

armed forces present for official duty. Not only do Crawford, Sands and Wilde, in their joint opinion on the BIAs not limit their definition to members of the armed forces, they specifically rejects the argument that article 98 is limited to SOFA type agreements.[20] This assertion is rejected by supporters of the ICC who consider article 98 to be of limited application only to members of armed forces. When the United States successfully negotiated the inclusion of article 98 in the Rome Statute, it intended that agreements under article 98 could cover "any American" and not just those traditionally covered by SOFAs.[21] In the understanding of USA, since the states were contemplating SOFAs while negotiating article 98, they likely used similar functional language merely to distinguish among the different parties involved.

The significance of the term "sending state"

The argument for the US is that article 98 does not refer to a "force," but merely to a person who is the accused.[22] The context of the article indicates that the accused may simply be "a person of that sending state". This construction is similar to the NATO SOFA in that the sending state is the party "to which the [person] belongs."

By evaluating article 98 in light of the object and purpose of the Rome Statute, which is to prevent impunity, then the "sending state" definition appears less narrow to the US. The title of article 98, "Cooperation with respect to waiver of immunity and consent to surrender," indicates that the purpose of article 98 is

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[20]Crawford, James SC, Philippe Sands QC and Ralph Wilde, 'Joint Opinion In the Matter of The Statute of The International Criminal Court and In the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute', (London:2003).
[21] David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent', *Journal of International Criminal Justice*. Vol. 3 (Oxford:2005) p. 18.
[22] Rome Statute, art. 98.

to prescribe ways that a state's consent to surrender, limits the ICC. The real issue is why a non-party should affect the operations of the treaty in this way. As the object and purpose of the Rome Statute is to prevent impunity, the only party that should be able to limit the ICC's jurisdiction is a party that has jurisdiction and an interest to investigate and prosecute the accused. This limitation should not however be for the purposes of defeating the objects of the ICC statute. In that way, the party would be able to exercise its right to bring the accused to justice under Article 17.[23] Article 17(1) provides that the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted undr article 20, paragraph 3;

(d) The case is not sufficient gravity to justify further action by the court.[24]

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[23] Jeffrey S. Dietz, 'Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court with U.S. Article 98 Agreements?', *Houston Journal of International Law.* Vol. 27 issue: 1. (Houston: 2004).

[24] Rome Statute, art. 17.

Even if the deciding entity concludes that "sending state", indicates that the U.S. person must be on official duty, the "official duty" requirement should only extend to the territory where the U.S. person is accused of committing a Rome Statute crime. A U.S. person on official U.S. duty is much like a foreign minister performing state business. Just as the United States uses an article 98 agreement to immunize a U.S. person so that she might accomplish the mission set forth by the United States, a state uses the immunities provided in the 1961 Vienna Convention on Diplomatic Immunities to ensure the effective performance of its diplomats on behalf of her sending state. The foreign minister is immune from prosecution for acts conducted in a foreign state while acting in an official capacity on behalf of the sending state and is even immune for those official acts after ceasing to hold office. In the same manner, U.S. persons such as a former state official on U.S. business as special envoy from the United States should enjoy immunity for those official acts even after the U.S. person ceases official duty.[25]

An ordinary meaning interpretation of article 98 leads to the conclusion that the person need not be present in the territory of ICC party on official duty. In that way, "sending state" merely, indicates where the ICC must turn to seek consent for surrender of an accused. Even considering the extrinsic evidence of SOFA definitions, the best conclusion is that the person must merely have a connection to the sending state and that "sending state" is simply language to differentiate among the parties. At most, the person must be on official duty in the

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[25] Jeffrey S. Dietz, 'Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court with U.S. Article 98 Agreements?', *Houston Journal of International Law*. Vol. 27 issue: 1. (Houston: 2004).

territory of ICC party where he is accused of committing a Rome Statute crime, but not necessarily on official duty in the requested state party.[26]

For these reasons, the US considers the BIAs to be in compliance with article 98 of the ICC Statute. First, the consent of the United States, which is the sending state, creates the conflict triggering article 98. Second, the accused person is from the United States because the person is either a U.S. official or employee or a member of the U.S. armed forces or a U.S. national.[27]

According to Bolton, one of the members of the US negotiating team to the Rome Conference, "the original US negotiating intent was to provide for a means within the Rome Statute to negotiate future international agreements for non-surrender of US personnel. This was intended to include, in addition to then-existing SOFAs and Status of Mission Agreements (SOMAs), stand-alone article 98(2) agreements when necessary, and future SOFAs and SOMAs that either would be of amended character or new agreements negotiated from scratch." [28]

BIAs effectively immunise a U.S. person from the ICC when the agreement prevents the ICC from requesting the surrender of the U.S. person from the ICC state party. [29] Once the ICC is unable to request surrender, the ICC state party does not have an order with which it would have an obligation to comply.[30] If the ICC is unable to request surrender, then the ICC state party no longer has an order requiring compliance.[31] Thus, the ICC state party does not

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[26] Ibid.
[27] John R. Bolton, 'Courting Danger: What's Wrong With the International Criminal Court', *The National Interest*, Winter (1998/99).
[28] David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent', *Journal of International Criminal Justice* Vol. 3: 2005 p.341.
[29] Rome Statute, art.98(2).
[30] Ibid. art. 89(1).
[31] Rome Statute, art. 89, (requiring Party States to "comply with requests for arrest and surrender").

defeat the object and purpose of the Rome Statute by not transferring the U.S. person to the ICC, and the ICC state party may then fulfil its obligations under the U.S. article 98 agreement. The U.S. article 98 agreements conform to article 98 of the Rome Statute. Therefore, the ICC should determine that it must not pursue surrender when the requested ICC state party has entered into a U.S. Article 98 agreement. The US therefore argues that a non-surrender agreement is contemplated in the Rome Statute.[32]

[32] Ambassador Larry Napper, US Mission to the OSCE, 'Reply on the International Criminal Court and Article 98 Agreements', OSCE Human Dimension Implementation Meeting, Warsaw, Poland, 8 October 2004 http://www.uspolicy.be/Article.asp?ID=D0399EE7-2CE8-4B34-B9EA-9AEC15FE7DEC

Chapter 5
Critical analyses of Article 98 of the ICC Statute and the Bilateral Immunity Agreements

Introduction

The previous chapters have provided the understanding of the current controversy surrounding the BIAs. Using the theoretical framework of the study, this chapter analyses the critical issues that have arisen from the discussion in the study. These issues include whether an ICC party can enter into a BIA with the US, the intention of the parties in coming up with the ICC and the compatibility of the BIA with the object and purpose of the ICC.

Preliminary observation on Article 98

There are two preliminary observations to be made in relation to article 98(2) of the ICC statute. First is that the article imposes an obligation on the court, not parties and still less on other states. In effect it prevents the ICC from proceeding with a request to a state for surrender under article 89(1) of the ICC statute in certain circumstances. Secondly, the combined effect of article 98(2) and other provisions in the ICC Statute concerning the obligations of states to comply with requests by the ICC only come into play once the court proceeds to make a particular request pursuant to its authority under article 89(1).

In effect article 98 prevents the court from proceeding with an article 89(1) request to a state for the surrender of a person in certain circumstances. Article 98(2) does not impose any rights or obligations directly on any state party to the Statute. In its own terms, it does not prevent a state party from entering into an agreement, which could have the effect of preventing the court from proceeding to an Article 89(1) request. Rather, it operates to establish the conditions under

which the court may proceed with a request. On the other hand it assumes that, in cases where the court may properly make a request, a state party to the Statute will be obliged to give effect to it. Article 98(2) therefore defines the proper scope of operation of the court, and in that way limits what is permissible for a state party.[1]

The analysis on the proper scope of article 98(2) can not be done without resort to the well established principle of international law that parties to a treaty have an obligation to each other not to act in such a way as to deprive a treaty of its object and purpose or to undermine its spirit. The object and purpose of the ICC statute is to establish effective arrangements to prevent impunity for the crimes over which the ICC has jurisdiction.

International cooperation and judicial assistance under the ICC Statute

The text of article 98(2) does not seek to limit the type of international agreement that would prohibit surrender of particular types of persons to the Court. In analysing the issue of the legality of BIA, it is necessary to distinguish between the positions of states parties to the Rome Statute, states which are signatories but have not yet ratified, and states, which are not parties. Moreover in terms of the rules concerning the relations between treaties as set out in articles 30(4) and 41 of the Vienna Convention on the Law of Treaties, it might make a difference whether a bilateral non-surrender agreement was concluded before or after the other state became a party to the Rome Statute.[2]

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[1] James Crawford, Philippe Sands and Ralph Wilde, 'Joint Opinion In the Matter of The Statute of The International Criminal Court and In the Matter of Bilateral Agreements sought by The United States under Article 98(2) of the Statute', (London:2003) p. 10

[2] Ibid p. 8.

Article 98 of the ICC Statute is one of the sixteen articles in part 9 of the Statute concerned with international cooperation and judicial assistance. Under this part, the states parties to the Statute have a general obligation to cooperate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the court as provided in article 86 of the ICC Statute. The Court also has the authority to make requests to states parties for cooperation in accordance with article 87(1)(a). The court may also invite any state, which is not a party to the ICC Statute to provide assistance to the court under article 87(5)). By article 87(7), where a state party fails to comply with a request for cooperation in a manner which is contrary to the provisions of the Statute, the court may make a finding to that effect and refer the matter to the assembly of states parties or, to the Security Council if it referred the matter to the court.

Article 95 provides that where there is an admissibility challenge under consideration by the court, the requested state may postpone the execution of a request pending a determination by the court.[3] Article 97 provides that a state party that receives a request in relation to which it identifies a problem, which may impede or prevent the execution of the request, shall consult with the Court without delay in order to resolve the matter.

Thus the issue to be addressed is the extent to which a state party may, by entering into a bilateral non-surrender agreement, prevent the court from proceeding to an article 89(1) request. Put another way, the issue is whether a state party can freely define the extent of the court's capacities by entering into a

[3] Article 18 addresses a situation where a state informs the court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. Article 19 requires the court to satisfy itself that it has jurisdiction in any case brought before it.

bilateral non-surrender agreement with a non-party, or whether article 98(2) operates to limit the entitlement of a state party to refuse an article 89(1) request from the court.

In practical terms, it is the reliance on an incompatible bilateral non-surrender agreement to refuse an article 89(1) request from the court, which would render the state in breach of its obligations to the court and to other parties to the Statute. In other words, even if a state party may proceed to enter into a bilateral non-surrender agreement, it cannot expect to be entitled to rely on such an agreement to deny ICC jurisdiction, taking into account its obligations to other state parties unless it properly falls within the scope of article 98(2). Ultimately it will be a matter for the court to determine whether or not it is entitled to proceed to an article 89(1) request in the circumstances of the case.

Withdrawal of consent to be bound by a treaty

The proper scope of the court's powers to request surrender, notwithstanding a bilateral non-surrender agreement, turns on the proper interpretation to be given to the object and purpose of the ICC Statute.[4] The question that arises from this is whether a state, which has signed a treaty by signature, may withdraw its signature before the treaty enters into force.[5]

During the negotiation of the 1969 Vienna Convention on the Law of Treaties, a Soviet delegate referred to the sovereign right of a state to withdraw from the treaty at any time before it takes effect. No delegate challenged this assertion. The International Law Commission felt that the right to revoke was implicit given that the notification or instrument would not take effect until a

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[4] *(Nicaragua v United States)* Case Concerning Military and Paramilitary Activities, ICJ Reports 14, (1986) p. 138 paras. 275-6.

[5] Anthony Aust, *Modern Treaty Law and Practice,* UK Cambridge University Press 2000 p. 95

certain date. In 1952 Greece withdrew an instrument of acceptance deposited in 1950. After the treaty had later entered into force, Greece reconfirmed it acceptance. In 1958 Spain withdrew an instrument of accession two months after it had been deposited, but before the treaty had entered into force. At the same time Spain deposited a new instrument containing a reservation. In both cases the UN Secretary-General notified the other states concerned. No objection was made. In view of these cases, it is now the practice of the UN Secretary-General to regard withdrawal of consent before the entry into force of a treaty as permissible, on the understanding that until entry into force states are not definitively bound.[6]

The obligation under article 18 of the Vienna Convention on the Law of Treaties does not prohibit a state from withdrawing an instrument. The obligation under the article is to refrain from acts which would defeat the object and purpose of the treaty. It relates to the substance of the treaty, rather than the procedure by which the state consents to be bound, or by which the treaty enters into force. Mere withdrawal of an instrument will not, in itself, be a breach of the obligation in article 18 since it must have the effect of defeating the object and purpose of the treaty. It is therefore necessary to identify the object and purpose of the ICC Statute. The rules governing treaty interpretation are reflected in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, and they are now broadly recognised as reflecting customary international law. The ICC Statute and the provisions of article 98(2) are to be interpreted in accordance with their ordinary meaning, in their context, and in the light of the treaty's object and

[6] Ibid p 96.

purpose.[7] To the extent that any ambiguity exists or the result would be manifestly absurd or unreasonable, recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion.[8] The object of the ICC Statute is to put in place effective arrangements to prevent impunity for the crimes over which the Court has jurisdiction. These crimes are of genocide, war crimes and crimes against humanity.[9]

The ICC was established to ensure that persons subject to the jurisdiction of a State party to the Statute who are suspected of committing one of these crimes are subjected to proper investigation, prosecution if a sufficient case exists, and if found guilty, are duly punished for their crimes. If national criminal justice processes are adequate to ensure investigation, prosecution and punishment, then they should be used: this is the notion of complementarity expressed in the preamble and in articles 1 and 17 of the ICC Statute. But if there is a significant risk that a suspect will escape investigation and prosecution, then the ICC is intended, in principle, to fill the gap. The overriding aim is thus not international prosecution as such, but to bring to justice perpetrators of the crimes outlined in the ICC statute. Looking at it from a different angle, if any state, since there is universal jurisdiction, investigate, tries and punishes for the ICC crimes, then the court does not have to play a role. But if a country feels that it is not able to do any of these things, then clearly there is a need for an international court whose mandate is to administer international criminal law.

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[7] Article 31 Vienna Convention on the Law of Treaties.
[8] Ibid Article 32.
[9] David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent', *Journal of International Criminal Justice*, Vol. 3, 2005 pp.333-353.

Understanding intention of parties through travaux préparatoires

Although the United States has not become a party of the Rome Statute, it intensively participated in the negotiations, drafting of the Rome Statute, the Rules of Procedure and Evidence, and the relationship agreement between the UN the ICC. The evidence of intensive participation by the USA is contained in the *travaux préparatoires*, a relevant document in deducing what the negotiating parties understood to have been the original intent behind particular provisions, notably article 98(2). Article 32 of the Vienna Convention on the Law of Treaties permits interpretation through recourse to the preparatory work of the negotiating states regardless of their current status under the treaty.[10]

Subsequent efforts of the United States to negotiate a procedural rules based on article 98(2) protection as a section to the relationship agreement between the UN and the ICC was clearly pointed to how the US interpreted the meaning of article 98(2) then. This interpretation must have informed its decision to sign the Rome Statute on 31 December 2000.

The attainment of the object and purpose of the ICC Statute depends on two factors; first, the number of states that become party to the Statute, and second, the extent to which states fulfil their obligations under the Statute, in particular as regards co-operation with the court under part 9, and particularly article 89(1). The general object and purpose and of the ICC Statute is, however, subject to limitations, which parties have accepted. Article 98 identifies two sets of obligations that may lawfully prevent a state party from acceding to a request to surrender a person to the court. These are immunities under article 98(1), and a certain class of international agreements under article 98(2). On its own terms,

[10] Ibid

therefore, the ICC Statute limits the possibility of the complete realization of the policy of avoiding impunity by ensuring the investigation or prosecution of persons within the territory of a state party. The general object and purpose of the Rome Statute (to remove impunity) is therefore qualified by article 98, which does not in express terms require that a person returned to a 'sending state' will be subject to investigation or prosecution.[11] In this respect, the International Law Commission's 1994 draft Statute expressly provided for this requirement.[12]

In interpreting the meaning and effect of article 98(2), having regard to the object and purpose of the treaty, it is necessary to take into account the balance that has been struck by the ICC Statute and to construe the limitations appropriately having regard to their terms and to the context. The proper approach to be taken is interpreting the balance that has been struck in the ICC Statute in terms of the promotion of two competing objectives. First, the parties' obligation is to ensure investigation or prosecution, on the one hand, and to respect certain international obligations, on the other. The question which arises in relation to article 98(2), is what international obligations are to be respected, and under what conditions.

Compatibility of BIAs with obligations of ICC state parties

Turning to the question whether entering into a BIA would be compatible with the obligations of state parties to the ICC Statute, and on what basis such agreements can be found be incompatible, the United States has long-standing national sovereignty concerns regarding the establishment of a permanent,

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[11] James Crawford, Philippe Sands and Ralph Wilde, 'Joint Opinion In the Matter of The Statute of The International Criminal Court and In the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute', (London:2003) p.16.
[12] Draft Articles 53 and 54 of the International Law Commission draft Statute, *ILC Year book* 1994.

international criminal court.[13] In general, the United States rarely signs or ratifies treaties which would open U.S. policy to international scrutiny. Following the end of the Cold War, when the international community resurrected the idea of a permanent international criminal court, the United States behaviour can be summed up as characterised by attempts to indefinitely delay its formation.[14]

Three main arguments have been advanced as to the incompatibility of the BIA agreements sought by the United States under the ICC Statute. The first is that article 98(2) covers only agreements that existed at the time of the signing of the ICC Statute, and subsequent agreements following the same model such as existing agreements mostly Status of Forces Agreements (SOFA). Secondly, that article 98(2) covers a narrower set of agreements, in terms of subject matter than the BIAs; and thirdly, that article 98(2) only covers agreements that provide a sufficient guarantee of investigation and prosecution of which BIAs do not conform with. It has been asserted that article 98(2) is limited to agreements that existed at the time of the signing or ratification of the Rome Statute or their renewals.[15] But these assertions do not provide any supporting evidence from the negotiating history of the Statute. Most states participating in the negotiations in Rome had concerns about conflicts with existing international obligations. Thus there are several provisions part 9, including those in articles 90, 93 and 98

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[13] Melissa K. Marler, 'The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute', 49 *Duke Law Journal* (1999) p 831

[14] Brigid O'Hara-Forster et al., Justice Goes Global: Despite U.S. Dissent the World Community Finally Creates a New Court to Judge the Crimes of War, *Time International*, July 27, 1998, p 46

[15] H.P. Kaul and C. Kreb, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, Hague:TMC Asser Press, 2000 p. 164-165 and Coalition for the International Criminal Court, Fact Sheet: US Bilateral Immunity Agreements or So-Called 'Article 98' Agreements, at 2, available at http://www.iccnow.org/pressroom/factsheets/FS-BIAsNov2004.pdf.

which address that concern.[16] Article 90 gives priority to a request for surrender by a state party in case of the existence of a competing request with the ICC. Article 93 provides for a modification of ICC requests where the first request is incapable of being executed due to a fundamental legal principle of general application in the requested state. Article 98 as already observed makes provision for cooperation with respect to waiver of immunity and consent to surrender.

An examination of the words 'obligations under international agreements' in article 98(2) indicates that it is not limited to existing international agreements. This provision contrasts with the approach elsewhere in part 9 of the Statute, which includes the qualifying word 'existing' in articles 90(6) and 93(3). Against that background, the claim that bilateral non-surrender agreements are limited to existing agreements is not plausible.

Another view of article 98(2) is that it was only intended to permit two categories of agreement. The first category, in the field of international criminal co-operation, addresses a problem caused by the fact that many bilateral extradition treaties prohibit re-extradition. This category comprises agreements providing for the transfer of a person to another state, with the proviso that the person in question would be returned to the state of origin and not a third state or entity, after the purpose for the original transfer had been achieved, unless consent for transfer elsewhere was obtained from the state of origin. Clearly a

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[16] Hans-Peter Kaul and Claus Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', 2 *Year Book of International Human Rights Law* (1999) pp. 143, 165; Christopher Keith Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court,' Vol. 94 *American Journal of International law,* 2000, p 786.

request for a transfer by the ICC, in the absence of consent for transfer by the state of origin, would contravene a bilateral extradition treaty of this kind. The second category is the general category of Status of Forces Agreements (SOFAs), concerning the presence of military forces and associated personnel in foreign States[17]. The question is whether article 98(2) is limited to these two types of agreements.

In terms of the subject matter of the agreements, article 98(2) refers only to agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the court. The ordinary meaning of this language is not limited to the two types of agreement described. Therefore, article 98(2) appears to cover any agreement including an obligation to surrender a person. There is nothing in the context of article 98(2), nor, in the *travaux préparatoires* to support a more limited reading.[18]

There is a complex formula to determine which civilians and dependants actually fall within the military jurisdiction of the sending state and discussion of that formula is beyond the reach of this study.[19] But the essential point to consider regarding the ICC is that whatever range of official and military personnel and related civilian component is covered by the particular SOFA or Status of Mission Agreements (SOMA), those persons would be subject to a separate regime of criminal procedure and hence not surrendered to the ICC. The exception to this principle, however, would be nationals of the receiving state who are employed by the sending state, in the event that the receiving state is a

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[17] Ibid.
[18] James Crawford SC, Philippe Sands QC and Ralph Wilde, 'Joint Opinion In the Matter of The Statute of The International Criminal Court and In the Matter of Bilateral Agreements sought by The United States under Article 98(2) of the Statute', (London:2003) p.19.
[19] Ibid p 92-102.

state party to the Rome Statute. That was the original intention of the US delegation in pressing so hard and consistently through the years of negotiation prior to and during the Rome conference, for the language that ultimately emerged as article 98(2). It was one of the many safeguards from ICC investigations and prosecutions of US personnel (official, military and related civilians) as the Rome Statute evolved into its final text on 17 July 1998.

By the time of the Rome Conference, the language of article 98(2) had developed into a more generic text that covered 'persons' of a 'sending state', which clearly would cover persons sent officially by a state into a foreign jurisdiction under the authority of the sending state. The US delegation was very comfortable with that progression of text, as in their interpretation, it strengthened the safeguard to incorporate, for example, the US diplomatic corps, Peace Corps workers, officials of the US Agency for International Development, and US civilian and military leaders who travel officially abroad.[20] This interpretation is flawed in the sense that it would then negate the object and purpose of SOFAS which covers only military and related personnel. A tourist or a contractor is not a 'sent' person, any more than would be a former foreign minister visiting a state party in a private capacity.[21]

The BIAs defines the individuals covered by the obligation of consent as current or former government officials, employees including contractors, or military personnel or nationals of one party. This covers a considerably broader class of persons than those who can properly be characterised as having been

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[20] David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent', Journal of International Criminal Justice Vol. 3, 2005.

[21] James Crawford SC, Philippe Sands QC and Ralph Wilde, 'Joint Opinion In the Matter of The Statute of The International Criminal Court and In the Matter of Bilateral Agreements sought by the United States under Article 98(2) of the Statute', (London:2003) p. 20.

sent by a state. Employees may have been locally engaged, former government officials and nationals may be resident in the requested state or visiting in a private capacity, for example, for the purposes of business or tourism. In this way the agreements being sought by the US go well beyond the scope of the agreements envisaged by article 98(2).[22]

It is then clear that the US concern during the negotiations of the Rome Statute was solely to ensure that there is an opportunity under the Rome Statute to use SOFAs and SOMAs to protect its military personnel and to negotiate additional agreements that would extend the range of protection to cover other persons on official mission of the US government in foreign jurisdictions. In the light of this, nothing in the language, context or history of article 98(2) limits its application to particular types of agreement, in terms of subject matter. [23]

A third main argument advanced about the incompatibility of BIAs with the ICC Statute is the view that article 98(2) only covers agreements containing a guarantee of investigation and, where warranted, prosecution. Here it may be appropriate to distinguish between existing agreements and new agreements. As to existing agreements, it is apparent that there is nothing in article 98(2) that expressly requires parties to the Statute to decline to give effect to them if they do not include a requirement to investigate or prosecute. In my view no such requirement can be read into Article 98(2), although there is nothing in that provision which limits the right of a state party to the Statute to seek to renegotiate an existing agreement to give effect to such a requirement.

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[22] Ibid.
[23] David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent', *Journal of International Criminal Justice*, Vol.3 2005 p.340.

As to agreements entered into by a state after it has become a party to the ICC Statute, the situation is however different. Having become a party to the ICC Statute, a state is required to take all necessary steps to give effect to its obligations under the Statute, including the obligation not to deprive it of its object and purpose. For these reasons, the object and purpose includes a commitment to prevent impunity, to ensure the effective prosecution of the most serious crimes, and to investigate or prosecute all cases involving matters over which it has jurisdiction according to article 17(1) of the ICC Statute.[24] A party which enters into a new agreement, which has or may have the effect of immunizing persons within the jurisdiction of the ICC from prosecution at either international or national level contradicts the obligation not to deprive the Statute of its object and purpose. It would not be compatible with that state party's obligations under the ICC Statute, both to other state parties and to the court. It would also be incompatible with the general duty under international law and specific treaties to investigate and, if warranted, to prosecute international crimes.[25]

The obligations of a signatory to the ICC Statute are governed by article 18 of the 1969 Vienna Convention on the Law of Treaties, which provides that:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.[26]

There is almost no practice or judicial authority on the application of article 18 of the Vienna Convention on the Law of Treaties, to determine the extent of

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[24] Amos Wako, Attorney General of the Republic of Kenya, remarks during the ICC and African Court on Human Rights Forum, Mount Kenya Safari Club, Nanyuki, Kenya 27th – 30th October 2004.

[25] Wanjuki Muchemi, Solicitor General of the Republic of Kenya, interview on the legality of BIA conducted on 16th March 2006.

[26] Article 18, Vienna Convention on the Law of Treaties of 1969.

the obligation. The position is that the obligation in article 18 is only to 'refrain' (a relatively weak term) from acts that would 'defeat' (a strong term) the object and purpose of the treaty. The signatory state must therefore not do anything, which would affect its ability fully to comply with the treaty once it has ratified it. Thus, it would be a breach of the article 18 of the Vienna Convention on the Law of Treaties if a state does something before ratification in a way that would prevent the state from performing the obligation under the treaty.[27]

It follows that the concept of good faith which flows directly from the principle of *pacta sunt servanda* is a cardinal principle in the interpretation of treaties since it encompasses two important elements; the doctrine of the abuse of rights and the protection of legitimate expectations of states. The words of Paul Reuter therefore find resonance; that treaties "are what the authors wanted them to be and only what they wanted them to be and because they wanted them to be the way they are."[28] States acting in good faith are under the obligation to refrain from acts calculated to frustrate the objects of a treaty. The object and purpose of the ICC Statute is to establish effective arrangements to prevent impunity for the crimes over ICC has jurisdiction and like all other human rights treaties, the ICC Statute is of universal application whether a state is party to it or not.

Good faith is an element of behaviour with a subjective nature, which in turn makes it difficult to prove whether or not this element is present in the behaviour of a party to a convention.[29] In this respect, the parties have a capacity

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[27] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press 2000 p 94.
[28] Ibid.
[29] John Rawls, *'A Theory of Justice'*, (New York: Harvard University Press 1971). p. 176.

for justice in the sense that they can be assured that their undertaking is not in vain. Assuming that they have taken everything into account, including the general facts of moral psychology, they can rely on one another to adhere to the principles adopted. Thus they consider the strains of commitment. They cannot enter into agreements that may have consequences they cannot accept. Honesty and fairness therefore, are two important elements shaping the conduct of states acting in good faith, and their policies are expected to reflect a level of coherency towards this international law requirement. In this juncture, states acting in good faith are under the obligation, to refrain from acts calculated to frustrate the objects of a treaty. Thus, when contracting with each other, it is presumed that states will honour their obligations in good faith and will refrain from imposing unreasonable burdens on one another.

Adhering to the principle of good faith, it is expected that parties to a treaty will always give a term its ordinary meaning since it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended. The determination of the ordinary meaning cannot be done in the abstract, only in the context of the treaty and in the light of its object and purpose. Even if the words of the treaty are clear, if applying them would lead to a manifestly absurd or unreasonable result, the parties must seek another interpretation. Using this concept, parties to the ICC Statute are expected not to take actions that may impair their ability to perform the obligations under the ICC Statute and international law.[30]

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[30] O'Connel, D., 'A Cause Celebre in the History of Treaty-Making', *British Year Book of International Law* (1967) p. 156.

Article 18 of the 1969 Vienna Convention on the Law of Treaties governs the obligations of a state party to a treaty. This provides that a state is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.[31] Whether Article 18 of the Vienna Convention on the Law of Treaties reflects a rule of customary law and the extent of the obligation is still a matter of debate. The position is that the obligation in Article 18 is only to 'refrain', which is a relatively weak term, from acts, which would 'defeat' (a strong term) the object and purpose of the treaty.

The signatory state must therefore not do anything, which would affect its ability fully to comply with the treaty once it has entered into force. It follows, it has been argued, that a state does not have to abstain from all acts, which will be prohibited after entry into force. But the state may not do an act that would (not merely might) invalidate the basic purpose of the treaty. Thus, if the treaty obligations are premised on the *status quo* at the time of signature, doing something before the entry into force which alters the *status quo* in a way which would prevent the state from performing the treaty would be a breach of the article.[32]

Case law on the principle of good faith

The principle of good faith has been the object of analysis in various cases decided by the Dispute Settlement Body (DSB) of the World Trade Organization (WTO). WTO members are expected to comply with their obligations in good

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[31] Vienna Convention on the Law of Treaties of 1969, Article 18.
[32] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press 2000) p 94.

faith, and this element is assumed to be present in the conduct of WTO members. In this respect in a landmark case (EC–Sardines) the Appelate Body of the DSB concluded that:

> "... We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of Pacta Sunt Servanda articulated in Article 26 of the Vienna Convention on the Law of Treaties. And always in dispute settlement, every Member of the WTO must assume the good faith of every other Member." [33]

In this respect, in another case, *Chile–Taxes on Alcoholic Beverages*, the appellate body concluded that, "Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith."[34] The DSB follows a "textual" interpretation of the WTO agreements in which the text is presumed to represent the final and most reliable expression of the intent of the parties, leaving the possibility to have recourse to other supplementary means of interpretation only when the text leaves a question unanswered. [35] This is consistent with the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties, which represent the "customary rules of interpretation of public international law" mentioned in article 3 (2) of the WTO Rules and Procedures Governing the Settlement of Disputes. In this perspective, the expressed intent of the parties included in the text prevails over other "subjective" interpretations. These rules provide that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context

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[33] Appellate Body Report on European Communities. Trade Description of Sardines. WT/DS231/AB/R 26 September 2002 and WT/DS/87/AB/R 13 December, 1999.
[34] Appellate Body Report on WT/DS/87/AB/R 13 December 1999.
[35] Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements.' *Journal of International Economic Law*. Vol. 5, Issue 1, 2002 pp. 17-89.

for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes; any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between the parties shall be taken into account. In this interpretation, a special meaning is given to a term if it is established that the parties so intended. In addition, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning to avoid the meaning being ambiguous or obscure; or manifestly absurd or unreasonable.

The Appellate Body reaffirmed the applicability of these provisions when interpreting the WTO agreements, indicating that the general rule referred to in article 31 of the Vienna Convention on the Law of Treaties constitutes part of the customary rules of interpretation of public international law, which the Dispute Settlement Body has to apply. Regarding the textual interpretation of the WTO agreements, the Appellate Body indicated that article 31 of the Vienna Convention on the Law of Treaties provides that the words of the treaty form the

foundation for the interpretative process; interpretation must be based above ail on the text of the treaty.[36]

This approach of interpretation leads to a general rule that a treaty interpreter must begin with, and focus on, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usually be sought.[37]

Additionally, the various elements contained in article 31 of the Vienna Convention on the Law of Treaties, such as context, object and purpose, and instruments made in connection with the agreement, must be applied as a whole, The elements of article 31 of the Vienna Convention on the Law of Treaties, are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.[38] A similar conclusion was reached by the Panel in *EC–Asbestos*, to the extent that Article 31 of the Vienna Convention contains a single rule of interpretation and not a number of alternative rules, the various criteria in the article should be considered as forming part of a whole.[39] An important corollary of article 31, which also reflects the good faith element conditioning the interpretation of treaties, is the principle of effective treaty interpretation, according to which a treaty should not be

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[36] Ibid.
[37] Appellate Body report on *United States, Import Prohibition of Certain Shrimp and Shrimp Products.* WT/DS58/AB/R 6 November, 1998.
[38] Panel report on *United States, Sections 301-310 of the trade Act of 1974.* WT/DS152/R 27 January 2000. par.7.22.
[39] Panel Report on European *Communities, Measures Affecting asbestos and Asbestos Containing Products.* WT/DS135/R 5 April 2001. par.8.46.

interpreted in such a way as to lead to a result which is manifestly absurd or unreasonable. One of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or in capable of being utilised.

From this analysis, the question that is posed is whether the conclusion of a BIA as presently drafted by a signatory to the ICC Statute prevents that state from performing its obligations to the court and parties to the ICC Statute. The answer would appear to be yes, both in relation to the category of persons addressed by a bilateral non-surrender agreement and the object and purpose of avoiding impunity. The better view is that a party to ICC should avoid entering into a bilateral non-surrender agreement, which may not be compatible with the ICC Statute and its article 98. [40] For the BIAs to conform to the provisions of the ICC Statute they should be guided by certain principles. Towards this end the European Union (EU) guiding principles to its members with regard to conclusion of a BIA with the US ensures that BIAs comply with international law. The EU guiding principles offers the following points:

a) Existing agreements: Existing international agreements, in particular between an ICC State Party and the United States, should be taken into account, such as Status of Forces Agreements and agreements on legal cooperation on criminal matters, including extradition;
b) The US proposed agreements: Entering into US agreements, as presently drafted, would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties;
c) No impunity: any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the

[40] Wanjuki Muchemi, Solicitor General of the Republic of Kenya, Interview on the legality of BIA conducted on 16th March 2006.

jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and where there is sufficient evidence, prosecution by national jurisdictions concerning persons requested by the ICC;

d) Nationality of persons not to be surrendered: any solution should only cover persons who are not nationals of an ICC State Party;

On the scope of persons to be covered by the BIA, the principles offers five cardinal points that must be taken into account when drafting any agreement pursuant to article 98 of ICC Statute. First, any solution should take into account that some persons enjoy state or diplomatic immunity under international law. Secondly, any solution should cover only persons present on the territory of a requested state because they have been sent by a sending state. Thirdly, surrender as referred to in article 98 of the Rome Statute cannot be deemed to include transit as referred to in article 89(3) of the Rome Statute. Fourthly, on the sunset clause, any proposed BIA should contain a termination or revision clause limiting the period in which the arrangement is in force. Lastly, the approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state.

On geo-strategic and political perspective, there are concerns in the US administration that American Servicemen Protection Act (ASPA) policy of denying military aid to countries that have refused to sign BIA is impeding US counter-terrorism efforts, since it makes little sense to ask for other countries' support in fighting terrorism while denying them money needed for training and equipping troops. This concern has led to the push to end the policy, also partly motivated by the US strategic fears of growing Chinese influence in Africa. The fear is that African countries deprived of US aid may turn to China as an

alternative source of aid. US Secretary of State Condoleezza Rice has likened the ban on military aid to US counter-terrorism allies as 'sort of the same as shooting themselves in the foot."[41] The aid cut is estimated to have cost Kenya some KShs. 950 million (approximately $13 million) in military training and equipment. This is an insignificant amount compared to stake of the country's reputation as a treaty-abiding member of the international community. Moreover the government of Kenya through the Kenya Revenue Authority collected Kshs. 275 billion (approximately $ 3.4 billion) in 2005 from taxes a portion of which can be used to fill the gap left from the loss of US aid.[42] The withholding of funds by the USA is therefore unlikely to persuade Kenya to sign a BIA.

However, the report of the Washington-based monitoring group, Centre for Defence Information (CDI), notes that the US has increased its military aid to Kenya by nearly 800 per cent since the September 11, 2001 terrorist attacks in the US. The rise in grants for training and arms sales reflects Kenya's designation by the US as a "frontline state" in its global war on terrorism. The CDI report points out that Kenya is considered a vital US ally in the war on terror supporting US counterterrorism efforts by sharing intelligence, providing overflight rights and granting access to airfields and bases. The keen interest of the US to cultivate allies in the Horn of Africa is borne out of its assessment that the region is the most at risk of becoming a haven for terrorists. This assessment could lead to increased military aid for the US allies in the region.[43]

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[41] Daily Nation, *US may lift aid ban over war crimes pact*, Nairobi: Nation Media Group, 24th July 2006 p 31.

[42] Kenya Revenue Authority News Letter Issue No 25 (2006) available at http://www.kra.go.ke/pdf/publications/RevenewsIssue25.pdf

[43] Daily Nation, 'Steep rise in US military aid', Nairobi: Nation Media Group, 9th September 2007 p. 42.

Chapter 6

Conclusions

In 1948 following the Nuremberg and Tokyo tribunals, the United Nations General Assembly recognized the need for a permanent international court to deal with the kind of atrocities that had recently taken place during the Second World War. The scope, scale and hateful nature of atrocities that have taken place during the last 20 years in many parts of the world gave impetus to creating a permanent mechanism to bring to justice the perpetrators of genocide, war crimes and crimes against humanity especially in the aftermath of the events in Rwanda and the former Yugoslavia. Previously the United Nations Security Council responded by creating tribunals to bring individual perpetrators to justice.

However, tribunals established after the fact are typically bound by mandates that are specific in time and place. Such tribunals are also challenging, lengthy and expensive undertaking to establish. Even though the Nuremberg and Tokyo Tribunals have been criticized as being "'victors' justice" tribunals they made great strides to make individuals accountable for violations of customary international law.[1]

As the world's only current superpower, the United States can flex its military muscle in an attempt to gain ICC exemptions through exceptions provided in article 98 of the ICC Statute. As Sandstrom recognized in his 1950 report, strong governments especially military powers, will not want to subjugate national sovereignty to an international governing or judicial body.[2] It is unlikely

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[1] M. Cherif Bassiouni, Establishing an International Criminal Court: Historical Survey, 149 *Military Law Review* (1995) pp 49 and 55.

[2] Cassandra Jeu, 'A Successful, Permanent International Criminal Court, Isn't Pretty to Think So?', Vol. 26, *Houston Journal of International Law*, (2004).

that charges before the ICC against U.S. senior civilian leaders and military officials could ever come to fruition. The principle of complementarity would mostly likely be relied upon to handle allegations made against U.S. troops in US courts.

Customary international law, as codified by the four Geneva Conventions of 1949, imposes an obligation on all states to search for, arrest, and prosecute or extradite those persons suspected of committing war crimes, genocide and crimes against humanity. This affirmative obligation extends to all territories where states, either individually or collectively, are authorized by international law to exercise jurisdiction. The ICC has jurisdiction over all these crimes and the US claim for special status undermines the very idea of the rule of law as a single, principled normative order to which all are bound. Such a claim for special status also undermines the great international effort of the last century to subject the use of force to the rule of law.[3] For the first time in the history of the world, the long-held dream of a permanent international criminal court has been realised. The establishment of the ICC marked an historic development in the enforcement of international humanitarian law and the advancement of human rights. The overwhelming support for the Rome treaty demonstrated in the final conference vote, indicated the determination of the international community to confront impunity and its perpetrators.

The creation of the ICC promises to become the single most important international institutional advance since the founding of the United Nations more than a half century ago. With the ICC the world has now reached a stage where

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[3] D.J.Scheffer, 'The Future of Atrocity Law ', Vol. 25 *Suffolk Transnational Law Review* (2002) p.422.

the principle of individual criminal liability is established for those responsible for the most serious human rights violations, and where an institution has been established on a permanent basis, to ensure the punishment of such individuals. The ICC prosecutor has already received three referrals from states. The office of the prosecutor is currently conducting investigations in Uganda, the Democratic Republic of the Congo and Central African Republic on crimes committed that are within the jurisdiction of the court. On March 31, 2005, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, adopted Resolution 1593 which refers reports about the situation in Darfur, Sudan to the ICC prosecutor. In all these referrals the ICC is to investigate crimes committed in these territories dating back to July 1, 2002 the date the ICC Statute came into force.[4]

For the present time at least, the ICC has come into force despite the United States not being a party to its Statute. The US stands follows a pattern similar to earlier treaties such as the United Nations Convention on the Law of the Sea, which it first objected to because it was unhappy with its provisions on the international tribunal for the law of the sea. The ICC is part of a continuum, a process that was catalysed in Nuremburg and one which does justice to the world public's demand that there be no impunity for international crimes that tear at the very fabric of humanity. As regards the international aspirations of the court, the hope must be that in years to come there will be a broad and universal acceptance of the International Criminal Court by all states, including its most powerful state.[5]

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[4] UN Press Release, SC/8351 and, Press Release SG/SM/9797 AFR/1132, March 31, 2005.
[5] Cherie Blair, 'The Impact of the International Criminal Court in Strengthening Worldwide Respect for Human Rights', Institute of International Studies (Geneva: 2004).

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