Article 98 Agreements: Legal or Not?

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Abstract
In 2002, an international criminal court was established – the ICC. It is based on the Rome Statute which gives the ICC jurisdiction to try persons accused of genocide, war crimes and crimes against humanity. Article 98 of the Rome Statute gives an opportunity for states to engage in international agreements prevailing over the Rome Statute regarding requests for surrender of suspects. This opportunity is taken by the United States when promoting bilateral, so called, Article 98 agreements. In signing them, states help in exempting Americans from the jurisdiction of the ICC, since they agree not to surrender possible American suspects to the ICC. These agreements have been signed by both members and non members to the Rome Statute while it is debated whether they are legal or not under international law, which this dissertation aims to clarify.

The authors reach the conclusion that there is not one single answer to the question of the legality of Article 98 agreements. Depending on what international obligations the United States has, and possible obligations of the other state, Article 98 agreements can be either legal or illegal under international law. What is clearer, however, is that member states to the Rome Statute oppose the objective of the statute by signing an Article 98 agreement – if it leads to an accused escaping trial. Simply by signing an agreement, the issue is still being discussed since the objective of the Rome Statute is to end impunity, not to promote prosecution by the ICC.

Non member states to the ICC may sign Article 98 agreements unless they have other obligations, national or international, that hinder them. Whether the United States can promote Article 98 agreements remains undecided, depending on if it is bound by the Rome Statute and/or the Vienna Convention through its signatories to both treaties. If it is bound by both, they are clearly breaking its legal obligations internationally, but that is yet to be proven and is a view strongly opposed by the United States itself.
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BIBLIOGRAPHY
List of Abbreviations

AMICC American Non-Governmental Organizations Coalition for the International Criminal Court
ASPA American Servicemembers’ Protection Act
CICC Coalition for the International Criminal Court
EU European Union
ICC International Criminal Court
ICJ International Court of Justice
IMET International Military Education and Training
NATO North Atlantic Treaty Organization
NGO Non-Governmental Organization
PACE Parliamentary Assembly of the Council of Europe
Preparatory Commission United Nations Preparatory Commission for the ICC
SOFA Status of Forces Agreement
UN United Nations
UN Charter Charter of the United Nations

Definitions of Main Concepts Used

America – When using the word America (or American) throughout this dissertation the authors refer to the United States of America as an adjective. When referring to the state as such, the United States is used.

Article 98 Agreement – This is a bilateral agreement between the United States and another state, agreeing not to surrender possible suspects to the ICC regardless of whether the ICC is asking them to do so or not. This type of agreements has been given their name due to the fact that they relate to the regulations under Article 98 of the Rome Statute. They are controversial in part because they include not only military personnel but also staff from NGOs and similar. These agreements create a legal system for Americans and another for the rest of the world, namely that under the Rome Statute and the ICC.

Crimes Against Humanity – This is a concept that does not have a single definition.\(^1\) A number of crimes can be classified as “crimes against humanity” under International Customary Law and can be found in Article 7(1) of the Rome Statute. The definition includes the acts mentioned below (not a complete list) if they are perpetrated as part of a systematic or widespread attack directed at any civilian population, with knowledge of the attack. Acts such as enslavement, extermination, murder, deportation and imprisonment can thus be crimes against humanity. Torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, also fall within the scope of this article, as well as persecution against any identifiable group or collectivity, such as cultural, ethnic, national, political, racial, religious, gender. Further, any crime within the jurisdiction of the ICC can be deemed as crimes against humanity.\(^2\)

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\(^1\) Survivors’ Rights International webpage, Definition of Crimes Against Humanity, found at http://www.survivorsrightsinternational.org/definitions/humanity_crimes.mv Read 18 May 2007.

\(^2\) Article 7(1) of the Rome Statute.
Geneva Conventions – There are four Geneva Conventions dated from 1864, 1906, 1929 and 1949. These conventions form the rules of how war is fought legally, thus laying the foundation to what constitutes crimes at war, which is punishable under the Rome Statute. Further, when states join the Geneva Conventions they allow for the International Committee of the Red Cross to perform humanitarian work during armed conflicts, such as disaster relief, which should be respected by the fighting parties. Non fighting persons and civilians should be treated in an impartial and humane way.³

Genocide – There are two international documents covering genocide; the UN Genocide Convention from 1948 and the Rome Statute. They use the same definition, found in Article II of the Genocide Convention and Article 6 of the Rome Statute. According to these documents genocide could be killing or causing serious harm (bodily or mental) to a group, as well as imposing conditions upon a group that is calculated to physically destroy it. Also birth prevention or transferring children away from its group can be genocide. Although, for all the crimes listed above, the intent needs to have been to destroy a group (in whole or in part) in order to fall under the crime of genocide.

International Customary Law – As the word implies, International Customary Law is a result from states acting in a certain way, and generally following certain practices consistently. There is a sense of legal obligation, without an actual law or agreement enforcing an obligation as such. This is different from International Law (private and public) which is derived from international agreement making up legal obligations.⁴

UN Security Council – Within the UN, the Security Council is responsible for dealing with international peace and security. It consists of fifteen member states (to the UN) and among them are five permanent members. They are the United States, Great Britain, France, Russia and China and they all have the right to veto all decisions taken by the Security Council. The ten other members are rotated, elected by the UN General Assembly, where every member to the UN is represented. Traditionally, the Security Council has played a large role in referring cases to the ad hoc tribunals and the ICJ. The Security Council can refer cases and situations to the ICC as well, but they do not have an exclusive right to do so.

War Crimes – According to the Rome Statute, war crimes constitute “Grave breaches of the Geneva Conventions of 12 August 1949” as stated in Article 8. It can be any of the following crimes (not a complete list); willful killing, torture, willfully causing great suffering, extensive destruction of property, willfully depriving a prisoner of war of the rights of fair and regular trial, taking hostages or intentionally directing attacks against civilians.

1. Introduction

1.1 Background
The international community has long lacked a proper way to bring persons to justice for the world’s most heinous crimes such as genocide, crimes against humanity, war crimes and crimes of aggression. Internationally, states have been reluctant to act when coming upon such a crime and therefore an international body to bring an end to impunity was created – the ICC. In so doing, a number of problems and issues have arisen – adding further complexity to the endeavor towards global justice. First, the ICC is based upon a statute\(^5\) and therefore is dependent on the states that have signed up to, and ratified it. Without its members, the ICC has no power and no jurisdiction. Second, the ICC can only prosecute crimes that have been committed in its territory – the same area as the member states – or by persons from a member state, unless the UN Security Council refers the case to the ICC.\(^6\)

The United States is the sole superpower within international politics since the end of the Cold War, and has also, for a long time, been the biggest contributor to the UN.\(^7\) The fact that the United States, as an active member of the UN, opposes the ICC might have large effects on the future legitimacy of the ICC. One way the United States currently shows its opposition to the ICC is through regulations like ASPA,\(^8\) which forbids certain military aid from the United States to countries that have ratified the Rome Statute and are not members of NATO or is one of their allies.\(^9\) The only way for other member states to the ICC not to lose aid from the United States is to sign a so called Article 98 agreement with them. These agreements are bilateral and are an arrangement not to hand over possible accused nationals to the ICC without their consent. This kind of regulations can easily be seen as mechanisms of pressure forming obstacles to states considering joining the ICC. The question is how these regulations affect the future of the ICC and whether they are legal or not.

1.2 Purpose and Main Focus
This dissertation focuses on the Article 98 agreements that the United States has signed with a number of other states all over the world (members and non members to the Rome Statute alike) and their function and legality. The purpose of this dissertation is to evaluate whether these agreements are legal under Article 98 of the Rome Statute and other international treaties.

For research purposes we are asking ourselves the following questions:
- What is (are) the main reason the United States opposes the ICC?
- What is the content of Article 98 of the Rome Statute? Moreover, how was (and is) it meant to be interpreted? What is an Article 98 agreement?
- What do Article 98 agreements mean in practice for the United States, the ICC, and the states that have signed them?
- What other articles of the Rome Statute, Vienna Convention and the UN Charter are relevant to this issue.

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\(^{5}\) The Rome Statute of the ICC, hereinafter referred to as the Rome Statute. It entered into force 1 July 2002.

\(^{6}\) Pursuant Article 13(b) of the Rome Statute.

\(^{7}\) However, the United States have from time to time been falling behind on its payments to the UN as a way of putting pressure on the UN.

\(^{8}\) ASPA is further explained below in Chapter 3.3.

\(^{9}\) U.S. Department of State official webpage, Security Assistance Team, found at http://www.state.gov/t/pm/ppa/sat/ Read 5 Mars 2007.
1.3 Problem
The legitimacy and organization of national courts are based on a country’s constitutional law, which are in effect establishing the boundaries of the legal system’s jurisdiction. However, under international law, increasingly expanding its range of competences, these same boundaries made up of many legal systems and traditions have to find joint ways to handle questions of common interest. Conventions are an example of this type of cooperation. From a perspective of legitimacy, one can generally conclude that the more states that sign and ratify a convention, the more it is accepted. Thus the area of common ground and common values grows through multilateral cooperation on an international level.

The ICC is a court created in the context of the UN, but not all of the UN member states have signed on. This poses a dilemma. The more states that support the Rome Statute, the larger the ICC’s legitimacy as an international court of law will be. On the other hand, if many states choose to leave, or neglect, the Rome Statute, the legitimacy of the ICC will decrease and it will be difficult for it to maintain its ability to fulfill its mission.

The United States has yet to endorse the Rome Statute. This may affect the legitimacy of the ICC. Moreover, The United States has also made other states promise never to hand over Americans to the ICC, even if they are member states to the Rome Statute and the ICC asks them to do so. The United States is in that way actively pursuing its opposition to the ICC. This might lead to the ICC becoming increasingly dependent upon support from the United States – or rather the American willingness, or lack thereof, to support the ICC. In trying to see what the future holds for the ICC, we must understand why the United States opposes the Rome Statute and if those agreements – called Article 98 agreements – are legal or not.

1.4 Method
The dissertation is based on legal sources; the Rome Statute, the Vienna Convention, the UN Charter and American laws, generally ASPA and the Nethercutt Amendment. Research reports, articles and various web pages have been used; among them are the official ICC webpage, U.S. Department of State, Coalition for the ICC, Citizens for Global Solutions, and Human Rights Watch. We have also used search engines on the Internet such as Google and databases such as Heinonline, JSTOR, MUSE and Oxford Journals in the library at the University of Örebro (and through its webpage) to find relevant material.

Legal sources of interest to the topic of the dissertation have been researched and analyzed, different interpretations of relevant articles in the Rome Statute have been contrasted and studied. The Vienna Convention has then been looked into in order to analyze the norm hierarchy of regulations relating to Article 98 and Article 98 agreements. The results from the research have then been put into writing in this dissertation and against that background, the authors’ present their conclusion and gives an answer to the question on whether Article 98 agreements are legal or not.

The focus rests on the relationship between the United States and the ICC, and the effect of Article 98 agreements. These agreements have not been studied in detail. There is a comparative undertone since different regulations; thoughts behind them and how they have been interpreted are being compared. This dissertation has a qualitative projection. Comparisons are performed between the sources, however only in a limited way that is relevant for the subject. The chosen material thus includes, and is limited to, the sources found relevant for this dissertation.
1.4.1 Authors’ Comments on the Reliability of Sources and Problems during the Research Phase

During the research phase there has been a problem to find trustworthy material. Being a highly political topic, maybe more so than a legal one in some aspects, articles, proposed legislation, and the role of the UN Security Council needed to be evaluated in light of its political significance. The ICC has the possibility to prosecute world leaders which is controversial. There have also been some problems getting hold of valuable sources for information referred to by other authors. Some of the documents are hard to find due to the fact that they are working documents, not viewable for the public.

Since there is no such thing as unquestionable preparatory legislative work to refer to in matters of interest to this topic, much of the discussion throughout this dissertation have had to be based on interpretations done by professionals. The authors to this dissertation are also aware of the fact that David J. Scheffer, as a former employee of President Clinton’s administration, is a politically influenced source of information and thus inclined to oppose the opinion of the Bush administration. His writings have however been found invaluable to the authors for the fact that he was present at the drafting of the Rome Statute. The authors have been careful in their interpretation of statements made by him in particular and other commentators in general.

1.5 Disposition

Chapter 1: Consists of an introduction including background, purpose and main focus, problem, choice of methodology and disposition.

Chapter 2: Contains an introduction to the ICC and the Rome Statute as well as its legitimacy and authority.

Chapter 3: Consists of a thorough explanation of the American position to the ICC and the Rome Statute, how it has changed over the years and reasons why the United States has chosen not to ratify the Rome Statute. Relevant domestic laws in the United States are also discussed here.

Chapter 4: Contains a presentation of Article 98 of the Rome Statute, followed by a presentation of the thoughts behind the Article and different legal interpretations of it.

Chapter 5: Explains what the so called Article 98 agreements are and what this kind of agreements means for the ICC and the countries bound by them.

Chapter 6: Brings up other legal aspects related to Article 98 of the Rome Statute which are examined and discussed. Relevant regulations in the Rome Statute, the Vienna Convention and the UN Charter as well as the thoughts behind them are discussed as well as short discussions on norm hierarchy are found here.

Chapter 7: Contains the authors’ analysis of the results brought forward throughout this dissertation, followed by the conclusion, answering the primary question presented in the beginning of the dissertation.
2. The ICC: Its Legitimacy and Authority

2.1 The ICC and the Rome Statute
The ICC is an independent and permanent court based in The Hague. The Rome Statute regulates its jurisdiction, administration and procedure; it also states its objective. The Rome Statute gives the ICC jurisdiction to try persons accused of the most egregious crimes of international concern – genocide, war crimes and crimes against humanity. The Rome Statute is currently ratified by 104 states around the world, which are called member states to the ICC. The statute was adopted in Rome, Italy on 17 July 1998 and entered into force 1 July 2002 when 60 states had ratified it. The Rome Statute was created by the UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, but the ICC as such is not a part of the UN. However, the two bodies maintain a close and supportive relationship.

Even though the ICC is based in The Hague, it can sit elsewhere if needed and found appropriate. The court functions as a last resort for the gravest crimes and will only act if the country where the crime took place is unwilling or unable to act itself. As such, it functions as a complement to national criminal jurisdictions, as stated in Article 1 of the Rome Statute.

The member states meet once a year in the Assembly of State Parties, which is the body to overlook management and legislative matters of the court. Other than that, the ICC has four major organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry. It also holds a number of offices that are semi-autonomous. The ICC is funded by its member states and the UN.

Dealing with international criminal law, which is part of public international law, the ICC can prosecute and bring individuals to justice following Article 25 of the Rome Statute. General rules of public international law only deal with disputes between states as subjects, while international criminal law applies to the conduct of individuals. This is important to distinguish since the ICJ, a UN organ also seated in The Hague, deals with public international law.

Following Article 13 of the Rome Statute, there are three different ways a case can be referred to the Prosecutor and thus be tried by the ICC, either:
1. by a member state to the Rome Statute,
2. by the UN Security Council, or
3. upon initiation by the Prosecutor.

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10 Following Article 5 of the Rome Statute, the crime of aggression will also fall under the jurisdiction of the ICC once it has been defined, see Article 5(2) of the Rome Statute.
12 Following Article 126 of the Rome Statute.
13 ICC official webpage, International Criminal Court. Structure of the Court, found at http://www.icc-cpi.int/about/ataglance/structure.html Read 27 April 2007; further, Article 2 of the Rome Statute regulate the ICC’s relationship with the UN.
14 Following Article 3 of the Rome Statute.
15 Following Article 112 of the Rome Statute.
16 Following Article 34 of the Rome Statute.
18 Following Article 115 of the Rome Statute.
When ratifying the Rome Statute, Article 120 makes it impossible for the state to make reservations to the Statute, which is generally possible when dealing with UN treaties. They can, however, declare how they intend to interpret certain parts of the Rome Statute, which a number of states have done. For instance pursuant to Article 87(2) regarding what language they want requests from the ICC in. States can also choose not to let the ICC exercise war-crimes jurisdiction over them for a period of seven years according to Article 124, giving member states to the Rome Statute more protection from the jurisdiction of the ICC than non members.

During the conference in Rome, state delegates had many problems to solve in order to get as many states as possible to agree to the result. One of them was how “strong” the statute should, and could be. An Asian delegate put it as “the treaty needs to be ‘weak’ enough, unthreatening enough, to have its jurisdiction accepted without being so weak and so unthreatening that it would thereafter prove useless.” Due to the many controversial aspects and the importance of state sovereignty regarding jurisdiction, informal, off-the-record discussions were needed. State delegates were allowed to negotiate outside the conference room, and shift in their positions without detracting from the overall purpose of the creation of an international criminal court. Therefore, in contrast to most other UN treaties, there are almost no preparatory works reflecting the debates and negotiations. The outcome, the Rome Statute, one must say proves a success in the way that many states signed and ratified it in a short period of time.

2.2 Jurisdiction of the ICC

A new aspect of state sovereignty and jurisdiction arose with the ICC; it is created by the very same states as it will have jurisdiction over, leading to a state losing a part of its sovereignty. The drafters of the Rome Statute were therefore seeking to limit the ICC’s admissibility by letting the states have primary jurisdiction and only if they are found unwilling or unable to investigate and prosecute will the ICC have a chance to act. The terms “jurisdiction” and “admissibility” thus are related but have different meanings. The court can have jurisdiction over a case it is lacking admissibility over. This phenomenon is sometimes called the principle of complementarity and is regulated in the Preamble of Rome Statute in paragraph 10, and in Article 1 and 17(1) of the Rome Statute.

According to Article 12 of the Rome Statute, the ICC will have jurisdiction over a case either if the territory where the crime takes place is a member state (regardless of the nationality of the offender), or, if the offender is a national of a member state. It cannot try crimes

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22 The Rome Statute entered into force after achieving 60 ratifications already in July 2002. This was decades earlier than was predicted, and just a few years later, in 2005, the number of ratifications reached 100. CICC official webpage, *Ratification of the Rome Statute*, found at http://www.iccnow.org/?mod=romeratification Read 10 May 2007.
24 Ib. at p 68.
committed earlier than 1 July 2002, which is when the Rome Statute entered into force. This derives from Article 11(1) and if a state becomes a member to the Rome Statute after that date, their date of entry will be when the ICC begins to have jurisdiction over them. This is regulated in Article 11(2). Although, a state joining after the ICC entered into force can make a declaration under Article 12(3) to accept the ICC to have jurisdiction from 1 July 2002.

As said, states can prosecute crimes also covered by the Rome Statute through the principle of complementarity and domestic legislation. A reason the ICC is still needed is because only two of the crimes – genocide and the most serious war crimes under the Geneva Conventions – requires a state to prosecute. The ICC is there to fill the void in an aspiration to end impunity.

Universal jurisdiction, when a state can prosecute regardless of links with its territory or persons, is limited to a small number of crimes. Due to International Customary Law these crimes are piracy, slave trade and trafficking in children and women. These developed since they often occur without necessarily being on a state’s territory. The list of crimes with universal jurisdiction has recently grown through various multilateral treaties and the essential crimes of the Rome Statute (genocide, crimes against humanity and war crimes) are also recognized as holding universal jurisdiction in national courts.

However, to let an international court hold universal jurisdiction was seen as a step too far. One can say that the decisions drafters in Rome decided on is a compromise between universal jurisdiction and jurisdiction only covering nationals of member states of the Rome Statute as can be seen in Article 12. The ICC does aim towards universal jurisdiction, but is dependent on the cooperation and consent of its member states. The Rome Statute does not automatically prevail over other international bilateral or multilateral treaties and it is left upon the states themselves to decide whether to surrender a suspect to the ICC or another state if they are both requesting surrender.

Regarding third party jurisdiction, i.e. jurisdiction over citizens from states not members to the Rome Statute, Ruth Wedgwood argues that this matter was not sufficiently discussed in Rome. Generally, there are three principles to decide when a state’s consent to prosecute one of its citizens in a different state is not needed. These are:

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25 The ratification period also needs to be taken into account as regulated in Article 126 of the Rome Statute; further, Article 11 is closely related to Article 24 of the Rome Statute.
32 Regulated in Articles 90(6) and 90(7) of the Rome Statute.
34 Ibid.
1. the principle of territoriality (the state where the offence occurred automatically has jurisdiction)
2. the principle of passive personality (the victims are citizens of a state thus automatically holding jurisdiction)
3. the principle of protective jurisdiction (the crime affects state interest which gives that state jurisdiction, regardless of offenders nationality)

These principles would be in favor of the ICC being able to prosecute non member states’ nationals. However, Wedgwood continues, to exercise jurisdiction over a foreign national is significantly different from surrendering that person to an international body his state is not, by choice, a member of. But then again, as long as the state itself initiates an investigation or prosecution – they will have primary jurisdiction. Jurisdiction of the ICC is never forced upon a state not a member to the Rome Statute. The fact that a non member state’s national might come under jurisdiction of the ICC is a practical consequence – not a legal obligation upon that state. Antonio Cassese puts it as “[The Rome Statute] simply authorizes the Court to exercise its jurisdiction with regard to nationals of third states, whenever these nationals may have committed crimes in the territory of a state party […].”

2.3 Legitimacy and Authority of the ICC

A challenge to the ICC has been described as “a challenge to the authority of the world community.” Nonetheless, the ICC is being challenged. The principle of complementarity, as mentioned above, means that the ICC only step in if a national state/court fails to, or is unwilling to act. This principle applies to non member, as well as member states to the Rome Statute. According to Cassese this is a principle that can be abused if a state pretends to investigate for the sole purpose of protecting the accused persons. Especially because of Article 18(1) of the Rome Statute, which regulates that the Prosecutor of the ICC must notify the state with jurisdiction over the crimes concerned (even a non member to the Rome Statute) when an investigation is about to be initiated by the ICC. Although, only if the case is not referred by the UN Security Council. An obvious question arises in how effective the ICC will be able to monitor whether a state is actually investigating “properly”?

There is also a difference in the role of the ICC if a state is found unwilling or unable to act. Unwilling refers to when a state may not want the person tried before a court whereas unable refers to cases when a state might have no possibility of investigating themselves. It could be because of a situation with a failed state without justice system and the necessary institutions without an established rule of law. But also other reasons can lie behind a state’s unwillingness. For example, Liberia has under its new ruler been unwilling to refer cases to an international criminal tribunal such as the one established in Rwanda after the genocide.
there, but that is because it is a very long process which in itself can lead to impunity, not that they are unwilling to act.

The UN Security Council has referred one case to the ICC, the alleged genocide in Darfur against the leaders of Sudan. Even though the United States strongly opposes the ICC it refrained from exercising its veto to stop the referral. Some view that as a somewhat softening approach to the ICC from its part. However, Luigi Condorelli and Annalisa Ciampi state that a UN Security Council referral of a situation, such as that in Darfur covered by Resolution 1593 (2005) to the ICC brings up four problematic issues:

1. Member states and non member states to the ICC have different obligations to cooperate with the ICC. Non members to the Rome Statute can only be advised to cooperate with the ICC, while member states have a de facto obligation to do so.
2. Nationals from non member states can be granted immunity from ICC jurisdiction through exemption such as that on the request of the United States stated in paragraph 6 in Resolution 1593 (2005). Further, the regulations in Article 16 of the Rome Statute gives the UN Security Council the right to repeatedly put cases on hold for twelve months at a time, thus leading to the risk of justice being postponed or even unattainable.
3. Referral by the UN Security Council risk legitimizing American exemptions agreements due to the fact that the ICC is partly funded by the UN, and the main contributor to the UN is in fact the United States.
4. The referral from the UN Security Council does not include any measures to provide compensation to victims to the crimes.

Thus there seems like the referral of the matter of Darfur by the UN Security Council to the ICC might be legitimizing Article 98 agreements, thus affecting the goal of the Rome Statute to end impunity. As a non member to the Rome Statute, the United States has no obligation under that treaty to cooperate with the ICC. This, together with the fact that the United States is a major financial contributor to the UN, and a permanent member of the UN Security Council with the right to veto resolutions not to its likings, makes the American opinion of the ICC highly influential when the UN Security Council tries to negotiate a resolution to which all permanent members can agree.

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44 Interview with Mrs Ellen Johnson-Sirleaf, President of Liberia, done by Malou von Sivers. Seen in a TV-documentary on the subject of child soldiers in Liberia. The documentary, called “Rita och Rufus – barnsoldater i Liberia”, was aired at TV4 on Swedish TV on 17 May 2007.
46 Paragraph 6 in Security Council Resolution 1593 (2005) states that the Security Council “Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of referral to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State”.
3. The American View of the ICC and the Rome Statute

3.1 The American Opinion of the ICC and the Rome Statute

Ever since the end of the Second World War, the United States has been at the forefront regarding international justice and striving to end impunity. In 1995, President Clinton expressed his support for a permanent international war crimes court. The United States took a lead in the drafting of the Rome Statute. While the United States has always wanted an international criminal court, they never intended for the personal jurisdiction of such a court to extend as far as it did under Article 12 of the Rome Statute, and the focus has generally been on its relationship with the UN Security Council. If the Rome Statute would have turned out more to the United States satisfaction, they would probably have become a member state, considering that they have allowed other international tribunals, which are more controlled by the UN Security Council, to have jurisdiction over Americans.

On the last day the Rome Statute was open for signatories, President Clinton signed. He clarified however, that the United States signature was only to be able to continue being a part of the development of the ICC – their objections about some flaws in the Rome Statute were still present.

When the Bush administration took office in 2001, the United States got more hostile towards the ICC. The terror attacks of 11 September 2001 changed the United States foreign policy from international justice towards defending themselves in the war on terrorism. In May 2002, a clear statement of unwillingness to become a member state to the ICC was made by the administration, and the “unsigning” of the Rome Statute was made in a letter addressed to the then UN Secretary-General, Kofi Annan from United States Under Secretary of State and Arms Control and International Security at the time, John R. Bolton. Since then, the United States has actively campaigned against the ICC fearing that the ICC might initiate prosecutions against Americans that are politically motivated. The Bush administration has also approached a large number of countries and urged them to sign Article 98 agreements, based on Article 98 of the Rome Statute.

During the drafting of the Rome Statute, the Ambassador at large for war crimes and head of the delegation from the United States, David J. Scheffer time and again had to restate the

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50 The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia.
54 A copy of the statement can be found on the U.S. Department of State official webpage, International Criminal Court: Letter to UN Secretary General Kofi Annan, found at http://www.state.gov/r/pa/prs/ps/2002/9968.htm Read 20 April 2007.
55 CICC official webpage, USA and the ICC. Read 15 March 2007; Article 98 agreements are further discussed below in Chapter 5.
position of his country. He said that the United States would never agree to a statute giving the ICC automatic jurisdiction over its core crimes, but preferred state consent over each crime.\textsuperscript{56} Jesse Helms,\textsuperscript{57} a US Senator at the time stated that a treaty coming from Rome having even the smallest chance of the ICC trying an American would be “dead on arrival”\textsuperscript{58} to the Foreign Relations Committee,\textsuperscript{59} to which he was the Republican chair.

It is rather evident that the majority of politicians in the United States are against the ICC; however, on a grass-roots level there is growing support for a promotion to sign and ratify the Rome Statute. On its homepage the AMICC presents results from several Public Opinion Polls asserting that about 70 percent of Americans actually support the ICC.\textsuperscript{60} The United States has nonetheless taken a position actively opposing the ICC, and stands by it. Further, a general tendency in the United States’ policy has lately been to favor national courts over international tribunals, similar to the current one in Iraq.\textsuperscript{61}

### 3.2 Reasons for the American Opinion

When the “unsigning” of the Rome Statute took place, Marc Grossman, Under Secretary of State for Political Affairs (2001-2005), stated that “the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court”,\textsuperscript{62} but he never explained why they did, and thought so.

According to Scheffer\textsuperscript{63} the main concerns the United States had during the drafting process were that the principle of complementarity does not solve the problem of the ICC sometimes having jurisdiction over nationals from non member states. Even if the state can claim primary jurisdiction by initiating its own investigation, the ICC can decide that it was not genuine and that way still have jurisdiction.\textsuperscript{64} The principle of complementarity is no guarantee for state jurisdiction. Another concern was that the ICC can have jurisdiction

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\textsuperscript{57} For more of his views on the United States, the UN, the ICC and international justice see GPO, U.S. Government Printing Office, webpage, \textit{THE FUTURE OF U.S.-U.N. RELATIONS; A Dialogue Between the U.S. Senate Committee on Foreign Relations and the U.N. Security Council, Hearing before the Senate Committee on Foreign Relations 106\textsuperscript{th} 12 (2000), found at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:62154.wais Read 20 April 2007.


\textsuperscript{59} For information on the Foreign Relations Committee go to the U.S. Senate Committee on Foreign Relations official webpage, \textit{U.S. Senate Committee on Foreign Relations}, found at http://www.senate.gov/~foreign/ Read 9 May 2007.

\textsuperscript{60} The results of several public opinion polls and the links to them can be found at the AMICC webpage, \textit{Public Opinion Polls}, found at http://www.amicc.org/usinfo/opinion_polls.html Read 20 May 2007.


\textsuperscript{64} Following Article 20(3) of the Rome Statute.
without referral from the UN Security Council over nationals from non member states. A third concern was about the amendments to crimes, and how they are adopted and applied under the Rome Statute. If a new crime is adopted, any member state can decide to opt-out, and that way immunize its nationals from that specific crime. That opportunity is not given to non member states.

In a report made by the Congressional Research Service in August 2006, it was reported that “the primary objection given by the United States in opposition to the treaty is the ICC’s possible assertion of jurisdiction over U.S. soldiers charged with ‘war crimes’ resulting from legitimate uses of force, and perhaps over civilian policy makers, even if the United States does not ratify the Rome Statute.” The report continues that because of the United States’ unique position regarding international peacekeeping, exemption of American soldiers is sought. The authors to this dissertation conclude that this statement, coming from the Congress of the United States, will have to be viewed as their official opinion of the ICC.

History tells us that the United States does tend to bring its militaries to justice, but they want to do so “at home.” On 3 May 2004, current Ambassador at large for war crimes in the United States Pierre-Richard Prosper spoke at American University in Washington, DC and he said: “…the best policy is to promote and push for domestic prosecution” thus confirming that standpoint. Although, in absence of SOFAs or Article 98 agreements, the state where the crime was committed has sole jurisdiction, thus the United States militaries might be tried in a foreign court. A long time ago, it was established through the case Charlton v Kelly by the United States Supreme Court that courts may not refuse surrender of a suspect to a foreign court that have jurisdiction over a crime for the sole reason that the fugitive is an American.

The biggest concern here however, may not be that the ICC would try an American soldier – but raise questions internationally about American foreign policy; or indict Americans stationed abroad only to challenge the United States. They have never trusted the fact that the Prosecutor of the ICC can initiate an investigation which is believed by the United States will lead to politicization of the court. William Schabas argues the importance of separating

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65 Namely through referral by a member state, Article 13(a) and initiation by the Prosecutor, Article 13(c) of the Rome Statute.
66 Following Article 121(5) of the Rome Statute.
70 SOFAs are further explained below in Chapter 4.2.
75 Following Article 15 of the Rome Statute.
real concerns with more trivial ones, and according to him the only real reason that explains United States hostility towards the ICC in a satisfying way is the role of the UN Security Council.  

Maybe the main reason for the United States’ pursuit for a guarantee in the Rome Statute that no Americans would ever be tried by the ICC is their distrust in its neutrality. They do not trust the court not to become politicized and thereafter bring on cases against the United States. It could only happen if the ICC refuses to accept an investigation or prosecution performed in the United States and therefore have jurisdiction to investigate again. But, despite the many procedural hurdles for that to happen – the United States wants a guarantee.

### 3.3 American Legislation Affecting Member States to the ICC

In order to make full use of the principle of complementarity set out in the Rome Statute, the United States needed to update its legislation making sure its domestic courts have full jurisdiction over the crimes constituted in the Rome Statute. Therefore, the US Federal Criminal Code has been recently updated, which means the United States now has jurisdiction over genocide and war crimes, thus covering two of the acts included in the jurisdiction of the ICC. Crimes against humanity does not have a separate law as of yet.

Even though the ICC does not have trial before a jury, otherwise rather critical towards the ICC, Ruth Wedgwood, argues that there is no “forbidding constitutional obstacle” for the United States to take part in the Rome Statute.

One act that was passed in order to protect Americans from the ICC’s jurisdiction, in a preventive manner, is ASPA. It was passed by Congress in August 2002 and makes it impossible for states to be granted military assistance, or other forms of aid, from the United States if they are members of the Rome Statute and have not signed an Article 98 agreement. American soldiers are therefore not allowed to participate in UN peacekeeping missions if that would expose them to the jurisdiction of the ICC. Further, it gives the President power to use force in order to obstruct the work of the ICC if found needed. This act resulted in 35 Member states to the ICC loosing military assistance from the United

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79 Regulated in Articles 1 and 17(1a) of the Rome Statute.
83 The full content of ASPA can be found at U.S. Department of State, Bureau of Political-Military Affairs July 30, 2003, webpage, American Service-Members’ Protection Act, found at http://www.state.gov/t/pm/rls/othr/misc/23425.htm Read 10 May 2007.
84 CICC official webpage, USA and the ICC. Read 25 April 2007.
States. A total withdrawal of $46 million by the United States has been reported. IMET is one of the programs affected, a program which states like Kenya, Peru and Ecuador have relied upon. This act is working as a threat to the many states around the world that are dependent on American aid and it has been criticized from people as high up as David J. Scheffer.

The Nethercutt Amendment is an amendment to the Foreign Operations Appropriations bill and cuts aid to all member states of the ICC (that have not signed an Article 98 agreement) from the Economic Support Fund. President Bush signed it into law, after Congress passed it in December 2004. The Nethercutt Amendment is even more wide-reaching than the ASPA, cutting aid to many key allies of the United States. There is fear that this amendment will do more to alienate important allies of the United States in the war on terror, drugs and other international challenges than function as a way to force states to sign Article 98 agreements.

However, on a more positive note from an ICC perspective, President Bush and his administration are starting to revise some of the effects of ASPA and IMET. The US Government says it wants to separate its policy on foreign aid from its ideological opposition towards the ICC, especially towards important friends and allies. Therefore an amendment and Presidential waivers have been made allowing aid to certain member states of the ICC even if they have not signed an Article 98 agreement with the United States. According to a press briefing at the White House, these waivers do not change the overall opinion of the ICC by the United States or their plans on fully implementing ASPA.

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87 Ibid.
89 Van Der Vilt, Harmen, (2005), p 94.
91 Information about the Nethercutt amendment found on the CICC official webpage, USA and the ICC. Read 25 April 2007.
4. Article 98 of the Rome Statute and Its Interpretation from a Legal Perspective

4.1 Article 98 of the Rome Statute

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

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

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

4.2 Interpreting Article 98 of the Rome Statute

The preamble of the Rome Statute governing the ICC states that there are “grave crimes threatening the peace, security and well-being of the world” and that those “…most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.

It is thus evident that the ICC is to end impunity for crimes within its jurisdiction – genocide, crimes against humanity, war crimes and, when defined, the crime of aggression.96

Article 98 of the Rome Statute is concerned with immunity waivers and state consent to surrender of suspects for crimes that fall under the jurisdiction of the ICC. Article 98(2) states the conditions for a state’s refusal to surrender such a suspect to the ICC. However the text of this article and the intent behind it has come to be much debated since the text seem to allow exemption from punishment while the purpose of the ICC as a whole is to ban and counteract impunity.

When it comes to the interpretation of, and meaning behind Article 98 of the Rome Statute there seems to be a lack of understanding between different parties. There are several ways in which Article 98 of the Rome Statute can be, and have been read:

1. The formulation in Article 98(2) does only cover agreements existing before the signing or ratification of the Rome Statute.97

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2. The formulation in Article 98(2) should be interpreted narrowly and does only cover some, namely two, specific types of agreements such as SOFAs\(^98\) and special diplomatic mission agreements (including agreements concerning peacekeeping missions under UN).\(^99\) The subject included in the scope of article 98(2) is thus not civilians but only officials performing in their role as state-sent on foreign ground.

3. The formulation in Article 98(2) does only cover such agreements that can assure promises of investigation and, if justified, prosecution.\(^100\)

As mentioned above in Chapter 3 of this dissertation, the United States sees the ICC as a threat in several ways. When it comes to Article 98 of the Rome Statute the United States’ concern is mainly focusing on the breach of sovereignty and the fear of Americans being prosecuted by foreign powers as a political act against the United States as a nation.\(^101\) The United States’ interpretation of Article 98 must be understood against this understanding of the ICC. Whether this threat is real or not is debated. Most members of the Rome Statute argue that the United States has nothing to fear since the Statute affirms that a state has the primary right to prosecute a suspect.\(^102\)

The language of Article 98 only requires an international agreement contrary to the ICC’s obligation to bring a request for surrender to a halt. It says nothing about giving any guarantees for investigation and prosecution somewhere else. This makes it even more of an exemption to the Rome Statute’s objective, as stated in its Preamble.

Alongside this notion of protecting one’s own national, so called SOFAs also take into account national interest when someone has committed a possible crime abroad. It is highly important for a state to be able to investigate and prosecute its own nationals, fearing that they would not be treated well in a foreign court – especially if the victim was a national of that other state.\(^103\) SOFAs are to be respected by member states to the ICC and non member states alike. Some argue that they also give the sending state the exclusive right to handle a possible request about whether to surrender a suspect to the ICC or not, thus giving the state the offence was committed in no power to act.\(^104\) These SOFAs are negotiated between states within NATO. A difference between Article 98 agreements and SOFAs is that SOFAs do not apply to civilians accompanying the armed forces,\(^105\) and hence has a more narrow interpretation of who is included in a “person” under Article 98 of the Rome Statute.

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\(^{100}\) Crawford, James & Philippe Sands and Ralph Wilde, (5 June 2003), p 21.
\(^{104}\) Argued by Wedgwood, Ruth, (1999), p 103. This is her view and interpretation, stating it was proffered as the “common understanding” of Article 98 in Rome and is in a binding statement from the Preparatory Commission.
Some commentators, such as David A. Tallman, states that the wording in Article 98 “strongly suggests”\textsuperscript{106} that a much narrower span of interpretation options was intended than that understanding promoted by the United States. One of the main objections to the American interpretation regards their understanding of the wording “sending state” as used in Article 98.\textsuperscript{107} Does the scope of “sending state” extend only to state officials, as is the case with SOFAs, or also to civilians and persons sent by NGOs, like in the promoted Article 98 agreements? There is, so far, no clear answer. When it comes to Article 98 agreements, Tallman continues, they come into clash with the cooperation requirements found in articles 86, 87, 89 and 90 of the Rome Statute. He further states that such agreements contradict the purpose and object of the Rome Statute.\textsuperscript{108}

Scheffer discusses the American understanding of Article 98(2) as follows:\textsuperscript{109}

“Throughout five years of treaty negotiations, the Article 98 safeguard was a major U.S. objective and it was successfully achieved. When Article 98 refers to the "sending state," it means the state that deploys an individual (including its top civilian officials) on official duty. Significantly, Article 98 does not prevent the new court from investigating and even indicting an American official. But if there is an Article 98 agreement with another country, that country would not be able to surrender an indicted official covered by that agreement to the court without Washington’s consent.

[…]

However, the Bush administration overreaches if it attempts, with Article 98 agreements, to immunize any U.S. national living abroad or traveling for any reason from surrender to the court and to blanket the entire world with such agreements. The negotiating objective never was to protect American mercenaries or any other citizen engaged in unofficial actions. (We would have used "state of nationality" rather than "sending state" if that had been our intent.)”

Not only Scheffer, but many countries and state officials have expressed unease about Article 98 agreements. In 2002, PACE\textsuperscript{110} approved a resolution about the effect of Article 98 agreements and states trying to undercut the integrity of the Rome Statute by exempting their nationals from the jurisdiction of the ICC. PACE further stated in its resolution that these forms of agreements are not acceptable under the Vienna Convention,\textsuperscript{111} especially Articles 86 and 27 of the Vienna Convention, and under other international law governing treaties.\textsuperscript{112}

\textsuperscript{107} Ibid.
\textsuperscript{108} Ib. at p 1047.
\textsuperscript{109} Scheffer, David J., (2002).
\textsuperscript{110} PACE consists of national parliamentarians from all 47 of PACEs’ member states and adopts texts in the form of opinions, recommendations and resolutions. For more information see PACE official webpage, \textit{PACE – The Assembly of the Council of Europe}, found at http://assembly.coe.int/Communication/Brochure/Bro01-e.pdf Read 17 May 2007.
4.2.1 The American Interpretation
As mentioned, during the Clinton administration the United States was an active and supportive part in the negotiations and formation of the Rome Statute. However, according to Scheffer\(^{113}\) there has been a shift in the United States’ policy towards the Rome Statute due to the change of president and the new administration’s interpretation of mainly Article 98(2) of the Rome Statute.\(^{114}\) Scheffer believes that Article 98(2) of the Rome Statute should be interpreted in accordance with the regulations in articles 31 and 32 of the Vienna Convention. Since the United States has not ratified the Rome Statute, it has not become a member state to it, and therefore do not fall under the obligations found in article 31 in the Vienna Convention.\(^{115}\) Further, the United States has not ratified the Vienna Convention either.\(^{116}\) But, Scheffer argues, due to the United States’ close negotiations and active participation during the drafting of the Rome Statute, the United States should be considered to have had the intent of joining the Rome Statute, including Article 98(2).\(^{117}\)

The fact that President Clinton signed the Rome Statute, which was later nullified by President Bush has sparked a discussion amongst professionals on whether the United States is bound by the Rome Statute or not.\(^{118}\) Scheffer claims that the interpretation of Article 98(2), as done by President Clinton, was a strong reason to why the Rome Statute was signed in the first place. Thus President Bush’s retraction can be seen as a sign of an altogether different interpretation of the same article.\(^{119}\)

According to Scheffer the text in Article 98(2) was intended only to be applied to bilateral or multilateral agreements regarding military or other state sent personnel on official missions, i.e. not civilians or persons sent by NGOs.\(^{120}\) Thus, the original intent was to cover SOFAs.\(^{121}\) Following that interpretation there should be no possibility, even under Article 98(2), to provide persons, except personnel sent by a state, with immunity through some kind of bilateral agreement.\(^{122}\) However the formulation of Article 98(2) and the difference in its interpretation have led to a debate about whether or not it leaves room for the formation of several new Article 98 agreements between the United States and other states.\(^{123}\) The Bush administration continues to see the Article 98 agreements as within the range of the wording of Article 98 of the Rome Statute and thus not in conflict with international law.\(^{124}\)

4.2.2 The ICC Members’ Interpretation
Most ICC members have a different way of interpreting Article 98 than that of the United States. Both within the United States and amongst the ICC members there are fractions regarding the United States’ ASPA regulations as a big threat to the ICC and its legitimacy.\(^{125}\)


\(^{114}\) Ib. at pp 334-335.

\(^{115}\) Ib. at pp 333-334.


\(^{120}\) Ib. at p 333.


\(^{125}\) Faulhaber, Lilian V., (2003), pp 537-539.
The EU maintains that the United States’ criticism towards the Rome Statute is unfounded and thus strongly opposes both the United States’ policy towards the ICC and ASPA.\textsuperscript{126} The EU has also taken a common position opposing the closing of Article 98 agreements.\textsuperscript{127}

The reasons why the meaning of the text in Article 98(2) was not discussed in detail before the entry into force of the Rome Statute should thus be seen as a sign of conformity between parties on the interpretation as presented by Scheffer.\textsuperscript{128} It therefore seems like, although there might be a glitch in the legal formulation which might allow for different interpretations, the Article should be interpreted according to the intention behind it. Especially since no one, at the time of formation could predict the future importance of just that article and its widened interpretation for the future of the ICC.\textsuperscript{129} Questions have thus risen concerning the interpretation of wordings such as “sending State” and “existing”. Does the language in Article 98 include only SOFAs or also other agreements? And does it in that case only cover SOFAs or agreements made prior to the signing, ratification or entry into force of the Rome Statute or does it also include agreements made just prior to the request for surrender? Since Article 98 runs counter to the overall objective of the Rome Statute, most ICC members claim that the wording of Article 98 should be interpreted narrowly.\textsuperscript{130}

\begin{flushright}
\textsuperscript{129} Ib. at p 1038.
\textsuperscript{130} Ib. at pp 1046-1047.
\end{flushright}
5. The Meaning and Effect of Article 98 Agreements

5.1 The Meaning and Function of Article 98 Agreements

As described in the previous chapter, Article 98(2) of the Rome Statute gives an opportunity for states to engage in bilateral agreements, in effect diminishing the effectiveness of the ICC’s jurisdiction. The United States is one state, in particular, that has latched onto this opportunity. Ever since they withdrew their signature to the ICC, the Bush administration has actively approached other states urging them to sign a so called Article 98 agreement. These agreements protect Americans “stationed” abroad, with the state in question agreeing to surrender a possible suspect to the United States rather than to the ICC. In other words, this agreement pre-empts any jurisdiction the ICC has in calling for custody of a suspect. Romania was the first state to sign such an agreement with the United States.

There are three types of Article 98 agreements, generally:

1. reciprocal agreements when both parties agree not to surrender each other’s nationals, including current and former government officials, military personnel and other employees, to the ICC (without their consent);
2. unilateral agreements when the second state agrees not to hand over Americans to the ICC without the United States consent – but at the same time the United States can do just that to the other state; and
3. agreements for states that are not a member to the Rome Statute, to the effect that they agree not to cooperate with a third state in efforts to surrender persons to the ICC.

To encourage other states to sign an Article 98 agreement with the United States, various domestic laws have been passed, like ASPA. Given that many states rely on aid from United States, these “encouraging” types of laws come close to a threat. However, former Secretary of State Colin Powell puts it simply as a discussion about the United States’ concerns. All these are measures taken as a way of shielding Americans from the jurisdiction of the ICC.

Under Article 90 of the Rome Statute, if a state is a member to the ICC, it is obliged to surrender an accused to the ICC if it asks, even if the accused is American, unless they have

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131 David J. Scheffer argues that Article 98(2) gives an “explicit right” to negotiate these types of agreements in Scheffer, David J., (2001-2002), p 74.
132 As of December 2006 a total of more than 100 Article 98 agreements were reported. However, only 21 of them have been ratified and 18 are considered to be executive agreements, not needing ratification. Of the signed agreements, 46 are by member states to the ICC. At the same time 54 states have publicly refused to sign. 24 member states to the ICC refusing to sign Article 98 agreements lost US aid in Fiscal Year of 2005. Statistics from CICC, presented at their official webpage, Status of US Bilateral Immunity Agreements (BIAs), found at http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf Read 9 May 2007.
133 International Information Programs, USINFO.STATE.GOV., official webpage, Romania Agrees to Protect Americans from Surrender to ICC. First country to sign Article 98 agreement with Washington, found at http://usinfo.state.gov/dhr/Archive/2003/Oct/15-544493.html Read 25 April 2007.
134 CICC brings up different kinds of agreements on their official webpage, USA and the ICC. Read 15 March 2007. Different agreements also brought up by Meyer, Eric M., (2005), p 116.
135 Explained above in Chapter 3.3.
an Article 98 agreement with the United States. The United States could however start their own investigation and would therefore get jurisdiction (through the principle of complementarity), but otherwise only an agreement like the ones mentioned above would hinder the ICC from investigating and prosecute the person in question.

5.2 The Real Effects of Article 98 Agreements

5.2.1 The United States
What the United States wants to accomplish is to keep Americans protected from the ICC’s jurisdiction. However, in trying to do so, it is compromising their relationship with other states around the world. Secretary of State Condoleezza Rice has said about the legislation forbidding American aid to states that have not signed an Article 98 agreement that it is “[…] sort of the same as shooting ourselves in the foot”. Forcing these Article 98 agreements upon states is not a help in other aspects of cooperation, for instance counter-drug and terrorism.

The question also remains whether the United States can do this under Article 18 of the Vienna Convention. Even though the United States is not a member to this convention, they are bound by this article through International Customary Law.

5.2.2 Member States of the Rome Statute
When becoming a member of an international treaty, a state needs to consider other possible obligations, both domestically and internationally. Ratifying a statute includes being bound by its content and it can oppose neither a national constitution nor other international treaties ratified by the state. The latter is regulated in the Vienna Convention, mainly Articles 18 (for signatories), 31 and 32 (dealing with interpretation). Therefore, it is for the member states of the Rome Statute that these agreements’ validity or not is the most important. They are bound by the Rome Statute – and obliged to work in accordance with it. If then the agreements turn out to be illegal under International Customary Law, it is questionable if it is possible for member states to sign and ratify an Article 98 agreement with the United States. It would have the effect of a member state to the ICC having to surrender a suspect to the United States instead of the ICC – which goes against the Rome Statute’s objective. However, according to Article 30(4) of the Vienna Convention it might be of importance which treaty they signed first – the Rome Statute or the Article 98 agreement.

An important concern to member states is the lack of guarantee of investigation and trial for the accused domestically in the Article 98 agreements. These agreements only prohibit transfer of accused to the ICC; there is no requirement to surrender the suspect to the United States. Both these aspects oppose the object of the Rome Statute to end impunity.

140 Meyer, Eric M., (2005), p 105. For further discussion on that topic see footnote 53 of Meyer’s article.
142 Also commented in Crawford, James & Philippe Sands and Ralph Wilde, (5 June 2003), p 21.
Opposing a treaty’s object is regulated about in Article 31 of the Vienna Convention, and is something a member state to a treaty cannot do. But, since the purpose of the Rome Statute is to end impunity, a member state to the Rome Statute would have to act in a way that would oppose that, not only trial by the ICC. As long as impunity is fought, either through a national legal system or through the ICC – the purpose of the Rome Statute will have been fulfilled. Where does that leave us in the case of Article 98 agreements? They do not guarantee an investigation and prosecution domestically. This is a problem.

If the case is that Article 98 agreements do not fall under Article 98(2) of the Rome Statute, member states have an obligation to cooperate fully with the ICC in its investigations and prosecution of the crimes that fall within its jurisdiction. This makes them unable to sign agreements of the kind the United States is pursuing. It can also be the case for member states to the ICC that when they have ratified the Rome Statute, they amend their domestic legislation to implement and incorporate the Rome Statute. If then Article 98 does not in fact allow these agreements, states break their own laws if signing one.

To help member states to the Rome Statute sign Article 98 agreements with them, the United States should add a guarantee of domestic investigation in the agreements as well as making sure there are no holes in its jurisdiction. If a member state agreed to surrender a person to them instead of the ICC, and it turns out that the United States does not have jurisdiction to try the accused, or no intention of doing so for other reasons – that state allowed impunity. That in turn would be to defeat the purpose of the Rome Statute, and that state would have broken their obligations towards the ICC and other member states.

The Council of the European Union took a stand on 13 June 2003. All member states of the EU but one has ratified the Rome Statute and the EU agreed on a common position. In Article 1(4) of their position, they state that they are “[…] to support the effective functioning of the Court and to advance universal support for it […]”. And Article 5(1) further

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145 The object and purpose of the Rome Statute is stated in its Preamble.
148 Articles 27, 86, 87, 89 and 90 of the Rome Statute require states to cooperate with, and provide assistance to the ICC; discussed by Van Der Vilt, Harmen, (2005), p 100.
150 See further discussion under Chapter 6.2.1.
153 Only Czech Republic have yet to ratify, they are however a signatory to the Rome Statute. ICC ratification status found on CICC official webpage, Europe, found at http://www.iccnnow.org/?mod=region&idureg=10 read 20 May 2007. According to CICC official webpage, Status of US Bilateral Immunity Agreements (BIAs), read 23 April 2007, Romania have signed an Article 98 Agreement with the United States that is not reciprocal. But they have later said they regret it and want to get into course with the EU according to Human Rights Watch official webpage, Bilateral Immunity Agreement analysis from June 20 2003, found at http://www.iccnnow.org/documents/HRWBIA/TableJune03.pdf Read 23 April 2007.
emphasizes that states should cooperate effectively and that cooperation will be followed closely by the EU and its member states. Thus giving a positive recognition of the ICC, and urging the EU member states to cooperate with it, but, without making a clear statement of where they stand with regard to Article 98 agreements.

5.2.3 Non Member States of the Rome Statute
States that have not signed the Rome Statute are not bound by it since it does not have universal jurisdiction. However, the principle of complementarity is adaptable for these states as well which means they can claim primary jurisdiction as long as they actually start an investigation. This is viewed upon as a practical consequence rather than a legal obligation. But as for legal obligations, it is not bound by the Rome Statute and as long as no other legal obligations obstruct them, they can sign these agreements with the Unites States. If the Rome Statute would put a legal obligation on non member states to the Statute, it would go against the principle of pacta tertiis and would be prohibited under international law. Since compulsive jurisdiction wasn’t invented by the Rome Statute drafters – they emanate from conventional law and even though the United States has not ratified the Rome Statute they have subscribed to that through being a member to 1949 Geneva Conventions and the 1948 Genocide Convention.

5.2.4 The ICC
These Article 98 agreements are a growing problem for the ICC. It remains unclear why exactly the United States decided to ‘unsign’ the Rome Statute and started opposing the ICC in this active way. Do they simply want to keep their personnel beyond the jurisdiction of the ICC, or are they aiming to weaken the institution as such? Either way it seems that there are two justice systems underway – one for the United States and one for the rest of the world. The ICC’s jurisdiction is being undermined.

However, ending impunity is not to be pursued at all costs and the ICC is based on its member states’ consent. They have no absolute obligation to cooperate and surrender suspects, and the member states and the ICC as an institution needs to cooperate.

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155 Further discussion of the jurisdiction of the ICC and universal jurisdiction above in Chapter 2.3.
156 Van Der Vlt, Harmen, (2005), p 97.
157 The principle of Pacta Tertiis prohibits obligations on non member states under International Law.
158 Van Der Vlt, Harmen, (2005), p 97.
160 Van Der Vlt, Harmen, (2005), p 100.
6. Legality of Article 98 Agreements

6.1 Procedural Rule 195
During the final stage in the drafting process of the Rome Statute, within the Preparatory Commission,\(^{161}\) there were several questions remaining and several countries trying to make changes to the text and contents of the articles in the statute. Time was pressured and several parties stressed the need to reach consensus.\(^{162}\) On the last day of negotiations at the fifth meeting of the Preparatory Commission, the United States raised the question concerning Article 98(2) and the fear for American nationals being surrendered and put to trial by the ICC. The United States then put forward a proposal for a procedural rule which wording distanced the intended interpretation of the words “international agreements” from that of only applying to SOFAs.\(^{163}\) This proposal diverges from the wording of Article 98 in the Rome Statute and later ended up as part of procedural Rule 195(2) in The Rules of Procedure and Evidence\(^{164}\) decided upon by the Preparatory Commission and read as follows:\(^{165}\)

“The Court may not proceed with a request for the surrender of a person without the consent of [a sending State] if, under article 98, paragraph 2, such a request would be inconsistent with obligations under [an international agreement] pursuant to which the consent of [a sending State] is required prior to the surrender of a person of that State to the Court.”

[Authors’ emphasis]

According to Scheffer, the United States' proposal for a prerequisite, that ended up as Rule 195(2) of the Rules of Procedure and Evidence, leaves room for the prospect for an international agreement between the United States and the ICC concerning the matter of surrender of suspects.\(^{166}\) Whether such an agreement will ever be realized, or even to the interest of the parties is another question, nonetheless the wording of the text seems to leave room for such an agreement in the future if so wanted.

6.2 Article 98 in Relation to Other Regulations in the Rome Statute

6.2.1 Safeguarding National Sovereignty vs. Ending Impunity
One of the main problems when dealing with the Rome Statute seems to be that different parties prioritize differently. Thus the purpose of the Rome Statute and the safeguard of national sovereignty might be seen as contradicting each other. As mentioned in Chapter 4 of this dissertation, the Preamble of the Rome Statute sets out the goals for the Rome Statute and its member states. It further states the importance of working together to end impunity and stresses every state’s responsibility to exercise its criminal jurisdiction; the ICC is only a

\(^{161}\) The Preparatory Commission consisted of some of the UN member states and was formed with the purpose of negotiating and forming a statute to guide the formation, authority and procedural rules of an International Criminal Court. The work of the Preparatory Commission resulted in the Rome Statute.


\(^{163}\) Ib. at pp 220, 248-149.

\(^{164}\) The Rules of Procedure and Evidence is an instrument, beside the Rome Statute itself, used for the application of the Rome Statute of the International Criminal Court. The ICC is subordinate to these procedural rules in all cases.


complement to the national criminal systems. States must also respect the principles and purposes of the UN Charter, i.e. to refrain from threatening the political independence, or territorial integrity, of any state.

There are a number of safeguards in the Rome Statute to protect national sovereignty. One is in Article 17 of the Rome Statute which states the conditions for admissibility by the ICC, and leaves room for a state with jurisdiction over the case to have a primary right to take action. Further Article 16 of the Rome Statute gives the UN Security Council the right to hinder investigations and prosecutions for twelve months by asking the ICC not to act on it. This request is renewable. Here it is important to remember that the United States, as a permanent member of the UN Security Council, has the power to veto issues on its agenda. Whether these safeguards are enough for the politicians in the United States seems to be one of the issues where member states to the ICC and the United States do not agree.

Of importance might also be the fact that Article 98 agreements do not usually include any regulations demanding the state obtaining the jurisdiction due to the agreement to actually take action in a case. Article 98 agreements thus make up waivers and protect certain nationals, with a risk it will lead to suspects going without ever being tried in court. Article 98 agreements thus seem to safeguard the national sovereignty more than the goal of ending impunity as stated in the Rome Statute.

**6.2.2 Bilateral Cooperation vs. Rights and Obligations of Multilateral Cooperation**

Article 98 agreements are bilateral arrangements acting as waivers to the built in obligation of multilateral cooperation in issues of surrender as stated in the Rome Statute. In Article 58 of the Rome Statute the regulations for when the ICC can issue a warrant for arrest of a suspect are set forward. Article 58(5) states that the ICC, on the basis of the requirements in this Article, has a right to make a request for surrender of that person under Part 9 of the Rome Statute, i.e. the part regulating “international cooperation and judicial assistance”. Article 59 regulates the proceedings of arrest in the custodial state and also regulates under what circumstances a member state to the treaty is obliged to surrender a person. Thus, according to Article 59(1), the custodial state’s legislation and the provisions of part 9 in the Rome Statute shall be applied. This further leaves room for a state to use its legislation to take the matter into its own hands instead of handing over a suspect to the ICC.

Article 86 binds the member states to the Rome Statute to cooperate in all ways with the ICC in matters within its jurisdiction. Article 87(1a) further gives the ICC the power and authority to request member states to cooperate with the court. Article 87(5) also gives the ICC some power to ask non member states to the Rome Statute to cooperate with it. When member states to the Rome Statute fail to cooperate with the ICC upon its request, Article 87(7) gives the ICC the right to refer the situation to the Assembly of States Parties or the UN Security Council. Further, Article 89(1) gives the ICC the right to make a demand for arrest and surrender of a suspect to any country in which that person dwell. Member states to the Rome Statute has further an obligation under this Article, and under provisions of national law, to act in accordance with this request from the ICC.

**6.2.3 Article 98 Agreements vs. Ending Impunity**

The goal of ending impunity is further emphasized in the Rome Statute’s Article 27(1) which stresses the equality of subjects to the Rome Statute, i.e. it should apply in the same way to all persons regardless of their official power, or lack thereof. Article 27(2) strengthens this by stating that not even procedural rules or immunities accompanying different officials can
hinder the ICC from acting. Consequently a person’s official capacity shall not in any way
give right to be excused from the criminal responsibilities due to the Rome Statute. According to some commentators, the widespread signing of Article 98 agreements will therefore become a threat to this equality, since exempting almost all Americans from the ICC’s jurisdiction may lead to them escaping punishment. Thus counteracting the very principles of the Rome Statute as presented in its Preamble.

6.2.4 Problems Defining Words Used in Articles of the Rome Statute
Article 90 deals with the situation where a state receives competing requests for surrender of a suspect. Article 90(1) declares under what conditions a member state to the Rome Statute must give the request from the ICC priority. Article 90(4) stipulate that if a requesting country is a non member to the Rome Statute, and the requested country has no international obligation to surrender a person to the requesting state, then, provided the ICC has deemed the case admissible, the requested state shall hand over the suspect to the ICC. Further, Article 90(6) states that in a case applicable to Article 90(4), it is up to the requested state to determine whether to surrender the person to the requesting state or to the ICC. That is unless the requested state is bound by an “existing” international obligation to hand over a person to the requesting non member state to the Rome Statute.

Article 93 deals with cooperation in other matters than surrender. Article 93(3) stipulates that if a requested state is forbidden to assist in certain ways “on the basis of an existing fundamental legal principle of general application”, then the requested state shall confer with the ICC in order to resolve the dilemma. If necessary the ICC shall have to adjust its request. Here it is important to remember that the ICC in general is dependent upon the cooperation from states in order to function as intended.

Articles 90(6), 93(3) and 97(c) all contain the referral to “existing” obligations or agreements between states. But what does the word “existing” mean in these paragraphs. Should “existing” be interpreted as existing before the signing, ratification or entry into force of the Rome Statute? Or perhaps existing before the request of surrender or cooperation? This further complicates the debate concerning the legality of Article 98 agreements. From one viewpoint the agreements might be seen as legal when they existed before the request for surrender. From another point of view, only agreements made since the signing, ratification or entry into force of the Rome Statute are illegal since they did not exist at that time.

According to Crawford, Sands & Wilde the wording “obligations under international agreements” as formulated in Article 98(2) must be interpreted against the background and wording in Articles 90(6) and 93(3). They further maintain that it is not possible that the wording in Article 98(2) only refer to already existing agreements.

6.3 Article 98 in Relation to Regulations within the Vienna Convention

6.3.1 Legality and Illegality under International Law
As Mary Penrose stresses, it is of importance to recognize that “international law is not really law at all” in traditional meaning, but rather “a symbiotic fusion of law, politics, and the

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competing interests of sovereignty".170 And in an attempt to analyze the question of Article 98 agreements’ legality internationally, some articles within the Vienna Convention must be looked into.

Tallman says that Article 98 agreements might not be covered by, or thought of, in the Rome Statute, and might also be contrary to the statute. However, he says, this in itself does not lead up to a fruitful conclusion that those agreements are unlawful. In order for such agreements to be illegal they have to violate an international obligation laid upon that state. Signing of Article 98 agreements can not bee seen as breaching international law, such as the Rome Statute, with regards to Article 18 of the Vienna Convention, unless the state signing an Article 98 agreement has also signed but not yet ratified the Vienna Convention. Article 18 of the Vienna Convention does not inflict any obligations on members to the Rome Statute to refrain from acting in a manner defeating the purpose of that treaty. Accordingly it thus becomes important to determine in what order a state has become a member to the treaties it is bound to when deciding whether an Article 98 agreement is legal or not.171

Further, the legal significance of ‘unsigning’ a treaty remains unclear172 and its status can be of importance. If the United States still is a signatory to the Rome Statute, it is bound by the Vienna Convention to oblige to the Rome Statute and not oppose its purpose.173 Emily Krasnor argues that the retraction, or “unsigning” of a treaty, is foreign to the Vienna Convention since states which have signed a treaty, but do not want to go further with it usually just decline ratifying it.174 Thus fueling the question of whether “unsigning” exists as a phenomenon and if it even is an actual possibility.

6.3.2 Bound by a Treaty or Not; Intent, Signature, Ratification and Retraction of Signature

According to Article 11 of the Vienna Convention a state can agree to be bound by a treaty in several ways. Among these methods are through a signature or a ratification of a treaty. However, Article 12 of the Vienna Convention conditions the effect of a signature to depend upon either what effect the treaty in question subscribe to a signature, or what the consenting states have decided a signature will have for effect. It could also depend on whether a state makes its intent to be bound by signature either during the negotiation, or through a statement by a state representative within his full powers. These articles have consequently left room for questions concerning whether the United States should be seen as bound by the Rome Statute or not.

Edward T. Swaine raises an important question in the matter where ratification is needed for a state to become a member to a treaty. He asks; “what significance remains for prior acts, particularly signature”175 in that case? He recaptures the discussion of this fact by referring to different sources and stating that some of them simply claims signatures’ lack of any legal effect while other maintain that signatures have the effect of putting into force an obligation on the signing states to ratify. However, the later argument would thus weaken the meaning of

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173 Article 18 and 31 of the Vienna Convention.
175 Swaine, Edward T., (2003), pp 2066-2067.
ratification since in effect a signature has almost the same consequence as that of ratification.\(^\text{176}\)

### 6.3.3 Bound by a Treaty or Not; Obligations

Article 18 of the Vienna Convention declare that states have an obligation to act in a manner which does not defeat the purpose and object of a treaty in question for as long as it has signed the treaty, or intends to do so. Only when a state has clearly expressed that it has no interest in becoming a member to a treaty in question, or when the entry into force of the treaty have been excessively delayed, is a state free to counteract the object and purpose of that treaty. A member state to a treaty has thus, under Article 18, a principal loyalty to that treaty and is consequently not legally permitted to consent to consecutive agreements at odds with the first treaty.\(^\text{177}\) The question is thus whether the United States through its signature is bound to both the Vienna Convention and the Rome Statute, or just one of them, or none of them?

Swaine says that the terms and influence of Article 18 of the Vienna Convention is uncertain, but despite that, it still retains a dominating authoritative power as “interim obligations” when it comes to coping with the situation in between the time of signature and ratification.\(^\text{178}\)

Chimène Keitner on the other hand is certain, and maintains, that although a state through its signature of the Rome Statute is bound not to counteract the treaty in accordance with Article 18 of the Vienna Convention, the United States is not a member to the Vienna Convention or a member to the ICC until it has ratified the Rome Statute.\(^\text{179}\) Thus, if a signature can be seen to be binding under Article 18 of the Vienna Convention, then American counteractions against the Rome Statute prior to the “unsigning” of the treaty can be seen as unlawful. And if there is no legal way to “unsign” a treaty the United States can still be seen as bound to the Rome Statute. In that case, Article 98 agreements can be considered to be unlawful. However if a signature is not to be seen as binding, the United States has never acted unlawfully when counteracting the Rome Statute, leaving room for the possibility of Article 98 agreements to be considered lawful.

What becomes important at this stage is thus to look at what intent the United States had when signing the Rome Statute. The catch with Article 18 of the Vienna Convention is that a state has no obligation to remain a signatory for all eternity if it, in accordance with Article 18(a) has clearly stated its intention not to become a member to the treaty. However, as Swaine notice, Article 18 does not stipulate any particular ways for how to proceed when a State wants to make its intent known not to become a member to a treaty.\(^\text{180}\)

This discussion is further complicated by the fact that the United States has in fact not ratified the Vienna Convention either. However The Third Resentment of Foreign Relations identifies the binding effect of the Vienna Convention as a manifestation of International Customary Law.\(^\text{181}\) Thus it seems like the United States might be bound under international law to proceed in accordance with Article 18 of the Vienna Convention.\(^\text{182}\) Maria Frankowska

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\(^\text{176}\) Swaine, Edward T., (2003), p 2067.
\(^\text{178}\) Swaine, Edward T., (2003), p 2071.
\(^\text{180}\) Swaine, Edward T., (2003), p 2088.
further explains how the United States is bound to the Vienna Convention through “opinion juris” even though it has not ratified the treaty. According to her, the Vienna Convention should be seen as a “restatement of customary rules, binding States regardless of whether they are members to the Convention.”

Thus, the content of Article 18 has further fuelled the debate on whether the United States can be seen as bound or not by the Rome Statute and if it has the right to counteract the object of the Rome Statute and the ICC.

6.3.4 Honoring International Treaties and the Use of “Good Faith”

According to Article 31(1) of the Vienna Convention a treaty should be interpreted in “good faith,” in the spirit of the common meaning and circumstance, and according to the purpose and object of the treaty. Article 32(a) states that additional “means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion […] can be used…] to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 […] leaves the meaning ambiguous or obscure”. Further, Article 26 states the obligation and principle of *pacta sunt servanda*. It also declares that these treaties shall be performed by its members in “good faith”. However, after reading the Vienna Convention the authors find that it does not further define “good faith” or how it should be interpreted. Article 26 hence leave room for interpretations to when a state act in a manner contrary to that required in Article 18 of the Vienna Convention. It can consequently be deemed as conducting a “material breach of that treaty.” However, in order to be guilty of a breach of a treaty a member state’s conduct must not only have a “possibly” defeating effect, but an “actually” defeating effect on the treaty in question. Article 26 thus only requires members to a treaty not to “actually defeat the treaty”.

This has sparked a debate concerning whether or not just the signing of Article 98 agreements can be seen as “actually” defeating the Rome Statute. Jeffrey S. Dietz is one of the commentators who claim that merely signing such an agreement can not be seen as “actually” defeating the statute unless the signing state has the intention of defeating the principles and goals of the original treaty, i.e. the Rome Statute in this case.

6.3.5 Successive Agreements

Article 30 of the Vienna Convention regulates the application of consecutive treaties concerning the same issue. Article 30(1) decides that states that are members to successive treaties that deals with the same issues will have its obligations (as well as its rights) determined by this Article. Article 30(4) deals with the relations between states and determines the norm hierarchy between different treaties when not all members to an older treaty come together as members to a later treaty. Paragraph 4a of Article 30 states that in matters between states that are members to both an older and a newer treaty the older “treaty applies only to the extent that its provisions are compatible with those of the later treaty”. Paragraph 4b in the same article states that, in matters between a state member to both the older and the newer treaty and a State member only to one of them, the treaty to which both

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184 Ibid.
186 Ib. at p 155.
187 Ib. at pp 155-156.
states are members shall regulate their conduct towards each other. Article 41 states the condition for states to make agreements among themselves that modifies multilateral treaties.

So called Article 98 agreements can be seen as successive treaties to the Rome Statute since they are in fact relating to the same issue. However, it is important to remember that only members to the Rome Statute are bound by it. But according to International Customary Law and Article 18 of the Vienna Convention, also signatories have obligations. Thus, whether this article 30 of the Vienna Convention applies to a state or not depend upon facts discussed above such as what effect a signature or a withdrawal of signature have. The regulations regarding successive agreements may be of importance for determining the legality of Article 98 agreements.

6.4 Article 98 in Relation to Regulations within the UN Charter

6.4.1 The Goals Set Forward in the UN Charter
Paragraph 3 in the Preamble to the UN Charter states that its member states have agreed “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. Thus the United States, as a member of the UN, have an obligation to refrain from making the upholding of certain obligations harder. Although, the question still remains whether Article 98 agreements are to be seen as “actually” or “possibly” having a “defeating” effect on the maintenance of obligations resulting from international agreements.

Article 2 of the UN Charter states the principles to which the member states of the UN shall act in accordance with. Article 2(1) focuses on the equality and sovereignty of the member states. Article 2(3) obligates the member states to resolve their international disagreements in a peaceful manner as not to threaten justice and international peace and security. Article 2(4) further binds the member states to avoid the use of threat or force against the political independence or territorial integrity of any state when maintaining their international relations. These paragraphs of the UN Charter can become important when deciding upon whether Article 98 agreements have a “possibly” or “actually” defeating effect. As mentioned above, the United States has in some instances forced help-seeking states to sign bilateral agreements with the United States in order to get the much needed help from them.

Article 103 of the UN Charter states that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. Thus, it does not matter whether or not the United States is seen as members to either the Vienna Convention or the Rome Statute, or not. Either way, as a member of the UN, the United States shall first of all conform to the obligations put forward in the UN Charter, and is thus bound to conduct in accordance with the goal as presented in paragraph 3 of the Preamble of the UN Charter.
7. Analysis and Conclusion

7.1 Analysis
In the beginning of this dissertation the authors set out to find the answer to the much debated question whether Article 98 agreements created by the United States and entered into by a large number of states are to be considered legal or not.

Some commentators, and especially the United States itself, claim that Article 98 agreements are fully within the scope of Article 98 of the Rome Statute. Others disagree, saying that they are not within the range of the original intent behind the Rome Statute and therefore should not be legal under Article 98(2).

As said above, the ICC was formed by members of the UN and is governed by the Rome Statute. The thought behind the formation of the ICC and the Rome Statute was in large to eradicate impunity for some of the most egregious crimes in the world. However, only states that are members to the Rome Statute have a duty to fulfill the obligations laid upon them by this statute. According to some commentators, the United States should still be considered bound to the Rome Statute through its signature. While others believe they should not be considered obligated by the statute, either because they never ratified it or because they retracted their signature. A third opinion is that the United States, as a member of the UN, needs to respect the Rome Statute in order to honor Paragraph 3 of the Preamble to the UN Charter.

The Vienna Convention binds its members not to act in a manner as to counteract the objective and intentions behind other treaties they join. That specific part of the Vienna Convention is also considered to be included in International Customary Law, thus binding all states – not just its members – to it. If the United States then is considered bound by the Rome Statute, it would have an obligation to interpret it in good faith and to act in a way as not to oppose its goal. This matter is also discussed with diverging conclusions. Generally, it is difficult to know who is bound, and to what extent, by International Customary Law. Some claim that the United States is not bound by the Vienna Convention simply because it has not ratified it, regardless of International Customary Law. It is thus not clear whether the United States can be said to be bound by either of the treaties and thus have an obligation not to counteract the goals of the Rome Statute or not.

However, while the Vienna Convention does not give an exact answer to how a state can retract its signature from a treaty it wishes to leave, it does say that its desires should be made clear. The way the United States let the world know they were no longer interested to join the Rome Statute has not been well received. It is discussed whether a retraction of a signature is even possible to make.

If the United States is bound by neither the Rome Statute nor the Vienna Convention, they would be able to promote Article 98 agreements legally. But for the other party to the agreement, one will have to look at every state that has signed one separately. As discussed above in Chapter 5.2.2, member states to the Rome Statute have the most to take into account here. It all depends on other possible legal obligations a state might have towards the international community, but also to its own domestic laws.

We also must take the powerful outcome of the domestic legislations the United States has adopted into account, especially ASPA and the Nethercutt agreement. In many cases these
laws left states that are dependent on American aid without a choice whether to sign an Article 98 agreement or not. The fact that President Bush now has revised some of the effects of these acts is positive, but it does not revise the acts themselves.

The picture is not entirely clear when it comes to what international law really is either. One cannot isolate law from politics, state sovereignty and issues of trade and business on an international level as is possible domestically. Although, despite being such a diverse field, the same internationally recognized principles are supposed to be applicable. Thus, in order to find someone guilty of an accusation in a court of law, proof is needed. One needs to be able to prove a person’s (or state’s) guilt beyond reasonable doubt, not just that the act is morally wrong. Thus making the Unites States’ Article 98 agreements not necessarily legal, but by using the existing loop-holes, they are not illegal either.

The authors to this dissertation also wonder, since the actual risk of an American being tried before the ICC is very small, and would depend on the United States not being willing to prosecute through the principle of complementarity, what the real reason is for its opposition. Could it have more to do with politics than law? Could it be that the ICC has a potential of being such a powerful way to cooperate for the states of the world that the United States will not be able to be in control? Are these bilateral Article 98 agreements really a way to shield Americans from prosecution by the ICC, or a way of undermining the whole institution?

7.2 Conclusion
Whether Article 98 agreements are legal or not will have to be decided separately for each and every state that has signed one, unless it can be proven that the United States is in fact bound by both the Vienna Convention and the Rome Statute – in which case the state is clearly breaking its international obligations – but that has not yet been possible to sustain.

Member states to the ICC will breach the object of the Rome Statute if their signing an Article 98 agreement leads to an accused escaping prosecution. If the act of signing an agreement in itself defeats the purpose of the Rome Statute remains unclear. Several articles within the Rome Statute concern state cooperation, especially Articles 86, 87, 89 and 90, which would suggest that signing Article 98 agreements would oppose the statute itself. However, these Articles are not entirely clear on what a state can do while still cooperating with the ICC, which brings this into a grey area.

Member states to both the Rome Statute and the Vienna Convention will also have to take Article 31 of the Vienna Convention into account, regulating that a member state to a treaty can not defeat its purpose. States that are members to the Rome Statute and signatories to the Vienna Convention will also be bound not to counteract the Rome Statute through Article 18 of the Vienna Convention. This may apply to all states through International Customary Law.

Concerning non member states to the ICC, its other legal obligations might have an impact on the outcome whether they can sign an Article 98 agreement or not. There is a greater possibility that these states can sign an agreement with the United States than member states to the ICC.

As for whether Article 98 agreements are legal in themselves; it is very difficult to say at this point. There are no laws applicable to the entire world and this kind of legal undertakings depend on the individual state’s other obligations towards themselves, other states and the international community.
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