

**PROTECTING THE PROTECTORS:  
CAN THE UNITED STATES SUCCESSFULLY  
EXEMPT U.S. PERSONS FROM THE  
INTERNATIONAL CRIMINAL COURT WITH  
U.S. ARTICLE 98 AGREEMENTS?**

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Thank you, American Servicemember, for fighting on the final frontiers of freedom to dutifully protect our nation. We appreciate your work, Madam Diplomat, for traveling to far off lands to honorably represent the United States. Your work to keep the fighting force running, Mr. Contractor, is greatly appreciated. However, after you complete your duties abroad, be careful of where you travel. Unless the United States prevails in exempting U.S. persons from the jurisdiction of the International Criminal Court (ICC),<sup>1</sup> visiting the wrong foreign country could land you before a foreign court, stripped of your customary constitutional guarantees.<sup>2</sup>

In the face of ratification of the ICC,<sup>3</sup> the United States has begun to pursue exemption for U.S. officials, employees, and military personnel through bilateral agreements with other nations.<sup>4</sup> These bilateral agreements, also known as U.S. Article 98 agreements,<sup>5</sup> bind the other nation to not transfer accused

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1. The Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] establishes the ICC to prosecute genocide, crimes against humanity, and war crimes. See Article 5, noting that the ICC shall have jurisdiction additionally over the crime of aggression once that crime is adopted.

2. "Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury." American Servicemembers' Protection Act of 2002, 22 U.S.C.A. § 7421(7) (West 2004).

3. Ninety-four states have ratified the Rome Statute, with Congo being the most recent, on May 3, 2004. United Nations, *Multilateral Treaties Deposited with the Secretary General: Rome Statute of the International Criminal Court*, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (July 17, 1998) [hereinafter Rome Participants].

4. See Elizabeth Becker, *U.S. Presses for Total Exemption from War Crimes Court*, N.Y. TIMES, Oct. 9, 2002, at A6 (reporting on the attempts by the U.S. government to exempt all U.S. citizens from the jurisdiction of the ICC).

5. The agreements refer to Article 98(2) of the Rome Statute:

The [ICC] 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 [ICC], unless the [ICC] can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Rome Statute, *supra* note 1, art. 98(2), 2187 U.N.T.S. at 148.

U.S. persons<sup>6</sup> to the ICC.<sup>7</sup> While the United States fully intends to investigate and prosecute U.S. persons accused of genocide, crimes against humanity, and war crimes, these agreements are meant to allow the United States to pursue justice, rather than to hand the duty over to the ICC.<sup>8</sup>

Critics of these U.S. Article 98 agreements, such as James Crawford<sup>9</sup> and the European Union (EU), argue that the

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6. "U.S. persons" refers to the entire category of people the United States attempts to exempt through U.S. Article 98 agreements. *See, e.g.*, Agreement Concerning the Surrender of Persons to the International Criminal Court, June 19, 2003, U.S.-Sen., Hein's No. KAV 6211, Temp. State Dep't No. 03-86, at 3 (entered into force June 27, 2003) [hereinafter Senegal Agreement] (defining U.S. persons as "current or former U.S. Government officials, employees (including contractors), or military personnel or U.S. nationals"). Some U.S. Article 98 agreements seek, however, only to exempt U.S. nationals, and current and former U.S. military personnel. Agreement Concerning the Surrender of Persons to Third Parties, June 6, 2003, U.S.-Mong., Hein's No. KAV 6212, Temp. State Dep't No. 03-87, at 3 (entered into force June 27, 2003).

7. *See, e.g.*, Senegal Agreement, *supra* note 6. As of July 16, 2003 more than fifty-five nations have signed Article 98 agreements with the United States. U.S. Dep't of State, *New Article 98 Agreements*, at <http://www.state.gov/r/pa/prs/ps/2003/22481.htm> (July 16, 2003). There are several different U.S. Article 98 agreements, but the two basic differences are bilateral immunity for both parties or unilateral immunity for the U.S. Compare Senegal Agreement, *supra* note 6 (requiring U.S. consent for the transfer of U.S. persons to the ICC), with Agreement Regarding the Surrender of Persons to the International Criminal Court, Aug. 23, 2002, U.S.-East Timor, Hein's No. KAV 6339, Temp. State Dep't No. 03-150, at 4 (entered into force Oct. 30, 2003) (requiring the consent of East Timor for the transfer of a person from East Timor to the ICC, and requiring U.S. consent for the transfer of U.S. persons to the ICC).

8. *See* Press Release, U.S. Dep't of State, U.S. and Romania Sign Article 98 Agreement, at <http://www.state.gov/r/pa/prs/ps/2002/12393.htm> (Aug. 1, 2002) [hereinafter Press Release] (announcing the signing of the first Article 98 agreement while asserting U.S. commitment to pursuing war criminals).

9. Whewell Professor of International Law, University of Cambridge; member of the bar in England and Australia. Professor Crawford condemns the U.S. Article 98 agreements in a joint opinion written for the Lawyers' Committee on Human Rights and the Medical Foundation for the Care of Victims of Torture. JAMES CRAWFORD SC ET AL., JOINT LEGAL OPINION: IN THE MATTER OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND IN THE MATTER OF BILATERAL AGREEMENTS SOUGHT BY THE UNITED STATES UNDER ARTICLE 98(2) OF THE STATUTE 23 (2003), at [http://www.humanrightsfirst.org/international\\_justice/Art98\\_061403.pdf](http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf) (June 5, 2003). In 1994, Crawford was chairman of the Working Group that refined the draft eventually adopted as the Rome Statute in 1998. JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 711 (2d ed. 2000). While Crawford's joint opinion criticizes the U.S. Article 98 agreements, this comment uses Crawford's analysis both to support the U.S. position and to address inadequacies in the U.S. Article 98 agreements.

agreements undermine the purpose of the ICC and are contrary to the International Law of Treaties.<sup>10</sup> The United States argues that the ICC was meant to have concurrent jurisdiction with other nations and that the Rome Statute contemplates the agreements.<sup>11</sup> The lack of U.S. constitutional safeguards for the accused before the ICC, compels the United States to block ICC jurisdiction.<sup>12</sup>

The U.S. Article 98 agreements effectively immunize only a limitedly defined group of U.S. persons from ICC jurisdiction. The shortfalls of this immunization lie in U.S. criminal jurisdiction and the ambiguous definition of “sending State”<sup>13</sup> in Article 98 of the Rome Statute. In the end, the ICC or the International Court of Justice (ICJ) will decide the validity of these agreements.<sup>14</sup> The United States will likely continue to pursue Article 98 agreements to exempt U.S. persons from the jurisdiction of the ICC, but the United States should also take measures to improve the effectiveness of these bilateral treaties.

This comment evaluates the legality of the U.S. Article 98 agreements with respect to the Rome Statute. Part I examines the history of U.S. Article 98 agreements and the United States’s attempts to avoid ICC jurisdiction. Part II reviews the procedure of the ICC. Part III evaluates the obligations different states incur under the Rome Statute. Finally, Part IV analyzes the legality of the U.S. Article 98 agreements and suggests solutions to improve their success.

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10. See *Risks for the Integrity of the Statute of the International Criminal Ct.*, EUR. PARL. ASS., 29th Sitting, Doc. No. 9567 (2002) [hereinafter *Risks for the ICC*] (outlining European Union opposition to Article 98 agreements).

11. John Bolton, Remarks at the Romanian Foreign Ministry at <http://www.state.gov/t/us/rm/12491.htm> (Aug. 1, 2002).

12. See 22 U.S.C.A. § 7421.

13. The international agreement indicated in Article 98 that prevents the ICC from pursuing the accused is “pursuant to which the consent of a sending State is required to surrender a person of that State to the [ICC] Court” Rome Statute, *supra* note 1, art. 98(2), 2187 U.N.T.S. at 148. However, the term “sending State” is not defined. See *id.* art. 102, 2187 U.N.T.S. at 149.

14. CRAWFORD, *supra* note 9, at 24–27 (explaining that the ICC decides its own right to make a request for surrender, but that if states party to the Rome Statute dispute the legality of a non-surrender agreement, then the ICC, the Assembly of States Parties, or the International Court of Justice may decide the issue).

## I. THE UNITED STATES AND INTERNATIONAL TRIBUNALS

The United States has established a tradition of involvement with international justice. The United States has supported both the use of foreign national courts to try their citizens for international acts,<sup>15</sup> and has supported international tribunals to try the accused before multinational courts of the world.<sup>16</sup>

When it comes to U.S. persons, the “United States has consistently demonstrated a willingness to discipline its own”<sup>17</sup> and continues to endeavor to exempt U.S. persons from the jurisdiction of foreign courts.<sup>18</sup> Fears that political rivals of the United States might use international courts to harass U.S. leaders,<sup>19</sup> combined with a commitment to preserving for U.S. persons the fair trial guarantees of the Bill of Rights,<sup>20</sup> have stoked the flames to keep the United States out of the ICC. To achieve that end, the United States has resorted to signing U.S. Article 98 agreements, Status of Forces Agreements (SOFAs),<sup>21</sup>

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15. The Bush Administration continues to support the use of Iraqi courts to try Saddam Hussein and other war criminals in Iraq, rather than the establishment of an international tribunal. Dana Milbank, *Bush Says Iraqis Will Try Hussein: President Opposes International Tribunal for Captured Dictator*, WASH. POST, Dec. 16, 2003, at A1.

16. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has “profited greatly from the support of the United States,” and represents the “first truly international war crimes court in modern history.” Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 51, 51–52 (Sarah B. Sewall & Carl Kaysen eds., 2000).

17. William K. Lietzau, *International Criminal Law after Rome: Concerns from a U.S. Military Perspective*, 64 *LAW & CONTEMP. PROB.* 119, 121 n.7 (2001).

18. Press Release, White House, Office of the Press Secretary, President Bush, Colombian President Uribe Discuss Terrorism (Sept. 25, 2002) at <http://www.whitehouse.gov/news/releases/2002/09/print/20020925-1.html>.

19. While “many procedural safeguards to prevent frivolous prosecution have been built into the [ICC],” the possibility exists for the ICC to “be used as a political forum for raising questions about U.S. foreign policy.” William L. Nash, *The ICC and the Deployment of U.S. Armed Forces*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT*, *supra* note 16, at 153, 159.

20. 22 U.S.C.A. § 7421 (seemingly condemning the ICC, because any U.S. person prosecuted under the Rome Statute will be denied the fundamental protections of the Bill of Rights).

21. See Erik Rosenfeld, *Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute*, 2 *WASH. U. GLOBAL STUD. L. REV.* 273, 276 n.30 (2003) (“The

and other extradition agreements.<sup>22</sup>

*A. International Crimes and the United States*

The United States has long been interested in codifying wartime conduct and punishing violators, but it has been inconsistent in asserting who should judge the accused. In 1863 during the Civil War, the United States created a model manual for conduct during wartime, prompting other nations to follow suit.<sup>23</sup> While the 1899 Hague Convention<sup>24</sup> established the first treaty of the modern era to address war crimes, the concept of crimes during war was not common until World War I.<sup>25</sup>

In 1907, the United States, along with other nations, dealt with the laws and customs of war including limitations imposed on belligerents.<sup>26</sup> Later, at the close of World War I, France, Great Britain, and Belgium called for international war crimes tribunals to punish the Central Powers<sup>27</sup> for cruel behavior during the war.<sup>28</sup> However, because the United States advocated that each nation's own military tribunals punish its own war criminals, these international tribunals did not occur.<sup>29</sup>

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Status of Forces Agreement (SOFA) is a legal arrangement established between the United States and a host nation which establishes uniform rules for handling legal matters involving U.S. military personnel serving overseas.”)

22. *Id.* at 291–92 (2003) (describing shortcomings in the application of SOFAs under Article 98, and noting that in addition to Article 98 agreements with some nations, the United States has also concluded an extradition agreement with the Republic of Korea).

23. HOWARD BALL, *PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE* 13–14 (1999). A Columbia law professor drafted the manual that “was distributed to every commander in the Union *and* Confederate armies, was followed by the belligerents, and remains the core of the latest manual for the conduct of war by American forces in the field” *Id.* at 14. The manual became a model for other nations in the decades after it was published. *Id.*

24. Convention between the United States of American and Certain Powers, With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803.

25. See BALL, *supra* note 23, at 14.

26. See *id.* at 15–16 (describing the meeting held at The Hague to discuss laws of war).

27. The Central Powers included Germany, Austria-Hungary, Bulgaria, and the Ottoman Empire.

28. BALL, *supra* note 23, at 19–21.

29. *Id.* at 19–21. Although contrary to President Woodrow Wilson's beliefs, Secretary of State Robert Lansing prevailed with his opposition to setting a precedent

Despite the Allies's attempts<sup>30</sup> to use international tribunals to punish violations of the laws of war, the tribunals could not proceed without U.S. support, and the Allies reluctantly allowed Germany to try its own alleged war criminals in Germany's Supreme Court.<sup>31</sup>

The first international military tribunal was held after World War II at Nuremberg, conducted by the victorious Allies, and endorsed by the United States.<sup>32</sup> Later in the Pacific, U.S. General Douglas MacArthur, as the Supreme Commander of the Allied Powers, established the International Military Tribunal for the Far East (IMTFE) in 1946.<sup>33</sup>

Notwithstanding U.S. support of these international tribunals following horrific acts of genocide committed by the Axis Powers in World War II, the United States did not fully support the Genocide Convention.<sup>34</sup> While President Harry Truman heartily endorsed the Convention in 1949, it took forty years for the U.S. Congress to ratify.<sup>35</sup> One of the Congressional complaints was that the international definition of genocide by the treaty would "replace domestic laws with international law" and violate the U.S. Constitution.<sup>36</sup> The United States's weak support of the Genocide Convention has left the United States

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with an international war crimes tribunal. *Id.* at 21.

30. The Allies include Russia, France, British Empire, and Italy (among others). The United States was considered an Associated Power.

31. BALL, *supra* note 23, at 21–24 ("Of the 900 Germans identified by the Allies, 888 were acquitted or had the charges dismissed without trial.")

32. *Id.* at 54, 60 (finding at the Nuremberg Tribunal nineteen of the twenty-two defendants guilty).

33. *See id.* at 77, 83 (finding all guilty in 207 verdicts at the International Military Tribunal for the Far East (IMTFE)).

34. Samantha Power, *The United States and Genocide Law: A History of Ambivalence*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 16, at 165, 165–66 (noting that, although the Genocide Convention was drafted by U.S. State Department lawyers, it was never ratified by the United States due to "congressional hostility").

35. *See id.* at 165–66 (referring to cases of genocide by the Khmer Rouge and Saddam Hussein that the United States was unable to pursue due to U.S. convention ratification failure).

36. BALL, *supra* note 23, at 89; *see also* Power, *supra* note 34, at 169 (arguing that the fear of the Genocide Convention trumping the U.S. Constitution and threatening U.S. sovereignty prolonged the ratification of the Convention).

“hoping that some other nation would file a case [against genocidal regimes] at the ICJ.”<sup>37</sup>

Despite the failure to fully support the Genocide Convention, the United States did support the United Nations (UN) in the 1993 creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a response to genocidal tragedies in the former Yugoslavia.<sup>38</sup> Later, in response to the genocide committed in Rwanda<sup>39</sup> and requests from the new Rwandan government, the UN established the International Criminal Tribunal, Rwanda (ICTR) in 1994.<sup>40</sup> Recently, however, the Bush Administration has been leading the United States to support national courts, to the exclusion of international tribunals, in order to bring Iraqi oppressors to justice.<sup>41</sup>

### *B. International Crimes by U.S. Persons*

The United States has firmly committed to holding its own criminals individually responsible for their international crimes.<sup>42</sup> For war crimes committed in Vietnam, the United States prosecuted and convicted U.S. Army Lieutenant William L. Calley, Jr.<sup>43</sup> For the “sadistic, blatant, and wanton criminal

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37. POWER, *supra* note 34, at 166–67.

38. See BALL, *supra* note 23, at 121, 141.

39. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 558 (1995). While the atrocities in the former Yugoslavia were of an international character, the conflict in Rwanda was an internal, non-international armed conflict. See *id.* at 556 (describing how the statutes that established the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (ICTR) differed when characterizing the respective conflicts as international or non-international).

40. BALL, *supra* note 23, at 171.

41. See Susan Sachs, *Iraq Prepares to Create its Own Tribunal to Prosecute War Crimes Under Hussein*, N.Y. TIMES, Dec. 8, 2003, at A14 (describing the Bush Administration's support of an all-Iraqi tribunal).

42. See U.S. DEPT OF THE ARMY, DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE FM 27–10, ¶ 498 (1976) (“Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.”).

43. United States v. Calley, 22 C.M.A. 534, 536 (1973). Calley led his platoon in the assault into the village of May Lai on March 16, 1968, killing twenty-two infants, children, women, and old men. *Id.* “Willful killing” and “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct

abuses”<sup>44</sup> inflicted on Iraqi detainees at Abu Ghraib prison in Iraq from October to December 2003, the United States has charged seven U.S. Army soldiers, has suspended the Brigadier General in charge of the prison, and has investigated culpability from the lowest ranking soldier all the way up to the U.S. Secretary of Defense.<sup>45</sup>

The United States traditionally expects immunity for visiting forces,<sup>46</sup> and has gone so far as to seek exemption from foreign bodies of justice for U.S. persons deployed in foreign countries, opting to try them in U.S. courts instead.<sup>47</sup> In order to preserve the U.S. system of criminal justice for U.S. persons, the United States negotiated with the other North Atlantic Treaty Organization (NATO) countries following World War II to establish SOFAs.<sup>48</sup> In subsequent SOFAs modeled after the

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part in hostilities” constitute war crimes under the Rome Statute. Rome Statute, *supra* note 1, art. 8(2)(a), (2)(b)(i), 2187 U.N.T.S. at 94–95.

44. MG ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16–17 (2004) (submitted Mar. 9, 2004) (detailing the Taguba investigation into the abuses and recommending that punitive action be taken against officers in the ranks of Brigadier General on down).

45. *Id.*; JAMES R. SCHLESINGER, ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (2004) (detailing the Schlesinger investigation and assigning indirect responsibility to Secretary Rumsfeld and other members of the chain of command); *see also* Eric Schmitt, *Abuse Panel Says Rules on Inmates Need Overhaul*, N.Y. TIMES, Aug. 25, 2004, at A1 (noting that Schlesinger investigated Secretary Rumsfeld’s level of responsibility); *Military Personnel in Abu Ghraib Probe*, BOSTON GLOBE, Oct. 22, 2004, at A14 (describing the crimes for which the soldiers have faced or are facing court-martial); Josh White, *Army Suspends General in Charge of Abu Ghraib*, WASH. POST, May 25, 2004, at A11 (reporting on the suspension of Brigadier General Janis Karpinski).

46. *See* DIETER FLECK, THE HANDBOOK OF THE LAW OF VISITING FORCES 12–13 (2001) (outlining various authorities discussing subject of international forces receiving immunity from a host state); *see also* *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 117, 147 (1812) (holding that the U.S. courts did not have jurisdiction over French forces that had seized American ships).

47. Robinson O. Everett, *American Servicemembers and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 16, 137–39 (explaining U.S. efforts since World War II to exempt U.S. servicemembers and later the dependents and employees who accompany them).

48. *See, e.g.*, Status of United States Forces in the Federal Republic of Germany, Aug. 3, 1959, U.S.-F.R.G., 14 U.S.T. 689 (outlining the agreement between the United States and Germany regarding the presence of U.S. troops in Germany); *see also* Rosenfeld, *supra* note 21, at 280 (defining SOFAs as “international agreements between

NATO SOFA,<sup>49</sup> the United States has not sought to exempt all violations.<sup>50</sup> In most agreements defining the status of U.S. persons in a foreign nation, the United States usually maintains exclusive jurisdiction over military crimes or offenses related to the performance of official duty.<sup>51</sup>

Initially, the SOFAs also extended to the “civilian component” of the visiting armed forces.<sup>52</sup> After the U.S. Supreme Court found trying these civilians in a military court-martial unconstitutional, the lack of U.S. federal court jurisdiction meant that the civilians would be tried in the host nation courts.<sup>53</sup> However, absent these SOFAs or other Article 98 agreements, a “sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.”<sup>54</sup>

The United States continues working to exempt U.S. persons from the jurisdiction of foreign courts because of fears that enemies of the United States may use a foreign court to challenge U.S. foreign policy.<sup>55</sup> In 2003, a Belgian legislator filed suit against U.S. General Tommy Franks, who was then the commander of U.S. troops in Iraq, charging General Franks with war crimes.<sup>56</sup> The suit offered credence to U.S. fears of political misuse, prompting the United States to criticize Belgium for

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states that create obligations concerning the jurisdiction over foreign state’s military or civilian citizen.”); Everett, *supra* note 47, at 137–38.

49. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].

50. FLECK, *supra* note 46, at 108–09.

51. *Id.* at 108.

52. See Everett, *supra* note 47, at 139 (explaining how the United States incorrectly assumed that civilians could be tried under Article 2 of the Uniform Code of Military Justice).

53. See *id.* (explaining the lack of U.S. jurisdiction for civilian crimes outside the United States).

54. *Wilson v. Girard*, 354 U.S. 524, 529 (1957) (citing *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812)).

55. See Nash, *supra* note 19, at 159 (justifying the fear that opponents of the United States might use the ICC to undermine U.S. operations).

56. Richard Bernstein, *Belgium: War Crimes Complaint Against Franks*, N.Y. TIMES, May 15, 2003, at A12.

allowing Belgian laws to be used for political purposes.<sup>57</sup>

The United States continues to avoid foreign jurisdiction. While the United States signed the Rome Statute that established the ICC, the United States subsequently refused to ratify the Rome Statute.<sup>58</sup> The American Servicemembers' Protection Act of 2002 (ASPA)<sup>59</sup> effectively: restricts U.S. participation in UN peacekeeping operations that would expose U.S. persons to ICC jurisdiction; prevents U.S. military assistance to states who are party to the Rome Statute; and prohibits cooperation with the ICC.<sup>60</sup> Congress based the decision on findings that the ICC would deny U.S. persons constitutional rights and that political rivals of the United States might use the ICC to target U.S. officials for national security decisions.<sup>61</sup>

However, the President can lift these restrictions if the state that is a party to the Rome Statute agrees to prevent the ICC from exercising jurisdiction over U.S. persons.<sup>62</sup> Therefore, the President of the United States will probably waive prohibitions on U.S. aid to states that enter into U.S. Article 98 agreements.<sup>63</sup> In an effort to punish its own, to maintain constitutional guarantees for U.S. persons, and to avoid the political misuse of foreign courts, the United States continues to pursue U.S. Article 98 agreements.

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57. *See id.* (reporting that the U.S. State Department dismissed the action as "ludicrous").

58. *See* Press Release, U.S. Dep't of State, International Criminal Ct.: Letter to UN Secretary General Kofi Annan, at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (May 6, 2002) [hereinafter Annan Letter] (informing the UN that the United States has no intention of becoming a party to the Rome Statute).

59. American Servicemembers' Protection Act of 2002, 22 U.S.C.A. §§ 7421–7433 (West 2004).

60. *Id.* §§ 2004–07.

61. *Id.* § 2002. U.S. military leaders cringe at the idea that a foreign, civilian court might judge professional U.S. military proceedings. *See* Nash, *supra* note 19, at 156 (arguing that "[t]he U.S. military has reason to be wary of the ICC").

62. 22 U.S.C.A. § 2007.

63. *See, e.g.*, Presidential Determination No. 2003-40, 68 Fed. Reg. 57,319 (Oct. 3, 2003) (lifting the restrictions of the ASPA for Afghanistan, Democratic Republic of the Congo, Georgia, and Honduras).

### C. U.S. Article 98 Agreements

The United States currently uses two different versions of Article 98 agreements. The first version provides for bilateral immunity from the ICC.<sup>64</sup> This bilateral version mandates that both parties must gain the consent of the other party in order to send nationals of that other party to the ICC.<sup>65</sup> Therefore, in an agreement between the United States and Uzbekistan, the United States agrees to not transfer an Uzbekistani person to the ICC without the express consent of Uzbekistan.<sup>66</sup> Likewise, Uzbekistan agrees to not transfer a U.S. person to the ICC without U.S. consent.<sup>67</sup> This agreement permits the parties to control when and if a person of their state will be transferred to the ICC.

The second version provides for unilateral U.S. immunity from the ICC.<sup>68</sup> This unilateral version provides immunity only for U.S. persons.<sup>69</sup> The United States has not ratified the Rome Statute, has not accepted the jurisdiction of the ICC, and is not a party to the Rome Statute.<sup>70</sup> This unilateral agreement only provides immunity for U.S. persons from ICC jurisdiction.

While the bilateral and unilateral versions of U.S. Article 98 agreements provide varying degrees of transfer limitations, this comment generally addresses the different versions together as U.S. Article 98 agreements, distinguishing as necessary.

## II. PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT

The ICC exists as an international body of justice, poised to prosecute individuals accused of international crimes when national bodies of justice are unable to pursue the accused.<sup>71</sup>

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64. See, e.g., Agreement Regarding the Surrender of Persons to the International Criminal Court, June 12, 2003, U.S.-Uganda, Hein's No. KAV 6338, Temp. State Dep't No. 03-149, at 1 (entered into force Oct. 23, 2003) [hereinafter Uganda Agreement].

65. *Id.*

66. *Id.*

67. *Id.*

68. See, e.g., Senegal Agreement, *supra* note 6, at 3.

69. *Id.*

70. See Annan Letter, *supra* note 58 (informing the UN that the United States has no intention of becoming a party to the Rome Statute).

71. See Rome Statute, *supra* note 1, arts. 1, 12, 2187 U.N.T.S. at 91-92, 100-01.

This section addresses the limited number of persons over whom the ICC has jurisdiction and the process of bringing an accused to justice before the ICC.

In order to clarify the different state actors with respect to the Rome Statute, this comment classifies a state as either a party to the Rome Statute (Party State), a signatory of the Rome Statute without ratification of the Rome Statute (Signatory State),<sup>72</sup> or not a party to the Rome Statute (Non-Party State).<sup>73</sup> All the Party States make up the Assembly of States Parties, which provides management oversight regarding the administration of the ICC.<sup>74</sup>

The purpose of the Rome Statute is to prevent international criminals from escaping punishment.<sup>75</sup> The ICC exists as a complementary<sup>76</sup> organ of international justice, so that it acts

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72. The Rome Statute provides that nations might sign the statute until 31 December 2000, but indicates that states do not consent to be bound by the Rome Statute until they deposit instruments of ratification, acceptance, approval, or accession. *See id.* arts. 125–26, 2187 U.N.T.S. at 157–58 (explaining the signature, ratification, accession, and entry into force provisions); *see also* Vienna Convention on the Law of Treaties, May 23, 1969, arts. 11–16, 24, 1155 U.N.T.S. 331, 335–36, 338 (1969) [hereinafter Vienna Convention] (describing the means of expressing consent to be bound by a treaty). For the purposes of this discussion, Party State means a state that has consented to be bound by the Rome Statute, while a Signatory State has merely signed the Rome Statute.

73. Non-Party States are defined as states that have not signed the Rome Statute, have never acceded to the Rome Statute, or have signed the Rome Statute but later expressed the intent to not become a party to the Rome Statute. *See* Vienna Convention, *supra* note 72, art. 18, 1155 U.N.T.S. at 336 (explaining that a state that has signed a treaty has obligations under that treaty unless it has clearly expressed an intent to not become a party to the treaty).

74. Rome Statute, *supra* note 1, art. 112, 2187 U.N.T.S. at 153–54. Each Party State has one representative with one vote in the Assembly and the Signatory States may observe the Assembly. *Id.* *See also* Rome Participants, *supra* note 3, for a list of Signatory States and Party States.

75. *Id.* pmb., 2187 U.N.T.S. at 91; *see* Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT*, *supra* note 16, at 1, 1–2 (explaining that the ICC will emphasize a commitment to human rights “[b]y helping end impunity for the worst violations of human rights”).

76. Rome Statute, *supra* note 1, art. 1, 2187 U.N.T.S. at 91–92 (explaining that the Court “shall be complementary to national criminal jurisdictions”); *see also* Rosenfeld, *supra* note 21, at 278 (explaining the principle of complementarity and how it “preserves the sovereign right of states to prosecute criminals within their jurisdiction without

only when a state tribunal is unable or unwilling to investigate and prosecute a person of that state.<sup>77</sup>

The ICC has jurisdiction over the crimes of genocide, crimes against humanity, and war crimes (collectively, Rome Statute crimes).<sup>78</sup> The only individuals over whom it has jurisdiction are either: (a) Party State nationals or (b) individuals who are accused of committing Rome Statute crimes on the territory of a Party State.<sup>79</sup> Therefore, a U.S. person accused of committing a Rome Statute crime must have allegedly committed the crime on the territory of a Party State to be within the jurisdiction of the ICC.<sup>80</sup>

As part of the principle of complementarity, the ICC must not try an individual when a state has jurisdiction, and has investigated, is investigating, or is prosecuting the accused.<sup>81</sup> If the ICC determines that the state is unable or unwilling to genuinely prosecute the individual, then the ICC may proceed with the case against the accused.<sup>82</sup> Therefore, when a U.S.

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external interference”).

77. A case is inadmissible before the ICC when the “case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.” Rome Statute, *supra* note 1, art. 17(1)(a), 2187 U.N.T.S. at 100.

78. *Id.* arts. 5–8, 2187 U.N.T.S. at 92–98. The ICC will have jurisdiction over the crime of aggression once the Assembly of States Parties adopts a provision that defines the crime of aggression. *Id.* art. 5, 2187 U.N.T.S. at 92.

79. *Id.* art. 12, 2187 U.N.T.S. at 99 (noting that jurisdiction is also proper when the crime is committed on a vessel or aircraft registered in a Party State, and that a Non-Party State may accept the jurisdiction of the ICC).

80. However, if the U.S. person is also a national of a Party State, then where the alleged crime occurred is irrelevant. *See* Rome Statute, *supra* note 1, art. 12, 2187 U.N.T.S. at 99 (describing the preconditions to jurisdiction).

81. *Id.* art. 17, 2187 U.N.T.S. at 100–01; *see also* Douglass Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 378, 388 (1999) (explaining that the ICC's “complementary” jurisdiction forces the ICC to “defer to national prosecutions, including those by non-state parties”).

82. According to the Rome Statute, the ICC determines unwillingness to investigate or prosecute based on whether the proceedings are for the “purpose of shielding the person concerned from criminal responsibility;” whether there has been “an unjustified delay” that signals an intent to avoid bringing the person to justice; or whether the proceedings are not independent and impartial. Rome Statute, *supra* note 1, art. 17, 2187 U.N.T.S. at 100–01. The ICC considers if there has been a “total or substantial collapse or unavailability of [a State's] national judicial system” to determine

court has jurisdiction over the accused and U.S. prosecutors intend to investigate or prosecute the accused, the ICC must not try a U.S. person.<sup>83</sup> Once U.S. prosecutors begin the investigation or prosecution, the case is inadmissible before the ICC.<sup>84</sup>

When the ICC determines that it will pursue an individual for investigation and prosecution, it transmits a request for the arrest and surrender of a person to “any State on the territory of which that person may be found.”<sup>85</sup> Party States must cooperate with the ICC for these requests.<sup>86</sup>

When both the ICC and a Non-Party State request the surrender of an accused, cooperation depends on existing agreements between the states. According to Article 90, the requested state has a primary obligation to transfer the individual to the ICC unless the requested state has an existing international obligation to extradite the person to the Non-Party State.<sup>87</sup> If the international obligation exists, then the Party State may decide whether to honor the international obligation or to honor the request for surrender to the ICC.<sup>88</sup> If the states do not have an extradition agreement and the ICC has determined the case is admissible, then the Party State must honor the ICC’s surrender request.<sup>89</sup>

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if that state is unable to investigate or prosecute. *Id.*

83. Even if the United States investigates and determines that prosecution is inappropriate, the ICC does not have jurisdiction unless it finds the United States was unwilling or unable to genuinely prosecute. Cassel, *supra* note 81, at 388.

84. Rome Statute, *supra* note 1, art. 17, 2187 U.N.T.S. at 100–01. However, the ICC may determine unwillingness to investigate or prosecute based on “an unjustified delay” that is “inconsistent with an intent to bring the person concerned to justice.” *Id.* art. 17(2)(b), 2187 U.N.T.S. at 101.

85. *Id.* art. 89, 2187 U.N.T.S. at 141.

86. *Id.*

87. *Id.* art. 90, 2187 U.N.T.S. at 141–43 (explaining the procedure for competing surrender requests).

88. *Id.* art. 90(6), 2187 U.N.T.S. at 142 (listing the factors to be considered when the Party State determines which surrender request to honor).

89. *Id.* art. 90(4), 2187 U.N.T.S. at 142. The Party State is not obligated to honor the ICC’s request if the ICC itself has determined that the case is inadmissible. *Id.* art. 90(4), (5), 2187 U.N.T.S. at 142. One way a case is deemed inadmissible is when a State with jurisdiction over the accused is investigating or prosecuting the accused. *Id.* art. 17, 2187 U.N.T.S. at 100–01.

However, in the matter of U.S. Article 98 agreements, the agreements prohibit transfer of the accused to the ICC but do not require extradition to the United States.<sup>90</sup> Therefore, U.S. Article 98 agreements do not take advantage of the protection that Article 90 might otherwise provide.

While Article 90 imposes obligations on the Party States,<sup>91</sup> Article 98 “imposes an obligation on the Court, not on the [Party States], still less on other States.”<sup>92</sup> The obligation under Article 98 prevents the ICC from proceeding with a request for surrender when the request would conflict with existing international obligations.<sup>93</sup>

Therefore, when the ICC requests the surrender of a U.S. person from a Party State and the Party State does not have an existing agreement with the United States, then the Party State must transfer the U.S. person to the ICC.<sup>94</sup> When the United States and the Party State do have an agreement pursuant to Article 98, then the ICC must not continue to request the individual.

Assuming U.S. courts have jurisdiction over a U.S. person, the Article 98 agreement becomes most important when the U.S. person is accused of a Rome Statute crime and the U.S. government considers the accusation frivolous.<sup>95</sup> When the United States has no intention of investigating or prosecuting the case, then the case is admissible before the ICC.<sup>96</sup> If the

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90. *See, e.g.*, Senegal Agreement, *supra* note 6, at 3.

91. Rome Statute, *supra* note 1, art. 90, 2187 U.N.T.S. at 141–43.

92. CRAWFORD, *supra* note 9, at 10.

93. Rome Statute, *supra* note 1, art. 98, 2187 U.N.T.S. at 148.

94. However, if the United States has jurisdiction and is investigating or prosecuting the case genuinely, then the ICC must determine that the case is inadmissible before the ICC. *Id.* art. 17, 2187 U.N.T.S. at 100–01.

95. The United States will not likely pursue cases that constitute politically motivated attacks against the United States and its officials. *See* Bernstein, *supra* note 56, at A12 (reporting that the United States believed a Belgian lawsuit charging General Tommy Franks with war crimes was for political purposes and that the U.S. State Department considered the action to be “ludicrous”).

96. *See* Rome Statute, *supra* note 1, art. 17, 2187 U.N.T.S. at 100–01 (explaining that a case is still admissible when a state with jurisdiction is unwilling to investigate or prosecute the accused). The U.S. Article 98 agreements express an intention to investigate and prosecute those accused of Rome Statute crimes. *See, e.g.*, Senegal Agreement, *supra* note 6, at 3; Uganda Agreement, *supra* note 64, at 1.

United States also has a valid Article 98 agreement with the Party State where the U.S. person is found, then the ICC must not proceed with the request for surrender of the U.S. person even if the case is admissible. Article 98 simply requires an international obligation contrary to the ICC's surrender request in order to trigger the ICC's obligation to halt.<sup>97</sup> Whether or not any state will investigate or prosecute is irrelevant.<sup>98</sup>

### III. OBLIGATIONS UNDER THE ROME STATUTE

The Vienna Convention on the Law of Treaties (Vienna Convention)<sup>99</sup> provides the framework for determining the meaning of Article 98 of the Rome Statute and the validity of U.S. Article 98 agreements.<sup>100</sup> The Vienna Convention was opened for signatures on May 23, 1969, and entered into force on January 27, 1980.<sup>101</sup> It began as an attempt to draft "articles which could form the basis of an eventual international convention" and later used to create an "expository code" for guidance on international treaties.<sup>102</sup> The Vienna Convention

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97. Cf. Rome Statute, *supra* note 1, stating:

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.

art. 98(2), 2187 U.N.T.S. at 148.

98. See CRAWFORD, *supra* note 9, at 16–17 (conceding that Article 98 limits the ICC by not expressly requiring a person who falls under Article 98 protections to be subject to investigation or prosecution). Crawford's joint opinion is generally critical of the U.S. position on Article 98. See discussion *supra* note 9 (describing Crawford's position).

99. Vienna Convention, *supra* note 72, 1155 U.N.T.S. at 331.

100. Critics of the U.S. Article 98 agreements assert that the agreements violate the Vienna Convention. See *Risks for the ICC*, *supra* note 10, at 2. Therefore, in support of the U.S. position, this comment analyzes the agreements using the Vienna Convention.

101. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 1 (2d ed. 1984).

102. See *id.* at 3 (explaining how the first two Special Rapporteurs drafted articles to support an international convention and a later Special Rapporteur favored the form of an expository code). See also Vienna Convention, *supra* note 72, pmb., 1155 U.N.T.S. at 332 ("[r]ecalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can

involves both “progressive development” in the law of treaties and the codification of pre-existing customary law,<sup>103</sup> and provides a standard for judging the U.S. Article 98 agreements and the Rome Statute.

This section addresses the obligations that Party States and Signatory States incur according to the Vienna Convention and the specific obligations that arise under the Rome Statute.

#### A. *Good Faith and Object and Purpose*

Parties States to a treaty have an obligation to make a good faith effort to adhere to that treaty so as not to frustrate the treaty’s object and purpose.<sup>104</sup> Therefore, a Party State to one treaty has primary loyalty to that treaty and may not lawfully enter into a subsequent agreement that conflicts with the initial treaty.

Article 26 of the Vienna Convention provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>105</sup> The Vienna Convention does not define “good faith,”<sup>106</sup> but Article 26 clearly establishes that a Party State is bound by that treaty and obligated to perform in a manner consistent with that treaty.<sup>107</sup> A “violation

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be maintained”).

103. SINCLAIR, *supra* note 101, at 12. While the Vienna Convention intends to codify the rules governing treaties to achieve cooperation among nations, the Vienna Convention is not meant to be the final word in analyzing treaties. Vienna Convention, *supra* note 72, pmb., 1155 U.N.T.S. at 332. Instead, the Vienna Convention points to the importance of customary international law as an additional source of guidance with respect to treaties. *Id.*

104. Vienna Convention, *supra* note 72, art. 18, 26, 1155 U.N.T.S. at 336, 339 (explaining a Signatory State’s obligation to not defeat the “object and purpose of a treaty” before the treaty enters into force and the obligation of states to perform a treaty in good faith, respectively); *see also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 140 para. 280 (1986) (finding that the United States breached a duty to not deprive a treaty of its object and purpose).

105. Vienna Convention, *supra* note 72, art. 26, 1155 U.N.T.S. at 339.

106. *See id.* art. 2, 1155 U.N.T.S. at 333 (defining several terms, but not “good faith”). *But see* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 321 (1985) (noting that Article 18 of the Vienna Convention “gives concrete meaning to the principle of good faith”).

107. *See* SINCLAIR, *supra* note 101, at 83–84 (noting the “fundamental nature of the obligation to perform treaties in good faith”).

of a provision essential to the accomplishment of the object or purpose of the treaty” by a Party State constitutes a material breach of that treaty.<sup>108</sup> In addition, Article 18 mandates that a Signatory State who has not expressly renounced the treaty may not “defeat the object and purpose of a treaty” prior to the treaty’s entry into force.<sup>109</sup> Therefore, both Party States and Signatory States have an obligation to not frustrate the object and purpose of the treaty.<sup>110</sup>

The obligation is to not *actually* defeat the treaty, which is a lesser standard than to *possibly* defeat the treaty.<sup>111</sup> Article 26 of the Vienna Convention merely requires good faith adherence to the treaty.<sup>112</sup> A subsequent agreement that contains potentially conflicting obligations with respect to the original treaty<sup>113</sup> does not indicate that the party has an intention to breach the treaty.<sup>114</sup> Obscure situations where the new agreement might provide a result contrary to the object and

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108. Vienna Convention, *supra* note 72, art. 60(3), 1155 U.N.T.S. at 346.

109. *Id.* art. 18, 1155 U.N.T.S. at 336. Even though the obligation of Article 18 specifically applies before the treaty enters into force, this should not be construed to mean that it is permissible to frustrate the object and purpose of a treaty after it enters into force. To do so would violate the “fundamental principle” of Article 26 and violate a “good faith” effort to operate under the treaty. *See* SINCLAIR, *supra* note 101, at 83–84 (explaining the fundamental nature of Article 26 of the Vienna Convention and “good faith”).

110. Note that the obligation of Article 18 of the Vienna Convention on Signatory States is a low subjective intention to not defeat the treaty rather than a higher objective standard. VILLIGER, *supra* note 106, at 322–23. In addition, a state that has signed a treaty, but has not ratified the treaty so as to become a party and has not yet expressed an intention to not become a party to the treaty, still owes a duty to not defeat the object and purpose of that treaty. Vienna Convention, *supra* note 72, art. 18(a), 1155 U.N.T.S. at 336; *see also* SINCLAIR, *supra* note 101, at 43 (suggesting that signatory states have agreed to certain limitations on their freedom of action).

111. *See id.* at 43 (noting the modification from “acts tending to frustrate the object of a proposed treaty” to “acts which would defeat the object and purpose” in Article 18 of the Vienna Convention, which pertains to Signatory States and the obligation not to defeat the object and purpose of a treaty).

112. Vienna Convention, *supra* note 72, art. 26, 1155 U.N.T.S. at 339.

113. If a subsequent treaty indicates that it is not to be considered as incompatible with an earlier treaty, then the provisions of the earlier treaty prevail. *Id.* at 30(2), 1155 U.N.T.S. at 339.

114. *See* CRAWFORD, *supra* note 9, at 11 n.4 (disputing the argument that joining a non-surrender agreement that goes beyond the scope of Article 98 constitutes an unlawful intention to breach the Rome Statute).

purpose of the treaty is not dispositive of defeating the treaty's object and purpose.<sup>115</sup> Also, an act cannot defeat the object and purpose of a treaty if the treaty contemplates such an act and provides that the treaty does not preclude such an act.<sup>116</sup> Thus, a Party State to a treaty may enter into a subsequent agreement that is separate from the original treaty as long as the Party State has the intent to comply with the original treaty and the new agreement on its face does not frustrate the original treaty.<sup>117</sup> Therefore, Party States and Signatory States have an obligation under the Rome Statute to not enter into subsequent agreements that would defeat the object and purpose of the Rome Statute.

### *B. The Rome Statute's Object and Purpose*

The object and purpose of the Rome Statute is to prevent impunity for those accused of Rome Statute crimes, while conceding jurisdiction to capable states within the principle of complementarity.<sup>118</sup> Thus, the ICC has an obligation to not interfere with a state's national justice system.<sup>119</sup> A Party State has an affirmative obligation to give effect to the Rome Statute

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115. *Id.*

116. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 136 (1986) (rejecting Nicaragua's claims absent a showing that the U.S. conduct is not "measures . . . necessary to protect" essential U.S. security interests).

117. Crawford's Joint Opinion suggests that the obligation of good faith is to not enter "into a new agreement which has (or may have) the effect" of defeating the object and purpose of the original treaty. *See* CRAWFORD, *supra* note 9, at 22. In formulating this opinion, however, Crawford asserts that an agreement that might immunize a person from justice contradicts the Rome Statute's purpose to avoid impunity. Crawford then asserts that Article 98 "qualifies the general object and purpose of the Rome Statute" so that it "cannot be understood as being the prevention of all impunity." *Id.* at 16-17, 22.

118. *See* Rome Statute, *supra* note 1, pmb., 2187 U.N.T.S. at 91 (noting that the ICC is "[d]etermined to put an end to impunity" while also emphasizing that the ICC "shall be complementary to national criminal jurisdictions"); *see also* CRAWFORD, *supra* note 9, at 13 (stressing that "the object and purpose of avoiding impunity is closely related to the principle of complementarity").

119. *See* CRAWFORD, *supra* note 9, at 10 (noting that Article 98 "imposes an obligation on the Court, not on the States Parties to the Statute, still less on other States"); *see also* Rome Statute, *supra* note 1, art. 17, 2187 U.N.T.S. at 100-01 (determining that the ICC cannot admit a case that is being investigated or prosecuted by the Party State).

and to prevent impunity.<sup>120</sup> A Signatory State does not have an obligation to prevent impunity but merely an obligation to not act in a way that actually provides impunity.<sup>121</sup> Non-Party States do not have obligations under the Rome Statute.<sup>122</sup>

In Article 98, the Rome Statute expressly contemplates that an ICC surrender request might conflict with a Party State's international obligation to not surrender the accused and expressly allows the non-surrender that would otherwise provide impunity for the accused.<sup>123</sup> Therefore, a Party State has an obligation to not defeat the object and purpose of the Rome Statute by providing impunity to those accused of Rome Statute crimes, but the Party State does not defeat that object and purpose by entering into non-surrender agreements in accordance with Article 98.<sup>124</sup>

### C. Preliminary Arguments

#### 1. Guarantee Clauses

James Crawford<sup>125</sup> argues that Party States may only enter new agreements that guarantee the accused will face justice.<sup>126</sup>

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120. See CRAWFORD, *supra* note 9, at 22 (describing a Party State's obligation to prevent impunity).

121. Compare Vienna Convention, *supra* note 72, art. 18, 1155 U.N.T.S. at 336 (describing a Signatory State's obligation to not act to defeat the treaty's object and purpose) with *id.* art. 26, 1155 U.N.T.S. at 339 (describing a Party State's obligation to act in order to perform the treaty in good faith); see also CRAWFORD, *supra* note 9, at 24 (describing a Signatory State's obligation to refrain from acts that would prevent impunity).

122. The obligations are imposed on parties and signatories to treaties. Vienna Convention, *supra* note 72, arts. 18, 26, 1155 U.N.T.S. at 336, 339.

123. See Rome Statute, *supra* note 1, art. 98, 2187 U.N.T.S. at 148; see also CRAWFORD, *supra* note 9, at 16 (noting that Article 98 does not require that the person ever be investigated or prosecuted when not surrendered to the ICC). Note, however, that Crawford also argues that a Party State should only enter into non-surrender agreements that also include guarantees that the accused will face investigation and prosecution. *Id.* at 22.

124. See *supra* note 117 and accompanying text (noting that an act does not frustrate a treaty's object and purpose when the treaty expressly allows the act).

125. See discussion *supra* note 9 (noting Crawford's background).

126. See CRAWFORD *supra* note 9, at 21–23 (arguing that the object and purpose of the Rome Statute requires that the Party State guarantee that an accused will face

The EU insists that any agreement that provides immunity from the ICC should “include appropriate operative provisions” to ensure that those accused of Rome Statute crimes “do not enjoy impunity.”<sup>127</sup> Article 98 is a limitation on the ICC and not on the states.<sup>128</sup> Even though a valid agreement according to Article 98 prevents the ICC from proceeding with a surrender request,<sup>129</sup> the requested Party State still must operate under the obligation to not provide impunity.<sup>130</sup> Therefore, the Party State must either investigate or prosecute the accused itself or ensure that another state with jurisdiction investigates or prosecutes the accused.<sup>131</sup>

This argument fails because Article 98 qualifies the object and purpose of the Rome Statute.<sup>132</sup> Both Article 98 and the principle of complementarity limit the reach of the ICC and limit the scope of preventing impunity.<sup>133</sup> Since the object and purpose of the Rome Statute is not to completely avoid impunity,<sup>134</sup> it is inconsistent to require a Party State to

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justice or the Party State will be internationally responsible).

127. Council of the European Union, General Affairs and External Relations Council Meeting, Sept. 30, 2002, 12134/02 at 10. [hereinafter EU Doc. 12134/02] (noting the EU guiding principles with respect to the ICC).

128. See CRAWFORD, *supra* note 9, at 10.

129. Rome Statute, *supra* note 1, art. 98(2), 2187 U.N.T.S. at 148.

130. See CRAWFORD, *supra* note 9, at 22–23 (arguing that a Party State violates its obligations under the Rome Statute by entering into new agreements that completely immunize a person from the ICC and from international or national prosecution).

131. *Id.* at 22–23 (arguing that a Party State “may be internationally responsible for the adoption or application of a new agreement which is inconsistent with its obligations”).

132. *Id.* at 16–17 (noting that Article 98 qualifies the Rome Statute’s object and purpose and that the object and purpose of the Rome Statute “cannot be understood as being the prevention of all impunity”). Crawford uses this information to come to a different conclusion and to argue that Party States maintain the obligation to include impunity prevention guarantees in Article 98 agreements. *Id.* at 22.

133. See *id.* at 16 (noting that the Rome Statute “limits the possibility of the complete realization of the policy of avoiding impunity”); see also Bartram S. Brown, *The Statute of the ICC: Past, Present, and Future*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 16, at 61, 73–74 (discussing the principle of complementarity as a jurisdictional safety net).

134. See CRAWFORD, *supra* note 9, at 16 (noting that the Rome Statute “limits the possibility of the complete realization of the policy of avoiding impunity”); see also Michael P. Scharf, *Justice Versus Peace*, in THE UNITED STATES AND THE INTERNATIONAL

completely prevent impunity.

Article 98 of the Rome Statute specifically contemplates the situation where an international obligation may provide impunity and permits a Party State to comply with that international obligation.<sup>135</sup> An agreement formed according to Article 98 that does provide impunity “cannot be said to be one calculated to deprive [the Rome Statute] of its object and purpose.”<sup>136</sup> Article 98 does not require that the accused ever face justice.<sup>137</sup> Therefore, the Rome Statute does not obligate Party States to only enter U.S. Article 98 agreements that guarantee that the accused will face investigation or prosecution.

Even assuming that the Rome Statute does require that agreements pursuant to Article 98 include a prevention of impunity guarantee, U.S. Article 98 agreements remain effective. The U.S. Article 98 agreements recite the importance of bringing international criminals to justice.<sup>138</sup> The agreements express the intent to investigate or prosecute persons accused of Rome Statute crimes within the jurisdiction of the parties.<sup>139</sup> Therefore, the Party State enters into the U.S. Article 98 agreements with a good faith intent to support the Rome Statute and battle impunity.

The U.S. government has shown an historical commitment

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CRIMINAL COURT, *supra* note 16, at 179, 180 (arguing that the Rome Statute might allow amnesty in certain situations so that a guilty person will go free in the interests of peace).

135. *See* Rome Statute, *supra* note 1, art. 98(2), 2187 U.N.T.S. at 148 (giving guidance for the situation where an ICC surrender request conflicts with a requested Party State’s international agreement).

136. This language refers to Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 136 (1986) (noting that if a treaty specifically foresees the possibility of an act and the parties agree that the treaty does not preclude the act, then the act does not defeat the treaty’s object and purpose).

137. *Cf.* Rome Statute, *supra* note 1, art. 98(2), 2187 U.N.T.S. at 148.

138. *See, e.g.*, Senegal Agreement, *supra* note 6, at 3.

139. *See, e.g.* Agreement Regarding the Surrender of Persons to the International Criminal Court, June 25, 2003, U.S.-Mauritius, Hein’s No. KAV 6215, Temp. State Dep’t No. 03-90, at 2 (entered into force June 30, 2003) (expressing the intent of both parties to investigate and prosecute where appropriate Rome Statute crimes alleged to have been committed by their own).

to bring its own criminals to justice.<sup>140</sup> A Party State that enters into a U.S. Article 98 agreement knows that the United States will administer justice. Therefore, a Party State that signs a U.S. Article 98 agreement fulfills its obligations under the Rome Statute to ensure that an accused does not avoid impunity.

## 2. *Bilateral U.S. Article 98 Agreements*

Crawford and the EU argue that bilateral U.S. Article 98 agreements are invalid.<sup>141</sup> When a Party State agrees to not send U.S. persons to the ICC without U.S. consent, in exchange for a U.S. agreement to not send the Party State's persons to the ICC without the Party State's consent, the Party State defeats the object and purpose of the Rome Statute.<sup>142</sup> Party States have an obligation to not provide impunity to those accused of Rome Statute crimes; and therefore, they have an obligation to not enter into agreements where the Party State's own persons might be exempt from ICC jurisdiction.<sup>143</sup> The Party State has an obligation to cooperate with the ICC in requests for surrender and may not prevent the ICC from going forward with a surrender request.<sup>144</sup> Since these bilateral immunity agreements permit the Party State to prevent the U.S. from transferring to the ICC a person who is rightfully within the jurisdiction of the ICC, the agreements permit the Party State to undermine the Rome Statute.<sup>145</sup>

This argument overreaches. The bilateral U.S. Article 98 agreements limit on ICC jurisdiction over a Party State's persons is placed on the United States, not on the Party State.<sup>146</sup> The Party State must still comply with a surrender request and

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140. *See supra* Part I.B.

141. CRAWFORD, *supra* note 9, at 10, 17–23; *Risks for the Integrity of the Statute of the International Criminal Court*, EUR. PARL. ASS., 29th Sitting, Res. 1300, paras. 9–12 (2002)

142. *Id.*

143. *Id.* at 22.

144. Rome Statute, *supra* note 1, art. 89(1), 2187 U.N.T.S. at 141.

145. CRAWFORD, *supra* note 9, at 22. Due to a Signatory State's similar obligation to not defeat the object and purpose of preventing impunity, a Signatory State has a similar obligation to not enter bilateral Article 98 immunity agreements. *Id.* at 24.

146. *See* Uganda Agreement, *supra* note 64, at 1–2 (noting that the United States agrees to not transfer a Ugandan person to the ICC without Uganda's consent).

give consent for transfer of the Party State person. The bilateral agreement simply limits the United States by requiring it to gain the Party State's consent to transfer.<sup>147</sup> This limitation on the United States does not affect U.S. obligations under the Rome Statute, because the United States has no obligations.<sup>148</sup> The bilateral agreement ensures that the Party State controls where a person of that Party State is transferred. The bilateral U.S. Article 98 agreement, therefore, gives the Party State the same amount of control over the Party State person with respect to transferring that person to the ICC as when the Party State itself has custody of the person.<sup>149</sup>

Although a Party State person is always within ICC jurisdiction,<sup>150</sup> that person is not always tried before the ICC due to the principle of complementarity.<sup>151</sup> Most often that person will face trial in the national judicial system of the Party State.<sup>152</sup> It is only when every state with jurisdiction over the accused is unable or unwilling to proceed against the accused that the ICC will assert jurisdiction.<sup>153</sup> The Party State is not obligated to transfer a person to the ICC until the ICC requests that person's surrender.<sup>154</sup> However, when the ICC requests the surrender of that Party State person, then the Party State must comply with the request.<sup>155</sup>

A bilateral U.S. Article 98 agreement does not prevent the Party State from complying with its obligations. The agreement must actually, not just possibly, defeat the purpose of the Rome Statute.<sup>156</sup> When the Party State expresses in the bilateral U.S.

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147. *Id.*

148. Vienna Convention, *supra* note 72, art. 12–17, 1155 U.N.T.S. at 335–36 (explaining ways that a party is bound by a treaty).

149. Brown, *supra* note 133, at 66 (noting that state consent is an element of ICC action).

150. Rome Statute, *supra* note 1, art. 12(2)(b), 2187 U.N.T.S. at 99.

151. *See id.*, art. 1, 17, 2187 U.N.T.S. at 91–92, 100–01.

152. *Id.* art. 17, 2187 U.N.T.S. at 100–01.

153. *Id.*

154. *Id.* art. 89, 2187 U.N.T.S. at 141.

155. *Id.*

156. *See supra* Part III.A. (arguing that the mere possibility that a subsequent agreement might remotely defeat the object and purpose of the primary treaty does not violate the obligation of good faith).

Article 98 agreement its intent to investigate or prosecute its own person accused of a Rome Statute crime,<sup>157</sup> the Party State reaffirms its obligation to act in good faith to battle impunity. The Party State may still battle impunity when it prevents the United States from transferring a Party State person accused of Rome Statute crimes, and in no way indicates through a bilateral U.S. Article 98 agreement that the Party State intends to avoid its obligations under the Rome Statute. Therefore, bilateral U.S. Article 98 agreements involving a Non-Party State and either a Party State or Signatory State<sup>158</sup> are valid.

#### IV. ANALYSIS OF U.S. ARTICLE 98 AGREEMENTS

Article 98 of the Rome Statute is the exception to the treaty.<sup>159</sup> While the Rome Statute is meant to prevent impunity,<sup>160</sup> Article 98 allows impunity in limited circumstances.<sup>161</sup> If, subsequent to ratifying the Rome Statute, a Party State enters into an agreement that also supports preventing impunity, then the agreement is valid as the Party State fulfills its obligations under the Rome Statute without the benefit of Article 98.<sup>162</sup> If a subsequent agreement complies directly with Article 98 of the Rome Statute and prevents impunity, then the subsequent agreement is certainly valid. A

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157. See, e.g., Uganda Agreement, *supra* note 64, at 1.

158. The Party State obligation to act in good faith to support a treaty, which includes the duty to not defeat the object and purpose of a treaty, is higher than the Signatory State obligation to merely not defeat the treaty's object and purpose. Vienna Convention, *supra* note 72, arts. 18, 26, 1155 U.N.T.S. at 336, 339. Therefore, if the Party State may enter the agreement, then a Signatory State may enter the agreement. See *id.*

159. CRAWFORD, *supra* note 9, at 16 (noting that Article 98 limits the Rome Statute's object and purpose).

160. Rome Statute, *supra* note 1, pmbl., 2187 U.N.T.S. at 91 (“[d]etermined to put an end to impunity for the perpetrators of [Rome Statute] crimes and thus to contribute to the prevention of such crimes”).

161. CRAWFORD, *supra* note 9, at 16–17 (noting that the object and purpose of the Rome Statute is not the prevention of all impunity).

162. A Party State is obliged to prevent impunity as a good faith measure to perform under the Rome Statute. See Rome Statute, *supra* note 1, pmbl., 2187 U.N.T.S. at 91 (noting the objective to prevent impunity); see Vienna Convention, *supra* note 72, art. 26, 1155 U.N.T.S. at 339 (stating a Party State's obligation to perform the treaty in good faith).

Party State's subsequent agreement has the least chance for success when it does not prevent impunity but merely complies with Article 98 of the Rome Statute.<sup>163</sup> The subsequent agreement should not succeed as valid when it neither prevents impunity nor complies with Article 98.

U.S. Article 98 agreements prevent impunity and comply with Article 98 of the Rome Statute. However, U.S. jurisdiction to investigate and prosecute as well as the definition of a "sending State" in Article 98 weakens the effectiveness of the agreements. The United States can still effectuate immunity from the jurisdiction of the ICC but must take steps to improve U.S. Article 98 agreements.

This section first evaluates how the U.S. Article 98 agreements comply with the Rome Statute without the benefit of the Article 98 exception. Second, it evaluates how well the U.S. Article 98 agreements fall under the exception available in Article 98 of the Rome Statute. Third, this section addresses ways that the United States can improve its position.

#### A. *U.S. Jurisdiction*

A U.S. Article 98 agreement effectively immunizes a U.S. person when the Party State is not faced with an ICC surrender request.<sup>164</sup> When the United States has full jurisdiction for Rome Statute crimes over U.S. persons, then the Party State may fulfill its obligations under the Rome Statute without having to rely on Article 98.<sup>165</sup> The United States is not taking full advantage of the Rome Statute. U.S. Article 98 agreements are not fully effective, because U.S. courts lack complete

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163. Crawford and the EU assert that Article 98 agreements must provide a guarantee of justice. *See supra* Part III.C.1. Arguably, Article 98 does not require such a guarantee. *Id.*

164. If the United States triggers Article 17 of the Rome Statute, then the case is inadmissible before the ICC so that the decision by a Party State to comply with an agreement to not send a U.S. person to the ICC is easy. *See Rome Statute, supra* note 1, art. 17, 2187 U.N.T.S. at 100–01 (describing factors that make a case inadmissible before the ICC). Also, if the United States triggers Article 90 of the Rome Statute, then the Rome Statute expressly gives the Party State control of the decision to not transfer the U.S. person to the ICC according to the U.S. Article 98 agreement. *See id.* art. 90, 2187 U.N.T.S. at 141–43.

165. *Id.* art. 17, 2187 U.N.T.S. at 100–1.

jurisdiction over U.S. persons for Rome Statute crimes.<sup>166</sup> This section analyzes U.S. Article 98 agreements without the benefit of Article 98 of the Rome Statute.

A case is inadmissible before the ICC when the United States has jurisdiction over the case and investigates or prosecutes the case.<sup>167</sup> Therefore, the U.S. courts must have jurisdiction over “current or former U.S. Government officials, employees (including contractors), or military personnel or U.S. nationals”<sup>168</sup> for all of the same crimes defined in the Rome Statute.<sup>169</sup> When the United States does not have jurisdiction, U.S. Article 98 agreements that require a Party State to immunize the U.S. person from the ICC are inadequate. In that case, the Party State must not allow impunity by transferring a U.S. person to the United States.<sup>170</sup> The Party State might investigate or prosecute the U.S. person itself,<sup>171</sup> but that subjects the U.S. person to foreign jurisdiction.<sup>172</sup> If the United States leaves gaps in its jurisdiction, then the ICC will fill in those gaps<sup>173</sup> and U.S. persons will face justice before the ICC. “U.S. capacity to prosecute is thus key to avoiding exercise of ICC jurisdiction over U.S. nationals or over other cases where the United States has an interest in investigation or

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166. See David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 15 (2001) (arguing that the United States should amend the federal criminal code and the Uniform Code of Military Justice to ensure that all Rome Statute crimes can be fully prosecuted in U.S. courts).

167. See *supra* notes 83–84 and accompanying text.

168. Senegal Agreement, *supra* note 6, at 3.

169. The crimes of genocide, crimes against humanity, and war crimes constitute the Rome Statute crimes. See Rome Statute, *supra* note 1, arts. 5–8, 2187 U.N.T.S. at 92–98.

170. Except for the limited applicability of Article 98, a Party State must not allow impunity for accused who fall under ICC jurisdiction. See *supra* Part III.B (discussing a Party State's obligations).

171. See CRAWFORD, *supra* note 9, at 22–23 (discussing a Party State's obligation to investigate or prosecute the accused rather than allow the accused to escape justice).

172. See *id.* at 22. The goal of U.S. Article 98 agreements is to guarantee a U.S. person the protections of the U.S. Constitution. Press Release, *supra* note 8; see also 22 U.S.C. § 7421(7) (2000).

173. See CRAWFORD, *supra* note 9, at 13 (discussing the ICC's role to fill gaps in criminal jurisdiction).

prosecution.”<sup>174</sup>

The Immigration and Nationality Act defines a national of the United States as “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”<sup>175</sup> Not every member of the United States armed forces is a U.S. national,<sup>176</sup> and not every government official or employee of the United States is a U.S. national.<sup>177</sup> Therefore, critical analysis requires separating the U.S. persons into three groups: members of the U.S. armed forces, U.S. nationals, and U.S. officials or employees.

1. *Members of the U.S. Armed Forces and Civilians Who Accompany Them*

Members of the U.S. armed forces and civilians who accompany them enjoy a great deal of protection from the ICC. The Uniform Code of Military Justice (UCMJ)<sup>178</sup> provides court-martial jurisdiction over members of the U.S. armed forces for all crimes,<sup>179</sup> and specifically includes violations of war crimes.<sup>180</sup>

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174. Cassel, *supra* note 81, at 388.

175. 8 U.S.C. § 1101(a)(22) (2000) (defining U.S. national).

176. See 8 U.S.C. § 1439 (2000) (outlining the process that a person may gain U.S. nationality through naturalization by serving in the U.S. armed forces).

177. See 8 U.S.C. § 1101(a)(27)(D) (defining a “special immigrant” as an immigrant who is an employee, or an honorably retired former employee, of the U.S. government abroad and who performed at least fifteen years of faithful service to the U.S. government); 8 U.S.C. § 1153(b)(4), (b)(6) (2000) (describing the process for special immigrants to obtain visas in the United States).

178. Chapter 47, title 10 of the United States Code, the Uniform Code of Military Justice (UCMJ), is the criminal code for members of the Armed Forces. See 10 U.S.C. §§ 801–947 (2000).

179. See § 934 (providing that even if crimes are not specifically listed in the UCMJ, a court-martial may have jurisdiction over “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital”); see also Scheffer, *supra* note 166, at 16 (noting that the UCMJ allows for prosecution of the underlying conduct of genocide and crimes against humanity). The U.S. Supreme Court held as constitutional maintaining court-martial jurisdiction based on status, even for an offense not “service related,” when the accused was a member of the armed forces at the time of the act. *Solorio v. United States*, 483 U.S. 435, 436, 450–51 (1987); see also Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 215 (2002) (noting that court-martial

Beyond members of the armed forces, U.S. courts-martial have incomplete personal jurisdiction over other U.S. nationals, officials, and employees.<sup>181</sup> Instead, the Military and Extraterritorial Jurisdiction Act of 2000 provides jurisdiction over any felonies committed by U.S. nationals, officials, and employees accompanying the U.S. armed forces outside the United States.<sup>182</sup> Thus, the United States government can adequately investigate and prosecute, where appropriate, members of the U.S. armed forces for all crimes defined by the Rome Statute. For U.S. nationals, officials, or employees, the crime must be defined as a felony in the United States and the person must have committed the crime while accompanying the U.S. armed forces.

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jurisdiction is based on status of the offender).

180. "General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against: (a) The law of war." MANUAL FOR COURTS-MARTIAL UNITED STATES, R.C.M. 201(f)(1)(B)(i); *see also* 18 U.S.C. § 2441(b) (2000) (requiring that a war crimes offender be a U.S. national or a member of the armed forces of the United States).

181. *See* 10 U.S.C. § 817 ("Each armed force has court-martial jurisdiction over all persons subject to this chapter."); 10 U.S.C. § 818 ("General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by military tribunal . . ."). 10 U.S.C. § 802 lists the only persons subject to the UCMJ, which includes members of the armed forces, and also extends to:

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial. (8) Members of . . . organizations, when assigned to and serving with the armed forces. (9) Prisoners of war in custody of the armed forces. [and] (10) In time of war, persons serving with or accompanying an armed force in the field.

§ 802(a)(7)–(10). *But see* Major Jan E. Aldykiewicz, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 82 (2001) (suggesting that "[a]ny person who commits a serious violation of the law of war, a violation resulting in individual criminal responsibility under existing international law, is subject to prosecution at a general court-martial" while arguing that the U.S. has general court-martial authority over non-U.S. military personnel).

182. Military and Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261 (2000) (providing federal jurisdiction over civilians employed by or accompanying U.S. armed forces abroad); *see also* Scheffer, *supra* note 166, at 16 (noting that before the Act, Congress had to first declare war to gain UCMJ jurisdiction over civilians accompanying military, but that the federal code now provides jurisdiction even when Congress has not declared war).

## 2. U.S. Nationals

U.S. nationals enjoy a limited amount of protection from the ICC. The U.S. Congress has codified genocide<sup>183</sup> and war crimes<sup>184</sup> so that U.S. courts have jurisdiction over accused U.S. nationals regardless of where the alleged crime occurs.<sup>185</sup> However, a substantive criminal statute for crimes against humanity does not exist in the U.S. code.<sup>186</sup> While U.S. courts have jurisdiction over U.S. nationals for some crimes against humanity, like torture,<sup>187</sup> the federal code fails to reach all the crimes against humanity listed in the Rome Statute.<sup>188</sup> While most of these crimes have counterparts in U.S. domestic criminal law, these crimes do not provide jurisdiction unless committed within domestic territory.<sup>189</sup> In addition, the Federal U.S. Courts have jurisdiction over some, but not all, war crimes with respect to accused U.S. nationals.<sup>190</sup> These statutes specifically provide jurisdiction based on the accused's status, as either a U.S. national or as a member of the U.S. armed forces,

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183. 18 U.S.C. § 1091 (2000).

184. 18 U.S.C. § 2441.

185. See 18 U.S.C. § 1091(d)(2) (requiring, if the crime is not committed within the United States, that the alleged offender be a national of the United States); see 18 U.S.C. § 2441(b) (requiring that the alleged offender or the victim be either a member of the U.S. armed forces or be a U.S. national).

186. See Scheffer, *supra* note 166, at 16 (“Crimes against humanity are the least effectively implemented by domestic law.”).

187. 18 U.S.C. § 2340A (2000) (giving U.S. courts jurisdiction over U.S. nationals for torture regardless of where committed).

188. See Cassel, *supra* note 81, at 383–85 (noting that the United States does not have a crime that mirrors the Rome Statute’s crimes against humanity for those crimes committed outside the United States, but torture or certain forms of international terrorism might still be prosecuted in U.S. courts); see also Rome Statute, *supra* note 1, art. 7, 2187 U.N.T.S. at 93–94 (defining crimes against humanity).

189. See Cassel, *supra* note 81, at 383–84 (explaining that crimes against humanity would likely violate laws against murder or assault but only if committed in the United States).

190. See *id.* at 384 (“Under current law some but not all war crimes may be prosecuted by U.S. courts.”); but see 18 U.S.C. § 3261 (2000) (giving U.S. courts jurisdiction when the U.S. national, official, or employee accompanies U.S. armed forces). The Rome Statute provides a greater list of acts that constitute war crimes than does the U.S. federal code. Compare Rome Statute, *supra* note 1, art. 8, 2187 U.N.T.S. at 94–98 (defining war crimes subject to ICC jurisdiction), with 18 U.S.C. § 2441 (defining war crimes under U.S. law).

so that U.S. courts can have jurisdiction even when the crime is committed outside of the United States.<sup>191</sup> Therefore, U.S. federal code provides jurisdiction over U.S. nationals for many, but not all, Rome Statute crimes.

### 3. *U.S. Officials or Employees*

U.S. officials or employees without a link to either U.S. nationals or U.S. armed forces enjoy no protection from the ICC. The official or employee must: be subject to the UCMJ;<sup>192</sup> accompany the U.S. armed forces while committing what would constitute a felony in the United States;<sup>193</sup> or be a U.S. national.<sup>194</sup> Otherwise, the U.S. official or employee accused of committing Rome Statute crimes will fall outside the jurisdiction of U.S. courts.

Assuming that the United States is willing to investigate and prosecute Rome Statute crimes,<sup>195</sup> cases against members of the U.S. armed forces are inadmissible before the ICC. Cases involving U.S. nationals, officials, or employees are less certain. This “uneven, incoherent patchwork of jurisdiction and codification”<sup>196</sup> might result in the ICC deciding that the United States is unable to bring an accused to justice. However, to the extent that the United States maintains jurisdiction over the accused, a Party State will be able to give effect to the U.S. Article 98 agreements and not transfer the U.S. person to the ICC.

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191. *See, e.g.*, 18 U.S.C. § 1091(d)(2) (2000) (requiring that if the offense is not committed within the United States that the offender be a U.S. national).

192. *See* discussion *supra* Part IV.A.1 (referring to courts-martial jurisdiction based on status).

193. *See* 18 U.S.C. § 3261 (providing federal jurisdiction over civilians employed by or accompanying U.S. armed forces abroad).

194. Even as a U.S. national, U.S. jurisdiction is limited. *See supra* Part IV.A.2 (describing the limitations of federal jurisdiction over U.S. nationals accused of crimes outside the territory of the United States).

195. The United States intends to investigate and prosecute appropriate acts within the jurisdiction of the ICC alleged to have been committed by U.S. persons. *See, e.g.*, Senegal Agreement, *supra* note 6, at 3.

196. Cassel, *supra* note 81, at 384.

*B. The “Sending State” Controversy*

A U.S. Article 98 agreement effectively immunizes a U.S. person from the ICC when the agreement prevents the ICC from requesting the surrender of the U.S. person from the Party State.<sup>197</sup> Once the ICC is unable to request surrender, the Party State does not have an order with which it would have an obligation to comply.<sup>198</sup> If the ICC is unable to request surrender, then the Party State no longer has an order requiring compliance.<sup>199</sup> Thus, the Party State does not defeat the object and purpose of the Rome Statute by not transferring the U.S. person to the ICC,<sup>200</sup> and the Party State may then fulfill its obligations under the U.S. Article 98 agreement. The U.S. Article 98 agreements conform to Article 98 of the Rome Statute. Therefore, the ICC should determine that it must not pursue surrender when the requested Party State has entered into a U.S. Article 98 agreement.

The United States seeks to exempt U.S. persons from the ICC for actions undertaken in an official capacity,<sup>201</sup> and expects the immunity to exist not only while the person is on official duty.<sup>202</sup> Crawford and others argue that a U.S. Article 98 agreement is only valid under Article 98 of the Rome Statute when the United States has “sent” the person on official

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197. Rome Statute, *supra* note 1, art. 98(2), 2187 U.N.T.S. at 148.

198. *Id.* art. 89(1), 2187 U.N.T.S. at 141 (giving the ICC the power to decide whether to make a request for surrender); *id.* art. 112(7)(a), 2187 U.N.T.S. at 154 (requiring two-thirds majority for Assembly of States Parties decisions on matters of substance); *id.* art. 119(2), 2187 U.N.T.S. at 155 (directing that the Assembly of States Parties may decide interpretation or application of the Rome Statute or refer the decision to the ICJ); *see* CRAWFORD, *supra* note 9, at 24–27 (explaining that the ICC decides its own right to make a request for surrender, but that if states party to the Rome Statute dispute the legality of a non-surrender agreement, then the ICC, the Assembly of States Parties, or the International Court of Justice may decide the issue).

199. *See* Rome Statute, *supra* note 1, art. 89, 2187 U.N.T.S. at 141 (requiring Party States to “comply with requests for arrest and surrender”).

200. *See supra* Part III.C.1 (arguing that Article 98 does not require an investigation or prosecution of the accused).

201. 22 U.S.C. § 7422(a)(2)(A) (providing guidelines for the President to waive ASPA prohibitions after the ICC enters a binding agreement to not exercise jurisdiction over U.S. persons “with respect to actions undertaken by them in an official capacity”).

202. *See* Senegal Agreement, *supra* note 6, at 3 (indicating that the agreement is to cover “current or former” U.S. persons).

business to the Party State where he is found.<sup>203</sup> The language of Article 98(2) refers only to the ICC, a person who is the accused, a “sending State,” and a “requested State.”<sup>204</sup> The “requested State” is the Party State. The Rome Statute’s use of terms section does not define “sending State,”<sup>205</sup> and Article 98(2) is the only location that the term is used.

Crawford concludes that the ordinary meaning of “sending State” suggests that the person’s presence must arise as a result of the sending State.<sup>206</sup> He gives as an example a diplomat or a member of the armed forces present in accordance with a SOFA.<sup>207</sup> However, Crawford rejects the argument that Article 98 is limited only to SOFAs or re-extradition agreements.<sup>208</sup>

Article 31 of the Vienna Convention indicates that a treaty is to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>209</sup> When considering the context of the treaty, interpretations may include the text and any agreement or practice by all the parties made in connection with the treaty.<sup>210</sup>

In looking at only the text of Article 98 to determine the

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203. See CRAWFORD, *supra* note 9, at 20 (arguing that Article 98(2) only covers persons who are in the Party State with the consent of their sending State to conduct the official business of that sending State); ROGER S. CLARK, CHALLENGES CONFRONTING THE ASSEMBLY OF STATES PARTIES OF THE INTERNATIONAL CRIMINAL COURT 11–12 (Rutgers-Camden, Series No. 7, 2002) (arguing that the U.S. has taken an “expansive view of what a sending State is and who it sends”), at <http://www-camlaw.rutgers.edu/faculty/occasional/7-clark.pdf>. Professor Clark was the Representative of Somoa to the Rome Conference and to the Assembly of States Parties of the Rome Statute of the ICC. *Id.* at 1 n.\*.

204. Rome Statute, *supra* note 1, art. 98(2), 2187 U.N.T.S. at 148.

205. *Id.* art. 102, 2187 U.N.T.S. at 149.

206. CRAWFORD, *supra* note 9, at 20; see EU Doc. 12134/02, *supra* note 127, at 9–10 (limiting the scope of persons to be covered by bilateral agreements under Article 98 to “only persons present on the territory of a requested State because they have been sent by a sending State”).

207. *Id.* at 9–10.

208. CRAWFORD, *supra* note 9, at 19; but see CLARK, *supra* note 203, at 11–12 (arguing that Article 98 was meant to prevent the ICC from interfering with SOFA-allocated jurisdiction with respect to a serviceperson or those associated with the military presence).

209. Vienna Convention, *supra* note 72, art. 31(1), 1155 U.N.T.S. at 340.

210. See *id.* art. 31(2)–(4), 1155 U.N.T.S. at 340.

ordinary meaning, the term “sending State” does not indicate that the person must be present in the requested Party State on official government business.<sup>211</sup> If sending State does have significance, Article 98 indicates that the state that is the receiving State is irrelevant.<sup>212</sup> Article 98 refers to the requested Party State as the “requested State”<sup>213</sup> and not as the “receiving State.”<sup>214</sup> Therefore, if the U.S. person must be “sent,” then the requested Party State does not have to be the state where he was sent for official duty.

Article 98 applies when a Party State has an international agreement that would conflict with an ICC surrender request.<sup>215</sup> The sending State is simply the party whose consent for surrender creates the conflict.<sup>216</sup> Article 98 only calls for an agreement requiring the sending State’s consent for surrender of the accused.<sup>217</sup> The accused is simply “a person of that [sending] State.”<sup>218</sup> Nothing in Article 98 or the Rome Statute indicates that the person must be present in the territory of the requested Party State in an official governmental capacity.<sup>219</sup> Therefore, the significance of “sending” in “sending State” is that the person have a connection to the sending State, but not necessarily that the person be in the territory of the requested Party State because of a “positive act of the sending State.”<sup>220</sup>

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211. Ambassador Scheffer argues that the United States can conclude an Article 98 agreement to “prevent any American being surrendered to the ICC from their respective jurisdictions without our consent.” Scheffer, *supra* note 166, at 18.

212. International documents that refer to a “sending State” also refer to a “receiving State.” See, e.g. NATO SOFA, *supra* note 49, art. I(1)(e), 4 U.S.T. at 1794 (defining “receiving State” as “the Contracting Party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit”).

213. Rome Statute, *supra* note 1, art. 98, 2187 U.N.T.S. at 148.

214. NATO SOFA, *supra* note 49, art. I(1)(e), 4 U.S.T. at 1794 (defining “receiving State”).

215. See Rome Statute, *supra* note 1, art. 98(2), 2187 U.N.T.S. at 148 (preventing the ICC from requesting surrender when the request would conflict with a Party State’s “obligations under international agreements”).

216. See *id.* art. 98(2), 2187 U.N.T.S. at 148 (“international agreements pursuant to which the consent of a sending State is required to surrender”).

217. *Id.*

218. *Id.*

219. See *id.*

220. But see CRAWFORD, *supra* note 9, at 20–21 (arguing that the person’s presence

SOFAs are not agreements made by all the parties to the Rome Statute that would aid interpretation according to Article 31 of the Vienna Convention,<sup>221</sup> but rather, SOFAs indicate how Crawford and the EU concluded that a person must be present in the Party State for official duty in order to trigger Article 98 of the Rome Statute. The states advocating inclusion of Article 98 in the Rome Statute did so with SOFAs in mind.<sup>222</sup> Thus, Article 98 ensures that the ICC will not interfere with a Party State's ability to allow peacekeeping forces to enter its territory by signing a SOFA with the peacekeeping force.

The NATO SOFA defines "sending State" as "the Contracting Party to which the force belongs."<sup>223</sup> It defines "force" as members of the armed forces "of one Contracting Party when in the territory of another Contracting Party . . . in [connection] with their official duties."<sup>224</sup> The SOFA definitions of "sending State" and "force" combine to suggest, that in Article 98 of the Rome Statute, "sending State" means the contracting party responsible for the accused and that the accused is in the territory of the requested Party State for official duty. However, this interpretation would also indicate that the accused may only be a member of the armed forces or present in connection with the armed forces.<sup>225</sup>

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"must have been occasioned by some positive act of the sending State" and that the person "must have a nexus with the 'sending State' which goes beyond mere nationality").

221. SOFAs usually have a limited scope and are concluded between a limited number of parties. *See, e.g.*, NATO SOFA, *supra* note 49 (concluding an agreement between the U.S. and other NATO governments).

222. *See* Scheffer, *supra* note 166, at 17 ("[W]hen the U.S. delegation successfully negotiated the inclusion of Article 98(2) in the Rome Treaty, we had in mind our own SOFAs and their applicability."); *see* CLARK, *supra* note 203, at 11–12 (arguing against U.S. Article 98 agreements but noting that he "understood the reference to 'sending State' as a term of art that suggested we were dealing here with Status of Forces Agreements, and that seems to have been the view of the chief US negotiator"); *see also* Pieter H. F. Bekker & David Stoelting, *The ICC Prosecutor v. President Medema: Simulated Proceedings Before the International Criminal Court*, 2 PEPP. DISP. RESOL. L.J. 1, 17 (2002) (suggesting that Article 98 "was designed to save those who would be covered by status of force agreements").

223. NATO SOFA, *supra* note 49, art. I(1)(d), 4 U.S.T. at 1794.

224. *Id.* art. I(1)(a), 4 U.S.T. at 1794.

225. The NATO SOFA also defines a "civilian component" that accompanies or is in the employ of the armed forces and a "dependent" that is family to a member of the

The link to SOFAs explains the choice of language in Article 98, but does not limit the application of Article 98 only to members of the armed forces present for official duty. Not only does Crawford not limit his definition to members of the armed forces, he specifically rejects the argument that Article 98 is limited to SOFA type agreements.<sup>226</sup> When the United States successfully negotiated inclusion of Article 98 in the Rome Statute, it intended that agreements under Article 98 could cover “any American” and not just those traditionally covered by SOFAs.<sup>227</sup> Because the states were contemplating SOFAs while negotiating Article 98,<sup>228</sup> they likely used similar functional language merely to distinguish among the different parties involved.

Article 98 does not refer to a “force,” but merely to a person who is the accused.<sup>229</sup> The context of the article indicates that the accused simply be “a person of that [sending] State”<sup>230</sup> or that the accused simply belong to the sending State. This construction is similar to the NATO SOFA in that the sending State is the party “to which the [person] belongs.”<sup>231</sup>

By evaluating Article 98 in light of the object and purpose of the Rome Statute, which is to prevent impunity, then the “sending State” definition appears less narrow. The title of Article 98, “Cooperation with respect to waiver of immunity and consent to surrender,”<sup>232</sup> indicates that the purpose of Article 98 is to prescribe ways that a Non-Party State’s consent to surrender limits the ICC. As the object and purpose of the Rome Statute is to prevent impunity,<sup>233</sup> the only party that should be

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armed forces. *Id.* art. I(1)(b)–(c), 4 U.S.T. at 1794. Neither definition requires the person to be present in the territory for official duty but merely to have a connection to the armed forces of the sending State. *Id.*

226. See CRAWFORD, *supra* note 9, at 19–20 (suggesting that an example of a “sent” person might be a diplomat, a government minister, an ambassador, or a soldier).

227. Scheffer, *supra* note 166, at 18.

228. See *id.* at 17.

229. See Rome Statute, *supra* note 1, art. 98, 2187 U.N.T.S. at 148.

230. See *id.*

231. See NATO SOFA, *supra* note 49, art. I(1)(d), 4 U.S.T. at 1794 (substituting “person” for “force”).

232. Rome Statute, *supra* note 1, art. 98, 2187 U.N.T.S. at 148.

233. *Id.* pmb., 2187 U.N.T.S. at 91.

able to limit the ICC's jurisdiction is a party that has jurisdiction as well as an interest to investigate and prosecute the accused. In that way, the party would be able to exercise its right to bring the accused to justice under Article 17.<sup>234</sup> The party, as the sending State, need only have the necessary connection to the accused person.

Even if the deciding entity<sup>235</sup> concludes that "sending State" indicates that the U.S. person must be on official duty, the "official duty" requirement should only extend to the territory where the U.S. person is accused of committing a Rome Statute crime. A U.S. person on official U.S. duty is much like a foreign minister performing official state business. Just as the United States uses an Article 98 agreement to immunize a U.S. person so that he might accomplish the mission set forth by the United States,<sup>236</sup> a state uses the immunities of customary international law to ensure the effective performance of a foreign minister on behalf of his sending State.<sup>237</sup> The foreign minister is immune from prosecution for acts conducted in a foreign state while acting in an official capacity on behalf of the sending State and is even immune for those official acts after ceasing to hold office.<sup>238</sup> In the same manner, U.S. persons on official U.S. business from the United States should enjoy immunity for those official acts even after the U.S. person ceases official duty. A U.S. person should enjoy immunity from the ICC when in a Party State with an Article 98 agreement with the United States, even if accused of Rome Statute crimes committed in

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234. *See id.* art. 17, 2187 U.N.T.S. at 100–01 (indicating that when a state has jurisdiction and is investigating or prosecuting an accused, the case is inadmissible before the ICC).

235. *See supra* note 198 (indicating that the ICC, the Assembly of States Parties, or the ICJ interpret the Rome Statute).

236. *See* 22 U.S.C. § 7422(a)(2)(A) (indicating that the United States intends to prevent the ICC from exercising jurisdiction over U.S. persons "with respect to actions undertaken by them in an official capacity").

237. *See* Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 1, 19 (Feb. 14) (describing the customary international law immunities for foreign ministers).

238. *See id.* at 22 (indicating that after a foreign minister ceases to hold office, a foreign state may try the former minister "in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity").

another state.

Consider the following scenario: A U.S. official is sent to Party State A for official business, returns to the United States, and then travels to Party State B for a personal vacation. While he is in Party State B, he is accused of a Rome Statute crime committed in Party State A. Even though he was sent to Party State A for official U.S. business, he traveled independently of his official duty to Party State B. Therefore, an Article 98 agreement with Party State B would not cover the U.S. official, and Party State B would be obligated to transfer the official to the ICC upon request.<sup>239</sup> Even an Article 98 agreement with Party State A fails to give effect to either agreement. As the hypothetical illustrates, the requirement that the U.S. person be sent to the requested Party State for official U.S. duty interferes with the sovereign treaty power of Party States.<sup>240</sup> This reading, however, conflicts with the intent of those who negotiated the inclusion of Article 98 in the Rome Statute.<sup>241</sup> To avoid this result, “sending State” at least means that the U.S. person was on official U.S. duty in the Party State where he is accused of committing a Rome Statute crime.

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

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239. See Rome Statute, *supra* note 1, art. 89, 2187 U.N.T.S. at 141 (requiring Party States to “comply with requests for arrest and surrender”). That the person is acting in official capacity, even as the Head of State, is irrelevant to the application of the Rome Statute. *Id.* art. 27, 2187 U.N.T.S. at 106.

240. “Article 98 places international treaty obligations in a position superior to requests or orders from the Court for surrender or delivery of a suspect.” Rosenfeld, *supra* note 21, at 277.

241. See Scheffer, *supra* note 166, at 18 (indicating that the United States can negotiate an Article 98 agreement to immunize “any American”).

committing a Rome Statute crime, but not necessarily on official duty in the requested Party State.

U.S. Article 98 agreements comply with Article 98. First, the consent of the United States, which is the sending State, creates the conflict triggering Article 98. Second, the accused person belongs to the United States because the person is a U.S. official or employee, a member of the U.S. armed forces, or a U.S. national. Therefore, U.S. Article 98 agreements are valid.

### *C. Ways to Improve U.S. Article 98 Agreements*

U.S. Article 98 agreements most effectively immunize a U.S. person when a case is both inadmissible before the ICC and when the U.S. Article 98 agreement complies directly with Article 98 of the Rome Statute. Therefore, in order to completely effectuate the goal of preventing foreign ICC jurisdiction over U.S. persons, the United States must take measures to improve U.S. jurisdictional claims and to improve direct compliance with Article 98.

#### *1. U.S. Jurisdiction*

To ensure that U.S. persons are adequately protected from the jurisdiction of the ICC, the U.S. Congress should expand the jurisdiction of U.S. Courts.<sup>242</sup> Legislative changes ensuring: (a) that U.S. criminal laws contain the same elements as those governing Rome Statute crimes, and (b) that U.S. jurisdiction at least reaches U.S. officials and employees along with members of the armed forces and U.S. nationals, would secure the success of the U.S. Article 98 Agreements.<sup>243</sup> Once the U.S. Congress grants U.S. courts the jurisdiction to investigate and prosecute Rome Statute crimes, the ICC will have to determine a case inadmissible when the United States intends to investigate and prosecute.<sup>244</sup> The ability to investigate and prosecute all accused

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242. See Cassel, *supra* note 81, at 393–96 (arguing that the United States should either enact a new code that provides universal jurisdiction for the crimes as defined in the Rome Statute or should expand the statutory jurisdiction for currently codified crimes).

243. See Scheffer, *supra* note 166, at 15.

244. See Rome Statute, *supra* note 1, art. 17, 2187 U.N.T.S. at 100–01.

U.S. persons for Rome Statute crimes also improves the United States's position as a "sending State."<sup>245</sup>

Statutes of limitations provide another problem with both the UCMJ and the federal criminal code.<sup>246</sup> The UCMJ provides a five-year statute of limitations.<sup>247</sup> The federal criminal code provides a five-year statute of limitations for non-capital offenses.<sup>248</sup> However, Article 29 of the Rome Statute provides that "[t]he crimes within the jurisdiction of the [ICC] shall not be subject to any statute of limitations."<sup>249</sup> The ICC could determine that a case is admissible, because the United States is unable to bring the accused to justice based on a statute of limitations.<sup>250</sup> Therefore, the U.S. Congress should also consider expanding statutes of limitations for Rome Statute crimes.<sup>251</sup>

The President may also create a special commission to monitor federal and military courts executing investigations or prosecutions based on violations of Rome Statute crimes.<sup>252</sup> The commission would advise prosecutors directly, and judges indirectly, about how the United States could best exercise justice under the Rome Statute as a Non-Party in a way that prevents ICC jurisdiction.<sup>253</sup> The commission would bolster U.S. claims of willingness and competence to bring an accused to justice and would also inspire the confidences of the ICC prosecutor as well as judges in the U.S. system.<sup>254</sup>

## 2. *Extradition Agreements and Intent to Prosecute*

The United States should reform U.S. Article 98 agreements

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245. *See supra* Part IV.B.

246. *See Scheffer, supra* note 166, at 16–17 (arguing that the statutes of limitation in U.S. code might prompt the ICC to regard U.S. investigation or prosecution as inadequate).

247. 10 U.S.C. § 843(b) (2000).

248. 18 U.S.C. § 3282 (2000).

249. Rome Statute, *supra* note 1, art. 29, 2187 U.N.T.S. at 107.

250. *See Scheffer, supra* note 166, at 16–17 (arguing that U.S. crimes and statutes of limitations are far too limiting).

251. *Id.* at 17.

252. *Id.*

253. *Id.*

254. *Id.*

to include extradition of U.S. persons accused of Rome Statute crimes to the United States and emphasize the U.S. intent to investigate and prosecute such cases. Article 90 of the Rome Statute provides guidance to Party States when they are faced with competing requests for surrender from the ICC and another state.<sup>255</sup> When the competing request is from a Non-Party State, such as the United States, the Party State still complies with its obligations to the ICC when it decides to transfer the person to the Non-Party State rather than to the ICC.<sup>256</sup>

Currently, U.S. Article 98 agreements only call for the Party State to not transfer the accused to the ICC.<sup>257</sup> Instead, the United States should also include a provision in U.S. Article 98 agreements that would compel the Party State to transfer the accused to the United States. Then, Article 90 would allow the Party State to disregard an ICC surrender request while complying with a U.S. Article 98 agreement.

The United States should explicitly say that it will investigate and prosecute, when appropriate, U.S. persons accused of Rome Statute crimes. U.S. Article 98 agreements that do not include a guarantee that the accused will face justice are still valid.<sup>258</sup> The agreements currently include a clause indicating the intent to battle impunity.<sup>259</sup> The United States can avoid the controversy created by critics of the U.S. position by simply bolstering the language to reflect a firm guarantee that an accused U.S. person will not enjoy impunity.

### 3. *Bilateral U.S. Article 98 agreements*

The United States should only conclude unilateral U.S. Article 98 agreements. Accordingly, the agreement would only

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255. Rome Statute, *supra* note 1, art. 90, 2187 U.N.T.S. at 141–43.

256. *Id.* art. 90(4), (6), 2187 U.N.T.S. at 142 (requiring the Party State to consider the dates of request, the interests of the requesting Non-Party State to include the crime's location and the nationality of the victims and the accused, and the possibility of subsequent surrender to the ICC).

257. *See, e.g.* Senegal Agreement, *supra* note 6, at 3.

258. *See supra* Part III.C.1.

259. *See, e.g.*, Senegal Agreement, *supra* note 6, at 3; Uganda Agreement, *supra* note 64, at 1.

call for the other state to not transfer a U.S. person to the ICC. The United States could then enter a separate agreement indicating that the U.S. would not transfer a person of that other state to the ICC. Both of these agreements should include commitments by both parties to battle impunity and to investigate or prosecute those accused of Rome Statute crimes. Further, these agreements should reiterate that when the Party State acts to sign the U.S. Article 98 agreement, the Party State is making a good faith effort to support the Rome Statute. The United States is neither a Party State nor a Signatory State and has expressly given up any obligations under the Rome Statute.<sup>260</sup> Therefore, the United States has no obligation to not defeat the object and purpose of the Rome Statute.<sup>261</sup>

While bilateral agreements that give the power of transfer to the Party State are valid,<sup>262</sup> the ICC may not necessarily come to the same conclusion. In order to avoid the possibility that the entire agreement will be held invalid, the United States should simply use two agreements. Therefore, the United States would avoid the possible taint of an agreement that provides Party State oversight for the transfer of that Party State's persons.

## V. CONCLUSION

U.S. Article 98 agreements are valid. However, they may not reach all the classes of persons for whom the United States seeks immunization from the ICC. Modifications in U.S. law and in current agreements will increase the likelihood that the ICC, the Assembly of States Parties, or the ICJ<sup>263</sup> will accept U.S. Article 98 agreements in their entirety as valid.

Party States have an obligation to merely make a good faith effort to not defeat the object and purpose of the Rome Statute.<sup>264</sup> Party States may enter into an agreement to not send U.S.

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260. Annan Letter, *supra* note 58.

261. Vienna Convention, *supra* note 72, arts. 16, 18, 1155 U.N.T.S. at 336.

262. *See supra* Part III.C.2.

263. *See supra* note 198 (indicating that the ICC, the Assembly of States Parties, or the ICJ interpret the Rome Statute).

264. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 138 (1986) (finding that acts that seem to contradict the purpose of a treaty do not always defeat the treaty's object and purpose).

persons to the ICC in good faith based on the U.S. history to investigate and prosecute, the likelihood that an accused will not escape justice, and the likelihood that the U.S. person belongs to the United States. Party States may also enter into an agreement with the United States that limits the U.S. ability to transfer a Party State person to the ICC without the Party State's consent. U.S. Article 98 agreements do not immediately defeat the object and purpose of the Rome Statute, because the accused will likely face justice.

The biggest problem that the United States will face in enforcing the validity of these agreements is the definition of a "sending State." While the ICC should determine that "sending State" only means the state to which a person belongs, Crawford and the EU assert strong arguments that "sending State" means that the person must be present in the Party State on official duty.

Based on U.S. jurisdiction and the U.S. intent to investigate and prosecute, members of the U.S. armed forces enjoy the greatest amount of immunity from the ICC, followed by an uneven protection for U.S. nationals, and an uncertain immunity for U.S. officials and employees. If the United States is able to maintain jurisdiction over U.S. persons, whether or not the U.S. Article 98 agreements comply with Article 98 is irrelevant. By making the necessary adjustments in U.S. law and to U.S. Article 98 agreements, the United States will adequately protect the U.S. persons who travel abroad in service to their nation.

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