

IMMUNITIES AND BILATERAL IMMUNITY AGREEMENTS: ISSUES ARISING FROM ARTICLES 27 AND 98 OF THE ROME STATUTE

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This article explores the extent to which international immunities and United States "Article 98(2) Agreements" will impact on the International Criminal Court's ability to secure custody of and prosecute suspects. It refutes the widely-held view that the Court can lift the immunities of officials of non-States Parties to the Statute, and argues for a restricted interpretation of Article 98(1) which would see it inapplicable to States Parties. The second half of the article questions the legitimacy of the measures taken by the United States to shield its nationals from the Court's jurisdiction, and considers what effective enforcement measures the Court can take, should States Parties fail to comply with Court requests for the arrest and surrender of suspects.

I INTRODUCTION

Crucial to the success of the International Criminal Court (ICC or Court) will be the effective functioning of its arrest and surrender regime. Unable to try suspects in absentia¹ and lacking an enforcement arm, the ICC is reliant on States' cooperation to secure custody of suspects. Yet, the arrest and surrender regime is not without problems. One major complication is the ambiguous and troublesome immunity provisions found in Articles 27 and 98 of the Rome Statute. The purview and operation of these provisions have come into focus in recent times due, first, to the concerted effort of the United States to enter into so-called "bilateral immunity agreements", and secondly, to the controversial decision of the Special Court for Sierra Leone (SCSL), which declined immunity to Charles Taylor whilst President of Liberia notwithstanding that Liberia was not a party to the treaty

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¹ Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90, art 63 [Rome Statute].

establishing the Special Court.² This article addresses some of the issues arising from the Rome Statute's immunity provisions and looks at their implications for the arrest and surrender regime.

The first half examines Articles 27 and 98(1) of the Rome Statute. An understanding of the individual scope of these articles, and their inter-relationship, is necessary for the smooth functioning of the arrest and surrender regime. However, neither their individual scope nor proper relationship is clear for a number of reasons. First, the extent to which international immunities at customary international law protect those who have committed international crimes is unsettled. National and international court decisions on this question diverge. Secondly, whether an international court established by treaty can lift the immunities of officials from third States is unclear. While the SCSL decided that an international court can, as this article will show, the SCSL's reasoning was unsound. Finally, there is an uneasy tension between the two immunity provisions. Whereas Article 27 appears to lift all immunities, Article 98(1) appears to preserve inter-State immunities.³

Sections A and B of Part II tackle the first of these issues. In view of rational argument, commentary, and the majority of case law, it is submitted that immunity *ratione materiae* should not act as a bar to the prosecution of international crimes.

Sections C, D and E consider Article 27 and its reach. Finding flaws in the SCSL decision and views of several commentators, it is argued that, despite what the Rome Statute's drafters may have intended, nothing can justify an interpretation of Article 27 that would see it applicable to non-States Parties.

Part II's final section, Section F, addresses the inter-relationship between Articles 27 and 98(1). Their proper inter-relationship will become critical when an ICC State Party has in its territory an alien who would normally enjoy immunity, and that person is wanted by the Court. Section D demonstrates that when the alien is from another State Party, immunities constitute no barrier to the arrest and surrender regime. This section argues further that Article 98(1) operates only to preserve the immunities of persons from non-States Parties. A contrary conclusion would undermine the Rome Statute's object and purpose and would otherwise render Article 27 partially meaningless.

This article's second half focuses on Article 98(2) of the Rome Statute and United States opposition towards the Court. This opposition has culminated in a global campaign to conclude

2 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction) (31 May 2004) SCSL-2003-01-I (Appeals Chamber, Special Court for Sierra Leone) <<http://www.sc-sl.org/>> (last accessed 10 October 2006) [*Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction)].

3 Commenting on this situation, Per Saland, Chairman of the working group in Rome responsible for Article 27, has said that "there may be a contradiction between the two articles." Per Saland "International Law Principles" in Roy S Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, The Hague, 1999) 189, 202 fn 25.

"Article 98(2) agreements", which purport to immunise United States nationals from the Court's jurisdiction. The United States has also taken other steps to undermine the Court, most notably in the United Nations (UN) Security Council.

Part III starts by identifying, in section A, United States concerns with the Court. Sections B and C then describe and highlight some of the problems with United States-sponsored Security Council resolutions which oust ICC jurisdiction over personnel on UN missions coming from States not party to the Rome Statute.

Part IV then examines Article 98(2), the provision upon which the United States has based its "bilateral immunity agreement" campaign. In particular, sections C, D and E of Part IV examine whether such bilateral agreements fall within the scope of Article 98(2), and assess whether States Parties can legally conclude such agreements. It scrutinises arguments that have been advanced casting doubt on the legality of these agreements, but finds many of them wanting. Section E argues that, while the United States bilateral agreements do exceed the scope of Article 98(2) in various respects, in simply concluding agreements, States Parties are only breaching their international obligations to the extent that the agreements conflict with the goal of ending impunity.

Part IV's final section canvasses enforcement options available to the Court should States Parties fail to comply with Court requests for surrender, justifying their non-compliance on their "Article 98(2) agreements". The deficiencies of the enforcement regime are highlighted.

Part V summarises the article's conclusions.

II INTERNATIONAL IMMUNITIES, ARTICLE 27 AND ARTICLE 98(1)

A Immunities Ratione Personae and Ratione Materiae

Two types of international immunity exist under customary international law which render officials of one State immune from another State's jurisdiction: immunity *ratione personae*, or personal immunity; and immunity *ratione materiae*, or functional immunity.

Personal immunities attach to certain State officials by virtue of their office. Heads of State, Heads of Government and foreign ministers all fall within this category.⁴ Such immunities from foreign jurisdiction are absolute in that they cover all acts of the official, whether done in a public or private capacity, whether done while on an official or private visit, and whether done while in, or

4 See generally Arthur Watts "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers" (1994) 247 *Recueil des Cours* 13; *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)* (Judgment) [2002] ICJ Rep 1, para 51 Judgment of the Court [*Arrest Warrant Case*]. Note too that diplomatic agents have personal immunity but only in the State to which they are sent. See Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, arts 29, 31.

prior to taking office.⁵ The absoluteness of the immunity flows from the functional rationale underpinning it: it enables high State officials to carry out effectively their duties on behalf of their States.⁶ This being the rationale, it rightly follows that on leaving office, the rationale becomes inapplicable and personal immunity ceases, leaving the former official with recourse solely to immunity *ratione materiae*.⁷

Immunity *ratione materiae* is a broader immunity than immunity *ratione personae*. It provides all State officials with immunity from foreign jurisdiction but only in respect of their official acts. It rests on the idea that the official is acting as a mere instrument of the State, and as such, the official action is attributable only to the State, not the individual.⁸ As a necessary consequence, the immunity continues after the official has left office. A further rationale underlying functional immunity is that it precludes foreign States from sitting in judgment of the conduct of other States,⁹ something that would damage the foreign State's dignity.¹⁰

The different rationales underlying the two types of immunities help us understand how the immunities work. Personal immunity is a *procedural* defence. It renders the State official immune from a foreign State's jurisdiction.¹¹ Functional immunity, by contrast, is a *substantive* defence: the violation of law is only imputable to the State, and thus individual liability does not arise.¹²

B Immunities and International Crimes

Fuelled by many decisions dealing with the issue, much debate has arisen recently over the scope of personal and functional immunities when international crimes have been committed. The position is reasonably clear for personal immunities. While in office, a high government official who holds personal immunity will be immune from the jurisdiction of foreign national courts, even

5 *Arrest Warrant Case*, above n 4, paras 54–55 Judgment of the Court. But note Watts, above n 4, 73–74: "A Head of State may visit another State privately rather than on an official visit. ... His position in international law is in such circumstances at best uncertain."

6 *Arrest Warrant Case*, above n 4, para 53 Judgment of the Court.

7 *Regina v Bow Street Magistrate, Ex Parte Pinochet (No 3)* [2001] 1 AC 147, 202 (HL) Lord Browne-Wilkinson, 210 Lord Goff [*Pinochet No 3*]; *Arrest Warrant Case*, above n 4, para 61 Judgment of the Court.

8 *Prosecutor v Tihomir Blaškić* (29 October 1997) IT-95-14, paras 38 and 41 (Appeals Chamber, ICTY).

9 See Hazel Fox *The Law of State Immunity* (Oxford University Press, New York, 2002) 353–354.

10 Steffen Wirth "Immunities, Related Problems, and Article 98 of the Rome Statute" (2001) 12 Crim L F 419, para 1.1.

11 Antonio Cassese "When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v Belgium Case*" (2002) 13 Eur J Int'l L 853, 863–864.

12 Cassese, above n 11, 863–864.

if allegedly having committed an international crime.¹³ This rule has recently been affirmed by the International Court of Justice (ICJ),¹⁴ the House of Lords¹⁵ and the Belgian Court of Cassation.¹⁶

Some commentators have tried to rationalise this rule. In particular, Wirth has argued that it is appropriate in view of the competing values which attach to immunity of high State officials on the one hand and accountability on the other. Prosecuting a Head of State, the argument goes, would deprive a State of its leader and ability to discharge its functions, and consequently arouse powerful nationalistic sentiment which could result in war and atrocities more grave than the crimes with which the Head of State has been charged. Wirth concludes that "the ability of states to discharge their functions is even more important than the deterrence of core crimes by criminal prosecutions."¹⁷ Not all commentators agree. Some argue there should be limited exceptions to the rule.¹⁸ However, in view of the court decisions referred to, such dissenting opinions cannot be said to reflect customary international law.

Whether functional immunity can bar the prosecution of international crimes is less clear. The uncertainty results from the ICJ's controversial and conservative dicta in the *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)*¹⁹ (the *Arrest Warrant Case*). In that case, not confining itself to the matter directly before it, namely, the applicability of personal immunity for a current foreign minister in a foreign national court for international crimes, the ICJ advanced a view on functional immunities. The Court stated that, in the absence of a State waiver, former officials

13 While it seems clear since the *Arrest Warrant Case* that Heads of State, Heads of Government, Foreign Ministers and diplomats have immunity *ratione personae*, it is unclear whether there may be other high-ranking officials who are likewise entitled to it. The ICJ was equivocal on this point. *Arrest Warrant Case*, above n 4, para 51 Judgment of the Court.

14 *Arrest Warrant Case*, above n 4.

15 *Pinochet No 3*, above n 7.

16 See Antonio Cassese "The Belgian Court of Cassation v the International Court of Justice: The Sharon and Others Case" (2003) 1 J Int'l Crim Just 437 [Cassese "The Sharon and Others Case"].

17 Wirth, above n 10, para 1.3.5.

18 See for example Zappalà, who argues that Heads of State on private visits should not receive the benefit of this immunity, but should be warned beforehand that the destination State will not recognise the immunity. That is, "a Head of State should not be taken by surprise, and a sort of warning that he or she may be not welcome in a foreign country should be required." Salvatore Zappalà "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation" (2001) 12 Eur J Int'l L 595, 606; see also Paola Gaeta "Official Capacity and Immunities" in Antonio Cassese, Paola Gaeta and John R W D Jones (eds) *The Rome Statute of the International Criminal Court* (vol 1, Oxford University Press, Oxford, 2002) 975, 986–989.

19 *Arrest Warrant Case*, above n 4.

may only be tried by foreign national courts in respect of acts committed prior to taking, or subsequent to leaving, office, or acts committed while in office so long as such acts were committed in a private capacity.²⁰ It follows that, in the ICJ's view, functional immunity attaches to all official acts committed while in office.

While ICJ decisions hold much authority, the ICJ's view on functional immunities is questionable. Its silence on a narrow exception to the rule of functional immunity for international crimes is incongruous given many national and international court decisions²¹ and instances of State practice,²² and has been heavily criticised.²³ Admittedly, the decision leaves open the possibility of classifying international crimes as "private acts", which would, if applied to the ICJ's formulation, effectively lift the functional immunity of State officials. But while this solution for circumventing immunity has been proffered by various courts and judges,²⁴ it is not ideal. It ignores the fact that most international crimes instigated by State officials will necessarily involve the exercise of the State's apparatus,²⁵ thereby unavoidably rendering the act a public one. It also has the unpalatable

20 *Arrest Warrant Case*, above n 4, para 61 Judgment of the Court.

21 Cassese has noted, among others, Eichmann in Israel, Barbie in France, Kappler and Priebke in Italy, Rauter, Albrecht and Bouterse in the Netherlands, Sharon and others in Belgium, Pinochet in the UK, Yamashita in the United States, Buhler in Poland, Pinochet and Scilingo in Spain and Cavallo in Mexico. Cassese, above n 11, 870–871; Cassese "The Sharon and Others Case", above n 16. As for international tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber has said that under norms of international criminal law prohibiting war crimes, crimes against humanity and genocide, "those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity." *Prosecutor v Tihomir Blaškić*, above n 8, para 41 (Appeals Chamber, ICTY); see also *Prosecutor v Furundžija*, where the ICTY Trial Chamber held that Articles 7(2) and 6(2) of the ICTY and International Criminal Tribunal for Rwanda (ICTR) Statutes respectively, which lift functional immunities in respect of the international crimes over which the tribunals have jurisdiction, are "indisputably declaratory of customary international law." *Prosecutor v Furundžija* (Judgment) (10 December 1998) IT-95-17/1-T, para 140 (Trial Chamber, ICTY).

22 See generally Cassese "The Sharon and Others Case", above n 16, 448–450; David S Koller "Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court" (2004) 20 Am U Int'l L Rev 7, 20–22.

23 See for example Cassese, above n 11; Paola Gaeta "Ratione Materiae Immunities of Former Heads of State and International Crimes: The Hissène Habré Case" (2003) 1 J Int'l Crim Just 186 [Gaeta "The Hissène Habré Case"]; Koller, above n 22; Campbell McLachlan "Pinochet Revisited" (2002) 51 ICLQ 959; Bernard H Oxman "Arrest Warrant of 11 April 2000" (2002) 96 Am J Int'l L 677; Steffen Wirth "Immunity for Core Crimes? The ICJ's Judgment in the Congo v Belgium Case" (2002) 13 Eur J Int'l L 877.

24 *Arrest Warrant Case*, above n 4, para 85 Judges Higgins, Kooijmans and Buergenthal; *Pinochet No 3*, above n 7, 261–262 Lord Hutton, 292 Lord Phillips of Worth Matravers; *Bouterse Case* (20 November 2000) (Court of Appeal of Amsterdam) para 4.2, partly translated into English in [2001] NYIL 266.

25 McLachlan, above n 23, 962.

consequence that, not being conduct attributable to the State, it would not constitute an internationally wrongful act of the State, and the State would avoid responsibility.²⁶

In addition to evidence of State practice, there is, for this author, a compelling reason why functional immunity should be lifted in national courts for international crimes. It is that the two rationales underlying functional immunity are insufficiently compelling to prevail over the lifting of this immunity. As Sir Arthur Watts has stated, international conduct "which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice."²⁷ If, therefore, we can no longer countenance this first rationale underlying functional immunity, then only one rationale remains: to prevent the breaching of comity which would result from one State asserting its jurisdiction over the affairs of another,²⁸ thereby impairing the foreign State's dignity. This rationale, however, must have its limits. Unlike the important rationale underpinning personal immunity, reasons of comity and dignity are insufficient in this age of accountability to justify granting immunity to those who have committed international crimes.²⁹

Whether a State can claim functional immunity on behalf of nationals who have committed international crimes has great importance; its ramifications for the ICC's jurisdiction over nationals of non-States Parties are far-reaching. These ramifications will become clear below. At this point, suffice it to note that while customary international law is unsettled, there is much case law, commentary and rational argument supporting a rule lifting functional immunity in respect of international crimes in national courts. Further, such a rule would accord with the international trend towards holding perpetrators of international crimes accountable.

C Article 27 of the Rome Statute

Article 27 of the Rome Statute strips those appearing before the ICC of the immunities which might otherwise be enjoyed at international law. Article 27(1) provides:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

26 Marina Spinedi "State Responsibility v Individual Responsibility for International Crimes: *Tertium Non Datur?*" (2002) 13 Eur J Int'l L 895, 898–899.

27 Watts, above n 4, 82.

28 *Buck v Attorney-General* [1965] Ch 745, 770 Diplock LJ.

29 For a comprehensive analysis of this argument, see Wirth, above n 10.

Article 27(1) makes clear that, irrespective of a person's official capacity, criminal responsibility will arise in respect of crimes over which the ICC has jurisdiction. Thus, it removes the substantive defence of functional immunity for State officials.³⁰

Article 27(2) explicitly states that all immunities, including personal immunities, which would otherwise be enjoyed at international or national law, are ineffective to bar the Court from exercising its jurisdiction:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The first issue arising from Article 27 is the reach of its applicability. While State Party nationals are obviously bound by Article 27, the position is less certain for non-State Party nationals.

There are a number of ways by which a non-State Party national could be subject to the Court's jurisdiction. Under Article 12 of the Rome Statute, the Court can exercise its jurisdiction over such nationals where they have committed relevant crimes on the territory of States Parties. Further, if such crimes are committed on another non-State Party's territory, the Court can exercise its jurisdiction with that non-State Party's acquiescence. Finally, the Security Council acting under Chapter VII of the UN Charter can refer to the ICC Prosecutor a "situation" in which it appears that international crimes have been committed by non-State Party nationals.³¹ These provisions, in themselves, have been controversial, as non-States Parties have argued that international law prohibits the imposition of treaty obligations on third States.³² That the Statute could also strip non-State Party nationals of their international immunities before the Court goes even further. Yet, Articles 12 and 13(b) read together with Article 27 strongly suggest this very conclusion. It is the

30 This provision has become standard in the constitutive instruments of international tribunals, having been first included in that of the International Military Tribunal of Nuremberg, and then in the ICTY and ICTR Statutes. See Fox, above n 9, 430. Koller notes that the indictment made by the ICTY Chief Prosecutor against Slobodan Milosevic when he was an incumbent Head of State, and his subsequent prosecution, indicate that this provision has been interpreted as removing personal immunities as well. Koller, above n 22, 33.

31 Rome Statute, above n 1, art 13(b).

32 The legitimacy of the ICC exercising its jurisdiction over nationals of non-States Parties has been canvassed extensively in the literature. See for example Dapo Akande "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits" (2003) 1 J Int'l Crim Just 618 [Akande "Legal Basis and Limits"]; Gennady M Danilenko "The Statute of the International Criminal Court and Third States" (2000) 21 Mich J Int'l L 445; Jordan J Paust "The Reach of ICC Jurisdiction over Non-Signatory Nationals" (2000) 33 Vand J Transnat'l L 1; Michael P Scharf "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position" (2001) 64 Law & Contemp Probs 67; Ruth Wedgwood "The International Criminal Court: An American View" (1999) 10 Eur J Int'l L 93.

applicability of Article 27 to non-State Party nationals which will now be examined. Two points, however, should first be noted. At this stage we are concerned with the position of individuals *before the Court*; we are not concerned with immunities which individuals might still enjoy in foreign States prior to being brought before the Court. Secondly, if under customary international law functional immunity is inapplicable to cases involving international crimes, then Article 27 would only be relevant to nationals of non-State Parties insofar as it purports to remove personal immunities. If, conversely, customary international law allows functional immunity irrespective of the seriousness of the crime, then non-States Parties may challenge the entire ambit of Article 27.

D The Applicability of Article 27 to Non-State Party Nationals

The principle of *pacta tertiis nec nocent nec prosunt* is enshrined in Article 34 of the Vienna Convention on the Law of Treaties³³ and is a fundamental international treaty law principle.³⁴ At first blush, then, even assuming the Court can legitimately exercise its jurisdiction over non-State Party nationals in certain circumstances, one would not expect the Rome Statute, a multilateral treaty, to be able to abrogate the international law immunities accruing to officials of States not party to the Statute. Non-States Parties have done nothing to waive their immunities. However, as with many legal matters, delving more deeply reveals a number of underlying issues.

The first issue arises when we consider the Security Council's power to refer a situation, which might implicate a non-State Party official in the commission of international crimes, to the ICC Prosecutor. It could be thought that, depending on how the Court's jurisdiction is triggered, the applicability of Article 27 to non-States Parties might differ.

In this author's view, the way the Court acquires jurisdiction has no bearing on the applicability of Article 27 to non-States Parties. This is because the Court, even if the Security Council refers a situation to it, is still subject to the limits on its powers as set out in its constitutive instrument, the Rome Statute. This follows from the well-established principle of conferred powers: that the powers of international organisations are limited to those attributed to them by member States.³⁵ The Security Council, therefore, cannot confer on the Court additional powers.³⁶

33 "A treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 34.

34 David J Scheffer "The United States and the International Criminal Court" (1999) 93 Am J Int'l L 12, 18.

35 Sometimes called the principle of attribution or the principle of speciality: see Henry G Schermers and Niels M Blokker *International Institutional Law: Unity within Diversity* (4 ed, Martinus Nijhoff, Leiden, 2003) 155–157. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 25, where the Court held: "International organizations ... are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

36 See generally Luigi Condorelli and Santiago Villalpando "Can the Security Council Extend the ICC's Jurisdiction?" in Cassese, Gaeta and Jones, above n 18, 571.

Thus, if the Court cannot apply Article 27 to non-States Parties by virtue of fundamental treaty law principles, as is argued below, then this limit on the Court's ability to exercise its jurisdiction over non-State Party officials enjoying immunity will remain constant, irrespective of a Security Council referral of a situation to the Court. Short of the Security Council demanding that the implicated non-State Party waive its immunities before the ICC, something which, in theory, the Security Council could do,³⁷ a mere referral will not allow the Court to exercise its jurisdiction over these officials.

The second issue in respect of Article 27's applicability to non-States Parties arises when we consider the ICJ decision in the *Arrest Warrant Case*. That case was controversial not only for its dicta on functional immunities but also for its ambiguous statement on the lack of available immunities before international tribunals. At paragraph 61, the Court stated that:

[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1988 Rome Convention.

By remaining silent as to why State officials may not claim immunities before the various international tribunals and failing to distinguish between ICC State Party and non-State Party nationals, the ICJ left it unclear whether both the International Criminal Tribunals and the ICC remove immunities to the same extent by virtue of their very international nature, or whether the reach of the respective tribunals' provisions removing immunity is dependent on the tribunals' constitutive bases. On the former view, which sets as the benchmark the tribunal's "internationalness"³⁸ rather than its constitutive basis, the above passage can be interpreted as meaning that Article 27 of the Rome Statute removes the international immunities of officials of both States and non-States Parties.³⁹ Indeed, Sands and Macdonald have argued that international

37 Although it might prove controversial in practice, the Security Council could do this by virtue of Article 48(1) of the UN Charter, which provides that actions required to carry out Security Council decisions for the maintenance of international peace and security "shall be taken by all the Members of the United Nations *or by some of them, as the Security Council may determine*" (emphasis added).

38 Ryszard Piotrowicz "Immunities of Foreign Ministers and their Exposure to Universal Jurisdiction" (2002) 76 ALJ 290, 293.

39 See for example Philippe Sands and Alison Macdonald "Submissions of the Amicus Curiae on Head of State Immunity" in the case of *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity From Jurisdiction) (31 May 2004) paras 55–56 <www.icc-cpi.int/library/organs/otp/Sands.pdf> (last accessed 20 April 2006).

practice from the Treaty of Versailles to the present day supports the view that, in respect of international courts, regardless of how they are constituted, there "exists no *a priori* entitlement of a State to claim immunity."⁴⁰

While this view represents one interpretation of the ICJ's ambiguous dicta, set against the judgment's conservative tone, such a daring conclusion appears out of place. Moreover, it does not account for the fundamental norm that treaties do not bind third States. And as for the international practice ostensibly supporting this view, the international tribunals referred to by Sands and Macdonald – the international tribunal established by the Treaty of Versailles, the International Military Tribunals of Nuremberg and the Far East, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – all have a commonality distinct from their "internationalness": the consent, whether indirect or direct, of the States whose nationals were being tried.⁴¹ It is this consent, and, in particular, the constitutive basis of an international tribunal, that provide the more cogent explanation for why international tribunals can try certain State officials and disregard immunities. Thus, turning to the examples given by the ICJ, the ICTY and ICTR Statutes may deviate from customary international law rules on immunities because they were adopted by the Security Council under Chapter VII of the Charter, and as such, bind all UN member States.⁴² Further, the Tribunals' decisions necessarily override States' other international obligations by virtue of Article 103 of the UN Charter.⁴³ UN member States, therefore, albeit indirectly, have consented to the waiving of their immunities.⁴⁴

40 Sands and Macdonald, above n 39, para 55.

41 See Fox, above n 9, 430–432, where the Commission which advised the Versailles peace conference is cited stating that consent for the trial before the tribunal of a former Head of State was secured through the articles in the Treaty of Peace. As for the International Military Tribunal at Nuremberg, Germany's consent was also obtained, for the Tribunal was established by the occupying powers exercising territorial jurisdiction in the aftermath of Germany's unconditional surrender. In the case of the International Military Tribunal for the Far East, the Japanese Government acceded to the prosecution of Japanese nationals before an international tribunal through the Instrument of Surrender. See generally Madeline Morris "High Crimes and Misconceptions: The ICC and Non-Party States" (2001) 64 *Law & Contemp Probs* 13, 35–40.

42 Article 25 of the UN Charter provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

43 Article 103 of the UN Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

44 It also follows that the reach of the ICTY and ICTR Statutes is not boundless. At the theoretical level, at least, the Security Council would not have the power to waive the immunities of nationals of States which are not members of the UN. See Koller, above n 22, 34–35.

Turning to the ICC, the treaty-based nature of the Court means that only States Parties have consented to the lifting of immunities. Third States have not waived their immunities before the Court. The mere label of an "international tribunal" is hardly reason for denying immunity to non-States Parties. There would need to be a more rational explanation. The Special Court for Sierra Leone (SCSL), however, examining Charles Taylor's assertion of immunity, thought it had found one.

E Charles Taylor and the Special Court for Sierra Leone

On 7 March 2003, the SCSL approved an indictment against the then President of Liberia, Charles Taylor, for war crimes and crimes against humanity committed during Sierra Leone's civil war, and issued a warrant for his arrest.⁴⁵ In June 2003, these documents were transmitted to Ghana where Taylor was attending peace talks, but were ineffective in achieving Taylor's apprehension.⁴⁶ Taylor later sought to quash his indictment and annul the warrant on the grounds that, when issued, he was Head of State of Liberia, and therefore immune from the SCSL's jurisdiction.⁴⁷

The SCSL's decision is relevant as it confronts the issue with which this article is concerned. The SCSL (unlike the ICTY and ICTR, which were directly established by Security Council resolutions under Chapter VII of the UN Charter) was created through a bilateral treaty between the UN and the Sierra Leonean Government. Being treaty-based, the SCSL resembles the ICC more than the ad hoc tribunals.⁴⁸ While it has only two parties, it nevertheless possesses international characteristics.⁴⁹ Particularly significant is that Liberia is not a party to the treaty establishing the Court, and has not consented to the provision in the SCSL's Statute waiving immunities.⁵⁰

Charles Taylor argued that as Head of State, he enjoyed absolute immunity from criminal proceedings, and any exception to this rule would only apply before a court endowed with Chapter VII powers, something the SCSL, being treaty-based, lacked.⁵¹ The Prosecutor argued that the lack

45 *Prosecutor v Charles Ghankay Taylor* (Decision Approving the Indictment) (7 March 2003) SCSL-2003-01-I (Special Court for Sierra Leone) <<http://www.sc-sl.org/>> (last accessed 10 October 2006).

46 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, para 1.

47 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, para 6.

48 Micaela Frulli "The Question of Charles Taylor's Immunity" (2004) 2 J Int'l Crim Just 1118, 1124.

49 Among other things: the Court was established by an international agreement and is funded by voluntary contributions coming from the international community; its majority comprises international judges and it has an international prosecutor; it is not part of the Sierra Leonean court system; it has legal personality enabling it to enter into agreements with other international persons; and has competence and jurisdiction broadly comparable to other international tribunals. See Sands and Macdonald, above n 39, paras 58–77; Frulli, above n 48, 1123.

50 Statute of the Special Court for Sierra Leone, art 6 <<http://www.specialcourt.org/documents/Statute.html>> (last accessed 10 October 2006).

51 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, para 6.

of Chapter VII powers was inconsequential, as customary international law permitted international criminal tribunals to indict Heads of State, and the SCSL was an international court.⁵² Taylor thus looked to the SCSL's constitutive basis to further his argument, whereas the Prosecutor focused on the SCSL's international nature. These arguments reflect the two possible interpretations of the ICJ's dicta.

The SCSL from the outset was keen to link itself with Chapter VII of the UN Charter. Although acknowledging that it lacked Chapter VII powers, the SCSL nevertheless found that the Security Council had acted pursuant to Articles 39 and 41 to initiate its establishment. The SCSL justified this conclusion by a disjunctive reading of Article 41 of the Charter:⁵³

Where the Security Council decides to establish a court as a measure to maintain or restore international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation.

However, rather than using its Chapter VII basis as a reason for denying immunity, the SCSL used it simply as evidence to support its finding that the SCSL was an international criminal tribunal:⁵⁴

[I]n carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. ... This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.

Only after establishing that the SCSL was "truly international", did the SCSL consider the issue of Taylor's jurisdictional immunity. The SCSL then seized on the ICJ's statement in the *Arrest Warrant Case* concerning the denial of immunities to State officials before international tribunals. It considered that the statement was clear: before an international tribunal, a State cannot claim immunity on behalf of its Head of State. The key inquiry lies solely in the determination of the tribunal's nature. If the tribunal is an international one, then regardless of its constitutive basis

52 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, para 9.

53 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, para 38. Article 41 of the UN Charter provides in part:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.

54 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, para 38 (footnotes omitted). The Court in paragraph 41 also relied on the reasons advanced by Sands and Macdonald in their *Amicus Curiae* submissions for finding the Special Court for Sierra Leone to be an international court.

(although this basis might be of help in determining the nature of the tribunal), no immunities, whether functional or personal, can be claimed.⁵⁵ The SCSL, using grammar as flawed as its reasoning, explained:⁵⁶

A reason for the distinction ... between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals

Thus, having determined the SCSL was an international tribunal and that "the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal",⁵⁷ the SCSL was able to deny Taylor's claim of immunity.⁵⁸

While the SCSL's decision may seem appealing insofar as it facilitates the prosecution of international crimes in international courts, little thought is required to see the flaw in this reasoning.

An incumbent Head of State may enjoy two types of immunity in respect of his or her acts: personal immunity and functional immunity. As noted earlier, the rationales underlying these immunities are not identical. The rationale underlying personal immunity is primarily functional: it is granted to high-ranking State officials "to ensure the effective performance of their functions on behalf of their respective States."⁵⁹ Functional immunity, on the other hand, operates to preclude foreign States from sitting in judgment on the conduct of other States. This rationale is sometimes referred to as the principle of *par in parem non habet imperium*,⁶⁰ and is the principle referred to by the SCSL. That this rationale does not underlie personal immunity is evident from the fact that a Head of State has immunity even for acts done in a purely private capacity. Since acts done in a private capacity have no connection to the State, granting personal immunity in such circumstances cannot be linked to the *par in parem* principle.

55 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, paras 50–53.

56 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, para 51.

57 *Prosecutor v Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction), above n 2, para 52.

58 Despite this denial of immunity, the Special Court was only able to obtain custody of Charles Taylor on 29 March 2006. For some time, Nigeria, where Taylor had been enjoying asylum, had been rejecting international calls to surrender him to the Court. See Mark A Drumbl "Charles Taylor and the Special Court for Sierra Leone" (12 April 2006) *ASIL Insights* <<http://www.asil.org/insights.htm>> (last accessed 10 October 2006).

59 *Arrest Warrant Case*, above n 4, para 53 Judgment of the Court.

60 An equal has no power over an equal.

The SCSL erred in attributing to both types of immunity the *par in parem* rationale and overlooking or ignoring the important functional rationale underpinning personal immunity. Even if, as the SCSL found, the *par in parem* principle has no relevance in relation to an international criminal tribunal, this provides justification only for lifting the *functional immunity* of a Head of State; it does not provide justification for lifting personal immunity as well. To justify the removal of personal immunity, the SCSL would have had to explain why the functional rationale underlying it did not apply to an international tribunal. The SCSL, however, failed to do this, and would most likely have been unable to do so. This is because whenever a Head of State is a defendant in criminal proceedings, irrespective of the nature of the court or tribunal before which he or she appears, the Head of State will be hindered in effectively performing official functions. And this important functional rationale cannot be downplayed. It guarantees "the proper functioning of the network of mutual inter-State relations, which is of *paramount importance* for a well-ordered and harmonious international system."⁶¹

Thus, the SCSL's conclusion rests on a flawed foundation and, accordingly, should not be used to support the argument that the personal immunities accruing to high-ranking officials of non-Party States to international tribunals such as the ICC are necessarily weakened. The SCSL was unable to elucidate why personal immunities should be denied on the mere basis that a tribunal is an "international" one. The lack of an adequate explanation strongly suggests that the dicta in the *Arrest Warrant Case* should be read as supporting the view that, while the statutes of international tribunals can lift immunities, the extent of such provisions' reach will be dependent on the constitutive bases on which the tribunals were established and the consent or non-consent of States which flows from this. This being the case, the SCSL should have upheld Taylor's claim of personal immunity and quashed the warrant.

Although the SCSL undoubtedly erred in its conclusion with regard to personal immunities, the Court's reasoning, insofar as it relates to functional immunities before international courts, has some merit. Indeed, it does appear that the *par in parem* principle, which underpins immunity *ratione materiae*, applies only to *inter-State* relations. Therefore, assuming functional immunity still exists in respect of international crimes, a matter which is unsettled, it could be argued that invocation of functional immunity before international tribunals should be ineffectual, even if those officials invoking it are from States not party to the constitutive instrument establishing the tribunal.⁶² Whatever the merits of this argument generally, there is a practical obstacle which would impair its application to the ICC. This obstacle becomes apparent when we examine Article 98(1).

60 *Arrest Warrant Case*, above n 4, para 75 Judges Higgins, Kooijmans and Buergenthal (emphasis added).

62 Paola Gaeta has argued on this very basis that State officials from non-Party States to the Rome Statute should not enjoy functional immunity before the ICC. See Gaeta "The Hissène Habré Case", above n 23, 194.

F The Relationship Between Article 27 and Article 98(1)

Although it appears, in view of Articles 27, 12 and 13(b), that the Rome Statute's drafters may have intended otherwise, the ICC must respect, at the very least, the personal immunities of officials from non-States Parties. Further, the Rome Statute cannot alter the international law immunities which exist between ICC States Parties and non-States Parties. While non-States Parties may waive their officials' immunities, in the absence of a waiver, these non-State Party officials are immune from any criminal proceedings.

The situation is different for States Parties. By virtue of Article 27, the immunities of State Party officials under national and international law will not bar the Court from exercising its jurisdiction. This, however, means little if the Court cannot first obtain custody of suspects. The Court is reliant on the cooperation of States to surrender, when appropriate, suspects to the Court upon the Court's request. The issue, therefore, is whether Article 27 removes international law immunities between States Parties themselves when the ICC is asserting jurisdiction and requesting cooperation. In other words, the question we need to answer is this: assuming that functional immunities are still effective at customary international law in respect of international crimes, when an ordinary or high-ranking official from State Party Z is found on the territory of another State Party to the Rome Statute (State Party Y), may State Party Z claim immunity on behalf of its official in the national courts of State Party Y when the ICC is wanting to prosecute, thereby preventing a transfer to the Court? Complicating the answer to this question is Article 98(1), which provides:

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

In answer to the hypothetical question above, some commentators have argued that the consequence of Article 98(1), which appears to preserve inter-State immunities, is that the Court will be required to convince State Party Z to waive the official's immunity so as to enable the Court to request the surrender of the suspect and allow State Party Y to transfer the suspect to the Court.⁶³ In the absence of a waiver, according to this reasoning, the Court would be unable to request the surrender, as to do so would impose on State Party Y conflicting international obligations, a situation which Article 98(1) is designed to obviate.

While many of the commentators who posit this view do not provide supporting reasoning for it, Gaeta has suggested, although not ultimately sharing this view, that such a conclusion might flow from the wording of Article 98(1), which refers to "the State or diplomatic immunity ... of a *third*

⁶³ See for example Danesh Sarooshi "The Statute of the International Criminal Court" (1999) 48 ICLQ 387, 391–392; Fox, above n 9, 432–433.

State.⁶⁴ A "third State" in treaty law parlance usually means a State not party to the treaty in question. However, since the rest of the Rome Statute when referring to non-contracting States uses the expression "States not Parties", it can be argued that the use of the term "third State" in Article 98(1) must mean something else, namely, in this context, the State, whether a party to the Statute or not, other than the State that is requested by the Court to cooperate.⁶⁵ If this is correct, it would mean that "a waiver of immunity by the competent State [Party] would *always* constitute a *sine qua non* condition to the execution of arrest warrants and requests for transfer concerning individuals enjoying personal immunities under international law."⁶⁶

Some delegates present at the Rome Conference have supported this interpretation of Article 98(1).⁶⁷ However, Kaul and Kress, members of the German delegation, have noted that there was insufficient time at the Conference for a thorough discussion of Article 98(1) and the issue of conflicting obligations. They have also acknowledged that the reference in the provision to "third State" is ambiguous.⁶⁸

An interpretation of Article 98(1) that contemplates the preservation of inter-State immunities between States Parties even when the Court is asserting jurisdiction leads to bizarre results. It would mean State Party Z would be obliged to transfer its official to the Court when he or she was on its territory,⁶⁹ but could legitimately prevent the Court from requesting surrender when its official was

63 Gaeta, above n 18, 993 (emphasis added).

64 Gaeta, above n 18, 993.

65 Gaeta, above n 18, 993.

67 In their commentary on Article 98, Prost (who was a member of the Canadian delegation) and Schlunck note that Article 98(1):

... places the obligation on the Court not to place a State in a position of conflict, with other existing international obligations. ... [F]or several delegations, the concept that the Court could place a State in a potential position of conflict with existing obligations of this nature, was unacceptable in itself. Thus the compromise achieved was to require the Court to seek the appropriate waiver of immunity before pursuing a request in these circumstances.

Kimberly Prost and Angelika Schlunck "Article 98 Cooperation with Respect to Waiver of Immunity and Consent to Surrender" in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos, Baden-Baden, 1999) 1131, 1132–1133. See also Hans-Peter Kaul and Claus Kress "Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises" (1999) 2 YB Int Hum L 143, 164.

68 Kaul and Kress, above n 67, 164.

69 This follows from Article 27(2) of the Rome Statute, which provides, inter alia, that immunities or procedural rules under *national law* shall not bar the Court from exercising its jurisdiction, and Article 88, which imposes obligations on States Parties to modify their national laws so as to be able to cooperate with the Court. For more on the obligation on States to surrender their own officials to the Court, see Bruce Broomhall *International Justice and the International Criminal Court* (Oxford University Press, Oxford, 2003) 139–141; Gaeta, above n 18, 996–1000.

in the territory of another State Party by declining to waive the official's immunity. Not only is this a strange outcome, but it could "place the conduct of ICC proceedings in great peril",⁷⁰ as the Court would be heavily reliant on States Parties agreeing to transfer their own State officials. This is problematic, as due to the complementarity principle, the ICC would often only be asserting its jurisdiction in the first place in situations where the State Party whose official is suspected of committing crimes is unwilling to prosecute the official itself. Yet, if unwilling to prosecute, it is highly unlikely that the State Party would be willing to transfer its own official to the Court. It might prefer simply to breach its obligations. Indeed, one commentator has opined that "*the primary way* the Court will gain custody of indicted State officials is through the cooperation of *other* States parties on whose territory the officials happen to be."⁷¹ Thus, an interpretation of Article 98(1) preserving inter-State immunities could effectively render all but powerless the provision in Article 27 removing immunities.

A more attractive interpretation of Article 98(1) would see its application limited to the immunities of non-States Parties. That is, the Court would only be precluded from requesting a State Party to surrender a suspect when that suspect was a non-State Party official enjoying immunity, and the Court was unable to obtain a waiver of immunity. On this view, States Parties, by virtue of Article 27(2), would be understood to have waived the immunities existing between themselves in respect of the international crimes set out in the Rome Statute in situations where the ICC was intent on prosecuting and requesting surrender.⁷²

What justifies an interpretation of Article 98(1) that would restrict its operation to recognition only of the immunities of non-State Party officials? First, the principle of effectiveness⁷³ demands a restrictive reading of Article 98(1) so as to give meaningful effect to Article 27(2).⁷⁴ For, if

70 Broomhall, above n 69, 143.

71 Dapo Akande "International Law Immunities and the International Criminal Court" (2004) 98 Am J Int'l L 407, 420 (first emphasis added, second emphasis in the original) [Akande "International Law Immunities and the International Criminal Court"].

72 Note well that Articles 27 and 98(1) are concerned with the removal of inter-State immunities *when the ICC is asserting jurisdiction*. In situations where the ICC is not asserting jurisdiction, the normal customary international law rules on immunities would apply. Nothing in the Statute implies the contrary. Thus, the *national courts* of one State Party could not try officials of another State Party enjoying immunity without a waiver from the latter. See Gaeta, above n 18, 996.

73 Known also by the Latin maxim, *ut res magis valeat quam pereat*. See *Prosecutor v Kordic* (18 September 2000) IT-95-14/2, para 23 (Appeals Chamber, ICTY).

74 Gaeta, above n 18, 994–995; Akande "International Law Immunities and the International Criminal Court", above n 71, 424. Note that Akande, rather than invoking the principle of effectiveness, draws on the rule that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" (citing *United States – Standards for Reformulated and Conventional Gasoline* (Appellate Body Report) (20 May 1996) WT/DS2/AB/R 23).

inter-State immunities are preserved between States Parties and only a State Party is obliged to render its officials to the Court, then Article 27(2), which provides that *international law immunities* shall not bar the Court from exercising its jurisdiction, is rendered all but redundant. As Akande notes, officials do not possess international law immunities with respect to their home States, so the reference to "immunities ... under international law" in Article 27(2) could not have been for the purpose of enabling the Court to issue an arrest warrant operating only in relation to the official's home State.⁷⁵ Further, once the Court has the official in custody, the argument that Article 27(2) is required to lift the international law immunity of the official is a hollow one, as the surrender by the State of its own official would itself constitute the waiver of immunity.⁷⁶ Therefore, if Article 98(1) is interpreted as *preserving* the international immunities between States Parties, the only relevance that Article 27(2)'s reference to "immunities ... under international law" would have would be in the "peripheral" case where an individual, who enjoys international immunity, voluntarily appears before the Court.⁷⁷ It is doubtful the drafters envisaged this situation when they referred to "immunities ... under international law" in Article 27(2).

Moreover, a restrictive reading would be more compatible with the Rome Statute's object and purpose.⁷⁸ One principal purpose of the Statute is to "put an end to impunity for the perpetrators" of international crimes.⁷⁹ This purpose would be undermined if States Parties could claim immunities on behalf of their officials when the Court was requesting their surrender from other States Parties.⁸⁰ It would also be contradictory for States Parties, on the one hand, to have consented to the establishment of an international court before which no immunities can be invoked, yet, on the other, to have preserved their right to claim immunities before foreign courts in order to prevent the Court from obtaining custody of their officials. To say that the lifting of inter-State immunities in circumstances where the Court is requesting surrender from another State Party would damage diplomatic relations is not a persuasive counter-argument either. As Broomhall has observed, the requested State Party is exercising no discretion in lifting the immunity. It is simply acting in accordance with its obligations under the Statute and the request of the Court, which is conduct the other State Party can hardly criticise.⁸¹

75 Akande "International Law Immunities and the International Criminal Court", above n 71, 425.

76 Akande "International Law Immunities and the International Criminal Court", above n 71, 425.

77 Gaeta, above n 18, 994.

78 Akande "International Law Immunities and the International Criminal Court", above n 71, 423–424.

79 Rome Statute, above n 1, preamble.

80 Akande "International Law Immunities and the International Criminal Court", above n 71, 424.

81 Broomhall, above n 69, 145.

The above arguments for a restricted reading of Article 98(1) are compelling. However, to avoid confusion, one apparent problem with this interpretation should be addressed.

Earlier it was noted that Article 98(1) was designed to obviate the situation where a State would find itself with competing obligations – one to the Court, and one to another State. If, as argued above, Article 27 is applicable only to States Parties, then it could be argued that Article 98(1) becomes redundant if interpreted as applying only to non-States Parties, because the Court, irrespective of Article 98(1), would *a priori* be precluded from requesting the surrender of a non-State Party official enjoying international immunity. This follows from the *Arrest Warrant Case*, where the Court held that the mere issuance by Belgium of an arrest warrant breached the immunity of the Congolese Foreign Minister.⁸² Thus, those States Parties on whose territory there were non-State Party officials enjoying immunity would not be in danger of incurring competing international obligations since the Court, regardless of Article 98(1), would be unable to request surrender for fear of violating those officials' immunity.

The answer to this apparent problem is quite simple. Article 98(1) must be given an interpretation consistent with the workings of the Rome Statute as conceived by the drafters. It is submitted that the Rome Statute was drafted on the (erroneous) assumption that the Court could lift the immunities of officials from both States and non-States Parties. Read together, this is what Articles 27, 12 and 13(b) strongly suggest.⁸³ While this article has argued that this is legally impermissible, it is understandable that the drafters may have held a contrary view. Indeed, this contrary view is shared by many commentators and was endorsed by the SCSL.

Article 98(1), then, has to be interpreted in the light of this dubious statutory framework. That the Court, in fact, cannot lift the immunities of non-States Parties is not a reason for changing our interpretation of Article 98(1). Article 98(1)'s effective redundancy if given a restrictive reading is a

82 *Arrest Warrant Case*, above n 4, para 70 Judgment of the Court. While one could try and distinguish this case on the ground that it dealt with a State issuing an arrest warrant, and not an international tribunal, such as the ICC, this apparent distinction, on closer analysis, is untenable. As Condorelli and Villalpando point out: "States cannot attribute to an organ they have created a power that they, the States, do not possess." Condorelli and Villalpando, above n 36, 579. Thus, if States cannot issue arrest warrants in such circumstances, then neither can a Court that those States have created. Neither would it make a difference if the Court is acting due to a Security Council referral: see the analysis at Part II D The Applicability of Article 27 to Non-State Party Nationals, above.

83 Note the sweeping scope given to Article 27 in the commentary on Article 98 by Prost and Schlunck, above n 67, 1132:

It is important to note that [Article 98(1)] does not accord an immunity from prosecution to individuals, which the Court may seek to prosecute. Article 27 makes it clear that no such immunity is available. ... [Article 98(1)] does not reduce the effect of article 27 in any way. A person sought for arrest for prosecution by the Court cannot claim an immunity based on official capacity nor does such capacity effect the jurisdiction of the Court over the person.

necessary consequence of reading Article 27 in a way that is consistent with fundamental principles of international treaty law. On the other hand, if this article has reached an incorrect conclusion as regards Article 27's reach and the Court interprets it as applying to both States and non-States Parties, then the restricted interpretation of Article 98(1) advocated in this article acquires life, and would preclude the Court from requesting from a State Party the surrender of an official from a non-State Party enjoying immunity unless a waiver could be obtained from the non-State Party.

Contrary to Per Saland's assertion of possible inconsistency between Articles 27 and 98(1),⁸⁴ assuming Article 27 was intended to apply to both States and non-States Parties, no inconsistencies arise if Article 98(1) is interpreted as applying only to non-States Parties. While the spectre of an incumbent President of a State Party being arrested by another State Party and surrendered to the Court may be novel, it is a natural consequence of States Parties adopting a treaty which unequivocally departs from customary international law immunities, and which has at its heart the goal of combating impunity for those suspected of committing international crimes.

III UNITED STATES OPPOSITION TO THE ICC AND ARTICLE 98(2)

Article 98(2) of the Rome Statute is another potential impediment to the Court obtaining custody of individuals. It purports to limit the Court's power to request the surrender of individuals from States when to do so would subject the requested State to conflicting international obligations. Before examining Article 98(2) and assessing the effectiveness of the United States bilateral agreements and whether or to what extent States Parties can enter into them, an explanation of the opposition of the United States to the Court and the tactics used in the Security Council to undermine and erode the Court's jurisdiction, is warranted.

A The United States and the ICC

The United States has not always opposed an international criminal court. Before the Rome Conference, President Clinton publicly professed support for one.⁸⁵ Such support, however, was qualified. There were certain non-negotiable features that any Court, to have the support of the United States, would require. Other States at the Rome Conference did not share those concerns, though, and when at the conference's close a vote was taken on the Rome Statute, the United States was among a handful of States that voted unsuccessfully against the Statute's adoption.⁸⁶

84 See above n 3.

85 Scheffer, above n 34, 13.

86 Other States known or thought to have voted against the statute were China, Libya, Iraq, Israel, Qatar and Yemen. Dominic McGoldrick "Political and Legal Responses to the ICC" in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, Oxford, 2004) 389, 390.

The principal concern of the United States is the ICC's competence to exercise jurisdiction over non-State Party nationals. This, the United States argues, contravenes international treaty law⁸⁷ which prohibits the imposition of treaty obligations on third States.⁸⁸ The United States has also expressed concerns over the Prosecutor's power to initiate investigations and prosecutions *proprio motu* (on his or her own motion),⁸⁹ fearing that politicised prosecutions could be brought against United States nationals.⁹⁰

These and other objections of the United States have been scrutinised and criticised.⁹¹ This article's purpose, however, is not to evaluate arguments for and against the Court. The Court has become a reality, and what is of more concern are the steps the United States has taken to weaken it.

B Security Council Resolutions 1422, 1487 and 1497

The first step taken by the United States had the purported aim of immunising from ICC jurisdiction United States personnel serving on UN missions.⁹² The United States threatened to

87 See Scheffer, above n 34, 18.

88 Vienna Convention on the Law of Treaties, above n 33, art 34.

89 William H Taft IV, Legal Advisor of the United States Department of State "The United States and the International Criminal Court" (Judicial Conference of the United States Court of Appeals for the Armed Forces, 13 May 2003) <<http://www.state.gov/s/l/2003/44392.htm>> (last accessed 10 October 2006).

90 William Cohen, United States Secretary of Defense, cited in McGoldrick, above n 86, 402:

Our concern is once you have a totally independent international court that is not under the jurisdiction, supervision or is any way influenced, obligated or accountable to a supervisory institution like the UN Security Council, then the potential for allegations to be made against our soldiers could be frivolous in nature.

91 See for example Akande "Legal Basis and Limits", above n 32; Benjamin B Ferencz "Misguided Fears about the International Criminal Court" (2003) 15 Pace Int'l L Rev 223; Gerhard Hafner, Kristen Boon, Anne Rübesame and Jonathan Huston "A Response to the American View as Presented by Ruth Wedgwood" (1999) 10 Eur J Int'l L 108; McGoldrick, above n 86, 404–408; Salvatore Zappalà "The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements" (2003) 1 J Int'l Crim Just 114 [Zappalà "The Reaction of the US to the Entry into Force of the ICC Statute"].

92 "Purported" because some have questioned the credibility of this stated aim. Franck and Yuhan, after analysing the empirical data regarding the deployment of United States personnel overseas, have concluded that:

[T]he overwhelming majority of U.S. nationals (1) are protected [from the ICC] by bilateral SOFAs [Status of Forces Agreements], (2) are stationed in jurisdictions where the host government is under no obligation to participate in ICC proceedings, or (3) are stationed in Kosovo and Bosnia, and are therefore – irrespective of the existence of the ICC – subject to the jurisdiction of the ICTY.

Thomas M Franck and Stephen H Yuhan "The United States and the International Criminal Court: Unilateralism Rampant" (2003) 35 NYU J Int'l L & Pol 519, 532–536.

withdraw all of its peacekeepers from UN operations unless the Security Council adopted a resolution exempting from ICC jurisdiction personnel from non-States Parties to the Rome Statute involved in such operations.⁹³ Moreover, the United States vetoed what would have been a Security Council resolution renewing for six months the UN peacekeeping mission in Bosnia and Herzegovina.⁹⁴ The underlying threat, notes one commentator, "was to vote against all future resolutions establishing UN operations."⁹⁵

Faced with such threats, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1422.⁹⁶ Resolution 1422 requested the ICC to refrain for a 12-month period from investigating and prosecuting nationals of States not party to the Rome Statute involved in UN established or authorised operations. This ability of the Security Council to defer ICC investigations and prosecutions comes from Article 16 of the Rome Statute.⁹⁷ The true purpose behind Article 16, however, was to allow such Security Council requests only when ICC investigations or prosecutions would disrupt ongoing diplomatic negotiations necessary for international peace and security.⁹⁸ Far from permitting blanket immunity, it was conceived as having utility on a case-by-case basis only.⁹⁹ In adopting Resolution 1422, then, the Security Council appears to have perverted the purpose of Article 16.¹⁰⁰

Notwithstanding the controversy surrounding Resolution 1422, the resolution was renewed in 2003 by Resolution 1487,¹⁰¹ although Germany, France and Syria abstained.¹⁰² In 2004, however,

93 The United States Representative to the Security Council stated the position of the United States bluntly: "There should be no misunderstanding that if there is not adequate protection for US peacekeepers, there will be no peacekeepers." Cited in Serge Schmemmann "U.S. Links Peacekeeping to Immunity from New Court" (19 June 2002) *The New York Times* New York A3.

94 UNSC (30 June 2002) Verbatim Record S/PV.4563.

95 Zappalà "The Reaction of the US to the Entry into Force of the ICC Statute", above n 91, 117.

96 UNSC Resolution 1422 (12 July 2002) S/Res/1422.

97 "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the [UN] Charter ... has requested the Court to that effect". Rome Statute, above n 1, art 16.

98 David Stoelting "ICC Pretrial Proceedings: Avoiding Gridlock" (2003) 9 *ILSA J Int'l & Comp L* 413, 422.

99 "The negotiating history makes clear that recourse to article 16 is on a case-by-case basis only, where a situation – for example the dynamic of a peace negotiation – warrants a 12-month deferral." Paul Heinbecker, Canadian Representative to the UN, UNSC (10 July 2002) Verbatim Record S/PV.4568 4.

100 See generally Zappalà "The Reaction of the US to the Entry into Force of the ICC Statute", above n 91, 119–120.

101 UNSC Resolution 1487 (12 July 2003) S/Res/1487.

102 United Nations "Security Council Requests One-Year Extension of UN Peacekeeper Immunity from International Criminal Court" (12 June 2003) Press Release SC/7789.

heeding calls from its allies and other member States on the Security Council, the United States refrained from seeking a third renewal.¹⁰³ The timing was particularly bad for the United States. Torture allegations perpetrated by its forces in Iraq were emerging, and internal administration memos approving highly dubious interrogation techniques became public, causing Kofi Annan to speak critically about the United States-sponsored resolutions of the past two years.¹⁰⁴ Responding to this non-renewal, the United States withdrew personnel from UN missions in Eritrea and Ethiopia, and Kosovo, citing the inappropriate risk to its forces.¹⁰⁵

The United States has also been behind two variant but no less controversial Security Council resolutions. In August 2003, the Security Council adopted Resolution 1497, authorising the establishment of a multi-national peace enforcement mission in Liberia.¹⁰⁶ Operative paragraph 7 provides that personnel on this mission from non-Party States to the Rome Statute "shall be subject to the *exclusive jurisdiction*" of the contributing State.¹⁰⁷ Thus, not only is ICC jurisdiction over personnel of non-States Parties ousted, but so too is Liberia's jurisdiction. Further, the paragraph limits jurisdiction of third States based on the passive personality principle and the universal principle.¹⁰⁸ Unlike Resolutions 1422 and 1487, which explicitly referred to Article 16 of the Rome Statute and required renewal, Resolution 1497 did not just defer ICC jurisdiction, it permanently terminated it.¹⁰⁹ Unsurprisingly, France and Germany, who had abstained when Resolution 1487 was renewed, did so again, as did Mexico. These States criticised paragraph 7 for being contrary to principles of national and international law.¹¹⁰ Notwithstanding the dubious legality of paragraph 7, the Security Council included a similar provision in its resolution on the Sudan.

103 Human Rights First "In Victory for the Rule of Law, US Withdraws Immunity Request" (28 June 2004) Media Alert <http://www.humanrightsfirst.org/media/2004_alerts/0628_icc.htm> (last accessed 10 October 2006).

104 Human Rights First, above n 103.

105 John J Lumpkin "US to Pull Forces from 2 UN Missions" (1 July 2004) *Associated Press* <<http://www.globalpolicy.org/security/peacekpg/us/2004/0701uspullout.htm>> (last accessed 10 October 2006). Exactly what "risk" the United States government had in mind is unclear: neither Eritrea nor Ethiopia is party to the Rome Statute, and those stationed in Kosovo, irrespective of the ICC, were subject to the primary jurisdiction of the ICTY.

106 UNSC Resolution 1497 (1 August 2003) S/Res/1497.

107 UNSC Resolution 1497 (1 August 2003) S/Res/1497 para 7 (emphasis added).

108 See the statement of the German Representative to the Security Council, UNSC (1 August 2003) Verbatim Record S/PV.4803 4.

109 See Ademola Abass "The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court" (2005) 40 *Tex Int'l L J* 263.

110 UNSC (1 August 2003) Verbatim Record S/PV.4803 2, 4, 7.

C The Sudan Resolution

Following the recommendation in January 2005 of the International Commission of Inquiry on Darfur, the Commission established by the UN Secretary General to investigate reports of violations of international humanitarian and human rights law occurring in the Sudan,¹¹¹ the Security Council adopted Resolution 1593.¹¹² Resolution 1593 referred the situation in Darfur since July 2002 to the ICC Prosecutor.¹¹³ Operative paragraph 6, to be read with Security Council Resolution 1590,¹¹⁴ which established the UN Mission in Sudan, provides that:

[N]ationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by the contributing State.

Once again, the exclusive jurisdiction provision was included in the resolution at the request of the United States,¹¹⁵ despite opposition to it in the Security Council,¹¹⁶ and despite the fact that since the establishment of the UN Mission in Sudan, the United States has contributed only one person to it.¹¹⁷ Its inclusion was required to prevent a United States veto over the resolution.¹¹⁸ For

111 Pursuant to UNSC Resolution 1564 (18 September 2004) S/Res/1564.

112 UNSC Resolution 1593 (31 March 2005) S/Res/1593.

113 Pursuant to Article 13(b) of the Rome Statute, above n 1.

114 UNSC Resolution 1590 (24 March 2005) S/Res/1590.

115 See the statement by the United States Representative to the Security Council following the vote on Resolution 1593. UNSC (31 March 2005) Verbatim Record S/PV.5158.

116 See for example the comments of Security Council President Ronaldo Sardenberg from Brazil speaking after the vote on the resolution, who said (UNSC (31 March 2005) Verbatim Record S/PV.5158 11):

Brazil has consistently rejected initiatives aimed at extending exemptions of certain categories of individuals from ICC jurisdiction, and we maintain our position to prevent efforts that may have the effect of dismantling the achievements reached in the field of international criminal justice.

117 A record of up-to-date State contributions to UN missions can be found at <<http://www.un.org/Depts/dpko/dpko/contributors/>> (last accessed 10 October 2006).

118 The United States Representative to the Security Council remarked (UNSC (31 March 2005) Verbatim Record S/PV.5158 3):

[W]e do not agree to a Security Council referral of the situation in Darfur to the ICC We decided not to oppose the resolution because of the need ... to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State Parties.

some time, the United States had opposed referring the Darfur situation to the Court, not wanting "to be party to legitimizing the ICC".¹¹⁹ Coming under increasing international pressure, however, the United States ultimately relented and simply abstained on the vote, but not before it had obtained the concessions it demanded.

As well as the controversial exclusive jurisdiction provision, the resolution contains several other unfortunate features. First, while one might have expected that a Security Council resolution referring a situation to the Court would place an obligation on *all* UN member States to cooperate with the Court in its investigation and prosecution, the resolution puts this obligation only on the Sudanese Government and other parties to the conflict in Darfur.¹²⁰ The resolution simply "urges" all other States and concerned regional and other international organisations to cooperate.¹²¹

The Security Council's use of the term "urges" has little relevance to States Parties to the Rome Statute. States Parties are obliged to cooperate with the Court in any event by virtue of their obligations under the Statute. Article 86 contains the basic obligation, obligating States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes". However, the use of hortatory language means non-States Parties, which are not bound by the Rome Statute, are under no legal obligation to cooperate with the Court. They can, of course, cooperate with the Court if they so wish. Article 87(5) provides for the Court and non-States Parties to enter into ad hoc cooperation agreements. Such ad hoc agreements then bind the non-State Party. However, without signing an ad hoc agreement, and in the absence of a Security Council resolution obliging them to cooperate, non-States Parties are free to ignore Court requests.

The Rome Statute's requirement that an accused be present during trial¹²² underscores the importance of State cooperation with the Court on matters of arrest and surrender. Thus, the failure by the Security Council to require non-State Party cooperation has the potential to undermine the Security Council's referral by hindering the Court's ability to secure custody of suspects and prosecute. Of concern is the conceivable situation where a person suspected of committing international crimes in Darfur flees to a neighbouring country that is not a party to the Rome Statute, such as Chad, Eritrea or Ethiopia. Neither bound by the Statute nor Security Council Resolution 1593, the harbouring State would be under no obligation to cooperate and to transfer the suspect to the Court. While one should not overlook the power of political pressure to obtain compliance, one

119 Jonathan F Fanton "US Obstructs Global Justice" (29 March 2005) *Los Angeles Times* Los Angeles B11, citing Pierre-Richard Prosper, the then United States Ambassador at Large for War Crimes Issues.

120 UNSC Resolution 1593 (31 March 2005) S/Res/1593 para 2.

121 UNSC Resolution 1593 (31 March 2005) S/Res/1593 para 2. The Security Council's use of the term "urges" is, in itself, not unusual: the term can be found in many Security Council resolutions adopted under Chapter VII of the UN Charter.

122 Rome Statute, above n 1, art 63.

need only recall the difficulties and delay that the SCSL had trying to obtain custody of Charles Taylor, who was seeking refuge in Nigeria, to realise that such a problematic scenario is not merely speculative.¹²³

Given the importance of State cooperation with the Court, it is at first difficult to comprehend why the Security Council would not impose on non-States Parties a legal obligation to cooperate. Indeed, prior to the Security Council's referral, which was the first referral of its kind under Article 13(b) of the Rome Statute, the legal literature suggested that imposing an obligation on non-States Parties would be the most likely course adopted by the Security Council when making a referral.¹²⁴ The reasons for not doing so, it would appear, are in part due to the problems some non-States Parties would have in cooperating with the Court. Speaking to the Security Council about Resolution 1593, the United States Representative said:¹²⁵

[T]he resolution recognizes and accepts that the ability of some States to cooperate with the ICC investigation will be restricted in connection with applicable domestic law. For the United States, we are restricted by United States statutes that reflect deep concerns about the Court from providing assistance and support to the ICC.

The legislation referred to by the United States Representative is the American Servicemembers' Protection Act.¹²⁶ This legislation provides in blunt terms that:¹²⁷

... no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.

However, despite the potential obstacles to cooperation faced by certain States due to their domestic laws, it is unlikely that these difficulties would constitute sufficient reason for the Security Council to forbear from imposing obligations on non-States Parties. When the Security Council adopts resolutions under Chapter VII of the UN Charter requiring certain State behaviour, States

123 See above n 58.

124 See for example Göran Sluiter *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia, Antwerpen, 2002) 71.

125 United States Representative to the Security Council, UNSC (31 March 2005) Verbatim Record S/PV.5158 4.

126 American Servicemembers' Protection Act 22 USC §§ 7421–7433 [ASPA].

127 ASPA, above n 126, § 7423(b). Note, however, § 7430(a), which provides an exception to this provision:

[Section 7423] shall not apply to any action or actions with respect to a specific matter involving the International Criminal Court taken or directed by the President on a case-by-case basis in the exercise of the President's authority as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the United States Constitution or in the exercise of the executive power under article II, section 1 of the United States Constitution.

will often have to adjust their internal laws. Therefore, it is more likely that obligations were not imposed on non-States Parties in Resolution 1593 as a result of a diplomatic compromise; due to United States hostility towards the ICC and the United States threat of a veto, any resolution requiring non-States Parties to cooperate with the Court would have been impossible to obtain.

Another unfortunate feature of Resolution 1593 is its provision that none of the expenses incurred in connection with the referral, including expenses incurred in the Prosecutor's investigations or prosecutions, shall be borne by the UN. Rather, all costs are to be met by ICC States Parties and States wishing to contribute voluntarily.¹²⁸ This is surprising in view of Article 115 of the Rome Statute, which provides that, in addition to States Parties' contributions, expenses of the Court can be met by funds provided by the UN, "in particular in relation to the expenses incurred due to referrals by the Security Council."¹²⁹ Indeed, Mahnoush Arsanjani has noted that during the Preparatory Committee's negotiations on this provision, the general sentiment among the delegations was that the UN should pay for Court expenses when the Security Council refers a matter to the Court.¹³⁰ However, the United States was adamant. The United States Representative to the Security Council stated that this principle of not providing funds to the Court was "extremely important", and that "any effort to retrench ... [on it] by this or other organizations to which we contribute could result in our withholding funding or taking other action in response."¹³¹

Finally, the resolution is unfortunate for its preambular reference to the existence of "Article 98(2) agreements".¹³² While the United States has used Security Council resolutions at every opportunity to weaken the Court, the bilateral agreements form another part of the United States campaign against the ICC. It is to these agreements that we now turn.

128 UNSC Resolution 1593 (31 March 2005) S/Res/1593 para 7.

129 Rome Statute, above n 1, art 115(b).

130 Mahnoush H Arsanjani "Financing" in Cassese, Gaeta and Jones, above n 18, 315, 325.

131 United States Representative to the Security Council, UNSC (31 March 2005) Verbatim Record S/PV.5158.

132 The preambular reference simply states: "*Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute" (emphasis in the original): UNSC Resolution 1593 (31 March 2005) S/Res/1593. Note the comments of the Danish Representative on the resolution's reference to these agreements (UNSC (31 March 2005) Verbatim Record S/PV.5158 6): "Denmark would like to stress that that reference is purely factual; it is merely referring to the existence of such agreements. Thus, the reference in no way impinges on the integrity of the Rome Statute." Further, the Brazilian Representative remarked (UNSC (31 March 2005) Verbatim Record S/PV.5158 11):

My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue. We understand that it would be a contradiction to mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court.

IV ARTICLE 98(2) AGREEMENTS

A Article 98(2)

Article 98(2) requires the Court to refrain from requesting the surrender of an individual from a State if to do so would require that 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 consent from that sending State can be obtained.

The lead United States negotiator involved with the Rome Statute, David Scheffer, has said the intent behind the provision was to "ensure that Status of Forces Agreements (SOFAs) between the United States and scores of countries would not be compromised and that Americans on official duty could be specially covered by agreements that fit Article 98's terms."¹³³ This claim is supported by the German delegates, Klaus and Kress, who have said that the idea behind the provision "was to solve legal conflicts which might arise because of Status of Forces Agreements."¹³⁴ Others, however, have questioned this view, and there is much debate over the exact scope of the "international agreements" referred to in the provision.¹³⁵

B Status of Forces Agreements

Status of Forces Agreements (SOFAs) are agreements concluded when one State (the "host State") is hosting military forces of another State (the "sending State"). Such agreements govern the division of jurisdiction between the sending and host States when armed forces personnel engage in criminal conduct.¹³⁶ Under the North Atlantic Treaty Organisation (NATO) SOFA (a typical SOFA), where the crime committed violates the laws of both sending and host States, there will be concurrent jurisdiction.¹³⁷ *Primary jurisdiction*, however, is given to the sending State where

133 David Scheffer "Original Intent at the Global Criminal Court" (20 September 2002) *Wall Street Journal Europe* <<http://www.iccnw.org/documents/09.20.02-UNAUSA-WSJ-A98OpEd.pdf>> (last accessed 10 October 2006).

134 Kaul and Kress, above n 67, 165. See also Prost and Schlunck, above n 67, 1133, who have said that the provision was crafted "in recognition of the provisions of Status of Forces agreements, where members of the armed forces of a third State may be present on the territory of the requested State."

135 See Chet J Tan "The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court" (2004) 19 *Am U Int'l L Rev* 1115, 1137.

136 M Cherif Bassiouni "Law and Practice of the United States" in M Cherif Bassiouni (ed) *International Criminal Law* (vol 2, 2 ed, Transnational Publishers, 1999) 216.

137 Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (19 June 1951) 4 UST 1792, art VII [NATO SOFA].

offences have been committed by members of the sending State's military or associated personnel in the course of official duty, or where the offences are committed against military personnel or property.¹³⁸ The host State has primary jurisdiction over all other offences.¹³⁹ Primary jurisdiction should not be confused with exclusive jurisdiction. If the State with primary jurisdiction declines to exercise it, nothing prevents the other State from stepping in.¹⁴⁰ Further, primary jurisdiction can be waived in favour of the other State on an ad hoc basis.¹⁴¹

Article 98(2) appears to have been included in the Rome Statute to enable, at the very least, States Parties to fulfil their existing obligations pursuant to SOFAs. Where such agreements exist, the Court will refrain from requesting a State Party to surrender the individual(s) concerned, unless consent can be obtained from the sending State.

C United States Agreements

The "Article 98(2) agreements" sought by the United States¹⁴² start by reaffirming the importance of bringing to justice those who commit serious international crimes. The United States then expresses its "intention" to investigate and prosecute such crimes "where appropriate". The agreements then stipulate that:

[C]urrent or former Government officials, employees (including contractors), or military personnel or nationals of one Party ... shall not, absent the expressed consent of the first Party, ... be surrendered or transferred by any means to the International Criminal Court for any purpose.

Such bilateral agreements are broader than traditional SOFAs; they cover not only military personnel, but *all* United States nationals, including private individuals. The idea behind them is simple: if ICC States Parties conclude such agreements, they will undertake obligations conflicting with their ICC obligations. As a result, the Court, due to Article 98(2), will have to refrain from requesting the surrender of United States nationals unless the consent of the United States can be

138 NATO SOFA, above n 137, art VII (3)(a).

139 NATO SOFA, above n 137, art VII (3)(b).

140 Although this is not explicit in the NATO SOFA, it can be implied from Article VII. Note though that double jeopardy rules will apply where appropriate. Salvatore Zappalà "Are Some Peacekeepers Better than Others? UN Security Council Resolution 1497 (2003) and the ICC" (2003) 1 J Int'l Crim Just 671, 673; Steven G Hemmert "Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction" (1999) 17 BU Int'l L J 215, 223.

141 NATO SOFA, above n 137, art VII (3)(c).

142 A model United States Article 98(2) Agreement can be found at <<http://www.iccnw.org/documents/USArticle98Agreement1Aug02.pdf>> (last accessed 10 October 2006).

obtained. Consent will be withheld, preventing the ICC from obtaining jurisdiction over United States nationals.¹⁴³

D Scope of Article 98(2)

In determining the extent to which ICC States Parties may enter into such agreements, and assessing their effectiveness in preventing the Court from requesting an arrest and surrender, we must first ascertain the scope of agreements contemplated by Article 98(2), for if the proposed bilateral agreements fall within this scope, then States Parties cannot be faulted, and the Court will be bound to respect them.

The United States government has argued that Article 98(2) "specifically contemplate[s]" the proposed American bilateral agreements.¹⁴⁴

[T]he Rome Statute does not impose any obligation on States Parties to refrain from entering into non-surrender agreements that cover all their persons, while those who insist upon a narrower interpretation must, in effect, read language into Article 98 (2) that is not contained within the text of that provision.

In addition, the State Department has said:¹⁴⁵

[O]ur legal experts find support in the usage found in other conventions such as the Vienna Convention on Consular Relations, whose use of the term "sending state" refers to all persons who are nationals of the sending state.

Our legal experts, moreover, have reviewed again the preparatory work of the Rome Statute ... Some may be surprised to learn that the records contain no official travaux préparatoires that would either

143 As of January 2006, the United States had signed some 100 bilateral agreements, 42 of which were with States Parties to the Rome Statute, although only 13 of these 42 States Parties have ratified them. A further 54 States have publicly refused to sign such agreements. See Coalition for the International Criminal Court "Status of US Bilateral Immunity Agreements by Region" and "List of Countries that Oppose Bilateral Immunity Agreements and Details on US Aid Cuts and Threats" <<http://www.iccnw.org/?mod=bia>> (last accessed 10 October 2006). The United States has used much diplomatic and economic pressure to get States to conclude bilateral agreements. Under ASPA, above n 126, for example, the United States is now prohibited from providing military funding to any State (excluding NATO and major non-NATO allies and Taiwan) which ratifies the Rome Statute, unless the President waives this prohibition out of national interest concerns, or unless a State signs a bilateral "Article 98(2) agreement". See also Citizens for Global Solutions "Economic Support Funds Threatened Again for ICC Member Countries" (29 June 2005) <<http://www.globalpolicy.org/intljustice/icc/2005/0629hr3057.htm>> (last accessed 10 October 2006).

144 John Bolton, Under Secretary for Arms Control and International Security "American Justice and the International Criminal Court" (Remarks at the Enterprise Institute, Washington DC, 3 November 2003) <<http://www.state.gov/t/us/rm/25818.htm>> (last accessed 10 October 2006).

145 Lincoln P Bloomfield Jr, Assistant Secretary for Political-Military Affairs "The US Government and the International Criminal Court" (Remarks to the Parliamentarians for Global Action, New York, 12 September 2003) <<http://www.state.gov/t/pm/rls/rm/24137.htm>> (last accessed 10 October 2006).

confirm or determine the meaning of Article 98(2) as relates to scope of coverage. In sum, the U.S. position on scope is legally supported by the text, the negotiating record, and precedent.

Opponents of the United States position argue first that Article 98(2) applies only to SOFAs, or at best, only to United States nationals who have been "sent" to the relevant State.¹⁴⁶ Further, some critics of the agreements argue that Article 98(2) applies only to *existing* agreements and not agreements concluded after a State has become an ICC State Party.¹⁴⁷

Finally, opponents of the United States position have argued that, as the principal objective of the treaty is to "put an end to impunity",¹⁴⁸ as a matter of logic, only agreements which put in place an arrangement which sufficiently combats impunity can fall within the ambit of Article 98(2).¹⁴⁹

To determine the true scope of Article 98(2), we must look at the ordinary meaning of its terms and their context, and have regard to the treaty's object and purpose.¹⁵⁰ Subsequent practice by States can also inform our interpretation.¹⁵¹ Should any ambiguity result or an interpretation be reached leading to absurdity or unreasonableness, recourse may be had to the treaty's *travaux préparatoires*.¹⁵²

Article 98(2), on its terms, is reasonably broad. The words "obligations under international agreements" give us no reason to believe that the agreements contemplated under Article 98(2) are limited to SOFAs or existing agreements only. Moreover, the fact that many States have entered into

146 See Amnesty International "International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes" (August 2002) 6 <<http://web.amnesty.org/library/index/engIOR400252002?Open&of=eng-385>> (last accessed 10 October 2006); James Crawford, Philippe Sands and Ralph Wilde "In the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute" (Joint Opinion, 5 June 2003) 18–21 <http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf> (last accessed 10 October 2006); Council of the European Union "EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the ICC and the US Regarding the Conditions to Surrender of Persons to the Court" (30 September 2002) Annex <<http://www.iccnw.org/documents/EUConclusions30Sept02.pdf>> (last accessed 12 October 2006) ["EU Guiding Principles"].

147 Amnesty International, above n 146, 5. These critics rely on statements made by German delegates at the Rome diplomatic conference, such as Hans-Peter Kaul and Claus Kress, who have said that "Article 98(2) was not designed to create an incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the Court." Kaul and Kress, above n 67, 165.

148 Rome Statute, above n 1, preamble.

149 Zappalà "The Reaction of the US to the Entry into Force of the ICC Statute", above n 91, 124.

150 Vienna Convention on the Law of Treaties, above n 33, art 31(1).

151 Vienna Convention on the Law of Treaties, above n 33, art 31(3)(b).

152 Vienna Convention on the Law of Treaties, above n 33, art 32 (*travaux préparatoires* literally means "preparatory works", and refers to the legislative history of a treaty).

bilateral agreements subsequent to ratifying the Statute would also suggest that agreements more broad than SOFAs, and not simply existing agreements, were contemplated by Article 98(2). While some Rome Conference delegates have stated otherwise,¹⁵³ such comments make "no reference to any negotiating history or text."¹⁵⁴ The only limit in the Article is the term "sending State". While the United States government has asserted that the Vienna Convention on Consular Relations¹⁵⁵ provides a precedent for construing the term "sending State" as meaning "State of nationality", there is nothing in the Convention which implies this. On the contrary, the subject matter of the Convention makes it clear that "sending State" refers to the State which has sent consular officials to another State, the "receiving State". It is perhaps indicative of the infirmity of the assertion of the United States that the legal analysis supposedly supporting it has never been made public.¹⁵⁶

This author agrees with analyses which limit the purview of Article 98(2) to international agreements that make provision only for people sent by their government on official missions, such as military personnel and government officials.¹⁵⁷ This interpretation accords with the ordinary meaning of the words. It is also an interpretation forcefully advocated by David Scheffer, the lead United States negotiator at the Rome Conference.¹⁵⁸

The remaining issue is the extent to which the agreements must guarantee investigation and, if sufficient evidence exists, prosecution. The Rome Statute's object and purpose is reflected in its preamble. It affirms that the most serious international crimes must not go unpunished and that there must be no impunity. Interpreting Article 98(2) in this light, its ambit must extend only to international agreements which *ensure* investigation and due prosecution. In its proposed agreements, the United States merely expresses its intention to investigate and prosecute "where appropriate". In this author's view, the words "where appropriate" leave too much ambiguity and discretion for such agreements to fall within the legitimate purview of Article 98(2).

153 See Amnesty International, above n 146, 8–9, citing Hans-Peter Kaul and Claus Kress (above n 67), and Kimberly Prost and Angelika Schlunck (above n 67).

154 Crawford, Sands and Wilde, above n 146, 19.

155 Vienna Convention on Consular Relations (24 April 1963) 596 UNTS 262.

156 David Scheffer "Article 98(2) of the Rome Statute: America's Original Intent" (2005) 3 J Int'l Crim Just 333, 345. Scheffer comprehensively refutes this United States assertion at 346–350.

157 See Crawford, Sands and Wilde, above n 146, 20–21; "EU Guiding Principles", above n 146.

158 Scheffer, above n 156, 349:

It would be particularly egregious to interpret Article 98(2) in such a way as to eviscerate the term "sending State" by regarding it as essentially meaning "State of nationality". If that were the original intent of the negotiators, we simply would have used the term "State of nationality". But we used the term "sending State" because our entire negotiating history behind the provision that became Article 98(2) referenced the officials and military personnel deployed by the 'sending State' into a foreign jurisdiction.

The above conclusions clarify the scope of international agreements compatible with Article 98(2). The United States bilateral agreements exceed this scope in two respects. First, they apply to all United States nationals rather than simply nationals sent by the government. Secondly, the agreements do not ensure investigation and due prosecution.

It should be noted that Article 98(2) does not place any obligation or duty on States Parties to the Statute. Rather, the obligation is on the Court to refrain from requesting the surrender of an individual when the State Party has entered into a bilateral agreement within the scope of Article 98(2). When the bilateral agreement is beyond the scope of Article 98(2), only then may the Court proceed with the request.¹⁵⁹

A State Party merely concluding a bilateral agreement beyond the legitimate ambit of Article 98(2) does not perforce breach its international obligations. It depends on *how* the agreement exceeds the legitimate scope of Article 98(2). The legality of the State Party's actions and the fact of entering into agreements beyond the scope of Article 98(2) are two separate matters. This point is often confused;¹⁶⁰ this article will now attempt to clarify it.

E The Legality of States Parties Entering into United States Bilateral Agreements

Bases on which States Parties are said to be violating their international obligations in entering the proposed United States bilateral agreements are numerous. Such bases include Article 86 of the Rome Statute;¹⁶¹ Article 26 of the Vienna Convention on the Law of Treaties (Vienna

159 While the State Party pursuant to Article 97 of the Rome Statute may consult with the Court if it feels a mistake has been made, ultimately it will be for the Court to determine whether the bilateral agreements fall within or without the proper scope of Article 98(2). Rome Statute, above n 1, art 119.

160 See Crawford, Sands and Wilde, above n 146; "EU Guiding Principles", above n 146; Amnesty International, above n 146; Parliamentary Assembly of the Council of Europe, Resolution 1300 (25 September 2002) <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/ERES1300.htm>> (last accessed 10 October 2006); European Union Commission Legal Service "Effective Functioning of the International Criminal Court Undermined by Bilateral Agreements as Proposed by the US" (Internal Opinion, 2002) <<http://www.amicc.org/docs/EUILegalServiceinternal.pdf>> (last accessed 10 October 2006); Zappalà "The Reaction of the US to the Entry into Force of the ICC Statute", above n 91.

161 Parliamentary Assembly of the Council of Europe, above n 160, para 11; "EU Guiding Principles", above n 146.

Convention)¹⁶² and Article 98(2) of the Rome Statute;¹⁶³ Article 18 of the Vienna Convention,¹⁶⁴ and a breach of a customary international law norm.¹⁶⁵ These bases will be analysed in turn.

1 Article 86 of the Rome Statute

The European Union (EU) Council has stated that bilateral agreements are acceptable if certain guidelines are followed. Following these guidelines will:¹⁶⁶

... ensure respect for the obligations of States Parties under the Statute, including the obligation of States Parties under Part 9 ... to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes falling within the jurisdiction of the Court.

This argument draws on Article 86 of the Rome Statute¹⁶⁷ which imposes a general obligation to cooperate with the Court. The necessary implication is that, if the guidelines are not met, Article 86 will be breached.

Part 9, under which Article 86 appears, is concerned with "International Cooperation and Judicial Assistance". Notably, this Part deals with the Court's power to request the arrest and surrender of individuals wanted by the Court, and States' obligations pertaining to such requests. Article 86, then, only becomes relevant when a request for cooperation has been made to the State Party. To suggest that simply concluding a bilateral agreement, with nothing more, is sufficient to render a State Party in breach of its obligation to cooperate with the Court is stretching Article 86 too far. It is not axiomatic that a State Party which has entered into a bilateral agreement will not cooperate with the Court if the Court requests surrender on the basis that the agreement falls outside the scope of agreements contemplated by Article 98(2). The State Party might decide to breach its obligation to the United States and cooperate with the Court instead. Until a State Party actually declines to honour an ICC request, there has been no Article 86 breach.

162 European Union Commission Legal Service, above n 160; Zappalà "The Reaction of the US to the Entry into Force of the ICC Statute", above n 91, 115.

163 Crawford, Sands and Wilde, above n 146, 23.

164 Parliamentary Assembly of the Council of Europe, above n 160, para 10; Amnesty International, above n 146, 6.

165 Crawford, Sands and Wilde, above n 146, 22.

166 "EU Guiding Principles", above n 146.

167 "State Parties shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." Rome Statute, above n 1, art 86.

2 Article 26 of the Vienna Convention on the Law of Treaties and Article 98(2)

The EU Commission Legal Service has argued that a State Party concluding a United States bilateral agreement "thereby violates its general obligation to perform the obligations of the Statute in good faith (principle of *pacta sunt servanda*)."¹⁶⁸

Arguing thus, the Legal Service has drawn on Article 26 of the Vienna Convention.¹⁶⁹ This argument is problematic as there is no explicit obligation under the Rome Statute to refrain from entering into bilateral agreements. As noted above, Article 98(2) is not imposing any obligation on the State Party. The obligation is imposed on the Court. Thus, when concluding an agreement within or outside the scope of Article 98(2), the State Party is not performing any obligations under the Statute. "Good faith" does not come into it. Further, as Tallman notes, Article 26 "has never officially been interpreted to prohibit a party to a treaty from undertaking inconsistent obligations."¹⁷⁰

3 Article 18 of the Vienna Convention on the Law of Treaties

The Parliamentary Assembly of the Council of Europe has stated the argument against the United States bilateral agreements thus:¹⁷¹

[Bilateral agreements] are not admissible under the international law governing treaties, in particular the Vienna Conventions [sic] on the Law of Treaties, according to which states must refrain from any action which would not be consistent with the object and purpose of a treaty.

Entering into agreements which do not ensure investigation and due prosecution may well be inconsistent with the object and purpose of the Rome Statute, which aims "to put an end to impunity".¹⁷² The argument above implicitly invokes Article 18 of the Vienna Convention. Article 18, however, is inapplicable to ICC States Parties. Article 18 indeed imposes an obligation on States to "refrain from acts which would defeat the object and purpose of a treaty", but only in situations where States have signed a treaty and not yet ratified it, or where States have expressed their consent to be bound pending the entry into force of the Treaty. None of these situations is applicable to a State Party. It could be argued that if a mere signatory State has such an obligation, then, *a fortiori*,

¹⁶⁸ European Union Commission Legal Service, above n 160, 159.

¹⁶⁹ "Every treaty in force is binding on the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, above n 33, art 26.

¹⁷⁰ David A Tallman "Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict" (2004) 92 *Geo L J* 1033, 1050.

¹⁷¹ Parliamentary Assembly of the Council of Europe, above n 160, para 10.

¹⁷² Rome Statute, above n 1, preamble.

a State Party, having ratified the treaty, ought to have it too. While as a matter of logic this seems sensible, it is nowhere explicit in the Vienna Convention.

4 *A norm of customary international law*

Crawford and others proffer the best argument against the bilateral agreements, relying on a customary international law norm enunciated by the ICJ.¹⁷³ They assert this "well-established principle" as follows: "States Parties ... have an obligation to each other not to act in such a way as to 'deprive' a treaty of its object and purpose, or to undermine its spirit."¹⁷⁴ Since the object and purpose of the Statute includes a commitment to combat impunity, the authors conclude that:¹⁷⁵

[A] State Party which enters into a new agreement which has ... the effect of immunizing persons within the jurisdiction of the ICC from prosecution at either international or national level contradicts the obligation not to deprive the Statute of its object and purpose.

This view seems wholly acceptable if we accept the norm of customary international law on which the argument rests.

We need to examine, however, in the light of this argument (which is the only valid one), the respects in which a State Party violates its international obligations. As is clear, entering into an agreement immunising persons from ICC jurisdiction undermines the Rome Statute's object and purpose and thus violates the customary international law norm identified. However, entering into a bilateral agreement which simply extends to all United States nationals, would not, in itself, undermine the treaty's object and purpose. Indeed, a State in doing this does not appear to be breaching any international obligation. This can be illustrated by an example. Imagine that an ICC State Party enters into a bilateral agreement which *does* ensure investigation and due prosecution, but which still extends to all United States nationals. Three things can be said about this:

- (1) The State Party is not acting to defeat the Rome Statute's object and purpose, as the agreement ensures that impunity will not result. Therefore, the State Party has not breached its international obligations under the norm of customary international law identified by Crawford and others;
- (2) The State Party has, however, entered into an agreement beyond the scope of agreements contemplated by Article 98(2). Thus, the Court can legitimately order the surrender of a United States national from the State Party;

173 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 138 paras 275–276.

174 Crawford, Sands and Wilde, above n 146, 11.

175 Crawford, Sands and Wilde, above n 146, 22.

- (3) Only when this request for surrender is received by the State Party *and the State Party refuses to comply and instead gives priority to its bilateral agreement to the United States* will the State Party be breaching its obligations under the Rome Statute. Up until this moment, simply by concluding the bilateral agreement, without anything more, the State Party cannot be in breach of its international obligations.

Thus, we must distinguish between the scope of legitimate agreements contemplated by Article 98(2), and the legality of concluding agreements exceeding this scope. The argument that, in every respect that the entered bilateral agreement goes beyond the scope of the international agreements contemplated by Article 98(2), the State Party correspondingly breaches its international obligations, is erroneous. It only breaches its obligations to the extent that it concludes an agreement conflicting with the goal of ending impunity, or later when it refuses to surrender a United States national after such a request has been issued by the Court, due to its adherence to a bilateral agreement going beyond the scope of agreements contemplated by Article 98(2).

F Enforcement Options

The United States "Article 98(2) Agreement" campaign has been roundly criticised. Much criticism reflects the view that States Parties are breaching their international obligations by concluding such agreements. This article's second half has pinpointed exactly how States Parties are violating their obligations. However, absent a Court request for the surrender of a United States national to a State Party which has ratified an Article 98(2) agreement, the legality of a State Party simply concluding a bilateral agreement is unlikely to be judicially determined. Article 119(2) of the Rome Statute provides for disputes relating to interpretation or application of the Statute between two or more States Parties to be referred to the Assembly of States Parties (Assembly), which can then make recommendations for further means of dispute settlement, including referral to the ICJ, but such referral to the Assembly is unlikely. There are three reasons for this. First, the Court is in its formative stages. Controversy, disputes and acrimony between States could undermine and tarnish the Court's reputation for the future. Secondly, more than 40 States Parties to the Rome Statute have signed bilateral agreements. Any referral to the Assembly would likely see heated debate on the issue, and there would be little chance of overwhelming condemnation of the agreements. Finally, at present, these agreements are not having an obvious adverse impact on the Court. For pragmatic reasons, then, in the near future it is unlikely any action will be taken in respect of States which have entered Article 98(2) agreements.

The real test will occur when the Court makes a request for surrender to a State Party after having determined that the bilateral agreements exceed the legitimate scope of Article 98(2).¹⁷⁶ The

¹⁷⁶ In accordance with the principle of complementarity, such a request would only occur if the United States had declined to investigate allegations of international crimes committed by its nationals. At least in respect of its minor officials and those of low rank, one would expect the United States to commence investigations itself, thereby precluding the ICC's jurisdiction.

requested State will then find itself bound by competing legal obligations: one to the ICC under the Rome Statute, and one to the United States pursuant to the bilateral agreement.

If the State breaches its obligations to the ICC, a searchlight will be thrown on the ICC's meagre and untested enforcement mechanisms. Pursuant to Article 87(7) of the Rome Statute, where a State Party acts contrary to the Statute by failing to comply with a Court's request for cooperation, "the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." Unlike the situation mentioned above where a dispute over interpretation between two or more States Parties is referred to the Assembly under Article 119(2), a referral from the Court itself to the Assembly will likely cast a very different hue over any subsequent debate. Those States Parties in the Assembly which have already signed bilateral agreements will be in a weak position: any dissent would directly disrespect the Court's definitive finding and would undermine the foundations on which the Rome Statute rests, namely, the competence of the Court to make binding judicial determinations.

Article 112(2) contemplates the situation where the Court has determined a State's non-compliance and referred the matter to the Assembly. Although it enables the Assembly to consider "any question relating to non-cooperation",¹⁷⁷ it is silent on the mechanisms available to the Assembly to enforce compliance. Political considerations, the need to maintain widespread support for the Court and the need to avoid regional and cultural polarisation will all play a role in the Assembly's decision as to what steps to take.¹⁷⁸

Sceptical of the Assembly's ability to deal effectively with enforcement issues due to its size and low frequency of meetings,¹⁷⁹ Sarooshi has called for the Security Council to develop the practice of making Article 39 determinations of threats to the peace when States fail to cooperate with the Court.¹⁸⁰ The Security Council would then be able to take enforcement measures if required to ensure compliance. While this may be a good solution generally, it would be unworkable where the Court, disregarding an Article 98(2) agreement, issues to a State Party a request for the surrender of a United States national. The United States would thwart any movement in the Security Council to take action. Thus, the Assembly would be left to its own devices. If the recalcitrant State has already transferred the United States national to the United States, then an order to comply with the Court's

177 Rome Statute, above n 1, art 112(2)(f).

178 Broomhall, above n 69, 157.

179 Danesh Sarooshi "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council" in McGoldrick, Rowe and Donnelly, above n 86, 95, 102–103 [Sarooshi "The Peace and Justice Paradox"]. The Assembly is scheduled to meet once a year, although special sessions can be convened at the request of one-third of the States Parties or at the initiation of the Bureau of the Assembly, a body consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms. Rome Statute, above n 1, art 112(6).

180 See Sarooshi "The Peace and Justice Paradox", above n 179, 103–105.

request would be fruitless. Further, although many commentators have suggested that the Assembly could take collective measures such as economic sanctions against the State,¹⁸¹ sanctions generally are imposed for *coercive* reasons. In the situation envisaged, there is no longer the possibility of coercing the State to surrender the United States national. Any countermeasures, then, would have to be punitive in nature, but would be limited by the constraints of international law. Obviously, as Kress and Prost have argued, given the Rome Statute's important humanitarian purpose, the termination of the treaty vis-à-vis the non-complying State would not be an option.¹⁸² It is unclear, then, what the Assembly could do in such circumstances. As time progresses, no doubt, practice will develop in this area. If the Assembly takes no action, nothing prevents individual States Parties from resorting to traditional international law remedies for breaches of treaties, or perhaps even adopting individual countermeasures.¹⁸³

V CONCLUSION

This article has attempted to cast light on how the Rome Statute regulates the immunities of State and non-State Party officials and on the legality and ramifications of United States "Article 98(2) agreements". The article's conclusions may be summarised as follows:

- (1) A State Party has an obligation to arrest and surrender its own nationals, irrespective of their status, to the ICC, if those nationals are suspected of having committed crimes within the Court's jurisdiction and the Court has requested their arrest and surrender.
- (2) An incumbent Head of State, Head of Government or foreign minister of an ICC State Party who is suspected of having committed crimes within the Court's jurisdiction, if found on the territory of another State Party and wanted by the Court, may not find protection in Article 98(1), and may be arrested and surrendered by that State to the Court.
- (3) Similarly, a subordinate official or a former high-ranking official of an ICC State Party who is suspected of having committed crimes within the Court's jurisdiction, if found on the territory of another State Party and wanted by the Court, may be arrested and surrendered by that State to the Court.
- (4) Article 27, which lifts international immunities, applies only to States Parties, and only when the ICC is asserting jurisdiction. If the ICC is not exercising jurisdiction, the normal international law on immunities applies.

181 See Annalisa Ciampi "The Obligation to Cooperate" in Cassese, Gaeta and Jones, above n 18, 1607, 1635; Claus Kress and Kimberly Prost "Commentary on Article 87" in Triffterer, above n 67, 1055, 1068.

182 Kress and Prost, above n 181, 1068.

183 Ciampi, above n 181, 1635–1636.

- (5) Following from (4), a Head of State, Head of Government or foreign minister of an ICC State Party, even if suspected of committing serious international crimes, in the absence of a State waiver, enjoys absolute immunity from the national jurisdiction of another State Party if the ICC is not exercising its jurisdiction.
- (6) The position of State officials or former high-ranking officials and whether they may enjoy immunity in the national courts of foreign States if suspected of committing serious international crimes is unsettled, although much would support the lifting of functional immunity in such circumstances. It is tentatively submitted, therefore, that irrespective of whether the ICC is asserting jurisdiction, a State Party or non-State Party subordinate official or former high-ranking official who is suspected of committing serious international crimes, enjoys no immunity from the exercise of jurisdiction by other States.
- (7) A Head of State, Head of Government or foreign minister of a non-State Party to the Rome Statute is unaffected by Article 27 of the Statute, and, even if suspected of having committed crimes within the Court's jurisdiction, in the absence of a State waiver, has absolute immunity both from the Court and from the jurisdiction of States Parties.
- (8) Following from (6), a subordinate official or former high-ranking official from a non-State Party suspected of committing serious international crimes or crimes within the Court's jurisdiction enjoys no immunity from the jurisdiction of other States or the Court.
- (9) If the conclusion in (6) is wrong, then, as with (7) above, in the absence of a State waiver, subordinate and former high-ranking officials from non-States Parties should be entitled to functional immunity barring the exercise of jurisdiction by the Court and States Parties.
- (10) Should the Court, contrary to the conclusion in this article, determine that Articles 27, 12 and 13(b) enable it to exercise its jurisdiction over the officials of non-States Parties who would otherwise enjoy immunity, then the Court, due only to Article 98(1), will be precluded from requesting the arrest and surrender of those officials from States Parties, unless a waiver can be obtained from the relevant non-State Party.
- (11) The proposed United States "Article 98(2) agreements" exceed the proper scope of Article 98(2) in two respects: they apply to all United States nationals rather than simply to nationals sent by the government; and they do not ensure investigation and due prosecution.
- (12) By simply concluding a proposed United States agreement, a State Party violates its international obligations only in the respect that the agreement does not truly combat impunity. Conceivably, a State Party could legitimately conclude a bilateral agreement

going beyond the scope of Article 98(2) if such an agreement were to guarantee investigation and due prosecution.

- (13) A judicial determination on the legality of a State Party simply concluding a United States bilateral agreement is unlikely.
- (14) Since the proposed United States agreements fall outside the scope of the "international agreements" contemplated by Article 98(2), nothing precludes the Court, if it has jurisdiction and is acting in accordance with the principle of complementarity, from requesting the surrender of a United States national from a State Party which has entered into a United States bilateral agreement. The State Party will then face two competing and legally binding obligations.
- (15) Should the State Party breach its international obligations under the Rome Statute, the Court can make such a determination and refer the matter to the Assembly of States Parties. There is much uncertainty as to what effective steps the Assembly can take due to the Rome Statute's silence on the consequences of non-cooperation.