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The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court

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THE PROLIFERATION OF BILATERAL NON-SURRENDER AGREEMENTS AMONG NON-RATIFIERS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

CHET J. TAN, JR.*

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INTRODUCTION

Public outcry against the execution of so-called bilateral non-surrender agreements between states is widespread in both the local and international news media. The number of notes and comments regarding the Statute of the International Criminal Court¹ ("Rome Statute") in legal literature is growing rapidly, and the issue of the validity and/or propriety of these bilateral non-surrender agreements are increasingly becoming contentious. Not surprisingly, these trends raise several questions that the international community must address. What exactly are these agreements? What do they entail? Would it be advisable for states to enter into such agreements? More

1. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute], available at http://www.un.org/law/icc/statute/99_corr/cstatute.htm (last visited Mar. 29, 2004).

importantly, are such agreements valid under international law? These and other pertinent questions are what this essay seeks to explore.

Following this introduction, in Part I, is a short overview that outlines the more salient points of the Rome Statute.² A brief situation report follows in Part II, which narrates the events that led up to the execution of the Republic of the Philippines-United States Bilateral Non-Surrender Agreement (“Agreement”). This agreement is typical of the bilateral non-surrender agreements the United States has negotiated and, for the purposes of this essay, it shall serve as a model bilateral non-surrender agreement. Pertinent parts of this essay will reference, if not scrutinize outright, the provisions of this agreement.³ Part III provides an analysis of the legal consequences that stem from the execution of a bilateral non-surrender agreement.⁴ Next, Part IV will present measures that commentators have suggested as alternatives to the execution of bilateral non-surrender agreements.⁵ What follows then in Part V is a set of recommended courses of action for states that wish to fulfill their obligations under both the Rome Statute and a bilateral non-surrender agreement.⁶ The final section presents an appropriately sober conclusion.⁷

I. THE ROME STATUTE: A BRIEF PRIMER

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (“U.N. Diplomatic Conference of Plenipotentiaries”) adopted the Rome

2. See *infra* Part I (giving a general overview of the Rome Statute).

3. See *infra* Part II (providing the background on the Agreement).

4. See *infra* Part III (explaining that bilateral non-surrender agreements have consequences affecting the parties as well as the international community at large).

5. See *infra* Part IV (outlining the various international legal measures available for parties to use rather than bilateral non-surrender agreements).

6. See *infra* Part V (noting that there are four options for states wishing to comply with both international customary law and a bilateral non-surrender agreement).

7. See *infra* Conclusion (concluding that states ought to strive to end impunity for international crimes, and rather than executing or carrying out bilateral non-surrender agreements, states should try to use alternate legal means if they insist on refusing International Criminal Court (“ICC”) jurisdiction over their nationals).

Statute on July 17, 1998.⁸ It entered into force on July 1, 2002.⁹ Currently, the signatory states number 139, while 91 state parties have ratified the Rome Statute.¹⁰ The treaty brings into existence a tribunal that exercises jurisdiction over the most serious crimes of concern to the international community as a whole.¹¹ The crimes over which the International Criminal Court (“ICC” or “the Court”) exercises jurisdiction, as provided for in the Rome Statute, are genocide, crimes against humanity, war crimes, and aggression.¹² Articles 6-8 of the Rome Statute define the first three of these crimes in greater detail, and feature descriptions and enumerations of specific, punishable acts for each crime.¹³ However, discussion of the exercise of jurisdiction over the crime of aggression is reserved for another time, seeing as the crime has been left undefined for now.¹⁴ The Rome Statute, as a treaty, is unique in several ways. First of all, by virtue of its entry into force, it creates a permanent tribunal, the ICC, that will deal with all occurrences of the most serious crimes of

8. Rome Statute, *supra* note 1, art. 128 (stating that the Rome Statute was signed on July 17, 1998, in Rome).

9. Coalition for the International Criminal Court, *A Timeline of the Establishment of the International Criminal Court* (explaining that the treaty entered force on July 1, 2002, thus becoming binding for states that had ratified or acceded to the Rome Statute), at <http://www.iccnw.org/pressroom/factsheets.html> (last visited Mar. 29, 2004).

10. *See id.* (describing how 139 states had signed the treaty by December 31, 2000).

11. *See* Rome Statute, *supra* note 1, art. 5(1)(a)-(d) (asserting jurisdiction over the four most serious crimes).

12. *Id.*

13. *See id.* arts. 6-8 (defining the terms genocide, crimes against humanity, and war crimes for the purposes of the Rome Statute). Genocide is defined as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. . . .” *Id.* art. 6. A crime against humanity can include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other forms of sexual violence, persecution, enforced disappearance of persons, apartheid, and other inhumane acts. *Id.* art. 7. War crimes include grave breaches of the Geneva Conventions of August 12, 1949. *Id.* art. 8.

14. *See id.* art. 5(2) (indicating that the Court will “exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime”).

concern to the international community as a whole. Its jurisdiction and mandate are not limited to specific events that took place in specific places within a specific time frame.¹⁵ Before the Rome Statute, ad hoc tribunals administered international criminal justice holding individuals accountable: the International Military Tribunal (“IMT”) at Nuremberg; the International Military Tribunal for the Far East (“IMTFE”) at Tokyo; the International Criminal Tribunal for the Former Yugoslavia (“ICTY”); the International Criminal Tribunal for Rwanda (“ICTR”); the Special Court for Sierra Leone; and other more recently established ad hoc and special courts.¹⁶

Secondly, even though, as a treaty, state parties entered into it, the Rome Statute provides that the ICC shall exercise jurisdiction upon individuals, as distinguished from other permanent international tribunals, such as the International Court of Justice (“ICJ”).¹⁷ The objects of the ICC’s powers and functions are the accused themselves, subjecting them to investigation, arrest, detention, prosecution and, if found guilty, incarceration.¹⁸ The Rome Statute creates obligations on the part of state parties to provide the means

by which to enforce these powers and binds state parties to cooperate

15. See *id.* arts. 13-21 (outlining the ICC’s jurisdiction, as well as the admissibility of cases and the application of the law).

16. See George S. Yacoubian, Jr., *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 165 *WORLD AFF.* 133, n.21-24 (2003) (noting that the international community has convened four ad hoc international tribunals to date, including the IMT in 1945, the IMTFE in 1946, the ICTY at The Hague in 1992, and the ICTR in 1994), available at http://www.findarticles.com/cf_0/m2393/3_165/97484236/print.jhtml (last visited Mar. 22, 2004).

17. See Rome Statute, *supra* note 1, art. 1 (indicating that the ICC shall “have the power to exercise its jurisdiction over persons for the most serious crimes of international concern”). The ICJ replaced the Permanent Court of International Justice in 1946, and acts as the principal judicial organ of the United Nations to resolve conflicts between states. The International Court of Justice, General Information – The Court at a Glance, at <http://212.153.43.18/icjwww/igeneralinformation/icjgnm t.html> (last visited Apr. 14, 2004).

18. See Rome Statute, *supra* note 1, arts. 53-76 (outlining the investigation and prosecution procedures under the ICC and explaining the rights of the accused).

with the ICC.¹⁹

The hallmark of the Rome Statute, however, is its allocation of jurisdiction between the ICC and the state parties. The Rome Statute's principle of complementarity apportions jurisdiction between the two.²⁰ This arrangement vests primary jurisdiction over cases involving the commission of acts amounting to any of the most serious crimes of concern to the international community as a whole in any state that can exercise jurisdiction over such cases.²¹ When such a state exercises jurisdiction over a case, the ICC deems that case inadmissible.²² However, the assumption of jurisdiction by a state over a case does not bar the ICC from later exercising jurisdiction over the same case.²³ Under Article 17, if the state in question, after conducting its investigation, decides not to prosecute, and the ICC makes a determination that such refusal to prosecute stems from the genuine unwillingness or inability of the state to prosecute, then the ICC can take cognizance of the case.²⁴

II. THE REPUBLIC OF THE PHILIPPINES-UNITED STATES BILATERAL NON-SURRENDER AGREEMENT

The Philippine government signed the Rome Statute on December 28, 2000,²⁵ and on the very last day that it was permissible to do so,

19. *See id.* arts. 86-102 (describing state parties' general obligations to cooperate with the ICC during the investigation and the prosecution of crimes).

20. *See id.* art. 1 (noting that the Court's jurisdiction shall be complimentary to that exercised by member states).

21. *See id.* art. 17(1) (discussing the admissibility of cases that shall be heard by the ICC).

22. *See id.* (explaining that the ICC will not exercise jurisdiction over that case when a state investigates or prosecutes a case).

23. *See id.* (stating that cases are admissible to the ICC if and when a state is genuinely unwilling or unable to prosecute).

24. *See* M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VA. J. INT'L L.J. 405, 439 (2003) (explaining the procedure under Article 17 of the Rome Statute that allows the ICC to take jurisdiction over a case).

25. *See* Coalition for International Criminal Court, *Country Information, Philippines* (indicating that the Philippine Government signed the Rome Statute), at <http://www.iccnw.org/countryinfo/asia/philippines.html> (last visited Mar. 22,

the U.S. Government signed the Rome Statute.²⁶ However, to this day, neither party has moved to ratify the same, which, in retrospect, is to be expected, given the events that were to follow. With the change of administration, the U.S. Government's policy regarding the Rome Statute also changed.²⁷ On May 6, 2002, the U.N. Secretary General received a communication from the U.S. government stating that "the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000."²⁸ The U.S. government also requested that its stated intention not to become a party "be reflected in the depositary's status lists relating to this treaty."²⁹

A Defense Department Operational Briefing revealed the U.S. government's policy regarding the Rome Statute, as well as the course of action it had decided upon for dealing with the ICC.³⁰ There, when asked about whether or not he was satisfied with the level of insulation U.S. troops enjoyed from the ICC, Donald Rumsfeld, U.S. Secretary of Defense answered in pertinent part that:

To the extent we're participating in peacekeeping activities that are U.N. related, we intend to do a similar thing by going around to countries on a

2004); *see also* Letter from Irene Khan, Secretary General, Amnesty Int'l, to Gloria Macapagal-Arroyo, President, Philippines (July 17, 2003) (noting that the Philippines signed the Rome Statute on December 28, 2000 and that the Philippines intended to ratify the Rome Statute), *available at* [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ASA350132003ENGLISH/\\$File/ASA3501303.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ASA350132003ENGLISH/$File/ASA3501303.pdf) (last visited Mar. 22, 2004).

26. *See* Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 58 (2002) (stating that the United States signed the Rome Statute during the Clinton administration on December 31, 2000).

27. *See id.* (remarking that the Bush administration subsequently "unsigned" the treaty in mid-2002).

28. Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, United States, to Kofi Annan, Secretary General, United Nations (May 6, 2002), <http://www.state.gov/r/pa/prs/ps/2002/9968pf.htm> (last visited Mar. 30, 2004).

29. *Id.*

30. *See* U.S. Dep't of Defense, *Defense Department Operational Update Briefing* (June 26, 2002) (discussing the U.S. policy to exempt U.S. forces from the requirements of the Court), *available at* http://www.amicc.org/docs/Rumsfeld6_26_02.pdf (last visited Mar. 22, 2004).

bilateral basis. There is a provision in the treaty which permits countries to come to an agreement bilaterally that—in this case U.S.—forces operating in their country would not be subject to the court and that they would not extradite people—Americans—to the court. And it's both civilian and military.³¹

This marked the beginning of a massive, worldwide campaign on the part of the United States to secure bilateral non-surrender agreements from states across the globe.³² As of this writing, fifty-five states have reportedly entered into such agreements with the United States.³³ The United States also enacted the American Servicemembers' Protection Act ("ASPA"), a law that basically prohibits the United States from cooperating with the ICC. Significantly, the law also prohibits the United States from providing military assistance to a government that is a party to the ICC, unless that government is a NATO or a major non-NATO ally, or unless it enters into an agreement with the United States—a provision with supposed support in Article 98 of the Rome Statute.³⁴

On May 13, 2003, Philippine Secretary of Foreign Affairs Blas F. Ople executed Note No. BFO-028-03, wherein he acknowledged receipt of U.S. Ambassador Francis J. Ricciardone, Jr.'s Note No. 0470, dated May 9, 2003.³⁵ The substantive provisions of these diplomatic notes can be divided into two parts. The first part seeks to

31. *Id.*

32. See Press Briefing, U.S. Dep't of State, State Department Press Briefing with Richard Boucher (June 12, 2003) (noting the provision of the ASPA that prohibits military assistance to any country that is an ICC party), available at http://www.amiccc.org/docs/Boucher6_12_03.pdf (last visited Mar. 22, 2004).

33. See American Nongovernmental Organizations Coalition for the ICC, *Bilateral Immunity Agreements* (listing the numerous countries that are concluding bilateral immunity agreements), at http://www.amicc.org/usinfo/administration_policy_BIAs.html (last visited Mar. 22, 2004).

34. See Johnson, *supra* note 24, at 465-67 (discussing ASPA and criticizing its attempt to preempt the ICC's jurisdiction through the restriction of U.S. participation in peacekeeping operations).

35. See Agreement Regarding the Surrender of Persons to International Tribunals, May 13, 2003 U.S.-Phil., State Dep't No. 03-06 [hereinafter Surrender Agreement] (acknowledging the receipt of Secretary Ople's Note accepting the terms of the Agreement between the United States and the Philippines), available at <http://www.amicc.org/docs/PhilippinesText13May03.pdf> (last visited Mar. 24, 2004).

deal with all possible situations that could result in the surrender of a defined “person” to the ICC; the notes to this portion provide that all current or former government officials, employees (including contractors), military personnel, or nationals of one party present in the territory of the other shall not, absent the express consent of the first party:

(a) be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council, or

(b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to any international tribunal, unless such tribunal has been established by the UN Security Council.³⁶

The second part of these diplomatic notes builds upon the aforementioned, and obligates each party to guard against the possibility of indirectly violating their commitments to each other by extraditing, surrendering, or transferring the other party’s nationals to a third state.³⁷ When, for example, the Philippines extradites, surrenders, or otherwise transfers any current or former government officials, employees (including contractors), military personnel, or nationals of the United States to a third country, the Philippines will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless the U.N. Security Council has established the tribunal, absent the United States’ express consent. This obligation applies with equal force to the United States with respect to current or former government officials, employees (including contractors), military personnel, or nationals of the Philippines.³⁸ This exchange of diplomatic notes forms what legal

36. *Id.*

37. *See id.* (explaining that both the United States and the Philippines must not agree to the transfer of a person by a third country to an international tribunal without the express consent of that person’s country, unless the United Nations established the tribunal).

38. *See id.* (establishing the reciprocal character of the agreement with the statement “[p]ersons of one Party present in the other shall . . . be surrendered or transferred . . .”).

publicists refer to as a bilateral non-surrender agreement between the Philippines and the United States.³⁹

III. ARTICLE 98(2) OF THE ROME STATUTE AND BILATERAL NON-SURRENDER AGREEMENTS

The number of bilateral non-surrender agreements is rapidly growing. The alarmingly short span of time that has elapsed between the entry into force of the Rome Statute and the execution of the first such agreements has brought to light the possibility that some parties may have entered into these agreements with undue haste and limited understanding of their ramifications. States should realize that bilateral non-surrender agreements are liable to result in a variety of legal consequences that affect not just the parties thereto, but the entire international community.

A. THE PROVISIONS OF THE ROME STATUTE

One of the ways in which the ICC can acquire personal jurisdiction over indicted individuals is for the Court to request their surrender from the state in whose territory they may be found.⁴⁰ Article 89 of the Rome Statute sets forth the authority whereby the ICC may make such a request:

Article 89: Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any state on the territory of which that person may be found and shall request the cooperation of that state in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of

39. See Cosmos Eubany, Note, *Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 HASTINGS INT'L & COMP. L. REV. 103, 104, 116 (2003) (explaining that the United States has attempted to "opt out" of the ICC's jurisdiction by concluding bilateral agreements designed to prevent the surrender of U.S. nationals to the Court under any circumstances).

40. See Rome Statute, *supra* note 1, art. 89 (discussing the process by which a person may be surrendered to the ICC).

this Part and the procedure under their national law, comply with requests for arrest and surrender.⁴¹

However, controversial limitations found in the Rome Statute counterbalance the ICC's power to make such a request.⁴² The contentious provision is Article 98(2), which states:

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

2. The Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, unless the Court can first obtain the cooperation of the sending state for the giving of consent for the surrender.⁴³

B. THE OBLIGATION UNDER ARTICLE 98 (2)

It is important to stress a point that legal publicists have raised regarding the nature of the conduct required under Article 98(2). Commentators have submitted, and quite convincingly so, that Article 98(2) imposes obligations not on state parties or non-parties to the Rome Statute, but on the ICC itself.⁴⁴ In effect, it is the ICC that is prevented from acting. If the state receiving the surrender request has an obligation under an international agreement pursuant to which the sending state's consent is required for the surrender of said person to the ICC, and the sending state does not give its consent to such surrender, the proscribed act is the ICC's proceeding

41. *Id.* art. 89(1).

42. *See generally* Eubany, *supra* note 39 (discussing and interpreting the provisions of Article 98 of the Rome Statute).

43. Rome Statute, *supra* note 1, art. 98(2).

44. *See* Eubany, *supra* note 39, at 117 (interpreting the "ordinary meaning" of Article 98(2) to mean that the provision "precludes the ICC from requesting the surrender of an accused within State A's custody if State A has a prior agreement with State B regarding the surrender of State B's nationals").

with a request for surrender. The provision does not directly impose any obligations nor grant any rights to the state parties and non-party states involved. Admittedly, it also does not prevent a state party from entering into an agreement that could have the effect of preventing the ICC from proceeding with a request for surrender.⁴⁵

Therefore, the suggested, and seemingly more correct, way of viewing this provision, then, would be to see it as a rule that prescribes the conditions under which the ICC may proceed with a request for surrender. As a result, in cases where the ICC may properly proceed with a request for surrender, a state party presented with such a request will be obliged to comply with it. Concomitantly, “[t]he combined effect of Article 98(2) and the other provisions of the Rome Statute concerning obligations of states to comply with requests by the Court only come into play once the Court proceeds to make a particular request [for surrender] pursuant to its authority under Article 89(1).”⁴⁶

Thus, a state party that refused to comply with an Article 89(1) request for surrender and subsequently relied upon a bilateral non-surrender agreement which is incompatible with the requirements of Article 98(2) in order to justify such refusal would be in breach of its obligations to the ICC and other state parties to the Rome Statute. Simply put, entering into a bilateral non-surrender agreement does not have the effect of automatically insulating a state from all requests for surrender that the ICC may make.⁴⁷ First, the bilateral non-surrender agreement must fall within the scope of Article 98(2). The question of whether or not the ICC is entitled to proceed with a request for surrender, in light of the specific circumstances of each case, would then fall within the exclusive jurisdiction of the ICC

45. See James Crawford et al., *In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute: Joint Opinion* (June 5, 2003), at 2 (summarizing the powers that Article 98(2) grants to states to enter into bilateral non-surrender agreements), available at <http://www.amicc.org/docs/Art98-14une03FINAL.pdf> (last visited Mar. 29, 2004).

46. *Id.* at 10.

47. See Roy S. Lee, *How the World Will Relate to the Court: An Assessment of the ICC Statute*, 25 FORDHAM INT'L L.J. 750, 760-61 (2002) (describing the effect of status-of-forces agreements (“SOFAs”) on the ICC’s power to request an individual’s surrender in various circumstances).

itself.⁴⁸ The ICC, and not the individual states, would have to determine what legal effect, if any, a particular bilateral non-surrender agreement would have under Article 98(2).⁴⁹ Pending such determination, “the requested state should promptly comply with the request for arrest and surrender.”⁵⁰ However, if the ICC later decides that Article 98(2) prohibits surrender, and the sending state will not cooperate, the release of the accused person from custody or any other restraint should follow.⁵¹

C. THE OBJECT AND PURPOSE OF THE ROME STATUTE

In a briefing held in London, Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, stated U.S. policy regarding bilateral non-surrender agreements thus:

Article 98 clearly says that we are allowed to engage in these types of agreements, international agreements, with the states that allow for the conditions, to dictate the conditions of surrendering. Essentially it is that the consent of the sending state, which in this case would be the United States, is required before someone would be transferred to the court.⁵²

U.S. Secretary of State Colin Powell reiterated the U.S. Government’s position, stating in a press conference that the Rome Statute “provides for Article 98 agreements with those countries who do not wish their citizens to be subject to the Court when serving in other countries.”⁵³ Similarly, former U.S. Ambassador-at-Large for

48. See Crawford, *supra* note 45, at 10-11 (indicating that the ICC must decide under Article 98(2) whether or not to request surrender).

49. See Amnesty Int’l, *International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crime* (Aug. 2002), at 5 (stating that the ICC, rather than individual states, has jurisdiction to determine the legal effect of bilateral non-surrender agreements under Art. 98(2)), available at <http://www.amicc.org/docs/aiusimpunity.pdf> (last visited Mar. 29, 2004).

50. *Id.* at 17.

51. See *id.* (noting the circumstances under which the accused will enjoy exemption from ICC jurisdiction and release from custody, and asserting that the Court may make non-binding requests for additional information from states in order to have a proper factual basis to make its determination).

52. Press Briefing, Pierre-Richard Prosper, American Embassy London, On the Record (Sept. 24, 2002), available at http://www.amicc.org/docs/Prosper9_20_02.pdf (last visited Mar. 29, 2004).

53. Press Conference, Colin L. Powell, Bogotá, Colombia (Dec. 4, 2002),

War Crimes, David Scheffer, asserted that “even as a non-party, under Article 98(2), [the U.S.] can negotiate agreements with other governments that would prevent any American being surrendered to the ICC from their respective jurisdictions without [the consent of the United States].”⁵⁴

However, an overwhelming majority of states throughout the world, particularly the European nations, espouse a different view. The Council of the European Union has expressed its view regarding the bilateral non-surrender agreements in a set of Guiding Principles annexed to its Conclusions on the ICC, the first of which reads:

The US proposed agreements: Entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties. . . .⁵⁵

Not satisfied with the Council’s position, the European Parliament went further by asserting that state parties are obligated not to defeat the Rome Statute’s purpose, and are thus precluded from entering into bilateral non-surrender agreements, even going so far as to say that ratifying the assailed agreements would be incompatible with EU membership.⁵⁶

available at http://www.amicc.org/docs/powell12_4_02.pdf (last visited Mar. 29, 2004).

54. David J. Scheffer, *A Negotiator’s Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 18 (2001).

55. Council of the European Union, *Draft Council Conclusions on the International Criminal Court* (Sept. 30, 2002) [hereinafter *Draft Conclusions*], available at http://www.amicc.org/docs/EC9_30_02.pdf (last visited Mar. 19, 2004).

56. See European Parliament, *European Parliament Resolution on the International Criminal Court (ICC)*, EUR. PARL. DOC. P5_TA-PROV 0049 (2002) (stating that Article 86 of the Rome Statute prohibits states parties from entering into immunity agreements), available at http://www.amicc.org/docs/EPres9_26_02.pdf (last visited Mar. 19, 2004); see also European Parliament Resolution on the General Affairs Council’s Position Concerning the International Criminal Court, EUR. PARL. DOC. P5_TA-PROV 0521 (2002) (explaining that ratifying an agreement which would undermine the Rome Statute’s effective implementation would be incompatible with membership in the EU), available at http://www.amicc.org/docs/EUP10_24_02.pdf. (last visited Mar. 19, 2004).

Other states throughout the international community share Europe's stand on bilateral non-surrender agreements. For example, those states composing the Joint Parliamentary Assembly of the African, Caribbean, and Pacific Group of States and the European Union and its Member States ("ACP-EU") articulated their position in the following Resolution, which expresses that each state

4. Recognises [sic] that the agreements proposed by the USA are contrary to the Rome Statute and to the Treaty commitments of the EU Member states;

6. Firmly believes that the ICC States Parties and Signatory States are obliged under international law not to defeat the object and purpose of the Rome Statute, under which, according to its Preamble, 'the most serious crimes of concern to the international community as a whole must not go unpunished' and that States Parties are obliged to cooperate fully with the Court, in accordance with Article 86 of the Rome Statute, thus preventing them from entering into immunity agreements which remove certain citizens from the States' or the ICC's jurisdictions, undermining the full effectiveness of the ICC and jeopardizing [sic] its role as a complementary jurisdiction to State jurisdictions and a building block in collective global security. . . .⁵⁷

It is evident, then, that the swirl of arguments of the opposing sides to this issue revolves around the effect a bilateral non-surrender agreement would have on a state party's legal obligations under the Rome Statute.⁵⁸ Specifically, the issue is whether a bilateral non-surrender agreement would frustrate the object and purpose of the Rome Statute.

Under international law, the Rome Statute's state 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."⁵⁹ Article 18 of the Vienna Convention on the Law of Treaties codifies this rule, which requires states to refrain from acts that would defeat the object and purpose of a treaty.⁶⁰

57. ACP-EU Joint Parliamentary Assembly, *Resolution on the International Criminal Court (ICC)*, ACP-EU Res. 3560/03/fin (2003), available at <http://www.amicc.org/docs/ACP-EUres.pdf> (last visited Mar. 9, 2004).

58. See, e.g., Eubany, *supra* note 39, at 125-26 (discussing how bilateral non-surrender agreements frustrate the Rome Statute's purpose).

59. Crawford, *supra* note 45, at 11.

60. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 18, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 (1980)

It is widely accepted that the Rome Statute's object and purpose is to put an end to the regime of impunity that protects the perpetrators of all the most serious crimes of concern to the international community within the jurisdiction of the ICC.⁶¹ The fifth and sixth paragraphs of the Preamble to the Rome Statute codify this principle:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. . . .⁶²

Putting effective arrangements in place to prevent impunity for the crimes over which the ICC will have jurisdiction serves these goals. "[T]he entire system is predicated on the voluntary cooperation of States in ensuring compliance with the orders of the [ICC]."⁶³ This includes "surrendering fugitives, obtaining and securing evidence, seizing and freezing assets and other forms of international cooperation."⁶⁴

The decision by states to enter into a bilateral non-surrender agreement, such as the one entered into by the governments of the United States and the Philippines, creates very specific consequences.⁶⁵ In a typical bilateral non-surrender agreement, the

[hereinafter Vienna Convention] (explaining that once a state signs a treaty and expresses its consent to be bound by the treaty, the state is obligated not to take action that would defeat the object and purpose of the treaty).

61. See Crawford, *supra* note 45, at 12 (indicating that the Rome Statute's purpose is to prevent crimes over which the ICC has jurisdiction); see also Parliamentary Assembly of the Council of Europe, *Declaration by the EU on the Position of the U.S. Towards the International Criminal Court* ¶ 5 (May 13, 2002) (noting the Rome Statute's purpose of ensuring that persons suspected of committing serious international crimes are properly investigated), available at http://www.amicc.org/docs/EUdec5_13_02.pdf (last visited Mar. 19, 2004).

62. Rome Statute, *supra* note 1, pmb1.

63. M. Cherif Bassiouni, *The International Criminal Court in Historical Context*, 99 ST. LOUIS WARSAW-TRANSATLANTIC L.J. 55 (1999).

64. *Id.*

65. See Surrender Agreement, *supra* note 35 (establishing that the United States and the Philippines will not surrender or transfer an individual to an international tribunal).

contracting parties bind themselves not to surrender, transfer, or consent to the surrender or transfer of certain defined persons of one party to any international tribunal.⁶⁶ Clearly, a signatory or state party to the Rome Statute that enters into such an agreement would already be in violation of its obligations under international law by virtue of this first covenant alone, for the Rome Statute provides:

Article 89: Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.⁶⁷

In construing this provision, parties must interpret it “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶⁸ Having thus cast the Rome Statute in the proper light, juxtaposing its applicable provisions with those of a typical bilateral non-surrender agreement leads to no other conclusion than that the agreements create an avenue for impunity. By promising not to surrender, transfer, or consent to the surrender or transfer of particular classes of people to an international tribunal, which the ICC most definitely is, a state thereby imbues those persons with a level of immunity it does not afford to everyone else.

There are no mechanisms in the bilateral non-surrender agreements designed to ensure that the persons whose surrender or transfer an international tribunal is pursuing are subject to investigation – much less prosecution by another competent authority – for the alleged commission of any act that may constitute a crime punishable by the Rome Statute. Its substantive provisions are geared towards the end goal of *depriving* a specific body of jurisdiction over

66. See *id.* ¶ 1 (defining persons as “current or former government officials, employees, (including contractors), military personnel, or nationals of one of the contracting parties”).

67. Rome Statute, *supra* note 1, art. 89(1).

68. See Vienna Convention, *supra* note 60, art. 31 (explaining how to interpret a treaty so as avoid defeating its objects and purposes).

certain persons; it does not *vest* jurisdiction in anyone else, not even the sending state or state native to the persons in question.⁶⁹ At most, bilateral non-surrender agreements, and the Agreement Regarding the Surrender of Persons to International Tribunals (“Surrender Agreement”) in particular, merely note that the contracting state parties “have each expressed their intention to, where appropriate, investigate and prosecute war crimes, crimes against humanity, and genocide alleged to have been committed” by the subject persons.⁷⁰ It is by virtue of this glaring omission that impunity becomes the order of the day.

Therefore, any signatory or state party to the Rome Statute that enters into a bilateral non-surrender agreement, such as the one the United States and the Philippines entered into, would be materially aiding or contributing to a scheme of impunity as it pertains to the obligation to give effect to the jurisdiction of the ICC.⁷¹ For a signatory or state party to the Rome Statute, such an integral role in an arrangement that results in impunity for those crimes covered by the Rome Statute necessarily renders said signatory or state party in breach of its obligation to refrain from acts that would defeat the object and purpose of the Rome Statute.⁷² The following Resolution of the Parliamentary Assembly of the Council of Europe authoritatively echoes these conclusions:

8. The Assembly regrets the ongoing campaign by the United States to convince State Parties to the Rome Statute, including member states of the Council of Europe, to enter into bilateral agreements aimed at subjecting these states' cooperation with the ICC, as regards United States

69. See FÉDÉRATION INTERNATIONALE DES LIGUES DES DROITS DE L'HOMME, INTERNATIONAL CRIMINAL COURT (ICC): NO TO AMERICAN EXCEPTIONALISM 4 (Dec. 2002) [hereinafter FÉDÉRATION] (discussing the complementarity concept and how it diminishes any need for bilateral “impunity” agreements by requiring states who wish to exclude their nationals from the Court’s jurisdiction to simply prosecute them at national law), *available at* http://www.amicc.org/docs/FIDH_US.pdf (last visited Mar. 19, 2004).

70. Surrender Agreement, *supra* note 35.

71. See *id.* ¶¶ 3-4 (establishing the willingness of both parties to refuse to surrender an individual from either country to any international tribunal absent the express consent of the governments of the other country).

72. See Crawford, *supra* note 45, at 22-24 (discussing the compatibility of state obligations created under the Rome Statute with bilateral non-surrender agreements).

citizens accused of crimes giving rise to the jurisdiction of the ICC, to prior agreement by the United States government.

9. The Assembly considers such agreements to be violations of the Rome Statute of the ICC (in particular Articles 27 and 86, Article 98 (2) allowing only narrowly defined exemptions in the framework of status of force agreements), and of the Vienna Convention on the Law of Treaties (Article 18), according to which states must refrain from any action which would not be consistent with the object and purpose of a treaty.⁷³

Note, however, that by the terms of our model bilateral non-surrender agreement, it is incorrect to characterize the United States as standing in breach of its international obligations, seeing as it is not a state party to the Rome Statute and does not consider itself bound by its signature thereto.⁷⁴ However, it is important to further note that the Rome Statute codifies the duty to cooperate in the detection, arrest, extradition, and prosecution of persons accused of war crimes and crimes against humanity, as they have been understood under customary international law.⁷⁵ This is also true of all members of the United Nations: evidently, the refusal by states to cooperate in the arrest, extradition, trial, and punishment of persons guilty of war crimes and crimes against humanity is contrary to generally recognized norms of international law.⁷⁶ The U.N. General Assembly expressed the same sentiments in the following declaration:

3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against

73. Counsel of Europe Parliamentary Assembly, Threats to the International Criminal Court, EUR. PARL. Res. 1336 (2003), available at <http://www.amicc.org/docs/COE1336.pdf> (last visited Mar. 19, 2004).

74. See Crawford, *supra* note 45, at 3 (suggesting that the United States does not have an obligation to refrain from acts that would defeat the purpose of the Rome statute since the United States does not intend to ratify or become a party to the treaty).

75. See Rome Statute, *supra* note 1, art. 86 (stating that states parties have a general obligation to cooperate with the court).

76. See George William Mugwanya, *Expunging the Ghost of Impunity for Severe and Gross Violations of Human Rights and the Commission of Delicti Jus Gentium: A Case for the Domestication of International Criminal Law and the Establishment of a Strong Permanent International Criminal Court*, 8 MICH. ST. U. C. L. J. INT'L L. 701, 757, 759, 778 (1999) (commenting that international norms prevent the international community from negating criminal responsibility of any individual).

humanity, and shall take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment as a general rule in the country in which they committed those crimes. In that connection, states shall co-operate on questions of extraditing such persons⁷⁷

The following provision from the same resolution is of particular significance, in that it specifically proscribes the resort by any state to measures that may be prejudicial to the obligations they take on under the United Nations:

8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.⁷⁸

Thus, the obligation to cooperate in the suppression of at least two of the crimes within the jurisdiction of the Rome Statute has attached both to state parties to the Rome Statute and to non-state parties that are members of the United Nations. They are also obligated to refrain from acts that would be contrary to the United Nations' declared principles regarding the suppression of these crimes.⁷⁹ Some have submitted that the General Assembly's declaration impliedly reflects a general expectation that it would be appropriate for states to create bilateral or multilateral institutional processes to assist in prosecuting such international crimes, and that such action might be required as part of the duty to engage in bilateral and multilateral cooperative efforts to halt, prevent, and prosecute such crimes.⁸⁰

77. G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 79, U.N. Doc. A/9326 (1973), available at <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/46/IMG/NR028146.pdf> (last visited Mar. 19, 2004).

78. *Id.*

79. *See id.* (establishing that States will cooperate with each other in the collection of information and evidence, and will not take any legal actions to interfere with international obligations).

80. *See id.* at 79 (asserting that states must work together to halt and prevent

Furthermore, observers have submitted that the ICC's exercise of universal jurisdiction over those crimes the Rome Statute proscribes has achieved the status of customary international law, for neither the international community nor any state nor group of states can validly negate the criminal responsibility of any individual who has committed international crimes.⁸¹ Adherents to that position argue that, consequently, the practice of granting immunities to transgressors, as well as refusing to cooperate with other states in the noble endeavor to deal with these crimes, are breaches of international obligations.⁸² Nevertheless, the mischief that a non-signatory, non-party to a treaty can cause to the ability of signatories and state parties to comply in good faith with their international obligations under said treaty has never been more pronounced and alarming.⁸³

war crimes); *see also* G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8592 (1971) (urging states to take measures to cooperate in ending war crimes and crimes against humanity); G.A. Res. 96, U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/64 (1946) (recommending international cooperation between states to expedite the prevention and punishment of the crime of genocide, a crime against humanity).

81. *See* discussion *infra* Part V.D.1 (explaining the effects of universal jurisdiction and that its purpose is to "enhance world order" by holding those who have committed certain crimes accountable); *see also* Mugwanya, *supra* note 76, at 757-58 (noting that if states indeed were to try to deny the criminal responsibility of an individual, this would run contrary to the principles of criminal responsibility recognized by customary international law).

82. *See generally* Mugwanya, *supra* note 76, at 757, 759 (noting that customary international law would prohibit the international community, states, and groups of states from dismissing the culpability specifically of an individual who has violated human rights or committed certain "core universal crimes"). The fact that the crimes punished under the Rome Statute fall under both of these categories makes his discussion on the obligations of non-party States in general especially applicable to non-parties to the Rome Statute. *Id.*

83. *See* FÉDÉRATION, *supra* note 69, at 6-11 (discussing the different U.S. legislation that interferes with the ability of signatories to comply with treaty obligations).

D. STATUS OF FORCES AGREEMENTS AND ARTICLE 98(2) OF THE ROME STATUTE

Questions have arisen regarding the nature of the “international agreements” contemplated by Article 98(2) of the Rome Statute.⁸⁴ Given the vastly different interpretations by both sides to the issue, international law allows recourse to the *travaux préparatoires* behind the formulation of this contentious provision; indeed, an interpretation that allows a non-state party to the Rome Statute to subvert the object and purpose of the Rome Statute would be manifestly absurd and unreasonable, prompting resort to such supplementary means of interpretation.⁸⁵

Preliminarily, a review of the available commentaries will reveal that there is growing support for the contention that the international agreements in Article 98(2) refer to status of forces agreements (“SOFAs”).⁸⁶ These are “international agreements between states that create obligations concerning the jurisdiction over a foreign state’s military or civilian citizen.”⁸⁷ SOFAs were developed in particular to define the legal rights and responsibilities of military forces stationed on foreign soil.⁸⁸ Generally, “the government that sent the troops legally retains criminal jurisdiction over their soldiers and they are

84. See Rome Statute, *supra* note 1, art. 98(2) (stating that the Court cannot request a surrender of an individual that would require a state to act inconsistently with its international obligations).

85. See Vienna Convention, *supra* note 60, art. 32 (allowing recourse to the preparatory work of a treaty when interpretation of the treaty otherwise leaves the meaning unclear or leads to a result that is absurd or unreasonable).

86. See Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 41 (1999) (reiterating that the second paragraph of Article 98 concerns SOFAs); see also M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 86 (2001) (noting that the language of Article 98 applies to SOFAs); Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 471 (2000) (explaining that Article 98(2) refers to host states' obligations under SOFAs).

87. Erik Rosenfeld, *Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute*, 2 WASH. U. GLOBAL STUD. L. REV. 273, 280 (2003).

88. See *id.* (emphasizing that SOFAs were created to respond to the problem of how customary international law would apply to criminal jurisdiction over visiting forces).

subject to the jurisdiction of the host government.”⁸⁹ In situations wherein there is, technically, no host state to negotiate with, states have had occasion to enter into peacekeeping SOFAs with the United Nations itself; for example, the peacekeeping forces in East Timor and Kosovo have operated under such agreements.⁹⁰

However, some authorities espouse an even narrower interpretation of the coverage of Article 98(2). Various articles have cited as authority some commentaries by participants in the U.N. Diplomatic Conference of Plenipotentiaries that state that only SOFAs existing at the time of the signing or ratification of the Rome Statute enjoy the status of international agreements as contemplated by Article 98(2).⁹¹ Some assert that the idea behind Article 98(2) was to solve legal conflicts that might arise because of SOFAs that were already in place, and that “Article 98(2) was not designed to create an incentive for (future) States Parties to conclude [SOFAs] which amount to an obstacle to the execution of requests for cooperation issued by the [ICC].”⁹²

Unfortunately, the only thing all these commentators have succeeded in establishing is that there is no consensus regarding the original intent behind this provision. It does not appear that a clear majority of participating states in the U.N. Diplomatic Conference of

89. Lee, *supra* note 47, at 760.

90. See Frederick Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT’L L. 103, 108 (2002) (asserting that the sending States retain the authority to waive the guarantees of immunity in the agreements for Kosovo and East Timor).

91. See Kimberly Prost & Angelika Schlunck, *Article 98*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1131 (Otto Triffterer ed., 1999) (discussing the protections arising from Article 98 and agreements such as SOFAs); see also Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 AM. J. INT’L L. 773, 786 n. 36 (2000) (stating that it was at the initiative of the United States that parties added Article 98(2) to the Rome Statute); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT’L L. 93, 103 (1999) (noting that the conference bureau’s interpretation of Article 98 requires respect for new and existing SOFAs).

92. Hans-Peter Kaul & Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. INT’L HUM. L. 143, 165 (1999).

Plenipotentiaries favored limiting the notion of international agreements in Article 98(2) to SOFAs, much less to SOFAs existing at the time of signing or ratification.⁹³

Still others contend that even the term “sending state” used in Article 98(2) is a term of art used primarily in SOFAs.⁹⁴ These commentators claim that the use of this allegedly technical term leads to no other conclusion except that Article 98(2) refers exclusively to SOFAs.⁹⁵ This contention is unconvincing.

Individuals must remember that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁹⁶ Thus, individuals cannot help but take note of the fact that the term “sending state” does not appear to be exclusively used in the formulation of SOFAs.

Even a cursory review of our basic texts in public international law will reveal that the term appears in other areas thereof, most notably in the field of diplomatic and consular relations.⁹⁷ What the

93. See Crawford, *supra* note 45, at 18, (indicating that there is no evidence suggesting that Article 98(2) is “limited to agreements that existed at the time of signing (or ratification) of the Rome Statute”); see also Hall, *supra* note 91, at 786 n.36 (explaining that Article 98(2) of the Statute was meant to apply to SOFAs and other agreements); Kaul & Kress, *supra* note 92, at 165 (pointing out that the idea behind Article 98(2) differs from its actual use, because it was not meant to encourage the creation of further SOFAs).

94. See Legal Service of the EU Commission, *Effective Functioning of the International Criminal Court (ICC) Undermined by Bilateral Immunity Agreements as Proposed by the U.S./ Internal Opinion of the Legal Service of the EU Commission* 158 (2002) [hereinafter EU Commission] (noting that the term “sending State” is not used nor defined anywhere else in the Statute, and it is a technical term taken from SOFAs), available at <http://www.amicc.org/docs/EUILegalServiceinternal.pdf> (last visited Mar. 19, 2004).

95. See Amnesty Int'l, *supra* note 49, at 7 (explaining that “sending State” appears almost exclusively in SOFAs); see also EU Commission, *supra* note 94, at 158 (concluding that, because Article 98(2) has a very specific definition, the term was only meant to apply to SOFAs).

96. Vienna Convention, *supra* note 60, art. 31(1).

97. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 3, 500 U.N.T.S. 95, 96 (using the term “sending State” within the treaty, without mention of SOFAs); see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 352-67 (5th ed. 1998) (illustrating that the term “sending State” appears in the

ordinary meaning of this wording *does* suggest is that a person's presence on the requested state's territory must originate from a sending state's act.⁹⁸ Thus, it is the circumstances leading to a person's presence on the territory of the requested state party, and not the status of the person or the activity he or she performs in said state, which is determinative of whether or not said person falls within the exception provided in Article 98(2).⁹⁹ The Council of the European Union espoused substantially the same view in the Guiding Principles annexed to its Conclusions on the ICC, the pertinent portion of which reads, "[a]ny solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute."¹⁰⁰ In doing so, the Council substantially adopted the same view as previously mentioned.

E. RULE 195(2) OF THE RULES OF PROCEDURE AND EVIDENCE OF THE ROME STATUTE

Rule 195(2) of the Rules of Procedure and Evidence of the Rome Statute provides:

[T]he Court may not proceed with a request for the surrender of a person without the consent of a sending state if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending state is required prior to the surrender of a person of that State to the Court.¹⁰¹

Former U.S. Ambassador-at-Large for War Crimes, David Scheffer, has maintained that a state is able to enter into a non-

Vienna Convention).

98. See Crawford, *supra* note 45, at 20 (commenting on how the term "sending State" limits the scope of the agreements, in that the person must have been "sent" by the state, and that thus the circumstances surrounding his or her presence in the territory are important).

99. See *id.* (noting that these people typically have a certain status and perform a specific activity, for example, a government minister, an ambassador, or a soldier).

100. *Draft Conclusions*, *supra* note 55.

101. Ruth Wedgwood, *The United States and the International Criminal Court: the Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 207 n.57 (2001) (citing the *Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2001/1/Add.1 (Nov. 2, 2000)).

surrender agreement directly with the ICC.¹⁰² Scheffer asserts that this rule, the adoption of which the United States successfully negotiated at the session of the Preparatory Commission for the International Criminal Court (“Preparatory Commission”) on June 29, 2000, gives rise to the possibility of entering into an accord with the ICC itself which would ensure that the United States would not surrender any U.S. citizen.¹⁰³

However, it was precisely this interpretation that an overwhelming majority of states participating in the Preparatory Commission specifically objected to.¹⁰⁴ They “agreed that Article 98(2) was intended to address a limited scenario in which a sending State has an agreement with a requested State that requires the prior consent of the sending State before its citizen is surrendered to the ICC.”¹⁰⁵ In reaching a consensus regarding the adoption of the text of Rule 195(2), the German delegation insisted that the following proviso be included in the Proceedings of the Preparatory Commission: “[i]t is generally understood that Rule 195(2) should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State.”¹⁰⁶

After the parties reached consensus on this compromise, Professor Roger Clark of the Samoan delegation pointed out that Article 98 was intended to include only agreements between states.¹⁰⁷ He stressed this point when he stated that “I am comforted by the

102. See Scheffer, *supra* note 54, at 18 (explaining that Rule 195(2) offers the possibility for non-surrender agreements directly with the Court).

103. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 90, 96-97 (Nov. 2001/Feb. 2002) (noting that the United States delegation's proposal regarding Rule 195(2) affords such immunity, consistent with international law).

104. See Hall, *supra* note 91, at 786 (commenting that many delegations were unhappy with the proposed interpretation).

105. Chimene Keitner, Comment, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)*, 6 UCLA J. INT'L L. & FOREIGN AFF. 215, 251 (2001).

106. Hall, *supra* note 91, at 786.

107. See Keitner, *supra* note 105, at 255-56 (emphasizing that Clark's assertion that Article 98(2) refers only to SOFAs is imperative, and that this obligation cannot be changed except by official amendment).

proviso, which provides that this rule is not in any way—two words—requiring or calling for, and does not authorize, permit, or empower a wide range of such agreements to be decided on another day.”¹⁰⁸

In the end, consistency with the principles of the Rome Statute remains mandatory, so that Article 98(2) does not and cannot limit the ICC’s jurisdiction beyond what the parties envisaged and agreed to in Rome.¹⁰⁹ Hence, despite the unfortunate wording of Rule 195(2), there is sufficient authority to state that the terms “international agreement” used in Article 98(2) refer to agreements entered into between states, and cannot include agreements entered into between or including international organizations.¹¹⁰

F. VOLUNTARY SURRENDER OR TRANSFER AND BILATERAL NON-SURRENDER AGREEMENTS

The typical bilateral non-surrender agreement prohibits a contracting state party not only from surrendering, but also from *transferring*, by any means, any current or former government officials, employees (including contractors), military personnel, or nationals of the other contracting state party to any international tribunal for any purpose, unless the U.N. Security Council established the tribunal.¹¹¹ Hence, a bilateral non-surrender agreement could even preclude a non-party national from surrendering voluntarily to the ICC, an unprecedented restriction on the possibility of self-surrender.¹¹² Evidently, a state party to the Rome Statute that enters into a bilateral non-surrender agreement

108. *Id.*

109. *See id.* at 253 (commenting that adherence to the principles of the Rome Statute remains mandatory, and that documentation and clarification of the circumstances of the adoptive process is important to forestall future confusion as to the imperatives of the Statute).

110. *See* EU Commission, *supra* note 94, at 159 (noting not only that Article 98(2) applies exclusively to SOFAs, but, more narrowly, only to SOFAs between parties to the Statute).

111. *See supra* Part III (explaining that such bilateral agreements protect, for example, U.S. citizens from foreign courts when in other countries).

112. *See* Keitner, *supra* note 105, at 254 (commenting on the obligations that may arise from bilateral or multilateral agreements).

would thus undoubtedly violate its general obligation to cooperate fully with the ICC in its investigation and prosecution of crimes within the jurisdiction of the ICC as codified in Article 86 of the Rome Statute. Furthermore, state parties and non-parties to the Rome Statute that enter into bilateral non-surrender agreements would contravene the declaration of the U.N. General Assembly regarding international cooperation in the halting and prevention of war crimes as well as crimes against humanity.¹¹³

Access to witnesses would also suffer, because even if a person is willing to assist the ICC in the fair determination of guilt and innocence, their own government would prohibit them from exercising their right to testify in the cause of international justice.¹¹⁴ Thus, a state party to the Rome Statute that enters into a bilateral non-surrender agreement would also be violating its specific duty to facilitate the voluntary appearance of persons as witnesses or experts before the ICC, as provided for in Article 93(1)(e) of the Rome Statute.¹¹⁵ Of course, it is difficult to overstate the importance of cooperation among state parties to the Rome Statute, specifically in the area of acquiring jurisdiction over indicted persons, judging from the experience of previously established international criminal tribunals.¹¹⁶ The failure to make arrests undermined the credibility of

113. See Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1, 4-5 (2000) (discussing the U.N. General Assembly's conclusion that states shall cooperate with each other and take all measures necessary for this purpose).

114. See Amnesty Int'l, *supra* note 49, at 23 (discussing the U.S.' ability to prevent persons from appearing as witnesses before the ICC, even if the person consents to assist the Court).

115. See Rome Statute, *supra* note 1, art. 93(1)(e) (recognizing the facilitation of the voluntary appearance of witnesses before the Court as a form of cooperation under the Rome Statute).

116. See Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 927, 944, 978 (2000) (discussing the difficulties in establishing international judicial systems that effectuate real change without a self-contained enforcement mechanism, and noting that the ICC must rely on cooperation by the international community as a result of its lack of any such provision for direct enforcement). *But see* Marieke L. Wierda, *What Lessons can be Learned from the Ad Hoc Criminal Tribunals?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 13, 17 (2002) (arguing that the development of international systems capable of addressing mass crime are viable and are taking root).

the ICTY, while the superior credibility of the ICTR is due to its ability to gain jurisdiction over persons it indicts.¹¹⁷

IV. ALTERNATIVES TO BILATERAL NON-SURRENDER AGREEMENTS

Having one's nationals hauled before the ICC is undoubtedly a diplomatically embarrassing and politically-damaging prospect for any state. Therefore, the desire of states to obtain exemption, if not outright immunity, for their nationals from the jurisdiction of the ICC is understandable. This is so even if the international community perceives such moves as arrogant and outright unsportsmanlike. However, one hopes that any state that finds itself in this situation will opt instead to utilize legal measures that are palatable to the international community.¹¹⁸

A. THE U.N. CHARTER

In the absence of specific agreements or grants, parties often cite the U.N. Charter as a basis for granting fundamental immunities to all U.N. personnel.¹¹⁹ It provides that representatives of the U.N. member states and U.N. officials shall enjoy the privileges and immunities that are necessary for the independent exercise of their

117. See Scharf, *supra* note 116, at 977 (commenting that NATO and the ICTY's failure to arrest Bosnian war criminals has compromised the credibility of those organizations); see also James Blount Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 445 (2001) (analyzing the factors that determine the effectiveness of international criminal tribunals, and specifically discussing the conviction success of the ICTR and the ICTY).

118. See, e.g., U.N. CHARTER arts. 92-96 (establishing various provisions which treat the International Court of Justice, as well as other tribunals, as the principal judicial organ of the United Nations, which may be used to solve differences between members).

119. See Rawski, *supra* note 90, at 106-07 (noting that the U.N. Charter affords certain immunities, and that they are intended to foster the efficient operations of an organization); see also Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 127 (1996) (describing how immunities can create a conflict of interests between the United Nations and receiving states, and noting how Article 105 of the U.N. Charter balances the two).

U.N.-connected functions.¹²⁰ Article 105 outlines what commentators have come to refer to as the principle of functional necessity of immunity and privileges.¹²¹ The grant of protection under this principle depends upon whether or not a particular act is “necessary for the independent exercise of their functions.”¹²²

These provisions apply uncontrovertibly to troops working under the command and control of the United Nations in what observers often refer to as a “blue-helmet” operation.¹²³ These protections extend specifically to U.N. troops that are part of either a non-belligerent consensual force or non-belligerent force acting under the coercive authority of the Security Council.¹²⁴ Additionally, the protection of Article 105 of the U.N. Charter encompass forces operating under U.N. authority by relating the same to the statutory duty of states to accept and carry out the decisions of the Security Council,¹²⁵ as well as the implied power of the United Nations to provide its agents with adequate protection.

120. See U.N. CHARTER art. 105, para. 2 (declaring that representatives of member states enjoy immunity to the extent necessary to perform their duties within the organization).

121. See Sharp, *supra* note 119, at 128 (discussing the Privileges and Immunities Convention and positing that it enjoys international acceptance as a grant of absolute immunity where U.N. property, funds, and assets are concerned); see also Rawski, *supra* note 90, at 111 (noting the limited immunity of U.N. civilian staff, and mentioning the ability of the organization to also protect locally-recruited staff).

122. See Rawski, *supra* note 90, at 111-12 (commenting on the interpretation of whether a function is “official,” and noting how a narrow construction provides more limited protection).

123. See *id.* at 110 (recognizing that blue-helmet soldiers receive absolute immunity because their duties are *de facto* official).

124. See Sharp, *supra* note 119, at 127, 136-38 (emphasizing that all U.N. member nations must accept that personnel on blue-helmet operations enjoy these privileges and immunities because such operations are necessary to fulfill the mandate of the Security Council).

125. See U.N. CHARTER art. 25 (providing that the decisions of the Security Council are binding on all members, and granting privileges to personnel acting under this authority).

B. THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS.

In the past, the U.N. Secretary-General recognized the status of personnel operating under a U.N. mandate as “experts on mission” for the United Nations, as defined by the Convention on the Privileges and Immunities of the United Nations (“Privileges and Immunities Convention”) adopted by the General Assembly on February 13, 1946.¹²⁶ Article VI, section 22 of the Privileges and Immunities Convention lays out the scope of the protection afforded these individuals.

Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall enjoy:

(a) immunity from personal arrest or detention and from seizure of their personal baggage;

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations¹²⁷

Moreover, these provisions not only shield personnel classified as experts on mission from the jurisdiction of certain courts, but accord actual *immunity* for acts done pursuant to their duty.¹²⁸ However, that grant of immunity depends upon whether one interprets the

126. See Sharp, *supra* note 119, at 129 (discussing the Convention and its establishment of different levels of privileges depending on the role of the party operating under U.N. authority).

127. Convention on the Privileges and Immunities of the United Nations, art. VI (Feb. 13, 1946) [hereinafter Privileges and Immunities Convention], <http://www.yale.edu/lawweb/avalon/decade/decad035.htm> (last visited Mar. 18, 2004).

128. See Sharp, *supra* note 119, at 129-30 (noting the total immunity granted to experts while in the course of their official duties).

provisions to grant immunity for all “official” activities, or for all activities that are both “official” and “necessary.”¹²⁹

Of course, because the Secretary-General may only confer this status with a positive act, whether or not there exists a grant of protection depends upon a case-by-case basis. For example, the Secretary-General accorded the status of experts to U.S. aircrews flying missions in support of the United Nations Protective Force (“UNPF”) in the former Yugoslavia and the technical experts providing integrated logistics support to the Rapid Reaction Force of the UNPF.¹³⁰ It is significant to note that the Privileges and Immunities Convention provides that the Secretary-General has the right and duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice.¹³¹ However, the Secretary-General may only waive such immunity if it will not prejudice the interests of the United Nations.¹³²

C. RESOLUTIONS OF THE U.N. SECURITY COUNCIL

Invoking its authority under Chapter VII of the U.N. Charter to deal with threats to peace, breaches of the peace, and acts of aggression, the U.N. Security Council has issued resolutions leading to immunity from prosecution, in varying degrees, for U.N. personnel. One recent example of this is Resolution 1487 (2003), involving the status of U.N. personnel conducting operations related to the entry into force of the Rome Statute. The Resolution provides:

129. See Rawski, *supra* note 90, at 111 (arguing that this interpretive question creates a circumstance where prosecution is possible only if the Secretary-General waives the privilege, which amounts to a default to absolute immunity, thereby undermining the concept of functional necessity).

130. See Sharp, *supra* note 119, at 129 (noting the role of the Secretary-General in conferring immunity from judicial proceedings on U.N. personnel).

131. See Privileges and Immunities Convention, *supra* note 127, arts. V-VI, §§ 20 & 23 (stating that the Secretary-General has the “right and duty” to waive prosecutorial immunity as it applies to U.N. officials where such a grant would obstruct the course of justice).

132. See *id.* (explaining that privileges and immunities of U.N. officials may be waived by the Secretary-General when they impede the pursuit of justice, but only provided such a waiver would not have a prejudicial effect on U.N. interests).

The Security Council,

1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary¹³³

Thus, the Security Council exercised its exclusive power in requesting that the ICC defer investigation or prosecution for a period of twelve months of any case arising under the Rome Statute for the benefit of officials and personnel of contributing states not parties to the Rome Statute. Many nations and organizations disapproved of this action.¹³⁴ The Security Council renewed this

133. S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg., at 1, U.N. Doc. S/RES/1422 (2002).

134. See Letter from Kofi Annan, Secretary-General, United Nations, to Colin Powell, Secretary of State, United States (July 3, 2002) (expressing concern that the United States' refusal to join the ICC will undermine the Rome Statute), available at http://www.amicc.org/docs/SG_to_SS.pdf (last visited Mar. 20, 2004); see also Letter from the Ambassadors of New Zealand, South Africa, Brazil and Canada, to H.E. Sir Jeremy Greenstock, President of the U.N. Security Council (July 12, 2002), in relation to the Draft Resolution S/2002/747 (arguing that allowing peace-keepers from non-signatory States to commit crimes without fear of punishment under the Rome Statute undermines the ICC's purpose), available at http://www.amicc.org/docs/Joint_letter_to_SC_July_12.pdf (last visited Mar. 20, 2004); U.N. Commission on Human Rights, *Draft Report of the Sub-Commission on the Promotion and Protection of Human Rights*, 54th Sess., 18th mtg., at 8, U.N. Doc. E/CN.4/Sub.2/2002/L.11 (2002) (noting the Human Rights Committee's disapproval of the immunity granted to parties not signatories to the Rome Statute), available at <http://www.amicc.org/docs/SubComm.pdf> (last visited Mar. 20, 2004); Parliamentary Assembly of the Council of Europe, *Declaration By the Presidency on Behalf of the European Union on the Position of the U.S. Towards the International Criminal Court* (May 13, 2002) (conveying the European Union's disappointment with the United States' decision not to ratify the Rome Statute), available at http://www.amicc.org/docs/EUdec5_13_02.pdf (last visited Mar. 20, 2004); FÉDÉRATION, *supra* note 69 (rejecting America's refusal to submit to the jurisdiction of the ICC, and attacking American policy).

request on July 1, 2003, with Resolution 1487 (2003).¹³⁵

The Security Council may delegate the power to modify the status of personnel working under U.N.-established or authorized operations to the Special Representative of the Secretary-General.¹³⁶ For example, the United Nations Interim Administration Mission in Kosovo (“UNMIK”), which issued UNMIK Regulation No. 2000/47, outlined the privileges granted for the U.N. action in Kosovo.¹³⁷ The regulation provides:

2.3 Locally recruited KFOR personnel shall be immune from legal process in respect of words spoken or written and acts performed by them in carrying out tasks exclusively related to their services to KFOR.

2.4 KFOR personnel other than those covered under section 2.3 above shall be: immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending states; and immune from any form of arrest or detention other than by persons acting on behalf of their respective sending states. If erroneously detained, they shall be immediately turned over to KFOR authorities.¹³⁸

“KFOR” refers to the specially-constituted force composed of the North Atlantic Treaty Organization (“NATO”), its member states, its subsidiary bodies, its military headquarters and national elements/units, and non-NATO contributing countries. In contrast to the type of immunity that personnel classified as experts on mission enjoy, these provisions merely insulate personnel serving with the

135. See S.C. Res. 1487, U.N. SCOR, 58th Sess., 4772d mtg., at 1, U.N. Doc. S/RES/1487 (2003) (recognizing the adoption of the Rome Statute and agreeing not to prosecute non-signatory nations for a twelve-month period).

136. See, e.g., S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999) (requesting the Secretary-General to act through his Special Representative to coordinate an international presence in Kosovo).

137. See Bernard Kouchner, Special Representative to the Secretary-General, *On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo*, UNMIK Reg. No. 2000/47 (2000) (describing the privileges and immunities granted through the Secretary-General’s Special Representative for the U.N. mission to Kosovo), <http://www.unmikonline.org/regulations/2000/reg47-00.htm> (last visited Mar. 20, 2004).

138. *Id.* § 2.3-2.4.

KFOR from the jurisdiction of courts in Kosovo;¹³⁹ exclusive jurisdiction over these individuals continues to exist in their respective sending states, much like under status of forces agreements. UNMIK Regulation No. 2000/47 also vests in the Secretary-General the right and duty to waive immunity to UNMIK and KFOR personnel in terms identical to those found in the Privileges and Immunities Convention.¹⁴⁰

D. STATUS OF FORCES AGREEMENTS

1. SOFAs in General

“If SOFAs are designed to guarantee immunity from prosecution for the most serious international crimes, then they may be deemed invalid as violating jus cogens norms that prohibit war crimes, genocide, and crimes against humanity.”¹⁴¹ A state party to the Rome Statute that later enters into an agreement that has or may have the effect of granting immunity to persons normally within the jurisdiction of the ICC from prosecution in either international or domestic fora contradicts its obligation not to deprive the Rome Statute of its object and purpose. Such an agreement would not be compatible with said state’s obligations under the Rome Statute, both to other state parties and to the ICC.¹⁴² Also, said agreement may be incompatible with said state’s general duty under international law and specific treaties to investigate and, if warranted, to prosecute international crimes.¹⁴³

139. *See id.* § 2.4 (granting immunity to personnel only before Kosovo courts, and stating that such personnel shall be subject to their sending state’s jurisdiction).

140. *See id.* § 6.1 (recalling that the Secretary-General has the right and duty to waive immunity where doing so would promote justice and would not prejudice the UNMIK’s interest).

141. Keitner, *supra* note 105, at 236-37.

142. *See Crawford, supra* note 45, at 22 (explaining that the Rome Statute’s provision that parties should not transfer a person who commits an ICC crime to a third state unless there exist guarantees that the person will undergo investigation and prosecution under the third state’s criminal jurisdiction).

143. *See id.* (suggesting that, in order to comply with international law, any new agreement should require that the sending state effectively investigate and, if necessary, prosecute the person); *see also Paust, supra* note 113, at 14 (stating that

However, if SOFAs are designed to protect a state's soldiers from the potentially biased or unfamiliar standards and procedures of a foreign court in the requested state, but not from prosecution and punishment by the sending state, then they would not contravene the object and purpose of the Rome Statute.¹⁴⁴ As long as the sending state fulfills its international obligation to prosecute such crimes itself, then the Rome Statute's noble goal of putting an end to the regime of impunity that protects the perpetrators of all the most serious crimes of concern to the international community as a whole would stand.¹⁴⁵

Remember also that SOFAs are of little use to troops in the custody of groups not party to said agreements. This is a situation wherein the ICC would be in a unique position to be of aid to all parties concerned.¹⁴⁶ Since the ICC is an independent international tribunal, combatants who have in their custody peace-keeping troops suspected of committing any of the crimes punished under the Rome Statute can opt to surrender the captured peace-keepers to the ICC, rather than attempt to prosecute the peace-keepers themselves.¹⁴⁷

2. U.N. Peace-Keeping SOFAs

In 1990, the U.N. General Assembly adopted a Model Status of Forces Agreement ("U.N. Model SOFA") for peace-keeping operations.¹⁴⁸ The drafters intended the U.N. Model SOFA to be the

international law does not allow the immunity of people accused of a crime against customary international law).

144. See Keitner, *supra* note 105, at 236 (asserting that it would be incorrect to interpret this provision to avoid surrendering a person to the Court "because of any obligations other than those existing between the sending State and the requested State").

145. *See id.* at 237 (noting that SOFAs will not protect soldiers from prosecution and punishment by the sending state).

146. *See Lee, supra* note 47, at 761 (stating that the ICC is an alternative mechanism to protect peace-keepers even if the entity that is detaining them is not an ICC party).

147. *See id.* at 760 (asserting that surrendering peace-keepers to the Court is one way for non-parties to the ICC, rebel groups, for example, to avoid potentially damaging political consequences).

148. *See Comprehensive Review of the Whole Question of Peace-keeping Operations in All their Aspects - Model Status-of-Forces Agreement for Peace-*

basis for drafting individual SOFAs between the United Nations and those states in which the U.N. conducts peace-keeping operations.¹⁴⁹ A U.N. peace-keeping SOFA patterned after the U.N. Model SOFA provides all-encompassing protection for the participants of a U.N. peace-keeping operation.¹⁵⁰ First of all, the U.N. Model SOFA treats the Special Representative, the commander of the military component, the high-ranking members of their staff, and the head of the U.N. civilian police as diplomatic envoys.¹⁵¹ On the other hand, the model considers military observers and members of the U.N. civilian police to be experts on mission, as the Convention on the Privileges and Immunities provides.¹⁵² Most relevant to the topic at hand, however, is the following provision under paragraph 47(b) covering military personnel: “[M]ilitary members of the military component of the United Nations peace-keeping mission shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offenses which may be committed by them in [host country or territory].”¹⁵³

However, the significance of the U.N. Model SOFA has transcended its humble beginnings as a mere tool to aid in the drafting of individual SOFAs between the United Nations and states in which the U.N. conducts peace-keeping operations. An example of a specific operation not governed by a signed agreement was the situation in Croatia.¹⁵⁴ In dealing with the matter, the Office of the

keeping Operations: Report of the Secretary-General, U.N. GAOR, 45th Sess., Agenda Item 76, U.N. Doc. A/45/594 (1990) (providing that military members of U.N. peace-keeping operations are subject to the jurisdiction of their respective states).

149. *See id.* ¶ 1 (stating that the model SOFA may be modified as agreed upon by the parties).

150. *See id.* ¶ 24 (granting the broadest privileges and immunities to high-ranking members of U.N. peace-keeping missions).

151. *See id.* (providing that sections 19 and 27 of the Convention specify this status).

152. *See id.* ¶ 26 (stating that Articles V and VII of the Convention confer these privileges and immunities).

153. *Id.* ¶ 47(b).

154. *See* United Nations Peacekeeping Operations, *Croatia – UNTAES* (providing background information on the U.N. peace-keeping operations in Croatia), at http://www.un.org/Depts/DPKO/Missions/untaes_b.htm (last visited Mar. 16, 2004).

Legal Adviser to the United Nations concluded that customary practices and principles applicable to U.N. peace-keeping or similar operations as codified in the U.N. Model SOFA governed the status of the U.N. forces and operations in Croatia.¹⁵⁵ The two-tiered immunity scheme provided that military personnel operating under the U.N. Model SOFA, or a U.N. peace-keeping SOFA based thereon, were imbued with the character of customary international law.¹⁵⁶

Clearly, entering into a U.N. peace-keeping SOFA with a receiving state in pursuance of a peace-keeping mission would actually provide more protection for the troops and personnel of participating states than those personnel would enjoy under a bilateral non-surrender agreement.¹⁵⁷ In the case of a U.N. peace-keeping SOFA, the sending state's duties do not end with the barring of surrender to an international tribunal, as the SOFA would vest all jurisdiction over the erring personnel solely in the sending state. As a result, the ICC would be unable to request the surrender of an individual if a U.N. peace-keeping SOFA governed his or her activities.¹⁵⁸

Some commentators have even opined that "the ICC creates greater protections against surrender and prosecution during peace-keeping operations than current ad hoc tribunals."¹⁵⁹ Personnel participating in peace-keeping missions "will be free from ICC prosecution so long as their nation of origin investigates and properly

155. See Sharp, *supra* note 119, at 118 (maintaining that the Secretary-General restated this position in 1991 in the Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-keeping Operations, explaining that before the conclusion of any particular SOFA, the United Nations would first apply the customary principles of the U.N. Model SOFA).

156. See *id.* (stating that the terms of the Model SOFA extend to operations established and conducted under U.N. authority).

157. See Rosenfeld, *supra* note 87, at 290 (suggesting that the U.N. Model SOFA provides greater protection than waivers or assignments of jurisdiction other SOFAs afford).

158. See *id.* (asserting that peace-keepers will be free from ICC prosecution only provided their nation of origin investigates and properly prosecutes any potential crimes they may have committed).

159. *Id.*

prosecutes any potential crimes they may have committed.”¹⁶⁰ Also, securing immunity for a sending state’s personnel through a U.N. peace-keeping SOFA would go a long way towards dispelling the impression that any one state is getting special treatment for its nationals who participate in international armed conflicts. Since the personnel who would enjoy insulation from the jurisdiction of an international tribunal would be participating in a U.N. peace-keeping operation, as opposed to a unilateral initiative, and would fall under a SOFA based upon the U.N. Model SOFA, the U.N. member states, if not all of the states in the international community, would have implicitly consented to such an arrangement. This would serve as an incentive for state parties to coordinate their overseas military activities with the United Nations and would discourage unilateral initiatives that have often received little or no support from the greater majority of states party to the United Nations.

E. COMPLEMENTARITY AND THE MUNICIPAL PROSECUTION OF CRIMES PUNISHED BY THE ROME STATUTE

Undoubtedly, the most effective device that a state can use to avoid having its nationals tried before the ICC exists within the Rome Statute itself: the Rule of Complementary Jurisdiction. Under Article 17(1) of the Rome Statute, two grounds which would render a case inadmissible before the ICC are that:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.¹⁶¹

Evidently, a state can prevent the ICC from possessing the authority to commence a case against its nationals simply by demonstrating its ability to genuinely prosecute such individuals.¹⁶²

160. *Id.*

161. Rome Statute, *supra* note 1, art. 17(1)(a)-(b).

162. *See id.* (providing, on the contrary, that a case is admissible to the ICC if

Even a state's decision not to prosecute such persons may serve as a bar to prosecution before the ICC, so long as the authorities undertake the investigation yielding such a conclusion in good faith. This is because the investigative and prosecutory jurisdiction of the ICC is "intended as a back-up to the exercise of national criminal jurisdiction over war crimes, genocide, and crimes against humanity."¹⁶³ National laws creating personal, territorial, or universal jurisdiction over the crimes defined by the Rome Statute in turn compel the exercise of national criminal jurisdiction over these same crimes.¹⁶⁴ Thus, the ICC could only request cooperation or surrender of a person if those states also possessing jurisdiction proved that they were unwilling or unable to exercise it.¹⁶⁵ This principle is in line with the United Nations' sense that every state has the right to try its own nationals for war crimes and crimes against humanity.¹⁶⁶

However, before a state can persuasively assert its ability to genuinely investigate and prosecute the crimes punished by the Rome Statute, it must satisfy a vital condition: a state must reengineer its municipal laws to make them compatible with the international cooperative effort to investigate, prosecute, and generally suppress international crimes such as those defined by the Rome Statute.¹⁶⁷ In pursuit of this goal, such a state should criminalize all acts that are considered crimes within the jurisdiction of the ICC.¹⁶⁸ Thus, an act that constitutes a crime as defined by the

the state is unwilling or unable to carry out the investigation or prosecution).

163. Keitner, *supra* note 105, at 228.

164. *See id.* (stating that this approach ensures that international criminals do not "enjoy impunity based on the unavailability of judicial remedies at the national level," and, absent the ability or willingness of state authorities to exercise criminal jurisdiction, that individuals facing prosecution at the hands of the ICC will enjoy an "impartial tribunal with adequate due process guarantees").

165. *See id.* at 237 (suggesting that the complementary jurisdiction of the ICC promotes international criminal accountability).

166. *See* G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, ¶ 2, U.N. Doc. A/8592 (1971) (presupposing that states may prosecute their own nationals by urging states to cooperate in coordinating information to prosecute persons accused of war crimes and crimes against humanity).

167. *See* Mugwanya, *supra* note 76, at 737 (suggesting that states have a duty to respond to human rights violations that amount to commissions of international crimes).

168. *See id.* at 764 (stating that the domestication of international criminal law

Rome Statute should also constitute a crime under a state's municipal law.¹⁶⁹

The duty of states to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, specified acts that constitute war crimes, as defined by the Rome Statute, has long existed in codified form under the four Geneva Conventions of 1949,¹⁷⁰ as well as in the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") of December 9, 1948.¹⁷¹ Furthermore, one recalls that the United Nations confirmed the existence of an overriding duty of states to cooperate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and, most significantly, to take the domestic and international measures necessary for that purpose.¹⁷² Accordingly,

should go "hand in hand with and be buttressed by" international mechanisms).

169. *See id.* at 738 (arguing that states must incorporate the gravamen of all international crimes into their domestic criminal regimes in order to conform with customary international law).

170. *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, ch. 9, art. 49 (asserting that the contracting parties shall enact legislation to provide penal sanctions for those committing grave breaches), <http://www.yale.edu/lawweb/avalon/lawofwar/geneva05.htm> (last visited Mar. 25, 2004); *see also* Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, ch. 8, art. 50 (requesting contracting parties to provide penal sanctions for those committing grave breaches through enacting legislation), <http://www.yale.edu/lawweb/avalon/lawofwar/geneva06.htm> (last visited Mar. 25, 2004); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129 (asking contracting parties to enact any legislation necessary to provide punishment in the form of sanctions for persons committing or ordering to be committed any grave breaches), <http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm> (last visited Mar. 25, 2004); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146 (requiring contracting parties to enact legislation to punish grave breaches such as willful killing, torture, or inhuman treatment), <http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm> (last visited Mar. 25, 2004) [hereinafter, cumulatively, Geneva Conventions].

171. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 5, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

172. *See* G.A. Res. 3074, U.N. GAOR, 28th Sess, Supp. No. 30, at 4, U.N. Doc. A/9326 (1973) (promoting international cooperation in the "detection, arrest,

even if an individual state cannot unilaterally create international crimes, the duty arising from the treaties to which such state is a party, as well as customary international law, require said state to enforce international criminal law. This rule applies with more force to those states that are party to treaties that explicitly provide for the duty to prosecute, punish, or extradite offenders, otherwise known as the principle of *aut dedere aut judicare*.¹⁷³ Thus, the obligation falls to such states to domesticate international criminal law.¹⁷⁴

Commenting on the specific situation of the United States, Scheffer recognizes the workability and desirability of complementarity, stating that:

The complementarity principle requires that the ICC defer to national legal systems that are willing and able to investigate and, if merited, prosecute perpetrators over which they have jurisdiction. The United States should be able to meet this test with respect to U.S. personnel, and thus render inadmissible any relevant case, provided U.S. federal law and the Uniform Code of Military Justice are amended to track thoroughly all of the specific crimes in Articles 5-8 of the ICC Treaty. Without such amendments to U.S. law, arguments could be raised that a gap in U.S. law renders the United States “unable” to investigate and prosecute the specific crime. Many of the concerns about the complementarity regime as it would be applied to the United States are concerns that would be vastly diminished if U.S. law were revised to close the gaps between U.S. law and the ICC Treaty.¹⁷⁵

Further advocating support for the exercise of complementary jurisdiction by the United States, Scheffer illustrates how current U.S. law addresses the acts that constitute crimes under the Rome Statute.

extradition and punishment of persons guilty of war crimes”).

173. See Mugwanya, *supra* note 76, at 705-06 (pointing out the argument that states party to treaties requiring them to prosecute, punish, or extradite offenders have a duty under this maxim of international law to domesticate those same provisions, and that non-parties may still have a duty to prosecute, punish, or extradite perpetrators of certain core universal crimes under customary international law).

174. See *id.* (suggesting also that the “interconnectedness and mutuality between international criminal law and international human rights” provides the most compelling basis for the domestication of international criminal law).

175. Scheffer, *supra* note 103, at 88.

The basic U.S. law on the subject is the Uniform Code of Military Justice.¹⁷⁶ Said law covers several of the most egregious acts that would fall under the category of war crimes.¹⁷⁷ On the other hand, the U.S. federal law only punishes genocide at the hands of U.S. nationals or when committed within the United States.¹⁷⁸ Finally, these provisions do not deal at all squarely with crimes against humanity *per se*; instead, as Scheffer offers, current federal and state legislation punishes only some of the underlying acts or conduct that would constitute crimes against humanity under the Rome Statute.¹⁷⁹ Thus, a cursory review of U.S. law already reveals significant gaps in providing for the investigation, prosecution, and punishment of the crimes that are within the jurisdiction of the ICC.

Additionally, the Rome Statute expressly provides that the crimes within the jurisdiction of the ICC “shall not be subject to any statute of limitations.”¹⁸⁰ Again, as Scheffer recognizes, statutes of limitations under the federal criminal code and the Uniform Code of Military Justice could bring the ICC to conclude that investigation is necessary merely because the U.S. statute of limitations for prosecution of a certain crime has expired. Thus, he recommends their revision to make them more reflective of the reality of Article 29 of the Rome Statute.¹⁸¹

176. Uniform Code of Military Justice, 10 U.S.C.A. §§ 801-940 (2004) (assigning particularized treatment to military personnel as specified by Congress).

177. *See id.* §§ 918-20 (prohibiting murder, manslaughter, and rape).

178. *See* Scheffer, *supra* note 54, at 16 (stating that applicable portions of federal law in the United States extend no further than to U.S. nationals, and do not explicitly address crimes against humanity or the crime of genocide).

179. *See id.* (explaining that federal and state statutes punish crimes such as torture, rape, kidnapping, and assaults, which can be classified as constituting crimes against humanity, but pointing out that no comprehensive substantive criminal proscriptions analogous to the provisions of the Rome State exist at domestic U.S. law).

180. *See* Rome Statute, *supra* note 1, art. 29 (noting the non-applicability of any statute of limitations to any crime that falls under the sweep of the Rome Statute).

181. *See* Scheffer, *supra* note 54, at 17 (positing that the existence of statutes of limitations in certain federal statutes and in the Uniform Code of Military Justice could invite the ICC to investigate crimes allegedly committed by U.S. nationals, and recommending revision of the codes so that the ICC does not begin an investigation merely because the U.S. statute of limitations may have run).

In sum, Scheffer submits that the federal criminal code and the Uniform Code of Military Justice are outdated and will deprive the United States of its “first line of defense” against ICC jurisdiction, and that consensus can be reached regarding the need to amend them.¹⁸² Similarly, once the United States amends its legislation, providing for jurisdiction over all of these crimes, the principle of complementarity will require that the ICC stop short of requesting the surrender of suspected American criminals where the United States thoroughly investigates and, where appropriate, prosecutes them.¹⁸³ The recommended measures are characteristic of the kind of concrete response that a state should develop in order to fully utilize the protection afforded by the exercise of complementary jurisdiction with respect to the crimes punished by the Rome Statute.

V. RECOMMENDATIONS

A. THE SUNSET CLAUSE

Given the current state of affairs, any country that has entered into a bilateral non-surrender agreement and that is truly interested in eradicating any doubts with regard to its good faith intent to comply with its obligations under both customary international law in general, and the Rome Statute in particular, has four options. The first and admittedly most obvious option would be for a government to simply wait out the natural life of the bilateral non-surrender agreement and not renew it, or simply exercise any termination clause that their bilateral non-surrender agreement may feature. This option would, of course, be available only if their bilateral non-surrender agreements had appropriately worded termination clauses. The European Union Council has even prescribed the inclusion of these “sunset clauses” to all of its member states that are considering

182. *See id.* at 10, 15 (recognizing that, according to the principle of complementarity, amending statutes of limitation under the federal criminal code and the Uniform Code of Military Justice would ensure that it will fall to U.S. courts, and not the ICC, to try crimes within the scope of the Rome Statute).

183. *See Hall, supra* note 91, at 788 (arguing that the current efforts of the U.S. Congress and the Executive to seek exemptions for U.S. nationals for committing “genocide, crimes against humanity, or war crimes on the territory of a State party” ignore the principle of complementarity, as well as safeguards inserted in the Rome Statute).

entering into bilateral non-surrender agreements with the United States.¹⁸⁴

The Surrender Agreement that the United States and the Philippines concluded, for example, is to remain in force for one year after the date on which one contracting party notifies the other of its intent to terminate the Agreement.¹⁸⁵ Remember that the Philippines and the United States entered into this Agreement through an exchange of diplomatic notes; neither the Philippine Senate nor the U.S. Senate had any hand in it.¹⁸⁶ There was neither concurrence through a vote among the senators nor was there a resolution in support of the bilateral non-surrender agreement. If the Philippine government insists that the United States did not pressure it into signing the bilateral non-surrender agreement, then non-renewal of the bilateral non-surrender agreement, less than a year hence, could sufficiently convince most people.¹⁸⁷

B. DISPUTE SETTLEMENT BY THE INTERNATIONAL CRIMINAL COURT

Secondly, if a government sincerely wishes to ensure that its acts are compatible with the Rome Statute, it can seek a definitive judicial determination by the ICC.¹⁸⁸ Article 119 of the Rome Statute

184. See *Draft Conclusions*, *supra* note 55 (affirming that the European Union is firmly committed to the establishment and effective functioning of the ICC, and providing guidelines for E.U. member states to consider when entering into a bilateral non-surrender agreement with the United States).

185. See *Surrender Agreement*, *supra* note 35 (providing that the agreement's provisions apply to any act or allegation arising before the agreement's termination).

186. See *3 Solons Contest RP-U.S. Pact*, MANILA STANDARD, Sept. 12, 2003, 2003 WL 71294351 (alleging that some Filipino leaders felt the execution of the Philippine-U.S. bilateral non-surrender agreement was a "hush-hush" affair).

187. See Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Colin Powell, Secretary of State, United States (Dec. 9, 2003) (maintaining that many countries signed bilateral non-surrender agreements with the United States as a result of "unbearable" U.S. pressure, including threats of cuts in military aid as well as other sanctions), <http://www.hrw.org/press/2003/12/us120903-ltr.htm> (last visited Mar. 21, 2003).

188. See *Amnesty Int'l*, *supra* note 49, at 16 (stating that it is up to the ICC, an independent international body, and not the individual states, to determine how much legal weight to afford to U.S. bilateral non-surrender agreements).

expressly authorizes this course of action: “any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.”¹⁸⁹ The government can, in this situation, submit the bilateral non-surrender agreement itself to the ICC, which could then exercise its prerogative to scrutinize the same. Whether a bilateral non-surrender agreement would preclude the ICC from requesting the surrender of an individual amounts to a dispute concerning the judicial function of the ICC; any dispute concerning the exercise of this particular judicial function of the ICC falls to the ICC itself.¹⁹⁰ This principle applies whether the dispute arises when the ICC contemplates a request for surrender or after making a request.¹⁹¹

C. DISPUTE SETTLEMENT BY THE ASSEMBLY OF STATES PARTIES

All disputes that do not involve ICC jurisdiction come under the following provision of the Rome Statute:

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.¹⁹²

There is authority stating that the controversy that revolves around the interpretation or application of Article 98(2) to bilateral non-surrender agreements may not be within the ICC’s decisional competence.¹⁹³ Since the dispute would not relate to whether or not

189. See Rome Statute, *supra* note 1, art. 119 (outlining the method of dispute settlement under the Rome Statute).

190. See Crawford, *supra* note 45, at 24 (describing the ICC’s jurisdiction over a case for the surrender of an individual under Article 89(1) of the Rome Statute).

191. See *id.* at 26-27 (summarizing the instances where such judicial review might occur and subsequent actions of the ICC).

192. Rome Statute, *supra* note 1, art. 119(2).

193. See Crawford, *supra* note 45, at 27 (contemplating a situation where the ICC would not have jurisdiction and suggesting that this might occur where the issue itself is whether the conclusion of a bilateral non-surrender agreement violates the Rome Statute).

the ICC was obliged to respect the agreements, it would not involve the judicial functions of the ICC.

Instead, one could frame the controversy in such a way that the issue would be whether or not the conclusion or maintenance of a bilateral non-surrender agreement by a state party is contrary to the Rome Statute. If the question appeared thus, then the dispute could go to the Assembly of States Parties, which in turn could deal with it in any number of ways. It has been suggested that the Assembly of States Parties could possibly resolve the dispute by adopting a resolution authoritatively interpreting Article 98(2) of the Rome Statute.¹⁹⁴ Such a decision would constitute a matter of substance, would be subject to the approval of a two-thirds majority of those present and voting at a session of the Assembly of States Parties wherein an absolute majority of the states parties, representing the quorum for voting, is present.¹⁹⁵ Of course, Article 119(2) allows the Assembly of States Parties to recommend a myriad of means towards settlement of the dispute, including referral of the same to the ICJ.¹⁹⁶

D. MUNICIPAL PROSECUTION THROUGH THE EXERCISE OF UNIVERSAL JURISDICTION

A state with custody over an accused criminal may not ignore the findings of the ICC if the ICC's prosecutor successfully establishes that there is a *prima facie* case against the accused.¹⁹⁷ If the requested state refuses to surrender to the ICC an individual covered by a

194. *See id.* (noting specific authority for this course of action under Article 112(7)(a) of the Rome Statute).

195. *See id.* (determining that the adoption of a resolution is a matter of substance and therefore requires more than a simple majority, as provided in Article 112(7)(b) of the Rome Statute); *see also* Rome Statute, *supra* note 1, art. 112(7)(a)-(b) (defining the voting and quorum requirements for procedural and substantive issues before the Assembly of State Parties).

196. *See* Rome Statute, *supra* note 1, art. 119(2) (providing that the Assembly of States Parties shall hear any dispute not settled within three months of commencement of negotiations, and may settle the dispute themselves or recommend another means of settlement).

197. *See* Danilenko, *supra* note 86, at 478 (noting that, even if the state is under no positive legal obligation to surrender an accused for an international trial, an argument exists that the principle of *aut dedere aut judicare* may compel surrender once the prosecution has made out a *prima facie* case, and additionally, that the state may feel extralegal pressure to pursue a domestic trial).

bilateral non-surrender agreement the requested state has with another state, the requested state must fulfill its obligations under the Rome Statute in some other way.¹⁹⁸ This is especially true if there is reason to believe that the refusal to turn over the requested persons to the ICC would result in clothing said persons with impunity for the commission of any of the crimes the Rome Statute defines.¹⁹⁹ In this situation, the Rome Statute allows the requested state to satisfy its seemingly conflicting obligations through the exercise of jurisdiction over the case, invoking the Rome Statute's system of complementarity.

As discussed above, the ICC's system of complementary jurisdiction vests primary jurisdiction over crimes defined by the Rome Statute in any state that possesses the ability and willingness to exercise jurisdiction over such cases. When such a state genuinely exercises jurisdiction over a case, whether or not said state decides to prosecute, the ICC deems that case as inadmissible.²⁰⁰ Clearly, the catalyst is the act of the subject state in exercising jurisdiction over a particular case that would normally fall within the complementary jurisdiction of the ICC. However, if the prosecuting state does not possess any direct interest in the case, the only way it could exercise jurisdiction over the case would be under the theory of universality or universal jurisdiction.²⁰¹

198. See Rome Statute, *supra* note 1, art. 86 (defining a state's general obligation to cooperate with the ICC's investigation and prosecution of crimes within the ICC's jurisdiction).

199. See Memorandum from the Coalition Secretariat, Coalition for the International Criminal Court to Coalition Members and Government Representatives (Aug. 23, 2002) (dubbing the U.S. bilateral non-surrender agreements "impunity agreements," stating that the only purpose for the agreements is to provide immunity from the ICC, and positing that they undermine the purpose of the Rome Statute by preventing the ICC from exercising its complementary function when states are unwilling to investigate or prosecute accused criminals), available at <http://www.iccnw.org/documents/otherissues/impunityart98/ciccart98memo20020823.pdf> (last visited Mar. 22, 2003).

200. See Danilenko, *supra* note 86, at 475-76 (stating that the ICC complements and does not replace national courts, and that therefore, where a state undertakes domestic procedures and is willing or able to prosecute the accused, the ICC will not interfere). However, the ICC has the power to determine whether the state is genuinely willing and able to bring the accused to justice. *Id.*

201. See Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction*

I. Universal Jurisdiction

Preliminarily, it is important to understand that states do not possess exclusive jurisdiction over their nationals even when they act in an official capacity.²⁰² “A sovereign state or a legal entity that has some sovereign attributes can enforce the prescription of another state, or of international law, even though the enforcing power may not have prescribed what it enforces.”²⁰³ It is upon these principles that we lay the foundation for the exercise of universal jurisdiction.

Bassiouni writes that in the exercise of universal jurisdiction, a state acts in the interest of the international community in a manner equivalent to the Roman concept of *actio popularis*.²⁰⁴ In this manner, the state acts as an agent of the community of states because it has “an interest in the preservation of world order as a member of that community.”²⁰⁵ Under *actio popularis*, a state may exercise universal jurisdiction even if there is no jurisdictional link between the territory where the crime was allegedly committed, the nationality of the accused, the nationality of the victim, and the state seeking to exercise jurisdiction over the case.²⁰⁶ The sole basis for the exercise of such jurisdiction would be the nature of the crime, and the sole purpose is to “enhance world order by ensuring accountability for the perpetration of certain crimes.”²⁰⁷

to Nationals of Non-Party States, 35 NEW ENG. L. REV. 363, 368 (2001) (defining universal jurisdiction as a concept that would provide all states with jurisdiction over certain crimes of universal concern regardless of the perpetrator’s nationality, locus of the crime, or the nationality of the victim).

202. *See id.* at 377 (explaining that a state may try to intercede through diplomatic channels when another state tries to prosecute that state’s national, but that the state has no legal right to require that their nationals may only face trial in their home state).

203. Bassiouni, *supra* note 86, at 89.

204. *See id.* at 88 (explaining the rationale behind universal jurisdiction).

205. *Id.* This writer also acknowledges that while a state may have its own interests in prosecuting an accused, the state exercises its own jurisdiction, and not universal jurisdiction, if those interests are jurisdictionally-based. *Id.*

206. *See id.* at 88-89 (arguing that, because a state asserting universal jurisdiction does so as an agent of the universal community, it must put the interests of the overall international community above its own national interests).

207. *See id.* at 88-89, 96 (identifying the basis for universal jurisdiction and asserting that the state exercising universal jurisdiction “carries out a *actio*

Importantly, “the application of universal jurisdiction for certain international crimes does not necessarily mean that it should be devoid of any connection to the enforcing state, or that it has precedence over other theories of jurisdiction.”²⁰⁸ Thus, distilling the rationale behind the exercise of such jurisdiction is paramount, for it also serves as an enumeration of the requisites for the proper exercise of universal jurisdiction. The rationale would appear to be thus: “1. no other state or entity can exercise jurisdiction on the basis of the traditional doctrines; 2. no other state or entity has a direct interest; and 3. there is an interest of the international community to enforce.”²⁰⁹ When the exercise of universal jurisdiction is carried out on the basis of these underlying principles, the state involved “exercise[s] universal jurisdiction not only as national jurisdiction, but also as a surrogate for the international community.”²¹⁰ Namely, a state that exercises universal jurisdiction “carries out an *actio popularis* against persons who are *hostis humani generis*.”²¹¹

Commentators have asserted the existence of a right to exercise universal jurisdiction over international crimes, particularly those defined by the Rome Statute, in varying degrees of persuasive weight, on the strength of several sources of international law.²¹² A number of conventions provide, implicitly or explicitly, for universal jurisdiction with respect to certain international crimes; some argue

popularis against persons who are *hostis humani generis*,” or “enemies of the human race,” that is, those who offend certain basic core obligations to humankind).

208. *Id.* at 104.

209. Bassiouni, *supra* note 86, at 96.

210. *Id.* This author sets forth two rationales underlying the transcendence of state sovereignty: the first is a universalist approach realizing principles and standards shared by the international community transcending singular national interests, and the second is pragmatic and policy oriented rationale recognizing that these commonly shared principles and standards occasionally need a universal enforcement mechanism. *Id.*

211. *Id.*

212. See Danilenko, *supra* note 86, at 479-82 (noting that the drafters of the Rome Statute were concerned that the statute sought to codify a body of customary law so vague that it might violate the principle of legality). This author also asserts that many of the current conventions relating to criminal law are so vague regarding definitions of crimes that they are only binding as customary international law. *Id.*

that several of these treaties, such as certain provisions of the Geneva Conventions and the Genocide Convention, have become part of customary international law.²¹³ But not all of these conventions include provisions on universal jurisdiction, and many that do are unclear.²¹⁴ The status of these “crimes as jus cogens also implies that universal jurisdiction over them exists.”²¹⁵ Commentators have cited general principles of law as the basis for elevating certain international crimes to the level of jus cogens. “The writings of the most distinguished publicists support the proposition that jus cogens crimes require the application of universal jurisdiction when other means of carrying out the obligations derived from *aut dedere aut judicare* have proven ineffective.”²¹⁶ Thus, Bassiouni submits that it is the cumulative weight of all these international law sources, along with national legislation and judicial practices, that provides sufficient basis to find the existence of universal jurisdiction for jus cogens and even other international crimes.²¹⁷

a. Genocide

The Genocide Convention “declares that genocide is a crime under international law for which an individual perpetrator is culpable, and

213. *See id.* at 482, 485 (recognizing that the ICJ ruled that the principles underlying the Genocide Convention are considered binding on civilized nations even without conventional obligations, and noting that certain provisions of the Geneva Conventions are considered binding on all states with or without ratification).

214. *See Bassiouni, supra* note 86, at 151-52 (analogizing the current state of recognition of universal jurisdiction to a checkerboard, and noting that its recognition is uneven and inconsistent).

215. *Id.* at 152.

216. *Id.* at 149.

217. *See id.* at 149-50 (arguing that the cumulative theory of universal jurisdiction for jus cogens crimes runs counter to the “purist theory” of international law that requires each of these sources of law to rise to the level of legal sufficiency before attaining the status of binding international law). *But see* Lee A. Casey, *The Case Against the International Criminal Court*, 25 *FORDHAM INT’L L. J.* 840, 857 (2002) (submitting that questions regarding the application of the universality principle in the United States is entirely academic, and that acceptance of the principle of universality is not widespread enough to warrant its application).

for which . . . states have a duty to prosecute.”²¹⁸ However, the Genocide Convention seems to allow a relatively limited number of avenues for the prosecution of genocide, as compared to multilateral treaties covering war crimes and crimes against humanity, which are discussed below.²¹⁹ Article 6 of the Genocide Convention provides that “persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed.”²²⁰ An international penal tribunal that has jurisdiction over state parties may also try persons charged with genocide.²²¹

At first blush, it seems clear that the venues where prosecution of a particular instance of genocide can proceed are limited to the state in whose territory the act was committed, or before an international tribunal whose jurisdiction the state parties involved have accepted.²²² However, the ICJ has recognized that the rights and obligations enshrined in the Genocide Convention are rights and obligations *erga omnes*, and that “the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”²²³

The proscription of genocide possesses the status of jus cogens, and any derogation from such a norm is properly subject to the exercise of jurisdiction by any state on the basis of universality; for example, customary international law recognizes the universality of

218. See Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 58 (1999). The authors describe the consequences and state response that custom anticipates when a party violates the Genocide Convention.

219. Compare Genocide Convention, *supra* note 171 (narrowing the scope of prosecution under the Convention to only those crimes related to genocide and genocide-related activities), with Geneva Conventions, *supra* note 170 (covering a broad range of human rights violations under which a violator may face prosecution under the Conventions).

220. Genocide Convention, *supra* note 171, art. 6.

221. See *id.* (providing an alternate option under the Genocide Convention that would require a violator to face prosecution).

222. See *id.* (describing the instances of full prosecutorial authority against a perpetrator of genocide under Article 6 of the Genocide Convention).

223. Danilenko, *supra* note 86, at 482-83.

jurisdiction for genocide, even though there is no state practice to support that argument.²²⁴ Furthermore, a stance receiving increased recognition from leading commentators argues that any state may prosecute the crime of genocide, despite the absence of a provision on universal jurisdiction in the Genocide Convention.²²⁵ “Notwithstanding the absence of support in conventional international law and in the practice of states for the unqualified assertion that genocide ipso facto allows universal jurisdiction, [the ICTY has ruled,] in connection with genocide, . . . that ‘universal jurisdiction [is] nowadays acknowledged in the case of international crimes.’”²²⁶ The ICTR made a similar ruling, holding that universal jurisdiction exists for the crime of genocide.²²⁷ Thus, the courts of all nations may assert, as a matter of international obligation, jurisdiction over persons accused of genocide.²²⁸

b. Crimes Against Humanity

Currently, there is no specialized convention dedicated to the codification of crimes against humanity.²²⁹ Before the adoption of the Rome Statute, the closest approximation to this sort of specialized

224. See Mugwanya, *supra* note 76, at 743-44 (explaining that one can be guilty of genocide even when the act occurs in a nation that is not a member of the Genocide Convention, since the act of genocide is universally criminal).

225. See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 569 (1995) (emphasizing how genocide need not be made a crime through the passage of international agreements, but exists as a crime in any nation where it takes place); see also Bassiouni, *supra* note 86, at 121 (supporting the concept that genocide should be widely outlawed in conjunction with the Genocide Convention, and not exclusively through the Genocide Convention).

226. Bassiouni, *supra* note 86, at 121-22.

227. See *Prosecutor v. Ntuyahaga*, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Mar. 18, 1999) (creating a precedent promoting the concept that all nations may hold jurisdiction to judge acts of genocide).

228. See Mugwanya, *supra* note 76, at 743 (asserting that such concepts “pierce” notions of sovereignty such that all nations may exercise jurisdiction over offenders “as a matter of international obligation”).

229. See Bassiouni, *supra* note 86, at 119 (expounding on the fact that the international legal community, while creating other specific conventions to deal with genocide and torture, has failed to create a more general convention addressing crimes against humanity).

convention existed in the myriad of separate conventions and treaties proscribing individual crimes, such as conventions relating to apartheid and torture.²³⁰ But the conventions relative to those crimes do not contain clear provisions, and in some cases contain no provisions at all, on universal jurisdiction. However, “as a *jus cogens* international crime, ‘crimes against humanity’ are presumed to carry the obligation to prosecute or extradite, and to allow States to rely on universality for prosecution, punishment, and extradition.”²³¹ In addition, crimes against humanity comprise part of customary international law.²³² As part of customary international law, they impose an obligation on the international community to prosecute, punish, or extradite offenders for such crimes that has the same force as a treaty, but which surpasses a state’s conventional, or treaty-based, obligations.²³³

A prime example of the exercise of universal jurisdiction in a case involving a crime against humanity is the treatment of torture. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) allows state parties to exercise jurisdiction over offenders located within a state’s

230. See International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973) [hereinafter Apartheid Convention] (making apartheid a crime against humanity in violation of international law, and recognizing apartheid as a serious threat to peace and security throughout the world), <http://www.unhcr.ch/html/menu3/b/11.htm> (last visited Mar. 26, 2004); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, draft reprinted in 23 I.L.M. 1027 (1985) [hereinafter Torture Convention] (establishing that certain acts, such as inflicting severe physical or mental pain on an individual for the purpose of obtaining information or a confession, constitute crimes against humanity, violative of international law), http://www.unhcr.ch/html/menu3/b/h_cat39.htm (last visited Mar. 26, 2004).

231. Bassiouni, *supra* note 86, at 119. The author affirms the far-reaching jurisdiction and power of states to respond to crimes against humanity by punishing those who commit them. *Id.*

232. See Mugwanya, *supra* note 76, at 755 (noting that such crimes are a feature of both conventional and customary international law, meaning that they compel states to enforce them whether or not those states are party to a treaty that would positively bind them to such an obligation).

233. See *id.* (outlining the responsibilities of states and the international community when dealing with offenders of crimes against humanity).

territory regardless of where the offender committed the acts of torture, provided the individual does not face extradition.²³⁴ Furthermore, “state recognition and domestic criminalization of [torture] is arguably widespread enough to be deemed to have crystallized into customary international law.”²³⁵

c. War Crimes

Article 8(a) of the Rome Statute provides, in part, that “‘war crimes’ means . . . [g]rave breaches of the Geneva Conventions.”²³⁶ These breaches are now considered *jus cogens* international crimes.²³⁷ The Geneva Conventions all require each state party to search for persons alleged to have committed, or to have been ordered to commit, grave breaches within that member state’s borders, and to bring such persons, regardless of their nationality, before its own courts.²³⁸ Thus, it is clear that all state parties possess the right to exercise jurisdiction over all persons accused of grave breaches of the Geneva Conventions perpetrated within their national borders. In effect, if a state wants to prosecute a person for war crimes in such a scenario, that state need not ask the permission of the perpetrator’s native state, or any other state, since the prosecuting state may go ahead and prosecute the perpetrator by the express terms of those agreements.²³⁹ There exists authority stating that the

234. See Torture Convention, *supra* note 230, art. 5 (indicating that states must take measures to establish jurisdiction “over such offenses in cases where the alleged offender is present in any territory under its jurisdiction,” as well as over various other cases and situations).

235. Scharf, *supra* note 201, at 374.

236. Rome Statute, *supra* note 1.

237. See Bassiouni, *supra* note 86, at 116 (commenting on how violations of the Geneva Conventions, especially those violations that are extreme in nature, will be deemed punishable under the principles of universality contained in international law).

238. See Geneva Conventions, *supra* note 170 (imposing upon member nations to the Conventions the responsibility of prosecuting violators of the gravest of crimes when such crimes occur within a member nation’s borders).

239. See Roger S. Clark, *Creating a Statute for the International Criminal Court: A Jurisdictional Quandary*, 22 SUFFOLK TRANSNAT’L L. REV. 461, 471 (1999) (confirming the solitary action a victim state’s prosecutorial authority may take when pursuing the punishment of a violator of the Geneva Conventions or crimes against humanity).

Geneva Conventions give parties the right, and indeed an obligation, to adopt national legislation without universal jurisdiction.²⁴⁰ This obligation leads to the conclusion that “states parties cannot legally grant amnesty or immunity from prosecution to transgressors for grave breaches of these Conventions.”²⁴¹

Significantly, the treaty also vests this prerogative to prosecute in states that were not a party to the war in question.²⁴² The treaty makes no distinctions based upon whether or not there is a nexus between the accused, the alleged acts constituting grave breaches of the Geneva Conventions, and the state that exercises jurisdiction over the case. The Geneva Conventions also uniformly implement the *aut dedere aut judicare* principle, giving a state party that finds itself in a position to exercise jurisdiction over persons allegedly responsible for such grave breaches an alternative to prosecuting the accused before its own courts: the Geneva Conventions provide that said state may, in accordance with the provisions of its own legislation, hand such persons over for trial to another concerned state party, provided such state party has made out a prima facie case against the accused.²⁴³

With respect to universal jurisdiction over war crimes, Bassiouni makes several arguments: he argues that the general enforcement obligations, including the specific obligations to prevent and repress grave breaches of the Geneva Conventions and Protocol I to the Geneva Conventions, allow states to expand their jurisdiction under the theory of universality, even if no convention dealing with the law of armed conflict contains a specific provision on universal jurisdiction.²⁴⁴ Recognizing that the existence of universal

240. See Bassiouni, *supra* note 86, at 118 (describing the Conventions' mandate that individual nations take action in the international fight against war crimes and crimes against humanity).

241. Mugwanya, *supra* note 76, at 742-43.

242. See Clark, *supra* note 239, at 466 (reaffirming the notion that all nations must contribute to the prosecution of war criminals, regardless where such war crimes took place).

243. See Geneva Conventions, *supra* note 170 (noting the prevalence of the extradition option for war criminals in the interplay that exists among various states under principles of international law).

244. Bassiouni, *supra* note 86, at 117. This author suggests that, while such universal authority certainly exists, it has held sway mainly among academics and

jurisdiction yet finds insufficient support in state practice, Bassiouni submits that “customary international law can exist irrespective of state practice if there is strong evidence of *opinio juris*, which is the case with respect to war crimes.”²⁴⁵

2. Case in Point: The Republic of the Philippines-United States Bilateral Non-Surrender Agreement, Domestic Prosecution, and the Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines (“VFA”)

The VFA generally states that the Philippines shall have the primary right to exercise jurisdiction over all offenses committed by U.S. personnel within Philippine territory, subject to certain significant exceptions.²⁴⁶ First, the United States shall have the primary right to exercise jurisdiction over offenses committed by U.S. personnel within Philippine territory when:

a) criminal and disciplinary jurisdiction over the offenses is conferred on them by U.S. military law;²⁴⁷

b) the offenses involved relate “to the security of the United States, punishable under the laws of the United States, but not under the laws of the Philippines,”²⁴⁸

experts in the field, rather than elected policy/law makers.

245. *Id.*

246. *See* Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, Feb. 10, 1998, U.S.-Phil., art. V(3)(a), T.I.A.S. No. 12,496 [hereinafter VFA] (explaining the Philippines’ authority to prosecute U.S. military personnel when those personnel commit illegal acts within the jurisdiction), available at <http://www.army.mil.ph/miscellaneous/vfa.html> (last visited Mar. 26, 2004). This forces one to reconsider the notion of military jurisdictional authority and the victim state’s right to prosecute foreign military personnel.

247. *See id.* art. V(1)(a)-(b) (noting that while U.S. military authorities customarily have criminal and disciplinary jurisdiction over U.S. personnel in the Philippines, the Philippines may exercise jurisdiction over U.S. personnel if they commit offenses punishable under Philippine law).

248. *Id.* art. V(2)(b).

c) subject to military law, the offenses committed are “solely against the property or security of the United States or offenses solely against the property or person of United States personnel;”²⁴⁹

d) subject to military law, the offenses arise “out of any act or omission done in performance of official duty.”²⁵⁰ The mere issuance of a certification to this effect will constitute proof of performance of official duty for the purposes of this provision.²⁵¹

Furthermore, in any case wherein the right to exercise jurisdiction is concurrent between the Philippines and the United States, the Philippines will waive the right upon the request of the United States, except in cases of particular importance to the Philippines.²⁵²

It is against the backdrop of the existing bilateral non-surrender agreement between the United States and the Philippines, the VFA, and the Rome Statute, that we must consider the possibility of Philippine prosecutorial jurisdiction. We look to determine whether there will ever be an instance when the Philippines will legally have the option to prosecute government officials, employees, contractors, military personnel, or nationals of the United States for any of the crimes punished under the Rome Statute.²⁵³

For this purpose, it is important to note that both the Philippines and the United States are state parties to several treaties codifying international crimes that are within the jurisdiction of the ICC, such as the Genocide Convention,²⁵⁴ the Torture Convention,²⁵⁵ and the

249. *Id.* art. V(3)(b)(i).

250. *Id.* art. V(3)(b)(ii).

251. *See id.* art. V(3)(e) (describing the certification process thus: a U.S. military commander decides that an offense constitutes an act done out of omission or in the performance of an official duty, and issues a certificate setting forth the decision which, once transmitted to the Philippine authorities, will constitute “sufficient proof of performance of official duty” and bring the actor under primary U.S. jurisdiction).

252. *See VFA, supra* note 246, art. V(3)(d) (explaining that the Philippines customarily waives its primary jurisdiction as a recognition of the U.S. military’s responsibility to maintain good order and discipline among their forces).

253. *See Rome Statute, supra* note 1, art. 5 (enumerating those crimes that fall within ICC jurisdiction as the crime of genocide, crimes against humanity, war crimes, and the crime of aggression).

254. *See Genocide Convention, supra* note 171, pmb. n.1 (listing the state parties to the Convention on the Prevention and Punishment of the Crime of

Geneva Conventions.²⁵⁶ In light of the existence of these conventional obligations, and the fact that the exercise of universal jurisdiction fits into the realm of customary international law, it is arguable that the Philippines need not enact domestic legislation for the investigation, prosecution, and punishment of these international crimes.²⁵⁷ This is because the Philippine Constitution considers the “general principles of international law [as] part of the law of the land.”²⁵⁸

Firstly, one must recall that current U.S. military law does not proscribe all of the crimes defined under the Rome Statute.²⁵⁹ The Uniform Code of Military Justice does not cover all instances of genocide, as it fails to deal adequately either with the acts of U.S. servicemen who are not U.S. nationals, or acts committed outside the United States.²⁶⁰ Secondly, the United States does not punish crimes against humanity as such, forcing potential complainants and prosecutors to piece together indictments from scattered federal and state criminal laws, thereby diluting the gravity of the offense and

Genocide).

255. See Torture Convention, *supra* note 230 (listing the State Parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

256. See Comité International de la Croix-Rouge (ICRC), *States Party to the Geneva Conventions and their Additional Protocols*, 6-7 (2004) (listing states that have ratified the Geneva Conventions, including the United States and the Philippines), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/\\$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf) (last visited Mar. 25, 2004).

257. See Aloysius P. Llamzon, “*The Generally Accepted Principles of International Law*” as Philippine Law: Towards a Structurally Consistent Use of Customary International Law in Philippine Courts, 47 *ATENEO L.J.* 243, 248 (2002) (explaining that the Philippine Constitution considers main principles of international law to be Philippine domestic law, as well).

258. PHIL. CONST. art. II, § 2 (1987).

259. See Scheffer, *supra* note 54, at 16 (stating that the Uniform Code of Military Justice fails to proscribe crimes against humanity or genocide “as crimes”). *But see* Casey, *supra* note 217, at 850 (discussing the political complications of allowing international prosecutorial jurisdiction for such crimes).

260. See Scheffer, *supra* note 54, at 16 (explaining that U.S. federal law on genocide covers only U.S. nationals and acts that occur within the United States).

downplaying its savagery.²⁶¹ The Uniform Code of Military Justice only substantially covers war crimes, so the United States' military personnel may be exempt from Philippine jurisdiction on such matters.²⁶² Therefore, Article V(1)(b) of the VFA, in relation to Article V(3)(a), cannot serve as the basis upon which to withdraw the enumerated instances of genocide and crimes against humanity in general from Philippine jurisdiction, since U.S. military law does not cover these crimes.²⁶³

Next, if a Philippine court charges any current or former government official, employee, contractor, military personnel, or national of the United States with commission of any of the crimes punishable under the Rome Statute, the United States cannot assert exclusive jurisdiction over the case on the grounds that the accused acted under the exercise of official duty. Although it seems to be common practice that receiving states accept a sending state's determination that performance of an act was in the course of official duty, "there seems to be no legal obligation" to accept such a determination.²⁶⁴ "In cases of grave international crimes of universal concern, the receiving State could argue that the relevant acts were not within the limits of 'official duty' and thus assert its jurisdiction."²⁶⁵ On the other hand, if the authorities of the receiving state arrest the accused and do not determine through diplomatic channels or arbitration whether the assailed acts were in the course of

261. *See id.* (asserting that there is no substantive criminal statute that addresses crimes against humanity, making implementation of such proscriptions the least effective under domestic U.S. law).

262. *See id.* (noting that the Military and Extraterritorial Jurisdiction Act of 2000 provides expansive jurisdiction over felonies committed by U.S. citizens abroad – both civilians and members of the armed forces – and as such, that jurisdiction no longer depends upon whether the U.S. Congress has officially declared war).

263. *See VFA, supra* note 246, art. 1(b) (stating that U.S. military authorities have the limited right to exercise their jurisdiction over United States personnel in the Philippines only when it is "conferred on them by the military law of the United States").

264. *See Danilenko, supra* note 86, at 474-75 (explaining that, although courts of the receiving state may review certifications as to whether an act was within the course of official duty, most accept the sending state's determination of the issue).

265. *Id.* at 475.

“official duty,” “the courts of the receiving State may make the final determination.”²⁶⁶

The Philippine Senate, in its Resolution Concurring in the Ratification of the Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, defines “official duty” so as to erase all doubts as to the construction of the provisions of the VFA: it defines “official duty” as

[a]ny duty or service required or authorized to be done by statute, regulation, the order of a superior or military usage. Official duty is not meant to include all acts by an individual during the period while he is on duty, but is meant to apply only to acts which are required or authorized to be done as a function of that duty which the individual is performing.²⁶⁷

Thus, it is evident that the Senate intended to limit the scope of the exception to the exercise of Philippine jurisdiction. Not all acts that U.S. personnel perform while they are within Philippine territory can be shoe-horned into the category of acts done in the performance of official duty. Among the acts that cannot fall under this category are the specific acts that constitute the crimes defined by the Rome Statute, and legal scholars write about this view.²⁶⁸

In their Separate Opinion in *Congo v. Belgium*, Judges Rosalyn Higgins, Pieter Kooijmans and Thomas Buergenthal stated “that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a state alone (in contrast to an individual) can perform.”²⁶⁹ They claim that “this view is underscored by the increasing realization that State-related motives are not the proper test for determining what

266. *Id.*

267. S. Res. 18, 11th Cong. (1st Sess. 1999), in Senate of the Republic of the Philippines, The Visiting Forces Agreement: The Senate Decision 187 (1999).

268. See generally Arrest Warrant of 11 April 2000 (*Congo v. Belg.*), para. 85 (Feb. 14) (noting recent law review articles and cases that discuss the idea that “official acts,” as they are usually defined, should not include grave international crimes).

269. *Id.*

constitutes public State acts,” and that it “is gradually finding expression in State practice, as evidenced in judicial decisions and opinions.”²⁷⁰

Regarding the application of this view to SOFAs in general, and the NATO SOFA in particular, Jordan Paust suggests that under the SOFA, international crime cannot constitute an act or omission done in the course of official duty.²⁷¹ Paust submits that the NATO SOFA, which vests primary concurrent jurisdiction over “offences arising out of any act or omissions done in the performance of official duty” in the United States, does not give U.S. personnel blanket immunity for all acts that supposedly fall under the scope of official duty.²⁷² Even “the act or omission out of which the offense arises must be ‘done in the performance of official duty’ and international criminal acts cannot properly be classified as acts done in performance of official duty.”²⁷³ Thus, the disputable excuse that an act occurred in the course of official duty cannot deprive the Philippines of the right to exercise jurisdiction if such act amounts to a crime against humanity or genocide perpetrated either by members of the U.S. armed forces who are not U.S. nationals or by U.S. nationals outside the United States.

Finally, assuming that the Philippines and the United States can exercise concurrent jurisdiction over crimes against humanity and the enumerated instances of genocide, the Philippines need not accede to a request made by the United States for a waiver of jurisdiction; although the general rule seems to be that the Philippines would grant such a request as a matter of course, the VFA itself apparently gives the Philippines the option to refuse in cases of “particular importance to the Philippines.”²⁷⁴ Also, the fact that the Philippine Senate purposely refrained from providing an exhaustive list of crimes that would constitute cases of particular importance for the

270. *Id.*

271. *See* Paust, *supra* note 113, at 10 (explaining that international crimes, by their nature, cannot arise as a part of an official duty).

272. *See id.* at 10-11 (explaining the limitations of the term “official act” under NATO SOFAs).

273. *Id.* at 11.

274. VFA, *supra* note 246, art. V(3)(d).

Philippines suggests that they would prefer to reserve interpretation to themselves.²⁷⁵

Hence, there is apparently no legal obstacle to the investigation, prosecution, and punishment by the Philippine judicial system of U.S. nationals who commit crimes against humanity, U.S. nationals who commit genocide outside of the United States, and members of the U.S. armed forces who, not being U.S. nationals, commit genocide. This delineation and particularization still leaves the Philippines with a wide area of responsibility with regard to the investigation, prosecution, and punishment of crimes defined under the Rome Statute where U.S. personnel are involved.²⁷⁶ The Rome Statute sets forth in detail the varied forms of genocide and crimes against humanity.²⁷⁷ Whether the Philippine Government is up to the challenge of fulfilling its obligations under international law remains a question.

In light of these analyses, it is interesting to note that “the United States has repeatedly demonstrated in its courts that it reserves the right to prosecute foreign nationals for transgressions of customary international law under a theory of universality.”²⁷⁸ Nevertheless, it appears that foreign states should be able to indict U.S. nationals for violations of customary international law under the same theory.²⁷⁹

275. S. Res. 18, 11th Cong. (1st Sess. 1999), in Senate of the Republic of the Philippines, *The Visiting Forces Agreement: The Senate Decision 187 (1999)* (evinced a desire to avoid specific enumeration of crimes of special concern with the provision that “the following cases, among others, are considered by the Philippines to be of particular importance”).

276. See *supra* notes 259-263 and accompanying text (arguing that the Philippines may have jurisdiction over crimes against humanity and crimes of genocide perpetrated by U.S. personnel).

277. See *supra* note 1, arts. 6-7 (defining with great particularity those activities that constitute genocide and crimes against humanity under the Statute).

278. King & Theofrastous, *supra* note 218, at 56.

279. See *id.* at 57 (noting that there is a “significant double standard” arising from the fact that the United States does not submit its nationals to foreign jurisdiction under the theory of universality). King and Theofrastous, in fact, focus their article on the ways that states can exercise jurisdiction over U.S. nationals. *Id.* They submit that if an international tribunal reserves jurisdiction, there is no reason states cannot individually wield such power. *Id.*

CONCLUSION

Bilateral non-surrender agreements that state parties to the Rome Statute entered into are legally infirm for being in contravention thereof.²⁸⁰ They are anathema to the noble goal of ending impunity for international crimes. Also, those states that vehemently refuse to subject their nationals to the ICC's jurisdiction need not violate it so blatantly through the mere entrance into a bilateral non-surrender agreement; there are established, alternative measures that are compatible with the international legal order.²⁸¹ On the other hand, those who want to bear out the spirit of the Rome Statute and customary international law, but who suffer the misfortune of already having bound themselves to bilateral non-surrender agreements, are not without recourse, for there are legal measures that they can take to remedy the situation.²⁸² Thus, all, it seems, is not lost.

Unfortunately, the damage has been done. The undesirable effects of these bilateral non-surrender agreements creep into every corner of the international community.²⁸³ They strain long-standing alliances. The withdrawal of military personnel compromises peace-keeping operations.²⁸⁴ Vital military aid is withheld from states that choose to stand up against impunity. And then there are the ones that relent: the following statement from the floor of the British House of Commons paints a vivid picture of exactly what kind of a state would resort to these unfortunate and questionable devices called bilateral non-surrender agreements:

280. See discussion *supra* Part IV.B (explaining the requirements under Article 98(2) for surrender).

281. See discussion *supra* Part V (discussing the alternative methods for obtaining immunity, for example, through the U.N. Charter or SOFAs).

282. See discussion *supra* Part VI (noting that there are four different ways for states who are already parties to such agreements to remedy the situation and show their intent to comply with both customary international law and the Rome Statute).

283. See discussion *supra* Part III (describing the character of the bilateral non-surrender agreement between the United States and the Philippines).

284. See Sean D. Murphy, *Efforts to Obtain Immunity from ICC for U.S. Peacekeepers*, 96 AM. J. INT'L L. 725, 727 (2002) (citing Colum Lynch, *3 Observers Pulled Out of East Timor*, WASH. POST, July 2, 2002, at A9 (reporting that the U.S. withdrew its military observers in East Timor on the date of the establishment of the ICC)).

[t]he United States is now aggressively seeking to negotiate bilateral impunity agreements for its citizens with every country that has signed up to the ICC. Up to now, fourteen nations have signed such agreements, although none has ratified them. They tend to be weak countries that are dependent on American favours; they are heavily leaned on if they do not sign. For example, the Philippines was threatened with the loss of cash for army retraining and Romania with lack of progress to NATO membership if they did not sign the bilateral agreements.²⁸⁵

Thus, battered, beaten and begging, they sign. The existing bilateral non-surrender agreements leave their indelible mark on foreign relations. They lay the foundation for a wall that will bar the ICC from reaching the perpetrators of genocide, crimes against humanity, and war crimes.²⁸⁶

Those states that, so far, have withstood the onslaught of hegemony, and those states that initially buckled under the pressure and are now ready to stand up again, must be ready to make bold moves and tough decisions. They must realize that any hope for the ICC's success will depend largely on the political will of states.²⁸⁷ As discussed, the international legal mechanisms to fight impunity are already in place. Existing treaties impose specific obligations on state parties including "the duty to domestically criminalize the specified offense, the duty to extradite or prosecute an offender found in its territory, and the duty to provide judicial assistance for the prosecution of such offenders by other States."²⁸⁸ Now, states must make the leap and actually fulfill these obligations.

In this era of globalization, when international compensation is necessary to combat both international and domestic crime, the only way by which a state may achieve the obligation "to prosecute or

285. House of Commons, *Debate on the International Criminal Court*, 2 (Jan. 14, 2003), available at http://www.amicc.org/docs/HofC1_14_03.pdf (last visited Mar. 17, 2004).

286. See discussion *supra* Part III (showing the negative qualities and legal consequences of bilateral non-surrender agreements through discussion of the VFA).

287. See Bassiouni, *supra* note 63, at 7 (stating that "[h]ow the new International Criminal Court will work in practice will largely depend on the political will of the States").

288. Scharf, *supra* note 201, at 376.

extradite, and, where appropriate, to punish persons accused, charged or convicted” of international or domestic criminal offenses is by making a move as bold as the exercise of universal jurisdiction.²⁸⁹ States must explore this and other existing legal measures if they are to remain true to their international obligations.

What states must realize, however, is that they need not go it alone. Scores of states stood fast and refused to be party to schemes designed to secure impunity for international crimes.²⁹⁰ The others alleviate the pressure applied upon one. A truly symbiotic and synergistic network of like-minded states must endeavor to coordinate their efforts and aid each other’s efforts to resist the temptation to bargain away their ability to fulfill international obligations in good faith.

In the end, it all boils down to how far states are willing to go for the fight against impunity, how badly they wish to see genocide, crimes against humanity, and war crimes punished, and what they are willing to sacrifice for the good of the international community. Indeed, for humanity’s sake, one hopes that states meet the challenge head on, bolstered by the strength of their collective political will.

289. See Bassiouni, *supra* note 86, at 150 (arguing that while the state of judicial practice, national and international, is insufficient to establish the principle of universality as a feature of customary international law, there is also enough support in current practice “to find the existence of universal jurisdiction for jus cogens and even other international crimes”).

290. See *supra* notes 32-33 and accompanying text (explaining that, although the United States has mounted a worldwide campaign to secure bilateral non-surrender agreements, they have only concluded fifty-five such agreements).