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INTERNATIONAL CRIMINAL COURT:
US efforts to obtain impunity for genocide, crimes against humanity and war crimes

Amnesty International is deeply concerned by the current worldwide campaign by one state, the United States of America (USA), to persuade states to enter into impunity agreements which seek to prevent US nationals accused of genocide, crimes against humanity or war crimes from being surrendered to the International Criminal Court. These impunity agreements do not require the USA or the other state concerned to investigate and, if there is sufficient admissible evidence, to prosecute the US national accused by the International Criminal Court of such horrendous crimes. The organization is dismayed that two states parties, Romania and Tajikistan, have signed such an agreement with the USA. Both states parties will violate their obligations under Article 86 of the Rome Statute to arrest and surrender persons accused of such crimes to the International Criminal Court if their parliaments ratify these agreements. Amnesty International is also concerned that two states that have signed the Rome Statute, East Timor and Israel, have signed impunity agreements – in Israel's case, the agreement also precludes arrest and surrender of Israeli nationals to the International Criminal Court. Both states will violate their obligations under international law not to defeat the object and purpose of the Rome Statute if their parliaments ratify these impunity agreements. Moreover, not only will these states surrender their sovereign right to determine which courts exercise jurisdiction over persons accused of crimes in their territory or found there, but they will also have to renegotiate all their existing extradition agreements. Amnesty International, together with the other more than 1000 members of the Coalition for the International Criminal Court (CICC) will be seeking to prevent states from entering into such impunity agreements, to revoke any such agreements and to urge the Court not to accord them any legal effect.[1]

As explained below, the object and purpose of the Rome Statute is to end impunity for the worst possible crimes in the world in accordance with the principle of complementarity - which places the primary responsibility of investigating and prosecuting these crimes on states, but ensures that the International Criminal Court will be able to exercise jurisdiction when states fail to fulfil these responsibilities. A fundamental principle underlying the Rome Statute is that no one is above the law and

[1] On 13 August 2002, William R. Pace, Convenor of the CICC declared that "[t]he threat to cut off military aid, and the coercive actions undertaken recently in the Security Council to get exemption for peacekeepers, are part of a multi-pronged effort of the US government to undermine international justice, international law and international peacekeeping." He added, "US spokespeople say these agreements are allowed under the statute that creates the ICC, but legal experts from leading NGOs and from governments disagree. Now the US is trying to bully governments into signing these agreements, just as it coerced them to agree to exempt US peacekeepers from the ICC in the Security Council last month despite consensus that this would be in violation of international law, the UN Charter and the Rome Statute. International law cannot be subordinated to the will of one country." Coalition for the International Criminal Court, *Experts Available: US Threatening to Withhold Military Aid over ICC Experts Refute Legality of Immunity Agreements US is Seeking*, 13 August 2002. See also, Coalition for the International Criminal Court, Bilateral agreements proposed by US government, 23 August 2002 (*both documents obtainable from:* http://www.iccnow.org).

immune for genocide, crimes against humanity or war crimes. Any possible exceptions in the Rome Statute to this principle must, therefore, be strictly construed in a manner consistent with the object and purpose of the Statute. As the language and drafting history of Article 98 (2) demonstrate, it was introduced to ensure that existing Status of Forces Agreements (SOFAs) were not nullified by the later in time Rome Statute.[2] It was not designed as a licence for impunity from the Court by letting states enter into subsequent bilateral agreements undermining the entire statutory scheme.

I. THE OBJECT AND PURPOSE OF ROME STATUTE TO END IMPUNITY THROUGH COMPLEMENTARITY

Under customary international law, as reflected in Article 31 (1) of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[3] As demonstrated below, any claim that the US impunity agreements were consistent with Article 98 (2) of the Rome Statute would not meet the requirements of an interpretation in good faith.[4] Such an interpretation would be completely at odds with what the states at Rome intended and, thus, contrary to the overriding principle of treaty interpretation under international law.[5]

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[2] A SOFA is a treaty governing the legal status of members of armed forces of one state (the sending state) stationed in another state (the receiving state) pursuant to that agreement. It also spells out which state has the primary duty to investigate and, if there is sufficient admissible evidence, prosecute members of armed forces from the sending state who were suspected of committing crimes on the territory of the receiving state.

[3] Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), Art. 31 (1).

[4] As one authority on treaty law has explained:

> "The first principle - interpretation *in good faith* - flows directly from the principle of *pacta sunt servanda* enshrined in Article 26 [of the Vienna Convention]. Interpretation is part of the performance of the treaty, and therefore the process of examining the relevant materials and assessing them must be done in good faith. Even if the words of the treaty are clear, if applying them would lead to a result which would be manifestly absurd or unreasonable (to adopt the phrase in Article 32 (b) [of the Vienna Convention]), the parties must seek another interpretation."

Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press 2000) 187.

[5] As McNair has explained, each of the various rules of interpretation "is merely a *prima facie* guide and cannot be allowed to obstruct the essential quest in the application of treaties, namely, to search for the real intention of the contracting parties in using the language employed by them". Arnold Duncan McNair, *The Law of Treaties: British Practice and Opinions* 175 (Oxford: Clarendon Press 1938). He reiterated:

> "The primary rule is that the tribunal should seek to as certain from all the available evidence the intention of the parties in using the word or phrase being interpreted. The many rules and maxims which have crystallized out and abound in the text-books and elsewhere are merely *prima facie* guides to the intention of the parties and must always give way to contrary evidence of the intention of the parties in a particular case. If they are allowed to become our masters instead of our servants these guides can be very misleading."

Ibid., 185.

The requirement that the treaty be interpreted "in accordance with the ordinary meaning to the terms of the treaty" does not, of course, mean a simplistic, literal interpretation of the words. As Article 31 (1) makes clear, they must be interpreted both "in their context" and "in the light of its object and purpose". As a leading authority on the law of treaties has explained, "while a term may be 'plain' *absolutely*, what a Court adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made".[6]

Article 31 (2) of the Vienna Convention explains that the context of the terms includes the text and preamble of the treaty. Article 31 (3) requires that subsequent agreements and practice of the parties, as well as relevant rules of law applicable in the relations between the parties, must be taken into account. As indicated below, the widespread reluctance of states parties and signatories of the Rome Statute to enter into impunity agreements with the USA is further evidence that confirms that they are contrary to the Statute.

In addition, under customary international law, as reflected in Article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation to confirm the meaning determined in the manner outlined above or when this method leads to ambiguity or absurd or unreasonable results:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."[7]

As discussed below, the drafting history confirms that Article 98 (2) was not intended to include agreements such as the US impunity agreements. Indeed, any interpretation that Article 98 (2) did cover such agreements would lead to the manifestly absurd and unreasonable result that a non-state party could subvert the fundamental principle in the Rome Statute that *anyone*, regardless of nationality, committing genocide, crimes against humanity or war crimes on the territory of a state party is subject to the jurisdiction of the International Criminal Court when states are unable or unwilling genuinely to investigate and, if there is sufficient admissible evidence, to prosecute. Indeed, if taken to its logical conclusion, it would permit every state party to escape its responsibilities under Article 86 of the Rome Statute to arrest and surrender persons from non-states parties accused of crimes on their territory or the territory of another state party.

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[6] McNair, *supra*, n. 5, 175. *See also* N.E. Simmonds, *Between Positivism and Idealism*, 50 Cam. L. J. 308, 311-318 (1991).

[7] Vienna Convention on the Law of Treaties, *supra*, n. 3, Art. 32. The International Court of Justice has stated that Articles 31 and 32 of the Vienna Convention reflect customary international law. *Libya v. Chad*, 1994 ICJ Rep., para. 41. *See also Restatement (Third) of the Foreign Relations Law of the United States* § 325, para. 1 (American Law Institute 1987).

The overall object and purpose of the Rome Statute is to ensure that those responsible for the worst possible crimes are brought to justice in all cases, primarily by states, but, under the underlying principle of complementarity, if they prove unable or unwilling to do so, by the International Criminal Court as a last resort.[8] Thus, any agreement not expressly provided for in the Rome Statute that precludes the International Criminal Court from exercising its complementary function of acting when states are unable or unwilling to do so, defeats the object and purpose of the Statute.

A key component of the object and purpose of the Statute is incorporation in Article 27 of the fundamental principle that no one is immune for crimes under international law such as genocide, crimes against humanity or war crimes. Article 27 (1) provides that the Rome Statute "shall apply equally to all persons without any distinction based on official capacity", and Article 27 (2) states that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".[9] That jurisdiction, apart from a referral of a situation pursuant to Chapter VII of the United Nations Charter, extends under Article 12 of the Rome Statute to crimes committed by any person over the age of 18, regardless of nationality, in the territory of a state party or state making a special declaration and to crimes committed by a national of one of these states.[10]

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[8] The object and purpose of the Rome Statute is set forth in the Preamble, in particular in the following paragraphs:

> "Affirming that the 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,
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
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> . . . .
>
> Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
>
> Resolved to guarantee lasting respect for and the enforcement of international justice[.]"

[9] Article 27 (Irrelevance of official capacity) reads in full:

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

[10] Article 12 (Preconditions to the exercise of jurisdiction) provides:

> "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
>
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

That this component of the object and purpose of the Rome Statute is a central one is demonstrated by the fact that there are only three narrow exceptions - or apparent exceptions - limiting the Court's exercise of such jurisdiction: (1) certain exceptional cases provided for in Article 90 (6) when states parties are permitted to give priority to competing extradition requests from non-states parties seeking extradition of their nationals under *existing* extradition agreements over requests by the Court for surrender of an accused, when certain factors are present indicating that compliance with the extradition request will not lead to impunity; (2) the special, limited temporary, diplomatic immunities and state immunities under Article 98 (1); and (3), as explained below in Section II, existing SOFAs envisaged in Article 98 (2).[11]

As noted below, it is up to the International Criminal Court, an independent international judicial body, and not individual states, to determine what legal effect under the Rome Statute to give to the US impunity agreements.

II. ARTICLE 98 (2) LIMITED TO EXISTING STATUS OF FORCES AGREEMENTS

Article 98 (2) applies to existing SOFAs, not to SOFAs entered into after a state has become a party to the Rome Statute. Nevertheless, even if the International Criminal Court were to hold that this provision also applies to renewed or new SOFAs, those SOFAs would, of course, have to be consistent with the Rome Statute and other international law. In addition, as explained below, a state entering into a US impunity agreement that had previously signed the Rome Statute would be acting in a manner

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(b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

[11] Article 90 (6) makes clear that a state party may give priority to a competing extradition request from a court of a non-state party over a request for surrender from the International Criminal Court only if it considers factors that will ensure that compliance with that extradition request will not lead to impunity, such as the possibility of subsequent surrender to the International Criminal Court by the state making the request if it proves unable or unwilling to investigate or prosecute. It provides:

"In cases where paragraph 4 applies [a non-state party has requested extradition, but there is no international obligation to extradite] except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including, but not limited to:
(a) The respective dates of the requests;
(b) The interests of the requesting State, including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
(c) The possibility of subsequent surrender between the Court and the requesting State."

that would defeat the object and purpose of the Statute and, therefore, would be in violation of its obligations under customary international law governing treaties.[12]

Article 98, which emerged at the Rome Diplomatic Conference, was drafted to address the question of the relationship between the obligations of states parties under the *future* Rome Statute and *existing* obligations of states parties under international law.[13] Paragraph 1 of Article 98 was drafted to deal with the narrow question of the relationship between the obligations of states parties to the Rome Statute and prior obligations under customary or conventional international law concerning diplomatic immunities and state immunities, particularly those incorporated in the Vienna Convention on Diplomatic Relations. As explained below, paragraph 2 of Article 98 was designed to address the problem of the effect of a subsequent multinational treaty, the Rome Statute, on existing agreements, that is, SOFAs. In both instances, the drafters adopted carefully crafted provisions, with very limited exceptions - or apparent exceptions - to the overall object and purpose of the Rome Statute.

The language of Article 98 (2). It is clear from the language of Article 98 (2) itself, without any reference to the drafting history, that the drafters intended to cover SOFAs and not other agreements. The phrase, "sending State", in that paragraph is a term of art used exclusively or almost exclusively in such agreements to refer to the state whose forces are stationed in another state (receiving or host state) pursuant to

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[12] Under Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) of the Vienna Convention on the Law of Treaties, which is considered to reflect customary international law, a state that has signed a treaty may not act in a way that would defeat the object and purpose of the treaty pending a decision whether to ratify the treaty, even before that treaty has entered into force:

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

See also Restatement (Third), supra, n. 7, § 312, para. 3 (signatory is "obliged to refrain from acts that would defeat the object and purpose of the agreement"). The International Law Commission considers that this rule is "generally accepted". 2 *Yearbook of the International Law Commission* 169, 202 (1969). *See also Certain German Interests in Polish Upper Silesia (Merits)*, 1926 P.C.I.J. ser. A, No. 7, 30. Of course, the USA ceased to be under such an obligation as a signatory on 6 May 2002 when it stated that it had decided not to ratify the Rome Statute and denounced its signature.

[13] Article 98 (Cooperation with respect to waiver of immunity and consent to surrender) reads:

> "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."

the agreement.[14] Subsequent state practice rejecting efforts by the USA to give the term "international agreement" a broader scope than intended by the drafters of Article 98 (2) is further evidence confirming this meaning. An attempt by the USA in the Preparatory Commission for the International Criminal Court to authorize the UN to include an exemption in its relationship agreement with the International Criminal Court for nationals of non-states parties from the Court's jurisdiction, on the supposed ground that the relationship agreement was an "international agreement" within the meaning of Article 98 (2), was squarely rejected by the Preparatory Commission. A similar attempt by the USA to obtain an exemption under the Rules of Procedure and Evidence by authorizing the International Criminal Court to do so through an agreement with the USA also failed.[15]

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[14] *See A Legal Analysis of the Proposal and Options for a Compromise Formula in the Light of the Debate in the Working Group on Friday, 23 June 2000: A Contribution by Germany, reproduced as an annex in* Hans-Peter Kaul, *The Continuing Struggle on the Jurisdiction of the International Criminal Court, in* Horst Fischer, Claus Kreß & Sacha R. Lüder, *International and National Prosecution of Crimes under International Law* 44 (Berlin 2001).

[15] The contention by the head of the US delegation at the Preparatory Commission that Rule 195 (2) of the draft Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, 30 June 2000, which restates the requirements of Article 98 (2) of the Rome Statute and was sought by the USA, "leaves open the possibility of negotiation of an international agreement within the meaning of Article 98 (2) between the ICC and the United States to protect any American citizen from surrender to the ICC", David Scheffer, *Staying the Course with the International Criminal Court*, 35 Cornell Int'l L. J. 47, 90 (2002), is not correct, as the repetition of the term, "sending State", itself demonstrates. Rule 195 (2) reads:

> "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."

Moreover, the drafting history of this rule in the Preparatory Commission clearly demonstrates that other governments flatly rejected the US claim as inconsistent with the narrow scope of Article 98 (2) as intended by the drafters of that article. At the fourth session of the Preparatory Commission, the USA informally circulated a two-part proposal. The first part was a draft rule that would permit the International Criminal Court to enter into agreements preventing the surrender of nationals of a non-state party to the Court and the second part, which the USA indicated was an integral part of the proposal, would be included in the relationship agreement between the UN and the Court and would have required the approval of the non-state party before the Court could accept the surrender of one of its nationals acting under that state's direction. At the fifth session, the USA introduced only the first part of this proposal, asking that it be examined "on its own merits". However, in the Working Group on the Rules of Procedure and Evidence,

> "thirty-nine of the forty-five delegations (87 percent) criticized the proposed rule and questioned its compatibility with the Statute. . . . In an effort to avoid the perceived risk that the United States would stop participating in the commission, but at the same time to respect the integrity of the Statute, the working group recommended, without a vote, that the commission adopt draft Rule 195 (2), subject to a proviso proposed by Germany. . . . The proviso, which is to be included in the Proceedings of the Preparatory Commission, and comes verbatim from Ambassador Scheffer's speech proposing the draft rule, states: 'It is generally understood that Rule 195 (2) should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State.'"

Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 Am. J. Int'l L. 773, 786 (2000). After the Working Group recommended adoption of this compromise package, Samoa pointed out that Article 98 was intended to include only agreements between states and did not "authorize, permit or empower" agreements involving international organizations. *Ibid*. No government delegation criticized this interpretation. After the Preparatory Commission adopted the compromise, Portugal, on behalf of the European Union and associated states, said that any rule must respect the integrity of the Rome Statute and Angola, Cuba, New Zealand and Nigeria expressed similar concerns. *Ibid*. See also Frederik Harhoff & Phakiso Mochochoko, *International Cooperation and Judicial Assistance, in* Roy S. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and*

The intent of the drafters to address existing SOFAs. Although it is true that *some* of the delegates at the Rome Diplomatic Conference wished that Article 98 (2) apply to renewals of existing SOFAs and even to new SOFAs, this view was anything but universally shared and the wording of Article 98 (2) does not suggest that it covers new agreements.[16] However, even if Article 98 (2) were determined by the International Criminal Court to apply to renewed SOFAs and new SOFAs entered into by states parties to the Rome Statute, these agreements would have to be consistent with the object and purpose of the Statute, as well as with other international law (see below).

Published commentaries on Article 98 by participants in the Rome Conference confirm that Article 98 (2) was designed to address the question of the effect of the Rome Statute on *existing* SOFAs. Hans-Peter Kaul and Claus Kress, both members of the German delegation, explained that Article 98 (2) was designed to address possible – not certain – conflicts between existing obligations under SOFAs and under the Rome Statute:

> "The idea behind the provision [Article 98 (2)] was to solve legal conflicts which might arise because of Status of Forces Agreements which are already in place. On the contrary, Article 98 (2) was not designed to create an incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the Court."[17]

Kimberly Prost, a member of the Canadian delegation, and Angelika Schlunck, a member of the German delegation, have noted that states were concerned about *existing* international obligations when drafting Article 98.[18]

Evidence 667-669 (Ardsley, New York: Transnational Publishers 2001) (recounting the history of the US proposal and its rejection by the Preparatory Commission); Kaul, *supra*, n. 14, 21 *et seq*.; Irene Gartner, *The Rules of Procedure on Co-operation and Enforcement, in* Fischer, Kreß & Lüder, *supra*, 430 *et seq*.

[16] The delegates that were of this view contended that renewed or new SOFAs would not be in violation of the obligations of states parties of the Rome Statute or the Vienna Convention on the Law of Treaties on the ground that the standard provisions of such agreements were contemplated within the scope of Article 98 (2) and did not fundamentally change from one agreement to another. However, these provisions have significantly changed over the past half-century, as described below.

[17] Hans-Peter Kaul & Claus Kreß, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. Int'l Hum. L. 143, 165 (1999). *See also* Hall, *supra*, n. 15, 786 n. 36 (noting that Article 98 (2) was added to address existing agreements on status of forces).

[18] Kimberly Prost & Angelika Schlunck, *Article 98, in* Otto Triffterer, ed., *The Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 1131 (Baden-Baden: Nomos Verlagsgesellschaft 1999) ("All States participating in the negotiations in Rome had concerns about conflicts with existing international obligations. Thus, there are several provisions within Part 9, including those in articles 90, 93 para. 9 and 98 which address that concern. . . . Even States which advocated for a strong Court were concerned about actions taken pursuant to this Statute, which would violate these existing fundamental

US commentary has implicitly recognized that Article 98 (2) does not apply to agreements entered into after a state has signed the Rome Statute. For example, although one US academic commentator has asserted that Article 98 (2) applies to such agreements, not just to existing agreements, she urged the Preparatory Commission for the International Criminal Court to adopt "a binding interpretive statement" confirming the supposed understanding at the Rome Diplomatic Conference that it applied to both existing and future SOFAs, a statement that would, of course, not be necessary if her assertion were correct.[19] This academic interpretation should be seen in the light of its underlying premise - US nationals suspected of genocide, crimes against humanity or war crimes should never be subject to the jurisdiction of the International Criminal Court.[20]

The role of SOFAs under the Rome Statute. Article 98 (2) was designed, consistently with the overall scheme of the Rome Statute to end impunity through complementarity and the law of treaties, to take into account the allocation of priority among sending and receiving states under existing SOFAs. Under classical international law principles, the subsequent Rome Statute could not of itself override pre-existing obligations of states parties to non-states parties under other treaties.[21] Although the Rome Statute, like the Charter of the United Nations, is a special treaty of constitutional nature, there is no need to examine that aspect of the Statute here. To the extent that existing SOFAs perform this function of allocating priority between

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obligations at international law."). Although this excerpt cites only examples of existing obligations relevant to paragraph 1 of Article 98, its general language clearly applies to both paragraphs of that article.

[19] Ruth Wedgwood, *The International Criminal Court: An American View*, 10 Eur. J. Int'l L. 93, 103 (1999).

[20] *See* Wedgwood, *supra*, n. 19, 99 (objecting to the International Criminal Court exercising jurisdiction over nationals of non-states parties accused of genocide, crimes against humanity or war crimes in the territory of a state party without the express consent of the non-state party). Two members of the German delegation, which played a key role in the Rome Diplomatic Conference, have commented on the contention by Wedgwood that Article 98 (2) was intended to cover future SOFAs:

> "The suggestion is to issue a 'binding interpretative statement in the Preparatory Commission' that both new and existing 'status of forces agreements' will be respected under Article 98 (2). This proposal confirms the thesis underlying this study [by the two delegates] that jurisdiction and cooperation are intimately interlinked. This necessarily means that almost identical practical results can be reached by using either set of rules. Therefore, the crucial question is whether the suggested 'interpretation' of Article 98 (2) does not lead to the same kind of watertight protection of soldiers of a non-State Party as the 'official acts-option' [a last-minute US proposal to exempt nationals of non-states parties from the jurisdiction of the Court when the government declared that the conduct in question was an official act]. If the answer to this were in the affirmative, it would be very hard indeed to concede by way of an interpretive statement that a State Party acted in conformity with its obligation to 'fully cooperate' with the Court in concluding [a] new Statu[s] of Forces Agreement to this effect."

Kaul & Kreß, *supra*, n. 17, 174.

[21] Vienna Convention on the Law of Treaties, Art. 30 (4). *See also Restatement (Third), supra*, n. 7, § 323, para. 2.However, if the parties to a pre-existing SOFA are also parties to the Rome Statute, to the extent that there might be any conflict, the Rome Statute would prevail. Vienna Convention on the Law of Treaties, Art. 30 (3).

a sending state and a receiving state, they are not necessarily inconsistent with the Rome Statute or other international law. As discussed below, the allocation of jurisdiction between sending and receiving states has evolved over the years and contemporary SOFAs, which are most consistent with the object and the purpose of the Rome Statute, leave the decision which state may exercise jurisdiction in cases of great public concern to the receiving, not the sending, state. However, any SOFA or similar international agreement must still be consistent with other obligations under international law and not lead to impunity.

NATO SOFA. Article VII of the NATO SOFA, which deals with jurisdiction over persons in the sending state's armed forces (and certain accompanying civilians) and was the model for US bilateral SOFAs for a number of years, provides for the allocation of jurisdiction between the sending state and the receiving state. It is not an extradition agreement, but an agreement spelling out the circumstances under which either state will surrender a person to the other state for investigation and prosecution, which could, in certain circumstances, take place on military bases of the sending state in the receiving state, and, which is particularly relevant for understanding the purpose of Article 98 (2), for cooperation in such investigations and prosecutions.[22]

US courts-martial have *exclusive jurisdiction* over members of US armed forces who are responsible for conduct that violates US military law, but not the law of the receiving state.[23]

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[22] Article VII (4), (5) and (6) set forth the basic mutual obligations concerning investigation and prosecution:

> "4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.
>
> 5.--(a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.
>
> (b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.
>
> (c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.
>
> 6.--(a) The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.
>
> (b) The authorities of the Contracting Parties shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction."

North Atlantic Treaty Organization Status of Forces Agreement, TIAS 2846, 4 U.S.T. 1792, *entered into force* 23 August 1953, Art. VII (4) to (6).

[23] Article VII (1) (a) and (2) provide:

> " 1. Subject to the provisions of this Article,
>
> (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
>
> . . . .

Courts of receiving state have *exclusive jurisdiction* over members of US armed forces for conduct that violates the laws of the receiving state, but does not violate US military law.[24]

US courts-martial and the courts of the receiving state have *concurrent jurisdiction* over members of US armed forces for conduct that violates both US military law and the law of the receiving state.[25] The determination of which courts will exercise such concurrent jurisdiction is as follows. US courts-martial have the *primary* right to exercise such concurrent jurisdiction over (1) crimes that are committed against the security or property of the USA, (2) crimes against US personnel or their property and (3) crimes "arising out of any act or omissions done in the performance of official duty". After the House of Lords decision in the *Pinochet* case, it is doubtful that genocide, crimes against humanity or war crimes can be considered as acts done in the performance of official duty.[26] This is also the view of a leading expert on US military law and jurisdiction.[27]

2.--(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State."

Ibid., Art. VII (1) (a) and (2) (a). Security offences within the meaning of Article VII (2) and (3) include treason, espionage and sabotage. *Ibid.*, Art. VII (2) (c).

[24] Article VII (1) (b) and (2) (b) provide:

" 1. . . .(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

. . . .

2. . . . (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State."

Ibid., Art. VII (2) (b).

[25] The rules governing concurrent jurisdiction are set forth in Article VII (3), which provides:

" 3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

Ibid., Art. VII (3).

[26] *See, for example, R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)*, [1999] 2 All. Eng. Rep. 97, 115 (Browne-

In all other cases of concurrent jurisdiction, the receiving state has the *primary* right to exercise that jurisdiction. However, each state having the primary right to exercise concurrent jurisdiction is required to give "sympathetic consideration" to any request by the other state to waive that primary right to exercise concurrent jurisdiction if the other state says that the waiver would be "of particular importance". The USA attached a reservation to the NATO SOFA that provides that US military authorities would routinely request such waivers whenever it was considered that the trial in the receiving state would be likely to be unfair in the light of US constitutional standards.[28] However, the US has declined to seek waivers under SOFAs in certain cases when the receiving state sought to exercise its primary right to exercise concurrent jurisdiction, although not in others.[29] Thus, the structure of Article VII of the NATO SOFA, as well as the intent of the drafters and subsequent practice under this and other SOFAs, make clear that a SOFA is not designed to give the members of the armed forces of the sending state impunity for crimes they commit, but, instead, designed to allocate the responsibility for investigating and prosecuting such crimes.

Wilkinson, J.) (if former head of state had organized torture, "he was not acting in any capacity which gives rise to immunity ratione materiae because such actions were contrary to international law"); 164 (Hutton, J.) ("But the issue in the present case is whether Senator Pinochet, as a former head of state, can claim immunity (ratione materiae) on the grounds that acts of torture committed by him when he was head of state were done by him in exercise of his functions as head of state. In my opinion he is not entitled to claim such immunity."); 192 (Phillips, J.) ("I do not believe that those [official] functions can, as a matter of statutory interpretation, extend to actions that are prohibited as criminal under public international law."); *Hussein, Oberlandesgericht Köln*, 16.5.2000, no. 2 Zs 1330/99, *Neue Zeitschrift für Strafrecht* 2000, 667; *Democratic Republic of the Congo v. Belgium*, 14 February 2002, I.C.J., Separate Opinion, Higgins, Kooijimans & Buergenthal, JJ., para. 85 (*obtainable from:* http://www.icj-cij.org).

[27] A leading expert on US military law, in response to the possible assertion that the phrase "arising out of" might extend beyond acts classified as "official duties", stated:

> "It can be recognized that intemational crime is not properly classifiable under SOFA as an act or omission done in the performance of 'official duty'. On the other hand, it might be argued that the phrase 'arising out of' might reach beyond acts actually classifiable as 'official duty' activities. Yet even then the act or omission out of which the offense arises must be 'done in the performance of official duty,' and international criminal acts cannot properly be classified as acts done in performance of official duty."

Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 Vand. J. Transnat'l L. 1, 10-11 (2000). He concluded that the NATO SOFA would have to be amended to provide expressly that crimes under international law were included. *Ibid.*, 11.

[28] U.S. Senate, Resolution of Ratification of the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, with Reservations, as Agreed to by the Senate on 15 July 1953, Reservation No. 3 (duty of US military authorities to seek waiver if accused will not have benefit of constitutional rights available if he or she were investigated or prosecuted in USA),annexed to U.S. Department of Defense, Status of Forces Policies and Information, Directive 5525.1, 5 May 1962, 1 Int'l Leg. Mat. (1962), Art. IV.E & D (policy applicable to all SOFAs to seek waivers when accused may not receive a fair trial).

[29] For example, in *Wilson v. Girard*, 354 U.S. 524 (1957), where the Supreme Court upheld the decision by US military authorities not to exercise the primary right under the SOFA with Japan to exercise concurrent jurisdiction over a US soldier accused of killing a Japanese citizen.

Article VII also provides that the principle of *ne bis in idem* applies to trials in either the sending state, the USA, or the receiving state, as well as requiring that courts-martial respect a number of important fair trial guarantees.[30]

Other, more recent SOFAs. Increasingly, the US now includes clauses in SOFAs modifying the provisions that give US military courts the primary right to exercise concurrent jurisdiction. Such clauses now provide that the receiving state has the primary right to exercise jurisdiction when the case involves paramount national interests or is of high public concern and the decision whether to exercise this right is exclusively for the receiving state to make.

The purpose of existing SOFAs. Contemporary existing SOFAs are designed to allocate *primary* responsibility for investigating and prosecuting crimes among states with concurrent jurisdiction, not to give impunity to nationals of sending state for crimes committed in receiving state by vesting *exclusive* jurisdiction in US courts.[31] They were originally drafted to govern the allocation of such primary responsibilities for US forces stationed in NATO countries to ensure that US military courts-martial would try members of US armed forces for military disciplinary offences committed in receiving states, to ensure that members of US armed forces would be investigated and tried by courts with familiar procedures and applying familiar law, to ensure that members of US armed forces would receive what was then considered greater fair trial protections than in foreign courts and to ensure that crimes committed by members of US armed forces against US nationals were investigated and tried, since it was perceived that these crimes would be of lower priority for foreign courts.

A leading expert on US military law has explained that SOFAs were drafted after the Second World War

> "to minimize the possibility that American servicemembers deployed in Europe and in Asia would be tried by foreign tribunals. At that time it was clear that hundreds of thousands of American servicemembers and quite a few of their dependents would be stationed overseas for long periods of time; and in many instances, their host countries would have systems of justice quite

[30] *Ibid.*, Art. VII (8), (9).

[31] As a leading commentator on Article 98 has explained,

> "NATO-type SOFAs do not provide immunity but only a primary right to exercise the jurisdiction of the sending state for certain crimes including crimes committed in the performance of official duties. This is very similar to the complementarity regime in the *Statute.* Such SOFAs should be interpreted in a manner similar to that prescribed by article 17 of the *Statute*: mock prosecutions with the sole purpose to shield the suspect from criminal responsibility are incompatible with the object and purpose of the jurisdictional provisions of NATO-type SOFAs. NATO-type SOFAs should pose no problem under article 98 (2) of the *Statute*."

Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute* 20 (advance copy of article to appear in 12 Criminal Law Forum (2002)) (footnote omitted, italics in the original).

> different from the system familiar to Americans. Even though U.S. courts-martial do not provide the accused some of the procedural safeguards available in civil courts, they do offer protections that in some respects exceed those available in foreign courts. The fear at the time was that servicemembers might fare even worse if, instead of being tried by courts-martial, they were prosecuted in foreign courts. This fear was heightened regarding the possibility that the victim of a service member's alleged crime was a citizen of the host country. On the other hand, if Americans were the only victims of a servicemember's crime and if the only basis for jurisdiction of a foreign court were the crime's occurrence within that country's territory, a foreign prosecutor might have little interest in the case; and a serious crime might go unpunished."[32]

It must be borne in mind that SOFAs were designed to deal with the problems that would be almost certain to arise in any situation where members of the armed forces, and certain accompanying civilians, of a sending state were stationed in the territory of a receiving state pursuant to such agreements, and they were suspected of ordinary crimes. The primary concern of the drafters of these agreements was not that members of the sending state's forces would be suspected of crimes under international law and the concerns of the international community about such agreements would have largely been limited to the question of whether the right to fair trial was respected. In contrast, when the crimes at issue are crimes under international law, such international agreements must also ensure that they do not lead to impunity and a denial of the right of victims to reparations.[33] Thus, even SOFAs must be consistent with international law, and, if the International Criminal Court were to interpret Article 98 (2) as applying to renewals of existing SOFAs or future SOFAs, they would also have to be consistent with the Rome Statute. If such international agreements were likely to lead to impunity, then they would not be valid under international law.[34] For example, a SOFA between a non-state party and a state

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[32] Robinson O. Everett, *American Servicemembers and the ICC, in* Sarah B. Sewall and Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* 137-138 (Lanham/Boulder/New York/Oxford: American Academy of Arts and Sciences and Rowman & Littlefield Publishers, Inc. 2000).

[33] The international community has recognized the right of victims to reparations in a number of instruments, including Rome Statute, Art. 75, and UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. The scope of this right is further clarified in Question of the impunity of perpetrators of human rights violations (civil and political), Final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Annex II: Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Joinet Principles), U.N. Doc. E/CN.4/Sub.2/1997/20 (1997); UN Commission on Human Rights Independent Expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000 (Van Boven-Bassiouni Principles), U.N. Doc. E/CN.4/2000/62/Rev. 1 (2000).

[34] As a recent commentary noted, if a SOFA guaranteed exclusive jurisdiction and absolute immunity for nationals of a sending state,

party or signatory of the Rome Statute that provides that the non-state party has exclusive jurisdiction over all crimes committed in the territory of the state party or signatory, even if it is an existing SOFA, may be contrary to international law if it will necessarily lead to impunity, as in the situation where the non-state party does not make the crimes under international law committed abroad crimes under national law.[35]

For a number of reasons, some of which are shared by senior US officials, it is possible that even the existing US SOFAs may not satisfy the requirements of Article 98 (2). It has been argued that none of the existing 105 SOFAs between the USA and 101 other states fall within Article 98 (2) because they do not expressly state that "the consent of a sending State is required to surrender a person of that State to the Court".[36] A leading expert on US military law agrees with this interpretation and notes that if such SOFAs were to lead to impunity they would be inconsistent with international law.[37]

> "such an arrangement may not provide an absolute guarantee. Theoretically, one cannot exclude the possibility of an argument relying on the *ordre public* of the international community. Domestic courts of host States Parties to the Rome Treaty could argue that they must accord primacy to community norms arising from obligations of *jus cogens*, such as prohibition of genocide or torture, over specific treaty obligations under the status-of-forces agreements."

Gennady M. Danilenko, *ICC Statute and Third States, in* Antonio Cassese, Paola Gaeta & John R.W.D. Jones, eds, 1 *The Rome Statute of the International Criminal Court: A Commentary* 1887-1888 (Oxford: Oxford University Press 2002). See also Bert Swart & Goran Sluiter, *The ICC and International Criminal Co-operation, in* Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking, eds, *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* 121 (The Hague: T.M.C. Asser Press 1999) (suggesting in the context of Article 98 (1) that international law may permit a state requested by the International Criminal Court to surrender a national of a state that refuses to waive immunity to comply with the Court's request).

[35] UN Status of Mission Agreements (SOMAs) with host states governing contributing forces to UN peace-keeping operations, provide that the courts of the state contributing personnel to such operations have exclusive jurisdiction over crimes by such personnel committed in the host state, *see* the 1990 model agreement, U.N. Doc. A/54/594 (1990), and the related UN Contribution Agreements with the contributing state, *see* U.N. Doc. A/46/185 (1991), provide that peace-keeping personnel enjoy the privileges and immunities in the UN SOMA and that the contributing state has the responsibility for disciplining its military personnel. Such SOMAs and Contribution Agreements are a matter of particular concern when the contributing state is a not a state party to the Rome Statute. To the extent that these agreements apply to genocide, crimes against humanity and war crimes when the non-state party has not made these crimes when committed abroad crimes subject to its courts' jurisdiction and, therefore, lead to impunity, they would be contrary to international law.

[36] Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98 (2) Agreements*, 9 July 2002, 2. Human Rights Watch stated that it believed "that existing U.S. SOFAs are not the type of agreement that would qualify under Article 98 (2), and cannot trump any obligations under the Rome Statute". *Ibid.* (footnote omitted).

[37] That expert explained in 2000 that with respect to international agreements within the meaning of Article 98 (2),

> "No such agreement is known to exist. For example, NATO SOFA does not preclude every sort of rendering of an accused U.S. national to another state or to an international tribunal. It arguably only precludes a rendering when the United States has exclusive or primary concurrent jurisdiction over an offence, but this limitation is unclear because NATO SOFA does not expressly require consent of the sending State concerning extradition or rendering to a third State or to an

Decision on whether surrender is barred by Article 98 (2) is up to the International Criminal Court alone. The decision whether proceeding with a request to surrender would require a requested state to act inconsistently with its obligations under an agreement within the meaning of Article 98 (2) is to be made by the International Criminal Court, not the receiving state or the sending state.[38]

The procedure for such a determination by the International Criminal Court is set forth in Rule 195 (1) of the draft Rules of Procedure and Evidence. That paragraph provides:

> "1. When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court."[39]

Of course, to ensure that the effective exercise of the International Criminal Court's jurisdiction is not undermined by the transfer or escape of an accused, the requested state should promptly comply with the request for arrest and surrender, as with any

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> international tribunal. Further, NATO SOFA makes no mention of 'the Court' created by the Rome Statute and thus does not require 'the consent of a sending State' 'to surrender a person of that State to the Court.' More generally, Article 98 does not preclude ICC jurisdiction over the nationals of a non-signatory or require consent of the state of nationality in most cases. It might also be argued that Article 98(1) can preclude such jurisdiction in some cases, for example when the request to surrender '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.' International law, however, simply does not permit immunity of a person accused of customary international crime. "

Paust, *supra*, n. XXX, 14 (footnotes omitted).

[38] Prost & Schlunck, *supra*, n. XXX, 1132 ("The provision requires that the Court not proceed with a request for surrender or assistance, if it recognizes that the request would conflict with the immunity of a person or property of a third State, under *international* law.") (emphasis in original); Kaul & Kreß, *supra*, n. XXX, 164-165 (noting that the Court must decide whether Article 98 (1) or (2) applies); Wirth, *supra*, n. 31, 19 ("Whether the compliance of a state with a request for cooperation amounts to a violation of another norm of international law is not to be decided by the requested state, but by the Court.") (footnote omitted); *ibid.*, 22 ("[I]t is for the Court to decide whether a request for cooperation requires the requested state to break its obligations under international [law]. No State party to the *Statute* may substitute its own legal assessment for the Court's opinion.") (italics in original).

[39] Rule 195 (Provision of information) of the draft Rules of Procedure and Evidence reads in its entirety:

> "1. When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.
> 2. 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."

other request, pending a determination by the Court whether it cannot proceed with the request without obtaining the cooperation of the sending state for the giving of consent to the surrender pursuant to Article 98 (2). If the Court determines that the surrender is precluded by Article 98 (2) and the cooperation of the sending state cannot be obtained, the accused person can then be released from custody or other constraint.[40] Although this paragraph of the rule refers to "additional information to assist the Court", the Court remains free under the Rome Statute to issue a non-binding request for information from third states or sending states regardless whether the requested state has provided information and such states may provide such information without a formal request by the Court.[41]

III. THE WORLDWIDE US CAMPAIGN TO OBTAIN IMPUNITY AGREEMENTS

The USA made clear in May 2002 when it repudiated its signature of the Rome Statute that it was embarking on a worldwide campaign to undermine the ability of the International Criminal Court to exercise its jurisdiction over nationals of non-states parties accused of genocide, crimes against humanity or war crimes on the territory of states parties to the Rome Statute.[42] John R. Bolton, the US Under Secretary for Arms Control and International Security, is leading this effort, according to a US State Department spokesperson, Philip Reeker, who added, "We'll be working with a number of countries to conclude similar agreements, a large number

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[40] As Wirth explains:

> "[I]n accordance with Rule 195 (1) of the Draft Rules of Procedure and Evidence, a state may inform the Court that it sees a problem with respect to article 98 and submit necessary information. Any third states involved may also submit information. Thus, the Court will have an appropriate factual basis on which to rule. In the author's opinion, it may also be expedient to allow states to challenge a decision of the Court under article 98 before the Appeals Chamber without, however, allowing the state to delay its prompt compliance with the request. If the Appeals Chamber quashes the original request the surrendered or arrested person must be transferred back or released."

Wirth, *supra*, n. 31, 19 (footnotes omitted).

[41] Wirth notes that "[t]he rule speaks of 'additional information', suggesting that the third state can only submit information if the requested state has already done so. However, the rule should be interpreted in such a way as to allow the third state to provide information regardless of whether the requested state has already done so or not." Wirth, *supra*, n. 31, 19, n. 105.

[42] A non-state party that incites another state to violate its obligations under international law as a state party or as a signatory to a treaty by entering into a new agreement itself violates international law and under the principle, *nullus commodum capere de sua injuria propria*, cannot claim any rights under that new agreement. *See* Bin Cheng, *Principles of International Law* 149-160 (London 1953); John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 Am. J. Int'l L. 287, 297 (1989).

of countries", and added that the impunity agreements "give us the safeguards we were seeking".[43]

This worldwide campaign has so far taken two approaches. The first was to obtain a Security Council resolution on 12 July 2002 seeking to invoke Article 16 of the Rome Statute deferring any investigation or prosecution by the International Criminal Court of nationals of non-states parties for acts or omissions in connection with a UN established or authorized operation.[44] The second approach has been to persuade states to enter into impunity agreements which seek to prevent states from surrendering US nationals accused of genocide, crimes against humanity or war crimes to the International Criminal Court, but do not provide for their investigation or prosecution by the USA or by any other state.

The second approach is coupled with threats to cut off military aid to any state party to the Rome Statute that does not enter into an impunity agreement with the USA. During the first full week of August 2002, the US State Department briefed foreign ambassadors on US opposition to the court and to warn them of the prohibition in Section 2007 of the American Servicemembers Protection Act (ASPA), which entered into force on 2 August 2002, against military assistance to countries that are a party to the treaty establishing the court, but allowing the US President to waive this ban if the state enters into an impunity agreement with the USA or if he decides that it is in the national interest.[45] Philip Reeker, a State Department

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[43] Christopher Marquis, *U.S. Seeking Pacts in a Bid to Shield its Peacekeepers,* New York *Times*, 6 August 2002.

[44] S.C. Res. 1422, 12 July 2002. The first three operative paragraphs of the resolution read:

> "1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
> 2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;
> 3. Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations[.]"

[45] Section 2007 (Prohibition of United States Military Assistance to Parties to the International Criminal Court) of that act prohibits US military assistance to states that ratify the Rome Statute, but that prohibition does not apply to NATO members and certain other allies, including Argentina, Australia, Egypt, Israel, Japan, Jordan, New Zealand and the Republic of Korea. This provision, however, can be waived by the President for other states if the state signs a US impunity agreement or the President determines that such a waiver is in the national interest. Section 2007 reads:

> "(a) PROHIBITION OF MILITARY ASSISTANCE- Subject to subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.
> (b) NATIONAL INTEREST WAIVER- The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.

spokesperson, said, "That is a fact under the law, it's right there in the law," and added, "The president welcomes the law - I can't underscore how important this is to us to protect American service members."[46] Another State Department spokesperson recently indicated the broad scope of the campaign:

> "I think that we have gone to many, many countries in the world. . . . I think that when we originally announced the effort we gave you some indication of how broadly we sent the cable to. We've had our embassies contacting foreign governments and concentrated, I think, on the most likely places that US troops are going to be present or deployed or passing through. So certainly places where US personnel are not likely to ever be located in the foreseeable future are not high on the list."[47]

A. The typical US impunity agreement

The typical US impunity agreement - which has no resemblance whatsoever to a SOFA - comes in at least three forms. Each is designed to remove the other state's sovereign right to determine which courts – its own or those of an international criminal court to which it has delegated its authority under a multilateral treaty – will investigate and prosecute crimes committed in its territory or by persons found in its territory. Each also will require states to renegotiate re-extradition provisions in all current extradition agreements.

The standard form of the US impunity agreement, apparently signed by only one state, Israel, a signatory of the Rome Statute, provides that both parties agree not to surrender a broad range of each other's nationals (and certain other associated nationals), not just persons serving in a UN peace-keeping operation, to the International Criminal Court without the consent of the other party.[48] The second form,

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> (c) ARTICLE 98 WAIVER- The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.
> (d) EXEMPTION- The prohibition of subsection (a) shall not apply to the government of--
> (1) a NATO member country;
> (2) a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or
> (3) Taiwan."

American Servicemembers Protection Act, Public Law 107-206, *signed* 2 August 2002, Sec. 2007.

[46] Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers' Immunity*, New York *Times*, 10 August 2002.

[47] State Department Daily Press Briefing, 27 August 2002.

[48] The text of the standard impunity agreement as obtained by the CICC and Amnesty International reads as follows (with numbering and lettering added by the CICC for the convenience of the reader):

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

signed by only two states, Romania and Tajikistan, both state parties to the Rome Statute, reportedly is identical, except that does not prohibit the USA from surrendering nationals (and certain other associated nationals) of the second state to the International Criminal Court. The third form, which is intended for states that have neither signed nor ratified the Rome Statute, and signed only by East Timor, which is not yet a UN member state, includes a paragraph requiring those states not to cooperate with efforts of third states to surrender persons to the International Criminal Court.[49] There are a number of notable features about the US impunity agreement.

Inability of the USA to investigate and prosecute all of the crimes in the Rome Statute committed abroad. First, the agreement declares that "the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals". However, the USA cannot investigate or prosecute all such

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B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,

D. Bearing in mind Article 98 of the Rome Statute,

E. Hereby agree as follows:

1. For purposes of this agreement, 'persons' are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.

2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,

(a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or

(b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.

4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.

5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination."

[49] The additional paragraph, as obtained by the CICC, reads:

"Each Party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal Court."

persons for all crimes within the jurisdiction of the Rome Statute. US law permits the USA to investigate and prosecute US soldiers and enemy nationals in general courts-martial for war crimes under customary international law committed abroad and enemy nationals in military commissions (executive bodies - not competent, independent and impartial courts) for war crimes. It is not entirely clear whether US law still permits the USA to investigate and prosecute US soldiers and enemy nationals in general courts-martial and enemy nationals in military commissions for crimes against humanity as defined in the Rome Statute; trials in such courts or executive bodies on charges of crimes against humanity have not occurred since the aftermath of the Second World War. However, the USA does not have clear jurisdiction over all such crimes committed by US civilians or over genocide committed abroad by members of the US armed forces that are not US nationals or by foreign civilians. For example, not all war crimes in the Rome Statute are expressly defined as crimes under Federal law when committed abroad. Crimes against humanity, apart from torture, committed abroad are not crimes under Federal law. US courts may balk at trying persons for crimes under customary international law that are not expressly defined as crimes under US law. Federal courts have jurisdiction over genocide committed abroad only if committed by US nationals, but not members of US armed forces or persons committed by the US impunity agreement who were not US nationals.[50]

Only investigations and prosecutions if "appropriate". Second, even with regard to the crimes under international law committed abroad over which US courts have jurisdiction, the USA expresses its intention to investigate and prosecute only "where appropriate", thus, indicating that the decision to investigate or prosecute is a matter solely within the discretion of the USA and not a matter of law. The USA sought in June 2002, but failed, to include similarly restrictive language concerning the duty of states to investigate and prosecute genocide, crimes against humanity and war crimes in what became Security Council Resolution 1422.[51]

Purpose of US impunity agreement exact opposite of that of SOFAs. The third notable point about the US impunity agreement is that, despite the reference in the fourth preambular paragraph to Article 98 of the Rome Statute, the purpose of the agreement is the exact opposite of the purpose of the existing SOFAs which are the

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[50] 18 U.S.C. § 1091 (d) (2). For the complex question of the scope of extraterritorial jurisdiction over war crimes, crimes against humanity, genocide and torture in US courts, see Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002-018/2001, September 2001 (Chapters Four, Six, Eight and Ten) (*obtainable from:* http://www.amnesty.org or as a CD-ROM from ijp@amnesty.org).

[51] The language describing the US restrictive view of the duty under international law to investigate and prosecute crimes under international law read as follows:

> "1. Emphasizes that Member States contributing personnel to UNMIBH or SFOR have the primary responsibility to investigate and to prosecute in their national systems as appropriate crimes over which they have jurisdiction alleged to have been committed by their nationals in connection with UNMIBH or SFOR,"

US draft, dated 27 June 2002, 3.20p.m.

subject of the second paragraph of that article. Existing SOFAs are designed to allocate responsibility for investigating and prosecuting crimes committed by armed forces of a sending state present on the territory of a receiving state pursuant to the agreement, not to provide impunity for the sending state's forces for crimes committed in the territory of the receiving state. Despite the expressed intention in the third preambular paragraph by the USA to investigate and prosecute persons (but only "where appropriate") for crimes within the jurisdiction of the International Criminal Court and the reaffirmation in the first preambular paragraph of "the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes", the agreement does not provide for primary jurisdiction in the USA - or even any jurisdiction in the USA - but simply provides that the second state may not surrender or otherwise transfer persons to the International Criminal Court. Indeed, the entire agreement must be seen against the background of the US denunciation of its signature of the Rome Statute on 6 May 2002.

No obligation for second state to investigate or prosecute. Fourth, there is no requirement that the second state investigate and, if there is sufficient admissible evidence, prosecute. The second preambular paragraph of the US impunity agreement simply recalls the principle of *vertical* complementarity under which the International Criminal Court will exercise its jurisdiction when states are unable or unwilling genuinely to investigate or prosecute. However, the agreement does not replace it with *horizontal* complementarity by the second state. There is no provision in the operative paragraphs requiring the USA to investigate and, if there is sufficient admissible evidence, to prosecute in good faith with due diligence any person extradited or otherwise transferred by the second state to the USA or to return any such person to the second state if this does not happen. Moreover, that state is likely to be under intense bilateral US political pressure not to investigate or prosecute a person covered by the impunity agreement. Thus, it is, truly, an impunity agreement, not an agreement allocating responsibilities for investigating and prosecuting persons suspected of crimes.

Need for states to renegotiate all existing extradition agreements. If a state signs a US impunity agreement, it will have to renegotiate all or almost all current extradition agreements with other states since most bilateral extradition agreements have re-extradition clauses. Such clauses provide that the state extraditing a person to another state normally retains the right to agree to the re-extradition of that person to another state or international court. Such clauses apply even if the state is extraditing a person of another nationality to a state not of that person's nationality. Under the US impunity agreement, the second state gives up this right to the USA. Therefore, if a state agreed to the US impunity agreement, it would have to renegotiate all or almost all current extradition agreements that have a re-extradition clause and to insert a new clause that provided that the second state retained this right to agree to re-extradition except when the person was a US national or fell within one of the other categories of persons covered by that agreement.

Broader range of persons covered than in SOFAs. Fifth, a broader range of persons are covered than in SOFAs. Persons covered by the standard US impunity agreement are "current or former Government officials, employees (including contractors), or military personnel or nationals of one Party". In marked contrast to SOFAs and the language of Article 98 (2) of the Rome Statute, the persons covered by the US impunity agreement are not limited to *current* members of armed forces and related civilians of a sending state stationed in the receiving state pursuant to that agreement. They include a broad range of persons not included in SOFAs. For example, they even include *former* members of the armed forces and related civilians. They include persons travelling through, conducting personal business or vacationing in the USA or the second state. It is important to note that the persons covered by the US impunity agreement can include nationals of other states than those of the two parties to the agreement (including nationals of states parties to the Rome Statute). In addition, any of the categories of persons covered on the US side, such as members of US armed forces (which include nationals of many other countries) could include even nationals of the other party to the agreement (which might be a state party to the Rome Statute).

Transfer of US witnesses to crimes under international law prohibited. Sixth, the US impunity agreement is designed to prevent US nationals and associated persons, as well as nationals and associated persons of the second state, from appearing as witnesses, including as expert witnesses, before the International Criminal Court. The agreement provides that persons of either party present in the territory of the other party "shall not, absent the expressed consent of the [other] Party, (a) be surrendered or transferred by any means to the International Criminal Court for any purpose[.]"[52] Since witnesses before the International Criminal Court ordinarily appear only if they themselves consent, under the US impunity agreement, they could be prevented from attending, even if they are willing to assist the Court in the search for truth and a fair determination of guilt and innocence based on all the relevant evidence, including exculpatory and mitigating evidence. Their right to testify in the cause of international justice would be taken away by their own government. Thus, the agreement could obstruct international justice for genocide, crimes against humanity and war crimes, even when a US national (or associated person) was not being prosecuted, by preventing crucial testimony that could determine guilt or innocence of persons accused of the worst crimes in the world.

Broader range of persons covered than in Security Council Resolution 1422. Seventh, the persons covered by the US impunity agreements are not limited to "current or former officials from a contributing State not a Party to the Rome Statute over acts and omissions relating to a United Nations established or authorized operation", as in Security Council Resolution 1422, but they also include employees, including civilian contractors (presumably, any person acting as an agent of the party

[52] It is possible that the agreement is seeking to prevent even compelled testimony in the second state by video link before the Court. Even assuming that the person gave testimony to the Court by means of a video link, the Court would have to rely upon the state concerned, which might not be a state party to the Rome Statute or have adequate legislation, to punish offences before the Court such as perjury.

to the US impunity agreement in some contractual relationship with the USA, such as intelligence sources), regardless of nationality and regardless whether the person was a national of a state party or a state signatory to the Rome Statute. In addition, the persons covered by the US impunity agreement are not limited to persons with some connection to a UN established or authorized operation, as in Security Council Resolution 1422.

B. Current status of response to US threats

Some of the states so far that have refused to enter into US impunity agreements. A number of states have already refused to enter into impunity agreements with the US, despite intense pressure. These states reportedly include ***Canada, the Netherlands, Norway, Switzerland*** and ***Yugoslavia,*** all of which are states parties to the Rome Statute. The Ministry of Foreign Affairs of the ***Netherlands,*** the host state for the International Criminal Court, a state party to the Rome Statute and a member of the European Union (EU), declared on 30 July 2002 that it was not considering such an impunity agreement. "Our position and the position of the European Union is clear," said the Ministry of Foreign Affairs spokesperson, Hans Jansen, who added, "An exception as such, as they [the USA] have indicated, would undermine the court's statute."[53] A spokesperson for the Federal Department of Foreign Affairs (DFAE) of ***Switzerland,*** a state party to the Rome Statute, stated, "We are for the universal application of the principles in the International Criminal Court . . . The DFAE requests the United States to apply these principles."[54]

The four states that have caved in to US pressure so far. Only three UN member states, ***Romania, Israel*** and ***Tajikistan,*** and one non-UN member state, ***East Timor,*** are known to have caved into US pressure so far and signed impunity agreements. However, none of these agreements have been ratified by national parliaments.

On 1 August 2002, ***Romania,*** a state party to the Rome Statute and an applicant to join the North Atlantic Treaty Organization (NATO), signed an impunity agreement under which it agreed not to surrender US nationals (and associated nationals, such as civilian contractors, who might be Romanian citizens) to the International Criminal Court.[55] The Romanian Ambassador to the USA, Sorin Ducaru,

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[53] Anthony Deutsch, *Dutch remain opposed to U.S. exemption from new international court*, Associated Press Worldstream, 30 July 2002 Tuesday.

[54] The spokesperson, Livio Zanolari, stated, "*Nous sommes pour l'application universelle des principes liéés à la CPI (...). Le DFAE demande aux Etats-unis d'appliquer ces principes."* SWISSINFO, *CPI: Berne dit non à un accord de non-extradition avec les USA*, 13August 2002.

[55] Marquis, *supra*. John R. Bolton, the Under Secretary of State for Arms Control and International Security, signed the impunity agreement in Bucharest with the acting Foreign Minister, Cristian Diaconescu.

denied that his country's application for membership in NATO and in the EU was related to the impunity agreement, which apparently must be approved by Parliament before it can enter into force.[56] A US State Department spokesperson, Philip Reeker, stated that "we very much appreciate the fact that Romania was the first of those countries to do this".[57] ***Israel,*** a signatory of the Rome Statute, signed a mutual impunity agreement with the USA on 4 August 2002 under which both states agree not to surrender nationals of their own states to the International Criminal Court.[58] The Deputy Chief of Mission at the Israeli Embassy in Washington, D.C., Rafael Barak, stated that Israel shared US concerns and it feared that its soldiers could be tried in the International Criminal Court for their actions against Palestinians, although he did not explain why Israel believed that the International Criminal Court could exercise its jurisdiction over Israeli soldiers in the Occupied Territories as long as Palestine is not a state party, absent a referral of the situation by the Security Council, or why he believed that signing the US impunity agreement was consistent with Israel's obligations under international law governing treaties as a signatory of the Rome Statute.[59] ***Tajikistan,*** a state party to the Rome Statute, where US troops are stationed, signed an impunity agreement on 27 August 2002.[60] The State Department has confirmed earlier press reports that East Timor had succumbed to US pressure and had signed an impunity agreement.[61]

Some of the states known to be under threat. Although the US has made clear that it is approaching almost every other state or jurisdiction seeking impunity for its nationals with regard to prosecution in the International Criminal Court for genocide, crimes against humanity and war crimes, there are a number of states which are known to be under particular threat.

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[56] However, President Ion Iliescu lated explained that Romania's decision to sign the impunity agreement was "an opportunity and a necessity for Romania". Associated Press, *Romania Defends Court Immunity for U.S.,* 21 August 2002.

[57] Marquis, *supra,* n. 43.

[58] John R. Bolton, the US Under Secretary of State for Arms Control and International Security, stated in a news conference in Jerusalem on 4 August 2002 on the occasion of the signing, "We respect the states that have acceded to their own statute creating the international criminal court." He added, "We hope they respect our decision not to accede to that. We hope they respect our decision to avail ourselves of the procedure made available by their own statute to prevent our respective nationals from falling into the potentially highly politicized jurisdiction of that court." Marquis, *supra,* n. 43.

[59] Rafael Barak said, "We are in the same position as the U.S." He added, "Almost everybody in my country is a soldier. Someone can complain against a soldier and say they perpetrated a war crime." Marquis, *supra,* n. 43.

[60] According to Richard Boucher, a US State Department spokesperson, the US and Tajikistan signed such an agreement on 27 August 2002 in Dushanbe. State Department Daily Press Briefing, 27 August 2002.

[61] Agence France Presse, *US signs third ICC immunity deal with East Timor,* 26 August 2002; Jonathan Steele, *East Timor is independent. So long as it does as it's told, The Guardian,* 23 May 2002.

Before the end of July 2002, the USA had approached most of the member states of the ***EU*** demanding that they enter into impunity agreements.[62] On 16 August, US Secretary of State, Colin L. Powell, wrote letters to European governments asking them to ignore the EU's request to wait until the EU adopted a common response to US impunity agreements and urged them to enter into such agreements "as soon as possible".[63] The foreign ministers of the EU are scheduled to discuss the International Criminal Court at an informal meeting in Denmark from 30 to 31 August 2002 and the legal advisers of EU ministries of foreign affairs are to discuss the US impunity agreements at a meeting of COJUR in Brussels on 4 September 2002. The report of that meeting is expected to be sent to the EU Committee on Politics and Security (COPS) for discussion at a meeting on 6 September 2002, with a view to adopting a common position at the end of September 2002. A legal opinion has reportedly been prepared by the EU's own legal experts that concludes that states parties would violate their obligations under the Rome Statute if they entered into a US impunity agreement.[64]

Of the EU member states, ***Italy,*** the host of the Rome Diplomatic Conference on the International Criminal Court, and one of the first states to ratify the Rome Statute, is a priority target for the USA.[65] In one particularly worrying development, the ***UK*** has indicated that it saw no legal objection to entering into an impunity agreement with the USA. A spokesperson for its Foreign and Commonwealth Office recently asserted, "By definition, it would not be incompatible with the ICC statute to conclude a bilateral agreement with the U.S", but the spokesperson did not cite any

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[62] Reportedly, after discussion in the EU Council of Minister's Political and Security Committee (PSC), and the working group on public international law, Council of Ministers agreed that the EU should have a common response to the US demand that was consistent with the EU's Common Position on the International Criminal Court, as amended on 20 June 2002. EU member states were to spend the summer recess considering the response and then discuss it at EU level in September or October. An EU Council of Ministers spokesperson confirmed on 30 July that the USA has approached "most Member States" recently, asking them not to transfer US nationals to the ICC. European Report, July 31, 2002, No. 2705, *EU/US: New Pressure on EU to Exempt US Citizens From Criminal Court Prosecution.*

[63] Elizabeth Becker, *U.S. Issues Warning to Europeans in Dispute over New Court*, New York *Times*, 25 August 2002.

[64] The text of the legal opinion, made available to a journalist, is said to conclude:

> "The legal opinion concluded that a "contracting party to the statute concluding such an agreement with the US acts against the object and purpose of the statute and thereby violates its general obligation to perform the obligations of the statutes in good faith." It adds, "[a contracting party's] legal obligation vis-à-vis its co-contracting parties and the Court to surrender a person to the Court upon request cannot be modified by concluding an agreement of the kind proposed by the US".

Judy Dempsey, *Accords with US 'will violate' ICC treaty*, *Financial Times*, 27 August 2002; Becker, *supra*, n. 63. Copies of the opinion reportedly were sent to Romano Prodi, Commission President, Chris Patten, External Affairs Commissioner, and the EU's office in New York.

[65] Marquis, *supra*, n. 43 (reporting that the Italian Prime Minister, Silvio Berlusconi, was eager to improve relations with the USA).

legal arguments in support of this claim.[66] Moreover, there are an increasing number of reports from a variety of sources that indicate that the UK are working on a number of fronts to prevent the EU from adopting a coordinated position opposing the US impunity agreements and have also reportedly opposed EU efforts to press applicant states to resist US pressure to sign immunity agreements.

The United States has indicated that states that are applying for membership in NATO have also been targeted. US Ambassador at Large for War Crimes Issues, Pierre-Richard Prosper, recently stated that whether a state applying for membership in NATO had entered into an agreement with the US to give its nationals impunity from the International Criminal Court would be a factor in determining whether it would be admitted. He said, "It will have to be considered within the application" and he added, "If we don't get Article 98 agreements across the board, we will have to reach an agreement, or understanding, within NATO and UN peacekeeping. If we don't reach that understanding, we'll have to evaluate the situation and reassess what it means."[67] For example, ***Estonia,*** a state party to the Rome Statute, has agreed to meet US officials on 2 September 2002 to discuss the text of an impunity agreement and the Prime Minister is scheduled to meet the President of the USA on 4 September 2002 to discuss the possible signing of an impunity agreement. However, Baltic countries and other applicant states reportedly are now willing to wait for the adoption of a common EU response, although not all of them have agreed to join such a response.

States where US armed forces are stationed in peace-keeping operations, such as ***Bosnia and Herzegovina,*** or in anti-"terrorist" operations are a priority, including ***Afghanistan, Colombia*** and ***the Philippines.*** For example, on 14 August 2002, according to a press briefing by Marc Grossman, a US State Department Spokesperson, the US informed ***Colombia*** that its military aid might be cut off if it did not agree to enter into an impunity agreement purporting to prevent surrender of US nationals to the International Criminal Court. At a congressional hearing on 28 August 2002, the Minister for Foreign Affairs neither confirmed nor denied that the President intended to sign an impunity agreement with the USA, but the Justice Minister reportedly said that his initial assessment was that such an agreement would be legal.

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[66] Philip Shishkin, *Eastern Europe is Pressured by U.S., EU on ICC Immunity*, *Wall Street Journal*, 16 August 2002.

[67] Carola Hoyos, *The Americas: US ups stakes in war court fight*, *Financial Times*, 22 August 2002. A senior US official explained the nature of the US concern:

> "The reach of the Rome statute [which established the court] is to anybody who might be involved, all the way up the chain of command and in fact we think one of the principal dangers of a politicised ICC is that senior American decision-makers would be hauled before the court in an effort to second-guess their national security decision. So whether we have troops in a particular country is really not affected by the Article 98 campaign,".

Ibid.

Other states known to have been approached by the USA include states parties, such as ***Argentina, Australia, Brazil, Ecuador***; signatories, such as ***Chile,*** and states that have neither ratified nor signed the Rome Statute. ***Australia,*** a state party and long the leader of the Like-Minded Group of states that supported the prompt establishment of an effective international criminal court, is considered on the verge of signing an impunity agreement. Indeed, in response to a question in Parliament asking whether he would "rule out the Government ever making such a deal", the answer recently provided by the Minister for Foreign Affairs, Alexander Downer, was that "[t]he government is carefully considering the US proposal".[68] He subsequently said that he was "sympathetic" to the US request to sign an impunity agreement.[69]

IV. US IMPUNITY AGREEMENTS CONTRARY TO ARTICLE 98 (2) OF ROME STATUTE

The US impunity agreements are contrary to Article 98 (2) of the Rome Statute and to international law. They are simply for the purpose of giving US nationals and others covered by the agreements impunity. Their purpose is the exact opposite of SOFAs, the agreements that Article 98 (2) was intended to address. Instead of allocating responsibility for investigating and prosecuting crimes committed by members of a sending state's armed forces stationed in a receiving state and requiring each party to provide the other with assistance in such investigations and prosecutions, as in a SOFA, the sole purpose of these agreements is to prevent the International Criminal Court from exercising its jurisdiction. The USA is not able to investigate and prosecute all persons covered by the impunity agreements for all of the crimes included in the Rome Statute. It has made clear, in any event, that it will exercise its discretion and only investigate and prosecute persons for the worst possible crimes in the world "when appropriate". Moreover, the second state undertakes no obligation to investigate and prosecute in its own courts persons covered by the agreement and will be under intense bilateral US political pressure not to do so. In addition, these agreements even go so far as to prevent US nationals and others covered from voluntarily appearing as witnesses in cases of genocide, crimes against humanity and war crimes. Thus, complementarity is completely negated – neither the International Criminal Court nor the courts of the second state can step in as courts of last resort if the USA is unable or unwilling genuinely to investigate or prosecute these crimes.

States parties to the Rome Statute should not sign or enter into impunity agreements with the US or refuse to arrest and surrender persons accused by the International Criminal Court because doing so would violate their obligations under the principle of complementarity, as reflected in the Preamble, Article 1 and Article

[68] Statement by Senator Ellison, Minister for Justice and Customs (text supplied to Amnesty International on 28 August 2002).

[69] Cameron Stewart, *Downer backs US war court let-out, The Australian,* 29 August 2002.

17, and their obligations to cooperate with the Court, as reflected in numerous articles, in particular, Articles 86, 87, 89 and 90, as well as under Article 27.

Signatories of the Rome Statute should not sign or enter into impunity agreements with the US because they would be acting in a manner that would defeat the object and purpose of the Rome Statute and, thus, in violation of their obligations under international law governing treaties.

States that have not signed the Rome Statute or yet ratified it should not sign or enter into impunity agreements with the US or refuse to arrest and surrender persons accused by the International Criminal Court because doing so may violate their obligations under international law to bring to justice those responsible for genocide, crimes against humanity and war crimes, particularly if they do not investigate and, if there is sufficient admissible evidence, prosecute such persons or extradite such persons to a state that will fulfil its international responsibilities.
Note here obligations under Geneva Conventions, Genocide Convention.

Both SOFAs entered into before and after a state has signed the Rome Statute must be read in the light of the object and purpose of the Rome Statute, contemporary conventional and customary international law and general principles of law. Thus, such agreements must not prevent surrender to the International Criminal Court in any case where the extradition or transfer of an accused to the sending state would lead to impunity.[70]

AMNESTY INTERNATIONAL RECOMMENDATIONS

No state party to the Rome Statute, state signatory to the Rome Statute or any other state should sign any US impunity agreement.

No parliament should approve any US impunity agreement signed by the state.

States that have not signed or yet ratified the Rome Statute should enter into agreements with the International Criminal Court pursuant to Article 87 (5) to

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[70] Wirth has explained that if a SOFA has been entered into by a state after it had signed the Rome Statute, "it must be interpreted taking into account the 'relevant rules of international law' [citing Article 31 (3) (c) of the Vienna Convention on the Law of Treaties]. Amongst such rules is the *Rome Statute* itself. The State party to the SOFA but not the *Rome Statute* must be deemed to have known of the other State's obligations under the *Statute.* Moreover, the State party to the SOFA but not the *Statute* cannot assume that the State party to both treaties wanted to violate its obligation under the *Statute* (and possibly also to Geneva law and the *Genocide Convention*), not to establish new bars to the Court[']s jurisdiction based on official capacity. Thus, unless there is an express provision to the contrary, such SOFAs must be interpreted *bona fide* and in a way that respects any obligations under the *Rome Statute.* Accordingly, the State party must be required to surrender alleged perpetrators of core crimes to the Court."
Wirth, *supra*, n. 31, 21 (italics in the original). *See also* Danilenko, *supra*, n. 34, 1887-1888; Swart & Sluiter, *supra*, n. 34, 121; Paust, *supra*,. n. 27, 14.

provide assistance to the Court by surrendering accused persons found in any territory subject to their jurisdiction.

Any state that has entered into a US impunity agreement should comply with any request by the International Criminal Court to arrest and to surrender US nationals (or associated nationals) pending a determination by the International Criminal Court of the legality of the agreement.

Intergovernmental organizations, including the EU and NATO, should each issue a statement making clear that US impunity agreements are contrary to the Rome Statute, that states parties and signatories should not enter into such agreements and that any state party or signatory that has signed such an agreement should not ratify it or implement it.

Although the USA is not at the moment asking states to enter into a new or renewed Status of Forces Agreements, no state party to the Rome Statute, state signatory to the Rome Statute or any other state should enter into such an agreement with the USA absent the following guarantees by the USA:

- that the USA has legislation that defines each crime in the Rome Statute at least as broadly as in the Rome Statute and defines principles of criminal responsibility and defences in a manner fully consistent with international law and provides for jurisdiction over such crimes in its civilian courts.

- that the USA will investigate all crimes under the Rome Statute allegedly committed by US nationals or others within its jurisdiction promptly, thoroughly, independently and impartially and that, if there is sufficient admissible evidence, it will prosecute these crimes in a similar manner.

- that if the USA proves unable or unwilling to investigate or prosecute any US national or other person within its jurisdiction returned by a state to the USA, it will return that person to the other state or surrender that person to the International Criminal Court.

The Assembly of States Parties should discuss this issue at its first session and should issue a statement making clear that US impunity agreements are contrary to the Rome Statute, that states parties and signatories should not enter into such agreements and that any state party or signatory that has signed such an agreement should not ratify it or implement it.

The Prosecutor should seek a definitive ruling by the Pre-Trial Chamber or other Chamber on any claim by a state that an agreement prevents the surrender of an accused to the International Criminal Court and that Chamber should declare any agreement that would lead to impunity contrary to the Rome Statute and without any legal effect on the duty of the requested state to surrender an accused to the Court.