The United States' opposition to the International 'Kangaroo' Court: legal and practical implications

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'This decision will not stand. I will make reversing this decision, and protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities…'

- Reaction of Senator Jesse Helms, Chairman of the US Senate Foreign Relations Committee, to the US signature of the *Rome Statute* in 2000.[1]

Introduction

Having earlier supported the notion, the United States has become the most vocal opponent of the International Criminal Court (ICC), established under the *Rome Statute*.[2] Whilst hardly a new development – there has been strong US dissent ever since the final proposal at the Rome Conference in 1998 – recent events make this opposition ever more pertinent. The first arrest warrants issued by the ICC were unsealed in October 2005, and are against five leaders of the Lord's Resistance Army for war crimes and crimes against humanity committed in Uganda since 2002. With no police force or army of its own, the ICC now relies on States' co-operation to bring the suspects to the Hague. The co-operation of powerful and well-resourced nations such as the United States will be pivotal to detaining war crimes suspects.

This paper aims to show that, despite increasingly aggressive opposition to the Court, co-operation between the United States and the International Criminal Court is achievable. It firstly outlines how US opposition to the ICC has manifested (Part I). In particular, in an attempt to avoid the jurisdiction of the ICC, the US is hoping to establish a network of 'Article 98 agreements' around the globe[3] which may fall under the scope of agreements envisaged under Article 98, paragraph 2 of the *Rome Statute*. So far, these so-called Article 98 Agreements, or 'avoidance agreements', have been signed by 100 countries.[4] These agreements, however, appear invalid (Part II), and are raising other consequences for both the US and ICC party States; in particular, questions surrounding their illegality (Part III). After demonstrating that the US's aggressive perusal of these agreements is unnecessary,

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[1] 'Helms Opposes Clinton's Approval of the ICC Treaty' (Press Release, 2 January 2001), *Department of State HyperFile – East Asia/Pacific Edition* <http://canberra.usembassy.gov/hyper/2001/0102/hpub2.htm>.

[2] *Rome Statute of the International Criminal Court* ('*Rome Statute*' or '*Statute*'), opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

[3] John R Bolton, US Department of State, 'State Parties Must Respect US Decision Not to be Bound by ICC' (Press Release, 19 September 2002).

[4] United States Department of State, 'U.S. Signs 100th Article 98 Agreement' (Press Release, 3 May 2005) <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>.

due to both legal analysis and practical realities, the reasoning given for such an aggressive political strategy is examined (Part IV).

I: A BRIEF HISTORY OF THE ICC: FROM A ROMAN (WORKING) HOLIDAY TO INVADING HAGUE

Long before Nuremburg, the concept of an international criminal court had been contemplated: from the International Prize Court in 1907[5] to a League of Nations covenant (which never came into force) in 1937, dealing with a counter-terrorism court.[6] Yet it wasn't until 1989, with the fall of the Berlin Wall, that the United Nations General Assembly invited the International Law Commission to consider the issue of an international criminal jurisdiction. By 1994 the Commission had a draft statute - 'a complex 200 page catalogue of options and alternatives.'[7]

Diplomatic negotiations, held in Rome in 1998, to discuss the Statute were decentralised. The position of, *inter alia* Germany and Australia, for a powerful and effective court, was juxtaposed with the United States' and others' aim to accord greater weight to state sovereignty.[8] The final proposal by the Conference Bureau, submitted in the early hours of 17 July 1998, was one of compromises,[9] and was followed that evening by an electronic vote that was non-recorded, at the request the US delegation. The outcome: 120 countries in favour of the Statute, seven against. The US, having been unable to secure an extension to the conference to enable further changes to the proposal,[10] joined the company of Iran, Iraq, China, Israel, Sudan and Libya in the dissent.[11] Nonetheless, the sixty ratifications necessary to bring the Statute into force[12] were achieved in whirlwind time, and the International Criminal Court ('the ICC') was created on 1 July 2002.

President Clinton signed the resulting *Rome Statute* on the last possible day for signature without ratification,.[13] Proclaiming his 'strong support for international accountability', he also unusually foreswore any intention of ratifying the treaty in the near future.[14] The US signature – as exemplified in this paper's opening quotation – was amid strong US objections to the Court, particularly from the Senate.

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[5] see the discussion of the Convention Relative à l'Etablissement d'une Cour Internationale des Prises in Cesare P R Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *International Law and Politics* 709, 720.

[6] William A Schabas, 'Editorial: International Criminal Court: The Secret of Its Success' (2001) 12 *Criminal Law Forum* 415, 415.

[7] Ibid, 416.

[8] Damir Arnaut, 'When in Rome…? The International Criminal Court and Avenues for US Participation' (2003) 43 *Virginia Journal of International Law* 525, 535.

[9] William A Schabas, above n **7**, 416.

[10] US negotiator Scheffer has described the lack of an extension as a 'fatal flaw in the process', surmising it would have made 'an enormous difference to US support' if they had been able to labour over it for longer: David J Scheffer, 'Staying the Course with the International Criminal Court' (2002) 35 *Cornell International Law Journal* 47, 72.

[11] see conclusions on voting reached by Michael P Scharf, 'The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position' (2001) 64 *Law and Contemporary Problems* 67, 67.

[12] *Rome Statute*, above n 3, Article 126.

[13] 31 December 2000.

[14] Ruth Wedgwood, 'The Irresolution of Rome' (2001) 64 *Law and Contemporary Problems* 190, 190.

The United States' opposition to the court is rather surprising, given their support since Nuremberg for the creation of a court and their leadership in establishing *ad hoc* war crimes tribunals.[15] Nevertheless, this particular format of an international criminal court has been denounced as one 'whose precepts go against fundamental American notions of sovereignty, checks and balances, and national independence'.[16]

The USA's opposition has led firstly to arguments that the ICC's jurisdiction is contrary to international law (A), and secondly to attempts to circumvent the ICC's jurisdiction (B). These will be discussed in turn.

A. US Opposition to ICC Jurisdiction

At the Rome Conference, three options were canvassed regarding the exercise of ICC jurisdiction. Germany proposed to enable the ICC to try anyone surrendered to it.[17] A Korean proposal provided jurisdiction if either the territorial state, the nation of the accused, the victim's nation, or the state with custody of the accused, were a party to the *Rome Statute*. The US suggested, as a precondition for the exercise of jurisdiction over war crimes and crimes against humanity, but not for genocide, the consent of the State of which the accused is a national.[18] The jurisdictional approach, finally codified in Article 12, was considered a compromise, and brings an individual into the jurisdictional reach of the ICC if the alleged crime was committed after 1 July 2002, [19] and if:

(a) the territory on which the conduct alleged crime occurred is a party-State[20] ('territorial jurisdiction'), or the accused is a national of a party-State[21] ('nationality jurisdiction'); or
(b) either the territorial or the national State, who is a non-party but consents to ICC jurisdiction on an ad hoc basis;[22] or
(c) the case is referred to the ICC by the Security Council.[23]

As a permanent member of the Security Council with the power of veto, it is really only the first two scenarios that concern the United States.

The United States views Article 12 as a violation of the *Vienna Convention on the Law of Treaties* (*VCLT*); viz. that a treaty cannot 'create either obligations or rights for a third State without its consent.'[24] The US argues that if the ICC tries an individual for a crime, the individual's home State is being subjected to obligations under the Statute,[25] which it

[15] eg the International Criminal Tribunal for the Former Yugoslavia, created by UN Security Council Resolution 827 of May 25 1993. UN SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827.
[16] John R Bolton (now US Ambassador to the UN), 'The United States and the International Criminal Court' (Speech at the Aspen Institute, Berlin, 16 September 2002) <http://www/state/gov/t/us/rm/13538.htm>.
[17] Ilias Bantekas and Susan Nash, *International Criminal Law* (2003), 380.
[18] Michael P Scharf, 'The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position' (2001) 64 *Law and Contemporary Problems* 67, 77.
[19] The Court has jurisdiction only with respect to crimes committed after the *Statute's* entry into force: *Rome Statute*, above n 3, art 11(1).
[20] Or if committed on board a vessel or aircraft, the State of registration: *Rome Statute*, ibid, art 12(2)(a).
[21] ibid, art 12(2)(b).
[22] By lodging a declaration with the Registrar: ibid art 12(3).
[23] Acting under Chapter VII of the *Charter of the United Nations*: ibid art 13(b).
[24] *Vienna Convention on the Law of Treaties* ('*VCLT*'), opened for signature 23 May 1969, 1155 UNTS 331, art 40 (entered into force 27 January 1980), art 34.
[25] Bartram S Brown, 'US Objections to the Statute of the International Criminal Court: A Brief Response' (1999) 31 *International Law and Politics* 855, 869.

cannot do without the State's consent. This is widely viewed as a novel argument,[26] as ICC jurisdiction is based on the recognised jurisdictional right of states to prosecute crimes committed either on their territory or by their nationals.[27] When the crime affects the interests of more than one State, the right to concurrent jurisdiction has been recognised since the *SS Lotus Case*[28] in 1927, when the Permanent Court of International Justice proclaimed that 'restrictions upon the independence of states cannot be presumed'[29] and that it 'is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole.'[30]

Further, US courts have previously accepted the exercise of treaty-based jurisdiction over nationals of States not party to that treaty, without that State's consent. In *United States v Yunis*,[31] the United States prosecuted a Lebanese national for hijacking from Beirut airport a Jordanian plane with two US passengers. The US government successfully asserted jurisdiction under the *Hostage Taking Act*[32], which implemented the *International Convention Against the Taking of Hostages*[33] and authorised the US to prosecute and punish extraterritorial violations of the Act where the hostages are American nationals. All this despite the fact that Lebanon was not a party to the Convention and did not consent to the prosecution.

The US contends that customary international law does not entitle a state to delegate to an international court its own domestic authority to prosecute crimes committed on its territory.[34] However, the requirement of territorial or national jurisdiction can be viewed as layered upon an universal jurisdiction,[35] given that the ICC has jurisdiction over issues of genocide,[36] crimes against humanity,[37] war crimes[38] and, after a definition is adopted,[39] the crime of aggression.[40] The *Rome Statute* can therefore be interpreted as simply a reflection of the contemporary international trend that every State has an interest in the prosecution of the most heinous crimes.[41] If any state can extend its own court's jurisdiction to these

[26] 'equating potential ICC jurisdiction over individuals with the idea that States are being inappropriately "bound" is a clever rhetorical device, but as legal reasoning … completely untenable': ibid.
[27] John Senguin, 'Denouncing the International Criminal Court: An Examination of US Objections to the *Rome Statute*' (2000) 18 *Boston University International Law Journal* 85, 104.
[28] *SS Lotus Case (France v Turkey)* [1927] PCIJ (ser A) No 10, (Judgment). Crimes were committed on a French ship while at sea, which effected a Turkish ship. The French argued that Turkey did not have a right to try a French national for these crimes as the State whose flag is flown has exclusive jurisdiction. This argument was rejected by the Court.
[29] ibid.
[30] Ibid 31.
[31] *United States of America v Yunis*, 924 F 2d 1086 (DC Cir, 1991).
[32] 18 USC 1203.
[33] *International Convention Against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).
[34] David J Scheffer, 'A Negotiator's Perspective on the International Criminal Court' (2001) 67 *Military Law Review* 1, 7.
[35] Leila Nadya Sadat, 'Redefining Universal Jurisdiction' (2001) 35 *New England Law Review* 241, 251-2. It is likely that the state consent regime was retained as a concession to the sovereignty of states: ibid.
[36] *Rome Statute*, above n 3, art 5(1)(a); defined in art 6.
[37] ibid, art 5(1)(b); defined in art 7.
[38] ibid, art 5(1)(c); defined in art 8.
[39] ibid, art 5(2).
[40] Ibid, art 5(1)(d).
[41] Gennady M Danilenko, 'ICC Statute and Third States' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1871, 1878.

universal offences – as seen in *Attorney General of Israel v. Eichmann*,[42] where Israel took Adolph Eichmann from Argentina to Jerusalem to prosecute him for crimes against humanity and war crimes[43] – it appears reasonable that a large majority of states, acting together, could pool their jurisdictions and delegate them to an international court.[44]
While universal jurisdiction may be a recognised international law principle,[45] prosecutions made relying upon it are fairly limited. Yet, even if the US was correct and ICC jurisdiction was initially contrary to established principles of international law, 'it can safely be argued that the adoption of the *Rome Statute* has authoritatively modified those principles',[46] given that 131 of the 191 independent countries in the world have signed the *Rome Statute*, including all European Union member states and candidate countries (bar Turkey).

B. Actions taken by the US in opposition to the Court

The first manifestation of their opposition came in July 2002, when the US threatened to veto the United Nations Mission in Bosnia and Herzegovina due to its 'frustration at its inability to convince the Council to take seriously the concerns of the United States about the legal exposure of its peacekeepers under the *Rome Statute*.'[47] Following several Security Council meetings,[48] the Council adopted Resolution 1422 under Chapter VII of the Charter of the United Nations. This requested that the ICC, pursuant to Article 16 of the *Rome Statute*, to defer for 12 months any prosecution or investigation of a matter involving an officer/personnel[49] from a non-party State relating to a UN-established operation.[50]
While some members of the Security Council asserted it was unnecessary and improper,[51] the Security Council adopted a new resolution repeating the request to the ICC for another 12 months in June 2003.
Some argue that the cumulative effect of the Security Council Resolutions has been to create an exception in *Rome Statute* jurisdiction provisions for UN peacekeepers from non-party States:[52] this exclusion would amount to an amendment of the *Rome Statute* and violate the *VCLT* prohibition on treaty amendments outside the manner provided for in their cumulative instruments.[53] Regardless, Security Council Resolutions are no longer being

[42] 36 I.L.R. 277, 299, 304 (Isr. Sup. Ct. 1962).
[43] See discussion in Michael P Scharf, 'The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the US Position' (2001) 64 *Law and Contemporary Problems* 67, 88.
[44] Thomas M Franck and Stephen H Yuhan, 'The United States and the International Criminal Court: Unilateralism Rampant' (2003) 35 International Law and Politics 519, 548-9.
[45] Gennady M Danilenko, above n 42, 1878.
[46] Damir Arnaut, 'When in Rome…? The International Criminal Court and Avenues for US Participation' (2003) 43 *Virginia Journal of International Law* 525, 554.
[47] United Nations Security Council, 'Bosnia Mission Mandate in Question, as Security Council Debates Legal Exposure of UN Peacekeepers' SC/7445/Rev.1 (Press Release, 10 July 2002).
[48] Ilias Bantekas and Susan Nash, *International Criminal Law* (2003), 379.
[49] current or former – see paragraph 1 of the resolution
[50] Security Council resolution 1422 (2002), United Nations Peacekeeping, S/Res/1422 (2002), Adopted by the Security Council at its 4572 meeting, on 12 July 2002.
[51] Sean D Murphy 'US efforts to secure immunity from the ICC for US nationals' (2003) 97 *The American Journal of International Law* 710, 711.
[52] Neha Jain, 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court' (2005) 16 *The European Journal of International Law* 239, 250.
[53] *VCLT*, above n 25, art 40

used in this way; since May 2004, when the US withdrew its proposal for renewal due to lack of support among Security Council members.[54]

Since August 2002, the United States has also been pursuing what they call Article 98 Agreements.[55] These agreements are wider than the Security Council resolutions, as they purport to exempt *all* US citizens from the Court's jurisdiction.[56]

Article 98 governs conflicts of obligation – under international law[57] or an international agreement[58] – with cooperation with the ICC. In a rather superfluous first paragraph (although it does clarify that the Court can obtain a waiver of these rights),[59] Article 98(1) prevents the surrender of a non-party State diplomat to the ICC without that State's consent.[60] It is under the scope of the second paragraph that the US contends its agreements fall. This reads:

> Article 98: Cooperation with respect to waiver of immunity and consent to surrender
> …
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The Article 98 agreements refer to this provision when, after reaffirming the importance of bringing to justice those who commit crimes under the ICC's subject jurisdiction, the ICC's complementary jurisdiction, and expressing US intentions to investigate and to prosecute (where appropriate) acts within ICC jurisdiction, the agreement commits another State to refrain from surrendering, or transferring, a US national by any means to the ICC.[61]

This is combined with the *American Servicemembers' Protection Act of 2002*,[62] signed by President Bush on August 3 2002; one month after the ICC came into being. This Act forbids the United States from granting military assistance to the government of a party-State,[63] unless the President deems assistance to be in the national interest,[64] the party-State has signed an Article 98 Agreement,[65] or is a NATO member country or another major ally.[66] It also authorises the President to 'use all means necessary and appropriate to bring about the release' of any US national being detained by the Court[67]; it is this section that led

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[54] Neha Jain, above n 53, 250.

[55] 'This agreement is the first Article 98 agreement we have concluded with another country': Phillip T Reeker, 'U.S. and Romania Sign Article 98 Agreement' (Press Release, 1 August 2002) <www.usembassy.ro/Documents/> at 20 May 2005.

[56] David A Tallman, 'Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict' (2004) 92 *Georgetown Law Journal* 1033, 1042.

[57] *Rome Statute*, above n 3, art 98(1).

[58] *Rome Statute*, above n 3, art 98(2).

[59] See Stephen Wirth, 'Immunities, Related Problems, and Article 98 of the *Rome Statute*' (2001) 12 *Criminal Law Forum* 429, 454.

[60] *Rome Statute*, above n 3, art 98(1).

[61] Or to another entity/State for the purpose of surrender/transfer to the ICC, without US consent.

[62] 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001–2015, 116 Stat. 820, 899–909 (to be codified at 22 U.S.C. §§ 7421–7432). ASPA was passed as Title II of this legislation. *See id.* §§ 2001–2015.

[63] *ASPA*, ibid, § 2007.

[64] Ibid § 2007(b).

[65] ibid § 2007(c).

[66] … or is Taiwan: *ASPA*, ibid, § 2007(d).

[67] ibid § 2008.

to the Act being widely referred to as the 'Hague Invasion Act'.[68] The US Senate adopted into Appropriations for 2005 a prohibition on funds from the US Economic Support Fund to be made available in 2005 to party-States that have not entered Article 98 Agreements with the United States.[69] This prohibition is subject to the President's waiver powers.[70]
The validity and implications of these Article 98 Agreements will now be examined. In particular, whether they validly protect the class of persons the US purports they do and the outcome of conflicting obligations on party-States and signatories. The legality of the agreements is also questionable.

II: The Validity of Article 98 Agreements

It must first be noted that, while the US State Department reports 100 agreements, the majority are not technically valid, as approval has not been given in accordance with the constitutional provisions (in most instances, legislative consent[71]) of each State.[72] Secondly, Article 98 prescribes obligations to the Court – not party States. State Parties must surrender a suspect to the ICC pursuant to a valid request[73]; Article 98 canvasses the circumstances in which the Court is to refrain from such a request, and will probably not take into account an avoidance agreement unless it properly falls within the scope of Art 98(2).[74] Third, most of the avoidance agreements provide for reciprocal obligations not to surrender both parties ('bilateral agreements').[75]

A. Possible limitations on the scope of 98(2)

The avoidance agreements may be invalid if they do not fall within the scope of Article 98(2).

[68] While 'not particularly amused' by the section's language, the Netherlands have 'not [deemed] an American invasion of the Netherlands an imminent threat': Dutch Ambassador to Washington Boudewijn van Eenennaam, quoted in William Orme, 'UN Extends Bosnian Missions' *The Los Angeles Times* (Los Angeles, USA) 4 July 2002.
[69] Council of the European Union, 'Declaration by the Presidency on behalf of the European Union on the Nethercutt amendment' 15864/1/04 REV 1 (Presse 353) P136/04 (Brussels, 10 December 2004).
[70] These waiver powers have been used, for example recently with Romania, Bahrain, Kyrgyzstan, Ethiopia and Jordan: see Joel Brinkley, 'Bush Budget Would Slash Bolivia Military Aid' *The New York Times*, 9 February 2006, 10.
[71] Jack L Goldsmith and Eric A Posner, 'International Agreements: A Rational Choice Approach' (2003) 44 *Virginia Journal of International Law* 113, 122.
[72] Council of the European Union, 'EU Guiding Principles concerning Arrangements between a State Party to the *Rome Statute* of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court', *Council Conclusions: International Court* (30 September 2002), 42 ILM 240, 241.
[73] *Rome Statute,* above n 3, art 89.
[74] James Crawford SC, Phillip Sands SC and Ralph Wilde, 'In the Matter of the Statute of the International Criminal Count and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute: Joint Opinion' (5 June 2003), <www.hrf.og/internaitonal_justice/Art98_061403.pdf> [23].
[75] References made to provisions in the avoidance agreement are based on the standard form agreement cited in Crawford et al, ibid.

i. Status of Force Agreements

Particularly in early academic debates, it was advanced that Article 98(2) only covers Status of Force Agreements, or even more narrowly, only pre-existing Status of Force agreements.[76]

The US delegation themselves have stated that the original intent of Article 98(2) was to ensure the continuing validity of Status of Force Agreements ('SOFAs').[77] These are international agreements that define the relationship between a state's military personnel (referred to as the 'sending State' in the SOFAs) and the legal structures of the state to which they are deployed (referred to as the 'receiving State'). It apportions criminal jurisdiction among the law of both States, depending on the nature of the crime and the victim's identity. When a crime represents a violation of both States' laws, the receiving State maintains primary jurisdiction; however, the SOFA also provides for a jurisdiction waiver request from the sending State.[78] The US has a policy of requesting this waiver whenever possible.[79]

Certain ICC negotiators have claimed that Art 98(2) was intended to be construed to protect only *existing* SOFAs.[80] However, under the *VCLT*, which is now broadly recognised as reflecting customary international law,[81] a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'[82] It is difficult to find Article 98(2) to be limited to pre-existing agreements on the ordinary meaning of the terms, given that the 'obligations' is not ordinarily defined as limited to existing agreements,[83] and several other articles of the *Rome Statute* include the qualifying word 'existing'[84] or 'pre-existing'.[85]

Arguing that Article 98(2) only contemplates SOFAs only is to make assumptions based on the terms used to describe the State parties ('sending State' and 'receiving' or 'requested' State). Neither 'receiving' nor 'sending' is defined in the *Rome Statute's* use of terms,[86] and Article 98(2) is the only section where 'sending State' is used. In SOFAs, 'sending State' is defined as 'the Contracting Party to which the force belongs' (where 'force' is members of the armed forces). If SOFAs were permitted as an interpretation aid, this would suggest that in Article 98, 'sending State' means the party responsible for the accused – a member of the armed forces – in the territory of the requested State for official duty.[87] However, under the

[76] Crawford et al, ibid, [39]-[45].
[77] Ambassador Scheffer: 'when the US delegation successfully negotiated the inclusion of article 98(2)… we had in mind our own SOFAs and their applicability': Scheffer, above n 68, 17.
[78] See generally Erik Rosenfeld, 'Application of US Status of Force Agreements to Article 98 of the *Rome Statute*' (2003) 2 *Washington University Global Studies Law Review* 273, 280-5.
[79] Ibid, 283.
[80] See Kaul and Kress, 'Jurisdictionn and Cooperation in the Statute of the ICC' *Yearbook of International Humanitarian Law* vol 2 (1999) 143, 165.
[81] Crawford et al, above n 75.
[82] *VCLT*, above n 25, art 31(1).
[83] Crawford et al, above n 75, [38].
[84] See 'existing international obligation' in art 90(6), (7)(a)&(b); 'existing fundamental legal principle' in art 93(3); 'existing bilateral or multilateral arrangements' in art 111.
[85] See 'pre-existing obligation' in art 73; 'pre-existing treaty obligation' in art 97(c).
[86] *Rome Statute*, above n 3, art 102.
[87] Jeffrey S Dietz, 'Protecting the Protectors: Can the United States Successfully Exempt US Persons from the International Criminal Court with US Article 98 Agreements?' (2004) 27 *Houston Journal of International Law* 137, 171.

VCLT, extrinsic evidence is only admissible where the ordinary meaning would lead to an absurd or unreasonable result.[88] This is not the case here. On its ordinary meaning, 'sending State' suggests a nexus between the State and the national which lead to their presence outside their nation:[89] the national will have to be expatriated due to being sent by the State, which probably narrows the scope of 98(2) to those on official duty at the time of (allegedly) committing the crime.

ii. Limitations through the term 'requested State' in Article 98(2)

The European Union Guidelines provide that the avoidance agreements only cover persons present on the territory of the requested State because they have been sent by the sending State.[90] However, this is straining the ordinary meaning of 'requested State' in the *Statute* a little too far and confusing it with the term 'receiving State' found in SOFAs. In the *Statute,* 'requested State' is being used to describe the party-State requested to co-operate by the Court. Thus, while 'sending State' limits the person accused to being abroad on official duty at the time of the crime, this does not necessarily mean on official duty in the requested State.[91]

iii. A holistic interpretation of 98(2)

Some argue that only agreements allowing for ICC avoidance by non-party States are contemplated by 98(2). [92] This is reached because an interpretation on the article's ordinary meaning, when the Article is read as a whole, would lead to an absurd or unreasonable result, thus allowing extrinsic evidence to be used to aid interpretation.[93]

Article 98(1) explicitly limits the right to State or diplomatic immunity to non-party States (unless consent is received), while Article 27 provides for the 'irrelevance of official capacity'; viz the Head of State and other officials shall not be exempt from ICC jurisdiction. However, the *Vienna Convention on Diplomatic Relations* – which provides for diplomatic immunity – is an 'international agreement' under 98(2) which requires State consent before a surrender to the ICC.[94] Therefore, if 98(2) applies to party-States, 98(1)'s limitations are circumvented by relying on a bilateral avoidance agreement.

If Article 98(2), due to conflictions with Arts 27 and 98(1), is interpreted as not covering party States' government officials, it would mean that a party State's troops may not be surrendered to the ICC, but that a serving Head of State or minister, etc., who goes to visit the troops has no immunity and may be surrendered to the ICC.[95] This is indeed an absurd result, and would suggest Article 98(2) should be interpreted to completely exclude any benefits to States Parties. However, little extrinsic evidence is available to provide for such an interpretation of 98(2); although, perhaps the circumstances of the conclusion of this

[88] *VCLT*, above n 25, arts 31 & 32.
[89] Crawford et al, above n 75, [40].
[90] European Union Guiding Principles, annexed to 'Conclusions on the ICC' (30 September 2002) < http://europa.eu.int/comm/external_relations/human_rights/gac.htm#hr300902> at 20 May 2005.
[91] Dietz, above n 88, 173.
[92] Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407, 428.
[93] *VCLT*, above n 25, art 31, 32.
[94] Akande, above n 93, 428.
[95] ibid.

Article – which was to allow SOFAs to be protected – is sufficient to interpret the agreements as *only* applying unilaterally to US nationals avoiding ICC jurisdiction.

B. Invalidity due to ICC member States' *Rome Statute* obligations

These Article 98 Agreements create a problem for *Rome Statute* party States who have entered into one, for they may be flouting their obligation to each other to act neither in a manner that undermines the spirit of the treaty, nor contrary to its object and purpose.[96]

A starting point for the Statute's object and purpose is its Preamble, where it is stated that States Parties are determined to put an end to impunity for the most serious of crimes, and assert effective prosecution of such crimes 'by taking measures at a national level and by enhancing international co-operation.' This objective is slightly tempered by Article 98, but only in that it acknowledges respecting certain international obligations. This is not inimical with preventing impunity.

The avoidance agreements do not provide effective guarantees of investigation and prosecution and thus undermine the purpose of the *Rome Statute*.[97] Rather than actually committing the United States, the agreements merely pay lip service to US intentions to investigate an prosecute acts where appropriate.[98] Combined with public comments made, it is clear that the US agenda is not to prevent impunity through their domestic courts, but to exempt all their nationals from the jurisdiction of the ICC under any circumstance. *ASPA* provisions allowing for the 'invasion of Hague' and use of force if necessary to repatriate US nationals also does not inspire confidence in the potential for the US to prioritise preventing impunity over exempting their nationals from ICC jurisdiction. This combined US position 'stands in fundamental opposition to the ideals of international justice and to the affirmation of universal jurisdiction over the most serious international crimes.'[99]

The reality of the US position also makes it untenable to proclaim that 'the Party State enters into the US Article 98 Agreements with a good faith intent to support the *Rome Statute* and battle impunity'.[100] The avoidance agreements are therefore also inconsistent with the *jus cogens* norm of *pacta sunt servanda*,[101] which obliges parties to a treaty to perform their obligations in good faith.[102] While the *VCLT* does not define good faith, it appears that if parties consistently deviate from a specific treaty provision, it would be to the violation of this principle.[103] The agreements are in conflict with party States' obligations to co-operate with the Court, as outlined in Articles 86, 87, 88 and 90, but only if (or when) the time comes, the party State decides to uphold their avoidance agreement rather than cooperate with the ICC.

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[96] *Case Concerning Military and Paramilitary Activities (Nicaragua v United States)*, 1986 ICJ Reports 14, 138.
[97] Jain, above n 32, 249.
[98] Tallman, above n 34, 1048.
[99] Chimene Keitner, 'Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)' (2001) 6 *UCLA Journal of International Law and Foreign Affairs* 215, 250.
[100] *contra* Dietz, above n 88, 159, who argues party States are, given that the agreements recite the importance of bringing international criminals to justice and the intent to investigate and prosecute persons accused.
[101] *VCLT,* above n 50, Preamble.
[102] ibid, art 26.
[103] Jain, above n 32, 250.

III: IMPLICATIONS FOR BOTH THE US AND PARTY STATES INVOLVED IN ARTICLE 98 AGREEMENTS

A. Invalid… but not illegal

It appears that by being bilateral agreements over a class wider than those sent by the State, and lacking any actual commitment to the effective investigation and prosecution of crimes, the avoidance agreements are not contemplated by the *Rome Statute* and even run counter to it. However, this does not by itself establish that the agreements are illegal.[104] There can only be state responsibility for an internationally wrongful act when there has been a 'breach of an international obligation of the State.'[105] Further, *Nicaragua* and Article 26 *VCLT* appear to require the State to actually defeat the treaty, a lesser burden that to possibly defeat the treaty.

Thus, to argue that becoming a party to an avoidance agreement constitutes an unlawful breach of obligations to the *Rome Statute* assumes that a party State will choose its obligations under the avoidance agreement over those in the *Rome Statute*.[106] This is far from a *fait accompli*. The strength of a State's commitment to either agreement is not a function of their validity, but rather whether or not their interests are strong enough to outweigh their sense of obligation to that particular agreement.[107] The act of the ICC requesting a State's cooperation would lead to international scrutiny, public opinion and discussion,[108] which may mean the State will heed to constituents' demands for an ICC investigation of the accused US national – especially when an accused has committed such heinous crimes that only a trial at the international level will satisfy victims' pleas for justice.[109]

Further, countries have in the past demonstrated a desire to assert their own legal jurisdiction, even in the face of a pre-existing agreement to allow US exclusive jurisdictional rights over their nationals.[110] In *Netherlands v Short*,[111] a US soldier was retained in a Dutch court on charges of murder. The Dutch court was reluctant to hand Short over to the US because doing so might subject him to the death penalty, which would violate Dutch obligations under the *European Convention on Human Rights*. Short was eventually released when the US promised that the death penalty would not apply. The willingness for countries to avoid agreements made with the US is also only likely to increase, given that some power and influence is shifting away from the US, as the war on terrorism exposes a US need for access to foreign military bases.[112]

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[104] Tallman, above n 34, 1048.
[105] International Law Commission, Articles on State Responsibility (2001) art 2(b). <http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf#pagemode=bookmarks> at 20 May 2005.
[106] Crawford et al, above n 84, footnote n 4.
[107] See Goldsmith & Posner, above n 81, 115; 128.
[108] Wedgwood, 'The Irresolution of Rome', above n 15, 203.
[109] Rosenfeld, above n 88, 278.
[110] Recall from the discussion in Pt III above that the US has a policy of importuning for the waiver of jurisdiction.
[111] 29 ILM 1375 (1990).
[112] Rosenfeld, above n 88, 288.

B. Dealing with the resulting treaty conflict for member States

Whatever decision is taken by the State Party, it will face the wrath of either the US or its fellow ICC parties for creating this conflict. No provision of the *Rome Statute* expressly prohibits signing an inconsistent treaty and the *VCLT* recognises the unhindered capacity of States to conclude treaties.[113] As the avoidance agreements are themselves treaties and appear to be inconsistent with Article 98(2) and the *Rome Statute*, there arises the issue of treaty conflict and which prevails. The *VCLT* provides that between a party to both treaties and a party to only one, the treaty to which both States are parties governs their mutual rights and obligations.[114] This is 'without prejudice to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.'[115] Therefore, the avoidance agreement is valid and binding under international law, but these obligations do not detract from those which party States continue to have with other party States to the *Rome Statute*.

If the situation arises and a Party State has to choose between the two conflicting treaties, whatever the decision, the State Party will face consequences under the principles of state responsibility, when one of the mutually inconsistent obligations is not met.[116] There is no clear answer as to what the consequences will be, for, contra contract violations, treaties are not subject to reliable sanctions by independent third parties.[117]

C. Breach of the law by the US?

While it appears that States Parties can sign the avoidance agreements which undermine the object and purpose of the *Statute* without their actions being automatically illegal, States who have merely signed but not ratified the treaty are prohibited from this identical course of action.[118] According to the *VCLT*, as a signatory yet to ratify the *Rome Statute*, the US should '*refrain* from acts which would defeat the object and purpose of the treaty' (emphasis added).[119] While there is little authority on the application of this article,[120] it appears to impose a more burdensome obligation on mere signatories to the *Statute*. Whether this obligation is imposed on the US depends on their signature status, given that they have declared, in a three sentence letter to the United Nations Secretary General,[121] that they do not intend to become a party-State and consequentially consider themselves released from any legal obligation arising from its signature.

Given that retracting a signature from a treaty is an unprecedented move, 'it remains uncertain how an international tribunal would respond to any complaint that the US has acted in a way that threatens the viability of the *Rome Statute*.'[122] However, it has probably

[113] *VCLT*, above n 50, art 6.
[114] Ibid art 30(4)(b).
[115] Ibid art 30(5).
[116] See Tallman, above n 34, 1052-3; Akande, above n 93, 429.
[117] Goldsmith and Posner, above n 84, 113.
[118] Tallman, above n 34, 1055.
[119] *VCLT*, above n 50, art 18.
[120] Anthony Aust, *Modern Treaty Law and Practice* (2000), 94.
[121] Bolton, above n 3.
[122] Gillian Triggs, 'Implementation of the *Rome Statute* for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507, 510.

been released of *VCLT* obligations since the US 'simply reverted to the status it might have retained all along – namely, that of a non-party', instead of occupying an ambiguous position.[123] This is particularly so in light of the policy reasons for article 18; viz. a means of preserving the legal significance of signature and reducing the risk of exploitation (through reducing the difference between non-ratification and ratification)[124] or as a safeguard against acts that would change the status quo before the treaty entered into force.[125] These policy reasons are not being undermined – the treaty has entered into force, and while the US is exploiting the *Rome Statute*, it never intends to ratify.

Ultimately, it will be up to the ICC or the International Court of Justice to determine this. Under Rule 195 of the Rules of Procedure and Evidence, if a State invokes Article 98 as a justification for not complying with a Court request, the requested State must provide any information relevant to assist the Court in the application of the Article, which will give the Court an appropriate factual basis on which to rule.[126]

IV: MUCH ADO ABOUT NOTHING

A. The superfluous nature of the agreements

As seen above, it appears that the agreements will not be able to validly exclude all US nationals from ICC jurisdiction and, without a commitment to pursuing the alleged criminals in US domestic courts, the agreements also run contra to the *Statute*'s object and purpose. These conclusions are pretty irrelevant in practice, however, given that the US could 'avoid' the jurisdiction of the ICC through the complementarity regime. Any State, whether a party or not, can assert a superior right over the ICC to deal with a matter by domestic investigation and, if merited, prosecution, of the accused.[127] This is particularly so if the US law and the *Uniform Code of Military Justice* are amended to track thoroughly all specific crimes under the *Statute*'s subject jurisdiction,[128] and if the US statute of limitations of five years[129] is expanded on *Rome Statute* crimes, given that there is no statute of limitation under ICC jurisdiction.[130]

The only practical window for ICC jurisdiction over US nationals would be situations in which the US government considers an allegation against a US national to be frivolous.[131] The US has little reason to fear these types of investigations, and not only because of checks on the Prosecutor's discretion in the *Rome Statute*.[132] The *Statute* relies on the support of the Security Council, who have the authority to impose sanctions or use force against States who are not complying with the *Statute*. There are safeguards 'implicit in this

[123] Edward T Swaine, 'Unsigning' (2003) 55 *Stanford Law Review* 2061, 2064,
[124] Ibid, 2064.
[125] Aust, above n 122.
[126] Wirth, above n ?, 454.
[127] *Rome Statute,* above n 3*,* art 17.
[128] Scheffer, 'Staying the Course' above n 11, 84. For example, Australia has enacted the *International Criminal Court Act 2002* and the *International Criminal Court (Consequential Amendments) Act 2002* to enable Australia to assert primary jurisdiction over ICC crimes: see Triggs, above n 136, 507.
[129] The federal criminal code has a five year statute of limitation for non-capital offences: 18 USC 3282 (2000).
[130] *Rome Statute*, above n 3, art 29.
[131] Dietz, above n 88, 152.
[132] See later discussion.

situation' for '[i]t would be both futile and irrational for the ICC to provoke an indispensable patron.'[133]

In reality, the troops the US is fixated on protecting from the ICC are not subject to its jurisdiction. The majority of US personnel overseas is either already protected by a SOFA, stationed in Kosovo or Bosnia (and therefore subject to the International Criminal Tribunal of Yugoslavia), or stationed in jurisdictions where the receiving State government is under no obligation to participate in ICC proceedings.[134] Contrary to horror scenarios predicted under Article 12(3)'s *ad hoc*-consent regime, it is extremely unlikely that Fidel Castro's Cuba or another rogue Non-Party State will choose to bring the US within the jurisdiction of the ICC, given that to do so will mean it has accepted the jurisdiction of the Court itself and all the rules concerning party States.[135]

A more likely worst-case scenario is that the US itself will find itself with custody over another Non-Party State national being pursued by the ICC, and over whom the US lacks jurisdiction. A decision to surrender the person to the ICC would undermine the United States' current strong stance that the ICC should not have jurisdiction over those without consent, but a refusal could mean the alleged war criminal would go free.[136] This is a hypothetical situation with which the US is faced today, with five Lord's Resistance Army leaders in hiding throughout Africa. The delicacy of these scenarios was recently exemplified when the US abstained from voting the UN resolution to try Sudanese war crime suspects at the ICC.

Of course, such scenarios can be avoided if US co-operation with the ICC is achieved. This would mean addressing and over-coming current US objectives to the Court. But what exactly is the rationale behind the US's opposition?

B. Rhetoric as an obstacle to co-operation

US objections to the ICC have overwhelmingly fixated on the potential for prosecutorial abuse, as well as a lack of procedural due process in the *Rome Statute*.[137] Firstly, the ICC is criticised as lacking 'many of the procedural protections to which all Americans are entitled under the Bill of Rights.'[138] This criticism is unsupportable, given that the *Statute* incorporates the presumption of innocence[139] and other due process guarantees[140] consonant

[133] Brown, above n 59, 883.
[134] Thomas M Franck and Stephen H Yuhan, 'The United States and the International Criminal Court: Unilateralism Rampant' (2003) 35 *International Law and Politics* 519, 536.
[135] Rule 44(2), Rules of Procedure and Evidence ICC-ASP/1/3 <http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf> at 27 May 2005.
[136] Arnaut, above n 9, 544. This scenario would be particularly difficult if the Security Council refused to refer the case to the ICC: ibid.
[137] In a random sample of 40 US government statements between 2001 and 2003, 80% of principal arguments (ie primary focus of the statement) and 63% of total arguments focused on these two areas: Mariano Florention Cuellar, 'The International Criminal Court and the political economy of anti-treaty discourse' (2003) 55 *Stanford Law Review* 1597, **??**.
[138] *American Servicemembers' Protection Act* ('*ASPA*') 22 USC §§ 7421–7432, § 7421(7).
[139] *Rome Statute*, above n 3**,** Article 66.
[140] Article 67 *Rome Statute*, ibid, restates the rights of the accused as recognised by *International Covenant on Civil and Political Rights* (16 December 1966), ratified by the US in 1992 .

with US Constitutional requirements, as well as the fact that the US sees no need for such protections for those being detained at Guantanamo Bay.[141]

Secondly, and perhaps in light of the Kenneth Starr investigation unfolding at the time of the *Rome Statute*'s adoption,[142] The US forecasts a *proprio motu* ICC Prosecutor[143] who will pursue baseless and politicised prosecutions of US nationals.[144] Yet there are ultimately checks on an overzealous prosecutor in the *Rome Statute*: for example, under Art 15(1), the prosecutor can only submit a case to the pre-trial Chamber for authorisation of an investigation if there exists a 'reasonable basis' to proceed.

While separately these two criticisms are rather tenuous, together they create rather powerful rhetoric: the former asserts that the Court's structure is insufficient to guarantee the sort of protection US citizens expect, while the second claims that, regardless of the protections provided by the court, they are undermined by the fact that the prosecutor is essentially unaccountable and the court powerless to keep her or him in check. These criticisms make it difficult to see how the court could ever rise above its limitations.[145]

Another obstacle to genuine debate is the United States' view of 'sovereignty' as synonymous with the domestic democratic process, complete with checks and balances and political accountability.[146] The US view of 'sovereignty' is also a draconian one of absolute control; irreconcilable with the interdependence other nations – such as members of the European Community – have embraced in their efforts for international peace. As argued recently by an American academic, rational discourse with the United States is impossible when it raises sovereignty as an argument, 'the invocation of which is its own justification, requiring no further explanation.'[147]

In order to engage the United States in a genuine debate over both the merits of their avoidance agreements, and the potential for co-operation with the ICC, this powerful, patriotic rhetoric needs to be demystified.

CONCLUSION

Sixty years ago, the US was the driving force behind the International Military Tribunal in Nuremburg; now, it is the ICC's most outspoken opponent and is aggressively pursuing avoidance agreements throughout the world.

However, these agreements appear to cover a wider class of nationals than contemplated by Article 98(2), and are creating conflicts of treaty obligations for *Rome Statute* States Parties. The agreements are also a waste of the United States' time: given the complementarily regime in the *Rome Statute,* as well as where US troops are deployed, it is extremely unlikely that any US national will be subjected to the jurisdiction of the ICC. If anything, the US approach is leaving it more exposed to the ICC jurisdiction as a Non-

[141] for example, see Philippe Bolopion, 'L'ONU dénonce l'usage de la torture à Guantanamo', *Le Monde*, 14 February 2006.
[142] President Clinton was issued with a grand jury subpoena on the day of the adoption of *Rome Statute*.
[143] See *Rome Statute*, above n 3, art 15, canvassing the Prosecutor's right to initiate an investigation.
[144] Allison Marston Danner, 'Navigating Law and Politics: the Prosecutor of the International Criminal Court and the independent counsel' (2003) 55 *Stanford Law Review* 1633.
[145] Cuellar, above n 139,1597.
[146] See for example, Bolton: the ICC is an organisation whose 'precepts go against American notions of sovereignty, checks and balances, and national independence' – in Part I.
[147] Jenik Radon, 'Sovereignty: A Political Emotion, Not a Concept' (2004) 40 *Stanford Journal of International Law* 195, 202-3.

Party, as the Court does not have jurisdiction over war criminals of party States who declared not to accept ICC jurisdiction for a period of seven years.[148] Further, in 2009, when amendments can be made to the *Statute*, State parties can decline to ratify an amendment which precludes ICC jurisdiction in that scenario; this opt-out of amendments is reserved exclusively for Party States.[149]

Rather than focusing its efforts on the futile avoidance agreements, the US should delve behind its glib references to 'sovereignty', constitutional guarantees and a 'kangaroo court' in order to determine its rational concerns that need to be resolved before it will co-operate with the ICC. The co-operation of this powerful nation would be extremely valuable in the near future, as the ICC aims to not only issue arrests for war criminals, but bring them in front of the Court to meet with justice.

[148] *Rome Statute,* above n 2, art 124. See also Jimmy Gurulé, 'United States Opposition to the 1998 *Rome Statute* Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?' (2001-2) 35 *Cornell International Law Journal* 1, 19.

[149] *Rome Statute*, above n 3, art 121.