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# International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act

## I. Introduction

On July 1, 2002, the Rome Statute of the International Criminal Court entered into force, establishing the world's first permanent international criminal tribunal.<sup>1</sup> Although other ad hoc international criminal tribunals have been established in the past,<sup>2</sup> these tribunals were never intended to become permanent fixtures in the international legal system. Instead, the ad hoc tribunals were temporary entities that were created to deal with issues arising from a specific conflict. Once the crimes committed during a conflict had been prosecuted, the tribunals were no longer necessary. The Rome Statute improved ad hoc tribunals by creating a permanent criminal tribunal with global scope. The new criminal tribunal is an international criminal court that, rather than being limited to cases from a specific geographic area, can hear issues arising from any country or conflict in the world.

The International Criminal Court (ICC) did not, however, have unlimited international support. Of the sixty-six countries that had ratified the Rome Statute by the time it entered into force,<sup>3</sup> the United States was conspicuously absent.<sup>4</sup> This absence was not surprising, however, given that the United States had expressed a number of concerns about the ICC throughout the meetings and conferences leading up to the drafting and adoption of the Rome Statute.<sup>5</sup> In an

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1. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute].

2. Examples of ad hoc tribunals include the war crimes tribunals for Rwanda and the former Yugoslavia.

3. See Rome Statute, *supra* note 1, art. 126 (providing for the entry into force of the Rome Statute "on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations"); see also Coalition for the International Criminal Court, A Timeline of the Establishment of the International Criminal Court, at <http://iccnow.org/documents/iccbasics/History.pdf> (last visited Feb. 5, 2005) [hereinafter ICC Timeline] (noting that on April 11, 2002, the sixtieth ratification instrument was deposited at a special ceremony at U.N. headquarters when ten countries — Bosnia and Herzegovina, Bulgaria, Cambodia, Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia — simultaneously submitted their instruments of ratification).

4. Although President Clinton added the signature of the United States to the Rome Statute on December 31, 2000, the Bush Administration later withdrew the U.S. signature. See *infra* Part II.B; notes 8-9 and accompanying text.

5. See generally Joel F. England, *The Response of the United States to the International*

early display of opposition to the ICC, for example, the United States was one of only seven states, including China, Iran, Iraq, and Libya, that voted against the adoption of the Rome Statute at the 1998 United Nations Diplomatic Conference of Plenipotentiaries in Rome.<sup>6</sup>

Since entering into force in July 2002, the Rome Statute has continued to gather support from other countries around the world. As of February 2005, there were 139 signatories and 97 parties to the Rome Statute.<sup>7</sup> Notwithstanding this display of worldwide support, the United States has consistently remained opposed to the Rome Statute. In May 2002, the United States notified the U.N. that it would not become a party to the treaty,<sup>8</sup> despite the fact that President William Jefferson Clinton had previously authorized the U.S. signature.<sup>9</sup> In the months following this notification, U.S. opposition to the ICC continued to intensify.

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*Criminal Court: Rejection, Ratification or Something Else?*, 18 ARIZ. J. INT'L & COMP. L. 941, 944-50 (2001) (discussing common U.S. objections to the Rome Statute); Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Jurisdictions?*, 35 CORNELL INT'L L.J. 1 (2001) (providing a detailed description of U.S. objections to the jurisdiction of the ICC); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 68-76 (2001) (discussing U.S. concerns in the negotiations surrounding the Rome Statute and addressing how flaws in the Rome Statute were treated following the Rome Conference); John Seguin, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85 (2000) (describing U.S. objections to the ICC, including concerns over the jurisdiction of the court and the vulnerability of U.S. military personnel to politically motivated prosecutions).

6. Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L. 19, 21 (2003).

7. Council for the International Criminal Court, State Signatures and Ratifications Chart, at <http://www.iccnw.org/countryinfo/worldsignsandratifications.html> (last visited Feb. 5, 2005).

8. Press Statement, U.S. Department of State, International Criminal Court: Letter to UN Secretary General Kofi Annan from Under Secretary of State for Arms Control and International Security, John R. Bolton (May 6, 2002), at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> [hereinafter Bolton Letter].

9. President's Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC., Dec. 31, 2000, ¶ 4 [hereinafter President's Statement on the Rome Treaty]. In his statement, President Clinton noted:

In signing, however, we are not abandoning our concerns about significant flaws in the treaty . . . . With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not . . . . Given these concerns [of politicized prosecutions and the exercise of jurisdiction over personnel of states that have not ratified the Rome Statute], I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.

*Id.* ¶¶ 4, 6.

One significant act of opposition to the ICC occurred on August 2, 2002, when Congress passed the American Servicemembers' Protection Act (ASPA),<sup>10</sup> a piece of legislation that sparked a great deal of criticism from ICC supporters.<sup>11</sup> Among the more controversial provisions of ASPA is section 2007, which prohibits the United States from providing military assistance to a state party to the ICC unless the state either has signed an Article 98 waiver, also known as a "bilateral immunity agreement" (BIA), with the United States or another exception to the prohibition on military assistance applies.<sup>12</sup>

The BIA exception has proved to be the most contentious aspect of ASPA. In August 2002, the United States began actively seeking these agreements with both parties and nonparties to the Rome Statute.<sup>13</sup> As of December 2004, the United States had signed BIAs with over ninety countries.<sup>14</sup> The United States claims that Article 98(2) of the Rome Statute, which recognizes that a state party may have other international treaty obligations that ICC jurisdiction should not disturb, contemplates these BIAs.<sup>15</sup> The strongest critics of the BIAs contend that the United States is either seeking to place its personnel beyond the jurisdiction of international law or attempting to undermine the ICC altogether.<sup>16</sup> These critics argue that the BIAs violate the Rome Statute and

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10. 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (codified at 22 U.S.C. §§ 7421-7432 (2004)) [hereinafter ASPA]. ASPA was passed as Title II of this legislation.

11. *See infra* Part II.C.

12. ASPA, *supra* note 10, § 2007; *see also infra* Part II.E (providing additional information about BIAs).

13. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Bilateral Agreements Relating to ICC*, 97 AM. J. INT'L L. 200, 201 (2003); *see also* Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, 547 (2003) (noting that the ASPA gives the United States more negotiating power in persuading other countries to sign a BIA); News Release, Human Rights Watch, *Bilateral Immunity Agreements* (June 20, 2003), *at* [http://www.hrw.org/campaigns/icc/docs/bilateral\\_agreements.pdf](http://www.hrw.org/campaigns/icc/docs/bilateral_agreements.pdf) (accusing the Bush administration of launching a "worldwide campaign to negotiate bilateral immunity agreements that would exempt U.S. nationals from ICC jurisdiction").

14. Coalition for the International Criminal Court, *Status of U.S. Bilateral Immunity Agreements*, *at* [http://iccnow.org/documents/otherissues/impunityart98/BIAsByRegion\\_current.pdf](http://iccnow.org/documents/otherissues/impunityart98/BIAsByRegion_current.pdf) (last modified Dec. 1, 2004) [hereinafter ICC, *Status of BIAs*].

15. *See* U.S. Department of State, *Fact Sheet: The International Criminal Court* (Aug. 2, 2002), *at* <http://www.state.gov/t/pm/rls/fs/2002/23426.htm> [hereinafter *Fact Sheet: ICC*] (asserting that the Rome Statute provides for BIAs in Article 98 and expressing the intention to pursue these agreements worldwide).

16. *See, e.g.*, Amnesty International, *International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes*, IOR 40/025/2002 (Sept.

that the United States is acting inappropriately in its pursuit of these agreements.<sup>17</sup>

This comment examines the controversy surrounding the BIAs and argues that even though the United States may contend that the Rome Statute contemplates BIAs, they are nevertheless contrary to the purpose of the statute and are incompatible with U.S. policy interests in the international arena. Part II of this comment initially provides a background of the events leading up to the dispute over the legality of BIAs. This background includes a brief history of the ICC in addition to the history and circumstances surrounding the drafting and adoption of Article 98(2) of the Rome Statute. Next, Part II discusses President Clinton's signing of the Rome Statute and the later withdrawal of the U.S. signature by the Bush administration. After introducing some of the primary areas of dispute in the Article 98(2) negotiations, Part II then focuses on ASPA and its more controversial provisions. Finally, Part II explains the relationship between ASPA and the BIAs and provides a detailed description of the characteristics of a BIA.

In Part III, this comment introduces the general principles of treaty interpretation as established by the Vienna Convention on the Law of Treaties (VCLT).<sup>18</sup> An understanding of treaty interpretation is necessary for insight into the issue of whether adherence to a BIA could cause a country to violate its obligations under the Rome Statute or whether, as the United States contends, the exceptions to ICC jurisdiction set forth in Article 98(2) contemplate BIAs.

To demonstrate a practical application of the issues involved in the dispute over the BIAs, Part IV presents a hypothetical conflict between the United States and the ICC. This conflict could arise in a situation in which the ICC seeks jurisdiction over a U.S. citizen held by State X, a state that is a party to the ICC but has also signed a BIA with the United States. After discussing the relevant provisions in the Rome Statute and the mechanisms involved in the resolution of the conflict, Part IV further examines some of the primary concepts contained in Article 98(2) and in the BIAs in light of the principles of

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2, 2002), at <http://web.amnesty.org/library/index/engIOR400252002?Open&of=eng-385> [hereinafter Amnesty International, U.S. Efforts] (arguing that the agreements violate the Rome Statute and urging countries not to enter into these agreements with the United States); Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements, at <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm> (last visited Feb. 5, 2005) (contending that the agreements "violate the Rome Statute and should be opposed").

17. Amnesty International, U.S. Efforts, *supra* note 16.

18. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

treaty interpretation discussed in Part III. This examination supports the conclusion that in the case of such a conflict, a state that attempts to follow its obligations to the United States under a BIA could simultaneously violate its duties to the ICC under the Rome Statute.

Finally, Part V examines the international consequences of the U.S. campaign to secure BIAs under ASPA and recommends a course of action for the Bush administration to pursue to strengthen both U.S. interests and international opinion of the United States.

## *II. Background Information*

### *A. The Formation of the ICC*

The concept of an international criminal tribunal is at least as old as the post-World War II Nuremberg and Tokyo trials.<sup>19</sup> During World War II, the world witnessed such atrocities that nations began to seek the formation of an international tribunal to punish those responsible and deter similar horrors from occurring in the future.<sup>20</sup> The push for an international criminal tribunal, however, decreased during the Cold War, which proved to be a significant political conflict that kept the international community “from building on the Nuremberg experience.”<sup>21</sup> The world would have to wait until the end of the Cold War before an international criminal tribunal would once again become a relevant topic in international discussions.

More recently, the experience of establishing war crimes tribunals for the former Yugoslavia and Rwanda has been instrumental in solidifying the desire for a permanent international criminal court.<sup>22</sup> Before the suspected war criminals could be investigated or prosecuted, the international community had to address the challenges of establishing the courts that would hear the cases arising from the events in the former Yugoslavia and Rwanda. Some of the difficulties involved in setting up the Yugoslavia and Rwanda tribunals included “negotiating the tribunal’s statute, its headquarters agreements, and appropriating its funds.”<sup>23</sup> In the absence of a permanent alternative, the international community will continue to face these difficulties when circumstances require an international criminal tribunal.

A permanent international criminal tribunal would alleviate some of the difficulties faced by those responsible for establishing the ad hoc tribunals. Ambassador David Scheffer, Head of the U.S. Delegation to the U.N.

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19. England, *supra* note 5, at 942.

20. *Id.*

21. *Id.*

22. Scheffer, *supra* note 5, at 50.

23. Seguin, *supra* note 5, at 86.

Diplomatic Conference on the Establishment of a Permanent International Criminal Court, remarked before the Senate Committee on Foreign Relations that the experience with the tribunals for the former Yugoslavia and Rwanda has “convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost efficient in its operation.”<sup>24</sup> Scheffer’s remarks reflected the view of ICC supporters that establishing a permanent international criminal tribunal would ultimately lead to greater efficiency in administering international justice.

Although the desire for administrative efficiency was an important consideration for those in favor of establishing an international criminal tribunal, a more fundamental concern was the assurance that war criminals would not go unpunished.<sup>25</sup> This concern is reflected in the Preamble to the Rome Statute, which acknowledges the determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>26</sup> ICC supporters resolved not to witness another war criminal going unpunished for atrocities simply because a domestic legal system was either unable or unwilling to try the case and provide the appropriate punishment.<sup>27</sup> A permanent international criminal tribunal would ensure that an individual suspected of war crimes would be required to face a trial in either a domestic or international legal system.<sup>28</sup>

The unwillingness or inability of a domestic legal system to take action against suspected war criminals is often closely related to the political or military position of the suspect.<sup>29</sup> Suspects in positions of power are sometimes better able to shield themselves from prosecution through mechanisms that provide some type of immunity for leaders.<sup>30</sup> In the absence of any international criminal tribunal, such a suspect who escapes domestic prosecution could likely escape all prosecution. Scheffer has noted that this “gap in the international system” that allows an individual in a leadership position to enjoy impunity can no longer be tolerated.<sup>31</sup> According to Scheffer, “The notion that political imperatives immunize any individual from criminal law with respect to the worst possible crimes directed against humankind is quickly losing credibility,

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24. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int’l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 11 (1998) (testimony of David Scheffer, Ambassador-at-Large for War Crimes) [hereinafter *National Interest Hearings*].

25. Scheffer, *supra* note 5, at 51.

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

27. See Scheffer, *supra* note 5, at 51.

28. See *infra* Part II.C.

29. Scheffer, *supra* note 5, at 52.

30. *Id.*

31. *Id.*

and no democratic government . . . could champion such impunity and remain true to the fundamental governing principles of a modern civilized society.”<sup>32</sup>

The ICC has attempted to fill this gap in the international system of criminal prosecution by ensuring that individuals in leadership positions will not enjoy impunity for their actions.<sup>33</sup> The Rome Statute addresses this issue in Article 27, which notes that the Rome Statute “shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity . . . shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”<sup>34</sup>

With these concerns in mind, negotiations on the formation of the Rome Statute began at the U.N. in 1995.<sup>35</sup> The Ad Hoc Committee on the Establishment of an International Criminal Court met twice that year to debate a draft statute proposed by the International Law Society. At the end of 1995, the U.N. General Assembly created a Preparatory Committee to prepare a draft of a statute to submit at an international conference.<sup>36</sup> The Preparatory Committee met twice in 1996, three times in 1997, and held its final meetings in March and April of 1998, where the Committee finalized a draft of the Rome Statute.<sup>37</sup> On July 17, 1998, the U.N. Conference of Plenipotentiaries in Rome adopted the Rome Statute amid a great deal of celebration.<sup>38</sup> Nevertheless, the international community’s goal of an international criminal tribunal was not easily fulfilled. By the end of the process, 160 states, 33 intergovernmental organizations, and a coalition of 236 nongovernmental organizations (NGOs)

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32. *Id.* at 52-53.

33. *See infra* Part II.C.

34. Rome Statute, *supra* note 1, art. 27, at 1017.

35. ICC Timeline, *supra* note 3. *See generally* M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443 (1999) (providing a detailed description of the negotiations at the 1998 Rome Conference).

36. ICC Timeline, *supra* note 3.

37. *Id.*

38. After the final vote:

[T]he delegates burst into a spontaneous standing ovation, which turned into rhythmic applause that lasted close to ten minutes. Some delegates embraced one another, and others had tears in their eyes. It was one of the most extraordinary emotional scenes ever to take place at a diplomatic conference. The prevailing feeling was that the long journey that had started after World War I had finally reached its destination. This historic moment was of great significance for everyone who had struggled to establish the ICC.

Bassiouni, *supra* note 35, at 459.



had participated in the conference that eventually culminated in the Rome Statute.<sup>39</sup>

*B. Signing and “Unsigning” the Rome Statute*

President Clinton authorized the U.S. signature on the Rome Statute on December 31, 2000, the last possible day for signing.<sup>40</sup> President Clinton’s support for the ICC, however, was not unqualified. He expressed concern over the potential reach of the ICC’s jurisdiction and the risk of politically motivated prosecutions against U.S. personnel.<sup>41</sup> He also indicated that he would not submit the Rome Statute to the Senate, recommending instead that his successor likewise refrain from doing so until the drafting committee had addressed U.S. concerns.<sup>42</sup>

After President George Walker Bush assumed office in January 2001, he and his advisors indicated that they were opposed to the United States becoming a party to the Rome Statute.<sup>43</sup> Nevertheless, the Bush administration did not make its first significant move to oppose the ICC until the following year. In May 2002, John R. Bolton, Under Secretary of State for Arms Control and International Security, sent a letter to U.N. Secretary General Kofi Annan stating that “the United States does not intend to become a party to the [Rome Statute]. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”<sup>44</sup>

Bolton’s letter marked the Bush administration’s attempt to “unsign” the Rome Statute.<sup>45</sup> Although the Bush administration clearly intended to nullify any legal obligations that arose from President Clinton’s act of signing the Rome Statute, the legal significance of this letter remains unclear.<sup>46</sup> When President Clinton signed the Rome Statute, the United States became a signatory to this treaty.<sup>47</sup> Even though the Rome Statute had not yet entered

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39. ICC Timeline, *supra* note 3.

40. President’s Statement on the Rome Treaty, *supra* note 9, ¶ 1.

41. *Id.* ¶¶ 3, 5.

42. *Id.*

43. Jean Galbraith, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: The Bush Administration’s Response to the International Criminal Court*, 21 BERKELEY J. INT’L L. 683, 686 (2003).

44. Bolton Letter, *supra* note 8; *see also* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003) (describing the possible legal significance of the U.S. attempt to withdraw from the Rome Statute).

45. *See generally* Swaine, *supra* note 44 (providing a detailed legal analysis of the act of “unsigning” a treaty before becoming a party).

46. *See* Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS (May 2002), at <http://www.asil.org/insights/insigh87.htm>.

47. *See* Swaine, *supra* note 44, at 2066-71 (discussing the relationship between signing

into force, the United States still had certain obligations that arose from its signature.<sup>48</sup> Article 18 of the VCLT addresses the obligations of a state that has signed a treaty that has not yet entered into force or has not yet been ratified by that state.<sup>49</sup> Article 18 reads:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.<sup>50</sup>

The obligations that arise after a state signs a treaty are known as interim obligations.<sup>51</sup> One commentator has pointed out that “[i]f signatories are encumbered by duties that meaningfully approximate those imposed on parties, their incentives to defect from ratification — that is, to seek out or to maintain status as a mere signatory — may be diminished.”<sup>52</sup>

Even though the United States is not a party to the VCLT, the VCLT is still binding on nonparties as a reflection of customary international law.<sup>53</sup> In the Bolton letter, the United States alluded to the VCLT’s notion of interim obligations by stating that “no legal obligations” resulted from President

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a treaty and ratifying a treaty).

48. VCLT, *supra* note 18, art. 18.

49. *Id.*

50. *Id.*

51. Swaine, *supra* note 44, at 2071.

52. *Id.* at 2077-78.

53. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 286 (1988). Frankowska explains:

The United States, although a signatory, is not a party to the [VCLT] . . . . But according to a widespread *opinio juris*, legal conviction of the international community, the [VCLT] represents a treaty which to a large degree is a restatement of customary rules, binding States regardless of whether they are parties to the [VCLT]. Even before the [VCLT] entered into force, its provisions had been invoked by States and by the International Court of Justice. The Department of State has on a number of occasions acknowledged that it regards particular articles of the [VCLT] as codifying the existing law. Also, the American Law Institute . . . took the [VCLT] as its “black letter” for setting out principles relating to the law of treaties.

*Id.*

Clinton's signature.<sup>54</sup> While international lawyers still debate the legal consequences of unsigned, one commentator has indicated that this response to international treaties may become more prevalent:

If little is asked of mere signatories, the risk that unsigned will become endemic is low. But with the continued popularity of multilateral conventions, and the proliferation of parties actively engaged in making and enforcing international law, it is becoming steadily less likely that states will be able to maintain any kind of collective repose. Under these circumstances, unsigned may well become more common, and in the process threaten the possibilities for international cooperation.<sup>55</sup>

While the possibility of unsigned might be contrary to the spirit of international cooperation, it has nevertheless been recognized as "a legitimate and understandable course of action under the [VCLT]."<sup>56</sup> Supporters of the U.S. position echoed this view and noted that the Bolton letter appeared consistent with international law.<sup>57</sup> According to international law, a treaty signatory is not obligated to become a party to the treaty.<sup>58</sup> This principle is reflected in Article 125 of the Rome Statute, which states that the Statute is "subject to ratification, acceptance or approval by signatory States."<sup>59</sup> This provision indicates that the drafters contemplated a situation in which a state that had signed the Rome Statute did not thereafter ratify it. The VCLT also contemplates a situation in which a signatory makes "its intention clear not to become a party to the treaty."<sup>60</sup>

Although supporters contended that the U.S. attempt to unsigned the Rome Statute was consistent with both the VCLT and the Statute itself, the Bolton letter sparked considerable international criticism and disapproval.<sup>61</sup> Those ICC supporters that had hoped for full U.S. participation in the ICC recognized that the letter was a significant setback to their position.<sup>62</sup> More significantly, "[i]nternational lawyers . . . regarded the mere act of unsigned as significant in itself."<sup>63</sup> Opponents of the letter argued that the U.S. withdrawal of its

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54. Bolton Letter, *supra* note 8.

55. Swaine, *supra* note 44, at 2089.

56. *Id.*

57. Bradley, *supra* note 46.

58. *Id.*

59. Rome Statute, *supra* note 1, art. 125.

60. VCLT, *supra* note 18, art. 18.

61. Swaine, *supra* note 44, at 2062.

62. *Id.*

63. *Id.* at 2063.

signature was unprecedented.<sup>64</sup> Some expressed fear that the United States' move would signal to other countries that it was acceptable to withdraw from a treaty after signing but before ratifying it.<sup>65</sup>

The legal status of the U.S. attempt to unsign the Rome Statute has significant implications for the controversy surrounding the BIAs. If the Bolton letter is recognized as an effective withdrawal of the U.S. signature, then customary international law as expressed in Article 18 of the VCLT would no longer obligate the United States to "refrain from acts which would defeat the object and purpose of a treaty."<sup>66</sup> If the Bush administration's attempt to unsign the Rome Statute is not internationally recognized, then the United States, as a signatory, would still be under the obligations imposed on a signatory by customary international law.

*C. U.S. Concerns About the Scope of the ICC's Jurisdiction and Article 98(2) Negotiations*

Despite its opposition to certain aspects of an international criminal tribunal, the United States actively participated in the drafting and negotiation of the Rome Statute. From the beginning of the negotiations, the U.S. delegation voiced a number of concerns that it wanted the drafters to address before it would offer its full support to the new international criminal tribunal.<sup>67</sup>

One of the primary U.S. concerns involved the scope of the ICC's jurisdiction. The provisions dealing with the exercise of the ICC's jurisdiction are set forth in Articles 12-20 of the Rome Statute.<sup>68</sup> According to Article 13, the ICC may exercise jurisdiction over a crime listed in the Rome Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.<sup>69</sup>

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64. *Id.* at 2064.

65. *Id.*

66. VCLT, *supra* note 18, art. 18.

67. *See* Scheffer, *supra* note 5, at 54 n.22 (citing several speeches made by Scheffer addressing U.S. concerns about ICC jurisdiction, explaining flaws in the Rome Statute, and providing reasons why the United States did not sign an earlier draft of the treaty).

68. Rome Statute, *supra* note 1, arts. 12-20.

69. *Id.* art. 13. Applicable crimes are listed in Article 5.

Article 12 of the Rome Statute outlines three preconditions in which the ICC may exercise jurisdiction.<sup>70</sup> Once any one of these Article 12 preconditions is met, the ICC may exercise jurisdiction in accordance with Article 13.<sup>71</sup> First, according to Article 12(1), a state that is a party to the Rome Statute accepts ICC jurisdiction.<sup>72</sup> Second, Article 12(3) explains that a state that is not a party to the Rome Statute can consent to ICC jurisdiction with respect to a particular crime.<sup>73</sup> Third, according to Article 12(2), in cases that are not referred to the ICC by the Security Council,

the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with [12(3)]:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.<sup>74</sup>

Under this third precondition, if the conduct in question occurs in the territory of a state party to the Rome Statute, then the ICC will have jurisdiction over the suspect regardless of whether the suspect's home state is a party to the Rome Statute.<sup>75</sup>

The scope of jurisdiction expressed in Articles 12 and 13 could thus include U.S. military personnel even though the United States chose not to become a party to the Rome Statute.<sup>76</sup> This possibility was an important concern of the United States during the drafting and negotiation of the Rome Statute.<sup>77</sup> Specifically, the United States expressed concerns about "the risk that the [ICC] may seek to investigate, obtain custody of, and ultimately prosecute a U.S. service member or U.S. Government official in connection with that individual's official duty."<sup>78</sup>

Although one of the main purposes of the ICC is to ensure that potential suspects do not enjoy impunity, this goal does not require the ICC to carry out

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70. *Id.* art. 12.

71. *Id.* art. 13(b). These preconditions are not necessary if an ICC prosecutor has referred the matter to the ICC. For any other case, these preconditions must be met.

72. *Id.* art. 12(1).

73. *Id.* art. 12(3).

74. *Id.* art. 12(2).

75. *Id.* art. 12.

76. *Id.*

77. Scheffer, *supra* note 5, at 64-65.

78. *Id.* at 87.

the prosecution itself.<sup>79</sup> If the domestic judicial system of the suspect is able to investigate and prosecute the alleged crime, then the ICC does not need to exercise its jurisdiction over the case. The United States was concerned about a situation in which the ICC would assert jurisdiction over U.S. personnel even though the United States was both willing and able to investigate the case.<sup>80</sup> Specifically, the United States objected to the possibility of politically motivated ICC prosecutions of U.S. personnel involved in an internationally unpopular military or humanitarian mission.<sup>81</sup> This fear of politically motivated ICC prosecutions was especially relevant given the scope and frequency of U.S. participation in international peacekeeping missions, as well as military actions taken by the United States and its allies.

As a partial solution to this concern, the United States demanded that the Rome Statute include a strong principle of complementarity, which “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.”<sup>82</sup> The importance of this principle is also reflected in the Preamble to the Rome Statute, which states “that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”<sup>83</sup> Scheffer considered the inclusion of “[a] strong regime of complementarity” to be one of the major U.S. objectives achieved during the Rome Statute negotiations.<sup>84</sup>

U.S. concerns about the jurisdiction of the ICC were most evident in negotiations over Article 98(2) to the Rome Statute and the accompanying procedural rules.<sup>85</sup> Article 98, entitled “Cooperation with respect to waiver of immunity and consent to surrender,” contemplates two situations in which a request for cooperation by the ICC may conflict with a state’s obligations under international law.<sup>86</sup> First, under Article 98(1), the ICC may not proceed with a request for cooperation or surrender of an individual if that request will conflict with the state’s obligations to honor the diplomatic immunity of that

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79. Rome Statute, *supra* note 1, arts. 17-19 (establishing the criteria for admissibility and providing guidelines for challenging either the jurisdiction of the ICC or the admissibility of a case).

80. U.S. Department of State, Fact Sheet, Frequently Asked Questions about the U.S. Government’s Policy Regarding the International Criminal Court (ICC) (July 30, 2003), at <http://www.state.gov/t/pm/rls/fs/23428.htm> [hereinafter Fact Sheet: U.S. Policy Regarding the ICC].

81. *Id.*

82. Scheffer, *supra* note 5, at 88.

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

84. Scheffer, *supra* note 5, at 73.

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

86. *Id.* art. 98.

individual.<sup>87</sup> Article 98(2), which contains the second situation, is the starting point for the present controversy surrounding the BIAs mentioned in ASPA. Article 98(2) reads:

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.<sup>88</sup>

The drafters of the Rome Statute included this provision in Article 98(2) to address the relationship between a state party's obligations to the ICC and any obligations it might have to states under other treaty agreements, such as extradition treaties or Status of Forces Agreements (SOFAs).<sup>89</sup>

A SOFA is "a treaty governing the legal status of members of armed forces of one state (the sending state) stationed in another state (the receiving state) pursuant to that agreement."<sup>90</sup> These agreements also explain "which state has the primary duty to investigate and, if there is sufficient admissible evidence, prosecute members of armed forces from the sending state who were suspected of committing crimes on the territory of the receiving state."<sup>91</sup> The drafters of the Rome Statute recognized that many states already had such agreements in place and did not want the Rome Statute to conflict with these agreements.<sup>92</sup>

Much of the debate over the compatibility of U.S. BIAs with the Rome Statute focuses on the "international agreements" contemplated by Article 98(2).<sup>93</sup> The United States contends that the BIAs are included in the "international agreements" mentioned in Article 98(2).<sup>94</sup> Scheffer himself noted this possibility in a discussion of safeguards from ICC jurisdiction available to the United States, observing:

The United States can negotiate bilateral or multilateral agreements to protect any American citizen from surrender to the ICC. The United States can leverage the approval of such international agreements with particular countries as a precondition to wide-

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87. *Id.* art. 98(1).

88. *Id.* art. 98(2).

89. Amnesty International, U.S. Efforts, *supra* note 16.

90. *Id.*

91. *Id.*

92. See Chimene Keitner, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)*, 6 UCLA J. INT'L L. & FOREIGN AFF. 215, 232-35 (2001).

93. See Amnesty International, U.S. Efforts, *supra* note 16.

94. *Id.*

ranging U.S. cooperation with the Court during its non-State Party status and ultimately to U.S. ratification of the ICC Treaty.<sup>95</sup>

The U.S. State Department also noted and has continued to emphasize that the BIAs were provided for in Article 98.<sup>96</sup> Furthermore, the State Department has explicitly recognized the broader scope of the BIAs and distinguished them from preexisting SOFAs.<sup>97</sup> A recent publication from the Bureau of Political-Military Affairs reflects this distinction, stating, “The Article 98 agreements we are seeking are not limited to protecting U.S. military and civilian employees of the Department of Defense and their dependents, as most SOFAs are, but will protect all [U.S.] nationals.”<sup>98</sup> The United States clearly does not agree with those who contend that the “international agreements” contemplated by Article 98(2) are limited to existing SOFAs.<sup>99</sup> To the contrary, U.S. efforts to pursue BIAs depend on an interpretation of Article 98(2) that is not limited to existing SOFAs.

In addition to advocating that the BIAs are included in the “international agreements” mentioned in Article 98(2), the United States also sought to include a procedural rule to further explain the scope and operation of Article 98.<sup>100</sup> This rule, included as Rule 195 in the Rules of Procedure and Evidence for the ICC, states:

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

Scheffer recognized that Rule 195 would be in the best interest of the United States, noting that it would “[leave] open the possibility of negotiation of an

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95. Scheffer, *supra* note 5, at 90 (internal citation omitted).

96. Fact Sheet: ICC, *supra* note 15.

97. Fact Sheet: U.S. Policy Regarding the ICC, *supra* note 80 (“Article 98 solely concerns the surrender of individuals to the ICC. SOFAs govern the status of forces in a particular country. While criminal jurisdiction issues within the context of the host nation’s laws are dealt with in SOFAs, there is no inherent conflict in signing an Article 98 agreement.”).

98. *Id.*

99. Opponents to the U.S. position contend that Article 98(2) only applies to agreements in existence at the time a state party signed the Rome Statute. See Amnesty International, U.S. Efforts, *supra* note 16 (arguing that “the wording of Article 98(2) does not suggest that it covers new agreements”). Part IV of this comment will more closely examine these conflicting interpretations.

100. Scheffer, *supra* note 5, at 90.

101. INT’L CRIM. CT. R. 195.



international agreement between the ICC and the United States to protect any American citizen from surrender to the ICC.”<sup>102</sup>

*D. ASPA and the U.S. Response to the Rome Statute*

On August 2, 2002, Congress passed ASPA, which prohibits the United States from providing military assistance to any state party to the ICC that has not signed a BIA with the United States.<sup>103</sup> The impetus behind ASPA was evident several years earlier when the Senate conducted hearings to discuss whether supporting the newly formed ICC would be in the national interest of the United States.<sup>104</sup> During the hearings, Senator Jesse Helms, an outspoken ICC critic, mentioned a number of concerns that he and others shared about the Rome Statute.<sup>105</sup> These concerns included the applicability of the Rome Statute to citizens of nonparty states, the objectivity of an independent prosecutor who appeared to be unaccountable to any government or institution, and the potential for the ICC to question U.S. foreign policy decisions.<sup>106</sup> During the hearings, Senator Helms summarized his position on the ICC, noting that “[i]f other nations are going to insist on placing Americans under the ICC’s jurisdiction against their will, then Congress has a right and responsibility to place a cost on their obstinacy, and to ensure our men and women in uniform are protected.”<sup>107</sup>

To help alleviate these concerns, Senator Helms and others asked the Secretary of State to meet a number of assurances before the United States became a party to the Rome Statute.<sup>108</sup> Senator Helms wanted assurance that: (1) the United States would not provide assistance to the ICC or any international organization that supports the ICC; (2) the United States would not refer a case or extradite an individual to the ICC; (3) the United States would prohibit its bilateral extradition treaty partners from extraditing a U.S. citizen to the ICC; and (4) the United States would not allow any U.S. military personnel to participate in international peacekeeping missions, including North Atlantic Treaty Organization (NATO) and U.N. operations, until all NATO allies and the U.N. agree that the ICC cannot subject U.S. military personnel to

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102. Scheffer, *supra* note 5, at 90.

103. ASPA, *supra* note 10.

104. *National Interest Hearings*, *supra* note 24.

105. *Id.*

106. M. Tia Johnson, *The American Servicemembers’ Protection Act: Protecting Whom?*, 43 VA. J. INT’L L. 405, 441 (2003).

107. *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution: Hearing Before the Senate Comm. on Foreign Relations*, 106th Cong. 12 (2000) (statement of Sen. Jesse Helms, Chairman of Comm. on Foreign Relations).

108. Johnson, *supra* note 106, at 441-42.

its jurisdiction.<sup>109</sup> These concerns are echoed in the findings portion of ASPA.<sup>110</sup>

In addition to concerns over the welfare of U.S. military personnel, critics of the Rome Statute also addressed the fear of politically motivated prosecutions by the ICC.<sup>111</sup> Some critics feared that U.S. leaders would become subject to ICC prosecution based solely on controversial foreign policy decisions.<sup>112</sup> This fear was heightened by what ICC critics viewed as an unaccountable prosecutor who could initiate prosecutions based solely on political motives.<sup>113</sup> Section 2002 of ASPA addresses these concerns, noting that the Rome Statute “creates a risk” that the ICC could subject the U.S. President and other senior officials to prosecution for “such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression.”<sup>114</sup> This section continues by stating, “No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the [ICC], especially with respect to official actions taken by them to protect the national interests of the United States.”<sup>115</sup>

The U.S. delegation to the Rome Statute conferences expressed concerns over ICC jurisdiction and the possibility of political prosecutions. Ultimately, however, the United States was unsuccessful in its attempt to exempt U.S.

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109. *Id.*

110. ASPA, *supra* note 10, § 2002. The relevant portions of this section read:

8. Members of the Armed Forces of the United States should be free from the risk of prosecution by the [ICC], especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the [ICC].

11. It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the [ICC] over United States nationals.

*Id.*

111. *See* Fact Sheet: U.S. Policy Regarding the ICC, *supra* note 80 (explaining that the protections provided for in the Rome Statute are insufficient to meet U.S. concerns).

112. *Id.*

113. *Id.* (expressing concern that there are insufficient checks and balances on the authority of the ICC prosecutor and judges because the Rome Statute creates a self-initiating prosecutor who does not answer to any state or institution other than the ICC itself and noting that without such an external check on the prosecutor, there is insufficient protection against politicized prosecutions or other abuses).

114. ASPA, *supra* note 10, § 2002.

115. *Id.*

personnel from ICC jurisdiction.<sup>116</sup> By passing ASPA, Congress reacted strongly to the possibility that U.S. citizens could be subject to ICC jurisdiction under a treaty to which the United States was not a party.

Consistent with the U.S. interpretation of Article 98(2), ASPA contemplates agreements that would exempt U.S. personnel from the jurisdiction of the ICC.<sup>117</sup> ASPA also prohibits U.S. courts, agencies, and entities of any state or local government from cooperating with the ICC.<sup>118</sup> Most significantly, ASPA prohibits U.S. military assistance to states that are parties to the Rome Statute.<sup>119</sup> There are, however, three exceptions to this provision: (1) the U.S. President can waive the prohibition if it is in the national interest;<sup>120</sup> (2) the prohibition does not apply if the state is a NATO member, a major non-NATO ally, or Taiwan,<sup>121</sup> and (3) the prohibition is not applicable to a state that “has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the [ICC] from proceeding against [U.S.] personnel present in such country.”<sup>122</sup>

ASPA was greeted with much criticism, both domestically and internationally.<sup>123</sup> Most notably, Scheffer voiced a number of criticisms about ASPA at a meeting before the House International Relations Committee in July 2000.<sup>124</sup> Scheffer argued strongly against ASPA, noting that:

[I]t is counter productive not only because of its direct impact on critical negotiations relating to the [ICC], but also because [it] would seriously damage U.S. national policy objectives. It would hold national security and foreign policy interests hostage to the fate of our relationship with governments that support the ICC . . . .<sup>125</sup>

Scheffer has also suggested that some ASPA provisions could unconstitutionally infringe on the president’s authority as commander-in-chief because they

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116. See Keitner, *supra* note 92, at 238-63 (providing an analysis of the process behind the drafting of Article 98(2) that focuses on U.S. proposals and reactions to them).

117. ASPA, *supra* note 10, § 2007.

118. *Id.* § 2004.

119. *Id.* § 2007.

120. *Id.* § 2007(b).

121. *Id.* § 2007(d).

122. *Id.* § 2007(c).

123. See, e.g., Roseann M. Latore, *Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court*, 25 B.C. INT’L & COMP. L. REV. 159, 172-75 (2002).

124. *International Criminal Court: Part 2 — Recent Developments: Hearings Before the House Int’l Relations Comm.*, 106th Cong. 87-91 (2000) [hereinafter *House Committee Hearings*] (statement of David J. Scheffer, Ambassador-at-Large for War Crimes).

125. *Id.* at 87.

limit the United States' ability to participate in certain military missions with countries that have not signed a BIA with the United States.<sup>126</sup>

International criticism of ASPA did not focus on the constitutional dilemma posed by the legislation, but rather on the apparent U.S. attempt to undermine ICC jurisdiction.<sup>127</sup> Some opponents pointed to ASPA as evidence of "a recent trend toward unilateralism and non-cooperation by the United States government."<sup>128</sup>

#### *E. Bilateral Immunity Agreements*

As a number of commentators have pointed out, ASPA's passage increases the United States' ability to persuade other countries to sign a BIA.<sup>129</sup> Some opponents of BIAs have gone even further by accusing the United States of questionable negotiation tactics in its pursuit of these agreements.<sup>130</sup>

Despite international criticism of the BIAs, the United States contends that these agreements are fully compatible with Article 98 of the Rome Statute.<sup>131</sup> While some organizations may disagree with the U.S. position on the compatibility of these agreements, the United States has been quite successful in executing these BIAs in the wake of ASPA. As of December 2004, over

126. *Id.* at 88-89. Scheffer noted:

[T]he Department of Justice advises that these restrictions [in ASPA] on the United States' ability to participate in cooperative international activities . . . may impair the President's powers as Commander-in-Chief, especially if such actions are deemed by the President to be necessary to further operations in which the United States armed forces are authorized to take part.

The Department of Justice further advises that insofar as such a court can be considered to be a type of international forum, the provision would seem to bar the President from communicating with that forum . . . if such conduct were considered "cooperation" with the forum. If so construed, it would present an unconstitutional intrusion into the President's plenary and exclusive authority over diplomatic communications.

*Id.*

127. See England, *supra* note 5, at 965 (suggesting that ASPA "is an attempt to solidify American opposition to the ICC and send a clear signal to other countries that are considering ratification of the treaty"); see also Faulhaber, *supra* note 13, at 554-55 (noting that the United States has used the threat of sanctions under ASPA to "encourage" other nations to sign BIAs, which "allow the United States to oppose the [ICC] while still falling within the letter of the Rome Statute"); Galbraith, *supra* note 43, at 693-95 (discussing the Bush administration's approach of "aggressive unilateralism" and its effect on the ICC).

128. Faulhaber, *supra* note 13, at 554.

129. *Id.* (discussing the "coercive nature" of ASPA).

130. See *supra* note 16 and accompanying text.

131. Fact Sheet: U.S. Policy Regarding the ICC, *supra* note 80 (asserting that the U.S. draft BIA "is fully consistent with the Rome Statute. Article 98 of the Statute expressly contemplates such agreements.").

ninety countries had signed a BIA with the United States.<sup>132</sup> Over forty of these countries are parties to the Rome Statute.<sup>133</sup> The United States considers the large number of BIAs it has signed with parties to the Rome Statute as evidence of the appropriateness of these agreements.<sup>134</sup> In a press statement announcing the recent signing of two new BIAs by parties to the Rome Statute, State Department spokesman Richard Boucher noted that the signing “demonstrates the recognition among States Parties to the [ICC] that Article 98 Agreements are an important mechanism provided for in the ICC Treaty.”<sup>135</sup>

Currently, there are three types of BIAs. The first type provides that both parties agree not to surrender each other’s nationals to the ICC without the consent of the other party.<sup>136</sup> Under the second type of BIA, the second state is prohibited from handing over a U.S. national to the ICC, but the United States may still surrender nationals of the second state to the ICC.<sup>137</sup> For states that have neither ratified nor signed the Rome Statute, the third type of BIA contains

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132. ICC, Status of BIAs, *supra* note 14.

133. *Id.*

134. Press Statement, U.S. Dept. of State, Article 98 Agreements (Sept. 23, 2003), at <http://www.state.gov/r/pa/prs/ps/2003/24331.htm>.

135. *Id.*

136. Amnesty International, U.S. Efforts, *supra* note 16. An example of a typical BIA (of the first type) reads, in part, as follows:

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

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

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

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

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

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

Murphy, *supra* note 13, at 201-02 (citing Agreement Regarding the Surrender of Persons to the International Criminal Court, Aug. 23, 2002, U.S.-E. Timor).

137. Murphy, *supra* note 13, at 201-02.

a provision “requiring those states not to cooperate with efforts of third states to surrender persons to the [ICC].”<sup>138</sup>

### *III. The Vienna Convention on the Law of Treaties and General Principles of Treaty Interpretation*

#### *A. The Vienna Convention on the Law of Treaties*

The VCLT sets forth the rights and duties of those states that are signatories or parties to international treaties.<sup>139</sup> Under Article 18 of the VCLT, “[a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty” when that treaty has not yet entered into force, or when the state is a signatory but not yet a party to that treaty.<sup>140</sup> A primary question in the controversy regarding the BIAs is whether a state that has entered into one of these agreements with the United States can meet the obligations of the BIA while still performing its required duties under the Rome Statute.<sup>141</sup> Opponents of the BIAs claim that entering into these agreements constitutes an act that could cause a state to violate its duties to the ICC under the Rome Statute.<sup>142</sup> To make such a judgment regarding the compatibility of the BIAs with the Rome Statute, however, the object and purpose of the Rome Statute must first be determined.

The principles of treaty interpretation are codified in Articles 31-33 of the VCLT.<sup>143</sup> Determining the object and purpose of a treaty is necessary to inform the inquiry into the interpretation of its terms.<sup>144</sup> Article 31 explains that a treaty must “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>145</sup>

Even though the ordinary meaning of the treaty terms is paramount in a treaty interpretation under the VCLT,<sup>146</sup> courts are not limited to such a literal reading. On the contrary, Article 31 requires a court looking at the ordinary meaning of a treaty’s terms to interpret these terms “in their context” and “in

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138. *Id.*

139. VCLT, *supra* note 18; *see also* Swaine, *supra* note 44, at 2066-71 (discussing the relationship between signing a treaty and ratifying a treaty).

140. VCLT, *supra* note 18, art. 18.

141. *See infra* Part IV.B.3.

142. *See supra* note 16 and accompanying text.

143. VCLT, *supra* note 18, arts. 31-33.

144. *Id.* art. 31(1).

145. *Id.*

146. *See id.*

light of [the treaty's] object and purpose."<sup>147</sup> In fact, the requirement in Article 31 that a treaty's terms be interpreted in light of its object and purpose prevents the "ordinary meaning" principle from becoming too constraining.<sup>148</sup>

For those situations in which Article 31 guidance may be insufficient to provide a satisfactory treaty interpretation, Article 32 describes supplementary means of interpretation.<sup>149</sup> To confirm or to clarify an ambiguous or obscure meaning of an Article 31 interpretation, the court may look to supplementary material, such as "the preparatory work of the treaty and the circumstances of its conclusion."<sup>150</sup>

### *B. Determining the Object and Purpose of the Rome Statute*

Of the eleven statements in the Preamble to the Rome Statute, three are relevant to an attempt to construe the Statute's object and purpose.<sup>151</sup> These read as follows:

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, . . .

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . . .<sup>152</sup>

Even within the Preamble to the Rome Statute, the potential for conflict among the goals of the ICC is evident. The conflict involves the principle of complementarity<sup>153</sup> and the determination to end the impunity of war criminals, both of which are echoed in the Preamble.<sup>154</sup> While the ICC demands that no individual escape punishment, it also defers to domestic courts through complementarity.<sup>155</sup> Thus, a conflict could easily arise when, after initially deferring to the jurisdiction of a suspect's domestic legal system, the ICC later

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147. *Id.*

148. *See id.*

149. *Id.* art. 32.

150. *Id.*

151. *See* Rome Statute, *supra* note 1, pmbl.

152. *Id.*

153. *See supra* notes 82-84 and accompanying text.

154. *See* Rome Statute, *supra* note 1, pmbl.

155. *Id.*

decides that the domestic legal system did not adequately handle the case.<sup>156</sup> In such a situation, the ICC's deference to a domestic legal system would be tested. The tension between these potentially competing goals within the ICC does not, however, obstruct an attempt to ascertain the object and purpose of the Rome Statute. To the contrary, the principle of complementarity in the Rome Statute makes the object and purpose of the treaty more apparent.

The ICC's purpose is not to prosecute every war criminal itself but rather to ensure that every war criminal is prosecuted by some tribunal, whether it be the ICC or a domestic court.<sup>157</sup> If a suspect's domestic legal system is able to adequately investigate and prosecute a case, then the ICC will remain uninvolved and defer to that legal system.<sup>158</sup> If, however, the domestic legal system is unable or unwilling to investigate a suspect, then the ICC will step in to ensure that the individual does not enjoy impunity.<sup>159</sup> Thus, the ICC's goal is to carry out the investigation, trial, and punishment itself only if the suspect's domestic legal system has failed in this regard.<sup>160</sup>

#### *IV. A Case of Jurisdictional Conflict Between the United States and the ICC*

##### *A. A Hypothetical Problem of State X: Arguments on the Issue of Jurisdiction*

Through the principle of complementarity, the United States hoped to avoid any jurisdictional conflicts with the ICC.<sup>161</sup> As the controversy surrounding the BIAs demonstrates, the potential for conflict is nevertheless a reality and a

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156. *See infra* Part V.

157. *See* Amnesty International, U.S. Efforts, *supra* note 16. The organization notes:

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

*Id.* For a state to "defeat the object and purpose" of the Rome Statute, it would have to engage in an act that would hinder a suspect's prosecution by either the ICC or a domestic legal system. *See* VCLT, *supra* note 18, art. 18; *see also infra* Part IV.B.3.

158. *See* Rome Statute, *supra* note 1, art. 20.

159. *Id.*

160. *See* Murphy, *supra* note 13, at 201 (noting that language in U.S. BIAs also asserts that the Rome Statute "is intended to complement and not supplant national criminal jurisdiction").

161. *See supra* notes 82-84 and accompanying text (discussing the principle of complementarity).



problem that the international community must address to ensure the ICC's effectiveness.

Consider the following hypothetical situation of State X, a state that is a party to the Rome Statute and has signed a BIA with the United States. In the event that a member of the U.S. military is captured in State X by authorities of State X on the suspicion of committing a crime that falls within Article 5 of the Rome Statute,<sup>162</sup> the ICC could request State X to surrender that individual. Assuming that the United States does not consent to the surrender of this individual to the ICC, U.S. officials would likely point to the provisions of the BIA that prohibit such a surrender by State X.<sup>163</sup>

In an attempt to gain greater international support for its position on nonsurrender, the United States could also work within the principles of the Rome Statute and point to the provisions that address the issue of complementarity, namely the Preamble,<sup>164</sup> Article 1,<sup>165</sup> and Article 17.<sup>166</sup> According to Article 17, the ICC should not assert jurisdiction over a case where:

(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.<sup>167</sup>

In the hypothetical situation with State X, the United States could demonstrate that it was investigating the conduct of the suspect and, if appropriate, would prosecute the individual in the United States according to U.S. law.

Even if the United States conducted an investigation, the international community or the ICC might still determine that the ICC could exercise jurisdiction over the case. If a U.S. court ordered a punishment that other states considered inadequate, or if the U.S. court found the suspect innocent, the Rome

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162. Rome Statute, *supra* note 1, art. 5.

163. *See supra* notes 136-38 and accompanying text (noting that the BIA prohibits the transfer of persons to the ICC for any purpose).

164. Rome Statute, *supra* note 1, pmbl. (noting that "the [ICC] established under this statute shall be complementary to national criminal jurisdictions").

165. *Id.* art. 1 (stating that the ICC "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.").

166. *Id.* art. 17.

167. *Id.*

Statute still provides a mechanism for the ICC to assert jurisdiction over the case.<sup>168</sup> Article 20 operates to ensure that no suspect can enjoy impunity through a staged or sham investigation or prosecution by allowing the ICC to conduct a second investigation.<sup>169</sup>

In response to the hypothetical U.S. arguments discussed above, proponents of the transfer of the suspect from State X to the ICC could point to the provisions of the Rome Statute that support the exercise of ICC jurisdiction. According to Article 86, “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the [ICC] in its investigation and prosecution of crimes within the jurisdiction of the [ICC].”<sup>170</sup>

More importantly, supporters of ICC jurisdiction would note that the ICC alone can make the decision whether Article 98(2) bars State X from surrendering the U.S. suspect.<sup>171</sup> One recent legal opinion on this question expressed a similar view, contending that if the issue of whether the ICC should respect the terms of a BIA “arises in the context of a request for a person to be transferred to the [ICC] . . . then it will likely be for the [ICC] to determine whether the terms of the [BIA] are compatible with the [Rome] Statute.”<sup>172</sup>

The text of the Rome Statute also supports the claim that the ICC itself would decide the issue of compatibility. Rule 195(1) of the Rules of Procedure and Evidence states, “When a requested State notifies the [ICC] that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the [ICC] in the application of article 98.”<sup>173</sup> This provision confirms that the ICC, not the

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168. *See id.* art. 20.

169. *Id.* One of the provisions in Article 20 reads:

No person who has been tried by another court for [genocide, crimes against humanity, or war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

*Id.* art. 20(3).

170. *Id.* art. 86.

171. Amnesty International, U.S. Efforts, *supra* note 16.

172. James Crawford SC, Philippe Sands QC & Ralph Wilde, *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* (June 16, 2003), at <http://www.iccnw.org/documents/otherissues/impunityart98/SandsCrawfordBIA14June03.pdf> [hereinafter *BLAs Sought by U.S.*].

173. INT’L CRIM. CT. R. 195.

sending state or the receiving state, makes the ultimate decision regarding a conflict between a BIA and the Rome Statute.

The granting of decision-making authority to the ICC is made more explicit in Article 119(1) of the Rome Statute, which states, “Any dispute concerning the judicial functions of the [ICC] shall be settled by the decision of the [ICC].”<sup>174</sup> The hypothetical conflict with State X and the United States would constitute a “dispute” within the meaning of Article 119.<sup>175</sup> The “judicial function” of the ICC involved in the dispute would be the ICC’s request for the surrender of the U.S. citizen from State X.<sup>176</sup> The ICC has reserved the right to make final decisions in situations where a state attempts to claim an Article 98 exemption for one of its nationals.<sup>177</sup> While the ICC welcomes information from that state to aid in its decision,<sup>178</sup> the ICC will ultimately decide the issue.<sup>179</sup>

If State X were to face the difficult decision of deciding whether to hand over a U.S. national to the United States or to the ICC, each of the parties to the controversy clearly would have strong arguments supporting its claim to jurisdiction over the suspect. To summarize, the United States can point to the principle of complementarity included in Article 17 of the Rome Statute and insist that it is conducting an investigation, which precludes the ICC from exercising jurisdiction.<sup>180</sup> In contrast, the ICC can rely on Article 86, which requires parties — in this example, State X — to cooperate fully with the ICC in its investigation and prosecution of crimes.<sup>181</sup> Furthermore, the ICC can argue that it alone determines whether the terms of the BIA are compatible with the Rome Statute.<sup>182</sup>

In resolving State X’s conflict, the ICC would likely have to examine the BIA’s provisions to determine whether it hinders ICC jurisdiction. In other words, if the ICC does not consider the BIA to be one of the “international agreements” contemplated in Article 98(2),<sup>183</sup> then Article 98(2) possibly would not apply and the BIA with the United States would not entitle State X to withhold assistance from the ICC. The ICC, therefore, must examine both the BIA and the Rome Statute to determine whether Article 98(2) contemplates this

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

175. *See BIAs Sought by U.S.*, *supra* note 172.

176. *See id.*

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

178. INT’L CRIM. CT. R. 195.

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

180. *See supra* notes 164-67 and accompanying text; *see also* Rome Statute, *supra* note 1, art. 17.

181. *See supra* note 170 and accompanying text.

182. *See supra* notes 173-74 and accompanying text.

183. *See supra* notes 93-102 and accompanying text.

type of agreement. In conducting this inquiry, the ICC should also consider the BIA in relation to the object and purpose of the Rome Statute.<sup>184</sup> This consideration will demonstrate whether, even if Article 98(2) contemplates BIAs, the ICC should uphold them as consistent with the Rome Statute or whether the ICC should effectively ignore them when asserting jurisdiction.

*B. Analysis of the BIAs in Relation to the Rome Statute*

To determine whether Article 98(2) contemplates BIAs, it is first necessary to understand the effect BIAs could have on an attempt by the ICC to exercise jurisdiction over a suspect. A closer examination of the major provisions of a typical BIA will aid in demonstrating how the agreement could affect an exercise of jurisdiction by the ICC. Furthermore, this examination will also address some of the major objections to the current form of the BIAs.

*1. The Scope of the BIAs*

The “persons” referred to in a BIA include “current or former government officials, employees (including contractors), or military personnel or nationals of one Party.”<sup>185</sup> A significant amount of the criticism surrounding BIAs has centered around the broad use of the term “person.”<sup>186</sup> Opponents of the BIAs contend that the drafters of the Rome Statute intended Article 98(2) to include only those persons who were traditionally covered under SOFAs.<sup>187</sup> This view would have the primary effect of limiting the scope of the Article 98(2) exception to military personnel.<sup>188</sup> The United States’ expansive use of the term “person” in the BIAs would mean that a broader range of individuals could be exempted from ICC jurisdiction. In addition to current military personnel, former military personnel could be exempted from ICC jurisdiction under the BIAs even if they were present in the state for nonmilitary or other personal reasons.<sup>189</sup>

For those BIA opponents who argue that the Article 98(2) exception includes only extradition treaties or SOFAs,<sup>190</sup> the United States’ use of the term “persons” results in a broader exception than that intended by the drafters of Article 98. Most notably, the European Union was among the critics of the

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184. *See supra* Part III.A-B.

185. Murphy, *supra* note 13, at 201.

186. *See, e.g.*, Amnesty International, U.S. Efforts, *supra* note 16.

187. *See* Keitner, *supra* note 92, at 238-63 (providing an analysis of the process behind the drafting of Article 98(2) that focuses on U.S. proposals and reactions to them).

188. SOFAs are intended to cover only those persons officially “sent” by a “sending state,” which is typically limited to military or support personnel.

189. Amnesty International, U.S. Efforts, *supra* note 16.

190. *See supra* notes 90-94 and accompanying text.

BIAs that objected to this broad use of “persons.”<sup>191</sup> In September 2002, the Council of the European Union issued a set of “Guiding Principles” to its member states regarding the appropriateness of proposed BIAs with the United States.<sup>192</sup> The Council noted, “Entering into U.S. 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.”<sup>193</sup> The Council indicated that the scope of the persons covered by the BIAs was overly broad.<sup>194</sup> In addition to the other suggestions for changes that would make the BIAs more compatible with the Rome Statute, the Council proposed that the agreements “should cover only persons present on the territory of a requested State because they have been sent by a sending State.”<sup>195</sup>

Other critics contend that the BIAs are therefore intended to “seek immunity for a broad class of persons, without any reference to the traditional sending state-receiving state relationship of SOFA . . . agreements.”<sup>196</sup> Critics have disapprovingly noted some of the possible results of broadly defining the term “persons.” Under a BIA, a “person” could include “anyone found on the territory of the state concluding the agreement with the [United States] who works or has worked for the [U.S.] government.”<sup>197</sup> According to this interpretation, a BIA could be used to exempt anyone of *any* nationality from ICC jurisdiction if that person has some relationship, however tenuous, with the U.S. government. This broad definition could even exempt a citizen of the state where that individual is found or in which the conduct occurs, which potentially has the effect of “preventing that state from taking responsibility for its own citizens.”<sup>198</sup> For example, according to this interpretation, if a citizen of Canada works for the U.S. government in Canada, the United States could use a BIA with Canada to claim jurisdiction over that individual, even against the wishes of Canadian authorities. Other critics point out that the persons covered under the BIAs could include “persons travelling through, conducting personal business or vacationing in the USA or the second state.”<sup>199</sup>

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191. *General Affairs and External Relations*, COUNCIL OF THE EUR. UNION, 2450th Sess., Doc. No. 12516/02 (Sept. 30, 2002).

192. *Id.* at 9-10.

193. *Id.* at 10.

194. *Id.* at 11.

195. *Id.*

196. Coalition for the International Criminal Court, U.S. Bilateral Immunity or So-Called “Article 98” Agreements, at <http://iccnw.org/pressroom/factsheets/FS-BIAsAug2004.pdf> (last updated Aug. 16, 2004).

197. *Id.* at 2.

198. *Id.* at 3.

199. Amnesty International, U.S. Efforts, *supra* note 16.

By insisting on a broad use of the term “persons,” the United States inadvertently supports those who argue that Article 98(2) of the Rome Statute was intended only to cover agreements such as extradition treaties or SOFAs and not broader agreements such as the BIAs. The U.S. contention that the BIAs are consistent with Article 98(2) might be stronger were the scope of the agreements narrower. In their current form, however, the broad scope of the exceptions in the BIAs appears to exceed those intended under Article 98(2).<sup>200</sup> Although Article 98(2) uses the traditional SOFA language and refers to the “sending state,”<sup>201</sup> the U.S. BIA does not defer to the traditional SOFA classifications intended by the drafters of Article 98(2).<sup>202</sup> A number of critics agree that the broader scope of the U.S. agreements effectively removes them from the exceptions under Article 98(2).<sup>203</sup>

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200. *See supra* notes 190-99.

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

202. *See supra* notes 90-92 and accompanying text.

203. Critics argue that the U.S. BIA definition of “persons” covers a considerably broader class of persons than those who can properly be characterised as having been “sent” by a State. “Employees” may have been locally engaged; “former Government officials” and “nationals” may be resident in the requested State or visiting in a private capacity, e.g. for the purposes of business or tourism. In this way the agreements being sought by the [United States] go well beyond the scope of the agreements envisaged by Article 98(2). *BIAs Sought by U.S., supra* note 172.

### 2. *Lack of a Guarantee of U.S. Investigation or Prosecution in the BIAs*

In addition to the broader scope of the persons covered by the BIAs, there is another weakness in the U.S. argument that Article 98(2) of the Rome Statute contemplates the BIAs. Under a typical BIA, a state agrees that they will not turn over a suspect to the ICC without the consent of the United States.<sup>204</sup> Nevertheless, no guarantee exists that the United States will conduct an investigation into the occurrence once the suspect is turned over to the United States. This lack of a guaranteed investigation could potentially result in a situation in which the United States would claim jurisdiction over a suspect in accordance with a BIA, but would then refuse to conduct an investigation or, if appropriate, a prosecution.

This lack of a guaranteed investigation also strengthens critics' contentions that the primary motivation behind the U.S. BIAs was to ensure immunity for U.S. citizens.<sup>205</sup> If the United States had included some guarantee of investigation once the suspect is handed over to U.S. authorities, perhaps the critics of the BIAs would have to concede that the suspect would still face investigation by the United States. In their current form, however, the BIAs do not provide this assurance. To the contrary, the agreements are silent regarding the procedures facing the suspects once they are under U.S. jurisdiction.

The Council of the European Union also noted this weakness in the U.S. position. It recommended that any immunity agreement proposed by the United States "should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the [ICC] do not enjoy impunity. Such provisions should ensure appropriate investigation and — where there is sufficient evidence — prosecution by national jurisdictions concerning persons requested by the ICC."<sup>206</sup>

### 3. *Inconsistency of a State's Obligations Under a BIA with Its Obligations Under the Rome Statute*

As demonstrated above, a state that is a party to both a BIA and the Rome Statute could face conflicting obligations when both the United States and the ICC claim jurisdiction over a suspect presently in that state.<sup>207</sup> If both the United States and the ICC claimed jurisdiction over a suspect, the United States would likely point to the BIA and argue that because Article 98(2) contemplated this agreement, the BIA should be honored by allowing the United States to

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204. See *supra* notes 136-38 and accompanying text.

205. Amnesty International, U.S. Efforts, *supra* note 16.

206. COUNCIL OF THE EUR. UNION, *supra* note 191, at 10.

207. See *supra* Part IV.

assert jurisdiction over the suspect. As noted in the discussion above, however, Article 98(2) does not contemplate the BIAs.<sup>208</sup> The expanded scope of “persons” included in the BIAs and the lack of any effective guarantee of prosecution or investigation support the critics’ arguments that these agreements are drastically different than the more limited SOFAs the drafters intended under Article 98(2).<sup>209</sup>

Even if the U.S. position that the BIAs are consistent with Article 98(2) is correct, the larger and more important issue of whether the BIAs are consistent with the Rome Statute must still be considered. For instance, in the hypothetical conflict discussed above, if State X decided to turn over the suspect to the jurisdiction of the United States in accordance with the BIA, there is no guarantee that the United States would conduct an investigation.<sup>210</sup>

This situation presents three primary challenges to a state’s obligations under the Rome Statute. First, the primary purpose of the Rome Statute is to ensure that no suspect enjoys impunity.<sup>211</sup> If State X turns over the suspect to the United States in accordance with a BIA and the United States does not conduct an investigation, this purpose of the Rome Statute has been defeated because that suspect could enjoy impunity. Critics of the BIAs have emphasized this impunity argument repeatedly in their campaign against BIAs.<sup>212</sup> For example, according to one legal opinion, a state that enters into a BIA that makes it possible to immunize a suspect from ICC jurisdiction does not uphold the object and purpose of the Rome Statute: “[I]t would not be compatible with that State Party’s obligations under the ICC Statute, both to other State Parties and to the [ICC]. It may also be incompatible with the general duty under international law and specific treaties to investigate and, if warranted, to prosecute international crimes.”<sup>213</sup>

Second, a state’s attempt to fulfill its obligations under a BIA could also conflict with the principle of complementarity established in the Rome Statute.<sup>214</sup> Under this principle, the ICC is obligated to defer to a state’s domestic judicial system when that state is willing and able to perform the investigation.<sup>215</sup> The principle of complementarity works in conjunction with the purpose of avoiding impunity because exceptions to ICC jurisdiction are made only when the ICC is satisfied that a suspect will not escape

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208. *See supra* Parts IV.B.1-2.

209. *See supra* notes 187-99 and accompanying text.

210. *See supra* notes 204-05 and accompanying text.

211. *See supra* Part III.A-B.

212. *See, e.g.*, sources cited *supra* note 16.

213. *BIAs Sought by U.S.*, *supra* note 172.

214. *See supra* notes 82-84 and accompanying text.

215. *See Rome Statute*, *supra* note 1, art. 20.



investigation.<sup>216</sup> Article 17 of the Rome Statute sets forth some of these exceptions, such as a situation in which a state's domestic legal system is willing and able to conduct an investigation.<sup>217</sup> Article 98(2) also provides the exceptions for extradition treaties and SOFAs.<sup>218</sup> In addition to the Article 17 exceptions to ICC jurisdiction, these Article 98(2) exceptions are also designed to include mechanisms for ensuring that a state will investigate and, if appropriate, prosecute a suspect.<sup>219</sup>

Although the United States claims that the BIAs fall under the Article 98(2) exceptions,<sup>220</sup> the lack of a guaranteed investigation of the suspect significantly weakens this claim. Through the BIAs, the United States attempts to circumvent the principle of complementarity: although it claims an exception under Article 98(2), it subsequently refuses to guarantee an investigation of the suspect exempted from ICC jurisdiction.<sup>221</sup>

The exceptions made in the Rome Statute for ICC jurisdiction under the complementarity principle presume that an investigation will still be carried out, even if not by the ICC. This idea is also echoed in Article 20 of the Rome Statute, which allows the ICC to investigate a suspect after a state's investigation if the state proceedings "[w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the [ICC]" or were otherwise "not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which . . . was inconsistent with an intent to bring the person concerned to justice."<sup>222</sup> Thus, under Article 20, even if a domestic legal system has conducted an investigation, the ICC still has authority to ensure that the state conducted the investigation in a manner consistent with the Rome Statute.<sup>223</sup> Because no assurance of investigation exists under U.S. BIAs, a state honors its obligations to the United States under a BIA at the expense of its obligations to the ICC, which could result in the state acting contrary to the principle of complementarity that is enshrined in the Rome Statute.<sup>224</sup>

A third and final area of conflict involves the duty of parties to the Rome Statute to "cooperate fully with the [ICC] in its investigation and prosecution

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216. *BIAs Sought by U.S.*, *supra* note 172.

217. Rome Statute, *supra* note 1, art. 17.

218. *Id.* art. 98(2).

219. *Id.*

220. *See supra* notes 96-100 and accompanying text.

221. *See* Amnesty International, U.S. Efforts, *supra* note 16.

222. Rome Statute, *supra* note 1, art. 20.

223. *Id.*

224. *See supra* notes 153-60 and accompanying text.

of crimes” within its jurisdiction.<sup>225</sup> This duty of cooperation is also reflected in Articles 86, 87, 89, and 90 of the Rome Statute, which provide the general provisions for requests for cooperation and describe the mechanisms for surrendering suspects to the jurisdiction of the ICC.<sup>226</sup> A state party that refuses to surrender a suspect to the ICC and instead turns that suspect over to the United States in accordance with a BIA contravenes not only the principle of complementarity but also the duty of cooperation articulated within the Rome Statute.<sup>227</sup>

Regarding the issue of cooperation, supporters of the BIAs point to Article 98(2), arguing that the state party does not have a duty to cooperate with the ICC when this type of conflict occurs, primarily because the ICC may not request a surrender when that request would require a state party “to act inconsistently with its obligations under international agreements.”<sup>228</sup> Once again, this line of argument leads to the discussion of whether the BIAs are considered one of the types of “international agreements” contemplated under Article 98(2).<sup>229</sup> As noted in the discussion above, the drafters of Article 98(2) did not intend to provide an exception to jurisdiction as broad as the one included in the current form of the BIAs.<sup>230</sup> Because Article 98(2) does not include the BIAs, the duty to cooperate with the ICC remains intact. When a conflict arises, a state cannot rely on its obligations under a BIA to justify its refusal to cooperate with an ICC request for jurisdiction over a suspect.

#### *V. International Consequences of the U.S. Campaign to Secure BIAs*

For those states that are parties to the Rome Statute but do not sign a BIA with the United States, severe consequences can result under ASPA. Most significantly, these consequences can include a prohibition of U.S. military assistance.<sup>231</sup> Unless the state is a NATO member, a major non-NATO ally, or Taiwan, the only way for that state to be assured that it will continue to receive U.S. military assistance is to sign a BIA.<sup>232</sup> ASPA does, however, provide for one additional exception to the military assistance prohibition — the U.S. President may waive the prohibition when it is in the U.S. national interest.<sup>233</sup> Although these waivers should allow a party to the Rome Statute to continue to

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225. Rome Statute, *supra* note 1, art. 86.

226. *See id.* arts. 86-87, 89-90.

227. *Id.* art. 86.

228. *Id.* art. 98(2).

229. *See supra* Part IV.B.

230. *See supra* notes 89-92 and accompanying text.

231. ASPA, *supra* note 10, § 2007.

232. *Id.*

233. *Id.*

receive U.S. military aid, President Bush's refusal to grant these exemptions has led to a combined loss of \$40.53 million in military aid for twenty-two countries in fiscal year 2004.<sup>234</sup>

The U.S. prohibition on providing military aid to those parties to the Rome Statute that choose not to sign a BIA has harmed U.S. foreign policy interests. Scheffer warned of the potential for harm to U.S. foreign policy interests under ASPA in his July 2000 address to the House International Relations Committee.<sup>235</sup> Scheffer argued that ASPA was counterproductive "not only because of its direct impact on critical negotiations relating to the [ICC], but also because [it] would seriously damage U.S. national policy objectives."<sup>236</sup> Scheffer characterized ASPA as something that "ties the President's hands in a way that can severely undermine this nation's ability and will to protect our national interests."<sup>237</sup>

In the four years since his testimony to the House International Relations Committee, some of Scheffer's fears about ASPA have been realized. One notable area of conflict with U.S. national interests occurred in relation to Operation Iraqi Freedom. Some of the countries that heeded the U.S. call for troops, including Bulgaria, Latvia, Lithuania, Estonia, and Slovakia, had their military funding suspended by the United States for their refusal to sign a BIA.<sup>238</sup> For example, Bulgaria lost \$1.2 million in aid from the United States, even though it had allowed U.S. planes to use one of its air bases on the way to Iraq.<sup>239</sup> Lithuania, which had sent troops to Iraq, lost \$4 million in U.S. aid.<sup>240</sup> Estonia faced \$2.75 million in suspended aid, even though it had also sent troops to Iraq.<sup>241</sup> One critic characterized the U.S. treatment of these European states as "a slap in the face."<sup>242</sup>

ASPA restrictions on military assistance have also affected U.S. efforts to control the international drug trade. As a result of these restrictions, the United States suspended military aid to twelve countries in Latin America, all of whom

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234. The American Non-Governmental Organizations Coalition for the International Criminal Court, *Chronology of U.S. Opposition to the International Criminal Court*, at <http://www.amicc.org/docs/USimeline.pdf> (last modified Oct. 2003).

235. *House Committee Hearings*, *supra* note 124.

236. *Id.*

237. *Id.*

238. World Federalist Ass'n, *Sanctioning Allies: Effects of the "Article 98" Campaign* (Dec. 2003), available at [http://www.iccnw.org/documents/otherissues/impunityart98/WICC\\_BIASanctions24Nov03.pdf](http://www.iccnw.org/documents/otherissues/impunityart98/WICC_BIASanctions24Nov03.pdf) [hereinafter *Sanctioning Allies*].

239. Jackson Diehl, *Allies and Ideology*, WASH. POST, Nov. 24, 2003, at A21.

240. *Id.*

241. *Id.*

242. *Id.*

had cooperated with the United States in the war on drugs.<sup>243</sup> These countries included Brazil, Paraguay, Peru, Uruguay, and Venezuela.<sup>244</sup>

Perhaps the most significant effect of the ASPA restrictions and the Bush administration's refusal to provide more waivers has been a backlash in public opinion against the United States. In a letter to U.S. Secretary of State Colin Powell urging the United States to provide more waivers to U.S. allies, Human Rights Watch Executive Director Kenneth Roth noted that the United States' worldwide campaign to execute BIAs has engendered "enormous resentment."<sup>245</sup> Roth also pointed out that many of the states that signed a BIA with the United States did so only as a result of threats and coercion:

Officials from a number of governments have stated publicly that they believe the [BIAs] violate their international treaty obligations, their domestic laws and in some cases even their constitutions. Several states have signed agreements only in the face of what their diplomats have labeled "unbearable" pressure, including threats to cut not only military aid, but humanitarian aid, and economic assistance as well.<sup>246</sup>

Although the Bush administration may contend that the campaign to secure BIAs has been a success, the "price" of these agreements has caused great damage to U.S. credibility worldwide.<sup>247</sup>

The Bush administration appears to have taken some of these criticisms into consideration. In November 2003, President Bush signed a waiver that partially lifted the military aid restrictions on Lithuania, Latvia, Estonia, Slovakia, Slovenia, and Bulgaria.<sup>248</sup> The significance of the waiver should not be overstated, given that it does not signify a retreat from the general opposition of the Bush administration to the ICC. Instead, President Bush granted only a partial waiver for states that were directly involved in military actions closely linked to U.S. interests.<sup>249</sup> Furthermore, there was a significant amount of bipartisan support for the waiver in Congress, which possibly sent a message

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243. *Sanctioning Allies*, *supra* note 238.

244. *Id.*

245. Human Rights Watch, Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Colin L. Powell, U.S. Sec'y of State (Dec. 9, 2003), at <http://www.iccnw.org/pressroom/membermediastatements/2003/HRWPowellLetterICC1209031.pdf> [hereinafter Kenneth Roth Letter].

246. *Id.*

247. *Id.*

248. Diehl, *supra* note 239. This waiver is a partial waiver because it only covers funds used in relation to NATO, Operation Iraqi Freedom, and Operation Enduring Freedom, which is the military action in Afghanistan.

249. *Id.*

to President Bush that “[e]ven for the mainstream of the Republican Party, Bush’s heedless erosion of American alliances has become a serious concern.”<sup>250</sup> These waivers could indicate that while the Bush administration remains opposed to the ICC, members within the administration are nevertheless receptive to political pressure from Congress on the issue.<sup>251</sup>

To ameliorate some of the damage caused by the BIA campaign to the international opinion of the United States and the United States’ ability to effectively pursue its national interests, the Bush administration should consider providing more “national interest” waivers<sup>252</sup> to states that are parties to the ICC but have not signed a BIA with the United States.<sup>253</sup> Like the waivers granted to the European nations, this course of action would signify not only that the United States recognizes the damaging effects of the BIA campaign, but also that the United States is willing to look at options other than a prohibition on military aid when dealing with states that are parties to the Rome Statute.

#### VI. Conclusion

Even if U.S. fears about possible uses or abuses of ICC jurisdiction are not unfounded, the BIA provision contained in ASPA represents an excessive and potentially abusive reaction to those fears. Instead of merely voicing its opposition to the ICC, the United States is using the BIAs to discourage other countries from demonstrating their support for the ICC.<sup>254</sup> For those states that are already parties to the Rome Statute, U.S. pressure could have the added

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250. *Id.* Diehl reports:

Bush’s delivery of the exemptions . . . seems to have been precipitated in part by a congressional rebellion. A measure to exempt the six countries from the military aid cutoff passed the Senate Foreign Relations Committee unanimously earlier [in November 2003], under the bipartisan sponsorship of Democrats Joseph Biden and Richard Durbin and Republicans Gordon Smith and Lisa Murkowski. In the House, a similar measure was sponsored by Republican John Shimkus of Illinois.

*Id.*

251. *Id.*

252. ASPA, *supra* note 10, § 2007.

253. See Kenneth Roth Letter, *supra* note 245. Roth writes:

The course the [Bush] administration has pursued comes with an extremely high price tag, including weakening the principle of the equal application of the law and respect for multilateral institutions. Moreover, it has been damaging to U.S. credibility worldwide. Now is the time to step back from an extremely costly approach and ‘cut your losses.’ We urge you to reconsider the campaign against the ICC and certainly to extend national interest waivers to all ICC states parties that have not signed a [BIA].

*Id.*

254. See *supra* notes 129-30, 231-44 and accompanying text.

result of effectively forcing those states to violate their obligations to the international community under the treaty.<sup>255</sup> Unsurprisingly, this pressure has caused a significant amount of international criticism of the United States.

If the United States continues to oppose the ICC, it should do so in a way that allows other states, particularly parties to the Rome Statute, to support the new court without fear of economic consequences. The United States could do this, and in fact already has done this with certain European allies,<sup>256</sup> by using the “national interest” waiver provision of ASPA.<sup>257</sup> A continuation and expansion of the waiver policy could alleviate some of the international tensions surrounding the BIAs. Even if the United States does not expand its waiver policy and instead insists on pursuing and enforcing the BIAs, it would still be possible to reduce some of the international backlash that this campaign has caused. By redrafting the BIAs to make them more compatible with the Rome Statute,<sup>258</sup> the United States could acknowledge some of the concerns of its international critics while simultaneously demonstrating its resolve to maintain its opposition to the ICC.

From its inception, the ICC has commanded a great deal of international support.<sup>259</sup> If the ICC successfully handles one or two high-profile cases in the future, the reputation and acceptance of the ICC could increase dramatically. The international community could begin to view the ICC as the authoritative source for international justice. Should this occur, the United States would find itself in the awkward position of actively opposing a court whose authority the rest of the world accepts. In evaluating their policy toward the ICC, U.S. leaders need to consider the potential inconsistency of asserting the authority of the United States as a world leader while at the same time opposing a court that a large portion of the international community supports.

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255. *See supra* Part IV.B.3.

256. *See supra* notes 248-51 and accompanying text.

257. ASPA, *supra* note 10, § 2007(b).

258. For a discussion of two major areas of potential conflict between the BIAs and the Rome Statute, see *supra* Parts IV.B.1-2.

259. *See supra* notes 1-7 and accompanying text.