IN THE MATTER OF THE STATUTE OF THE INTENATIONAL CRIMINAL COURT

AND IN THE MATTER OF BILATERAL AGREEMENTS SOUGHT BY THE UNITED STATES UNDER ARTICLE 98(2) OF THE STATUTE

JOINT OPINION

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1. We are asked by the Lawyers' Committee on Human Rights and the Medical Foundation for the Care of Victims of Torture to advise on the compatibility with Article 98(2) of the 1998 Rome Statute of the International Criminal Court (ICC Statute) of certain agreements that the United States has entered into – or proposes to enter into – with States that are signatories or Parties to the ICC Statute. We refer to these as 'bilateral non-surrender agreements'. Specifically, we are asked the following questions:

    1. Would entering into bilateral non-surrender agreements as sought by the United States be compatible with the obligations of States Parties to the ICC Statute? On what bases might such agreements be found not to be compatible?
    2. Would entering into such agreements be compatible with the obligations of signatories to the ICC Statute? On what bases might such agreements be found not to be compatible?
    3. How will it be determined whether the ICC should respect the terms of such agreements?

2. This Opinion is divided into three parts. Part I describes the background history concerning the bilateral non-surrender agreements; Part II addresses the main legal issues at stake; and Part III sets out our conclusions on the three questions posed.

3. In summary, and for the reasons set out below, our conclusions are that:

- Article 98(2) of the ICC Statute contemplates that States parties may enter into bilateral non-surrender agreements subject to certain conditions;
- Article 98(2) does not permit a State party to enter into or apply an Agreement which provides for the return to a third State of any person who cannot objectively be treated as having been 'sent' by that State;
- It is inconsistent with the object and purpose of the ICC Statute for a State party to enter into or to apply a bilateral non-surrender agreement if purpose or effect of doing so would be to provide impunity to a person credibly suspected of having committed a crime within the jurisdiction of the ICC;
- Similar considerations would apply to a signatory to the ICC Statute, to the extent that a bilateral non-surrender agreement might tend to frustrate the object and purpose of the Statute, contrary to Article 18 of the Vienna Convention on the Law of Treaties;
- In accordance with Article 119 of the ICC Statute, the compatibility of a bilateral non-surrender agreement with the Statute would be a matter to be addressed by the International Criminal Court (in the context of a request for transfer), or by the Assembly of States Parties. It might also fall within the jurisdiction of the International Court of Justice.

Part I: The Bilateral Non-surrender Agreements

4. The ICC Statute was signed on 17 July 1998 and entered into force on 1 July 2002. To date, 139 States have signed and 90 States have ratified the Statute.[1] Under the terms of Article 11, the temporal jurisdiction of the Court runs from

[1] Source: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (visited 3 June 2003).

the date at which the Statute entered into force. The ICC will be based in The Hague, its 18 judges were elected in February 2003, the Prosecutor is to be sworn in on 16 June, and it is expected to start functioning during 2003.

5. On 31 December 2000 the United States signed the ICC Statute. However, by letter to the UN Secretary-General dated 6 May 2002, the United States stated its intention not to ratify the ICC Statute. It follows that, having made clear its intention not to become a party to the Statute the United States has no obligation to refrain from acts which would defeat the object and purpose of the Statute, pursuant to the rule set out in Article 18 of the 1969 Vienna Convention on the Law of Treaties.

6. In addition, in the context of the coming into force of the ICC Statute the United States has taken certain steps to prevent the Court from exercising jurisdiction over United States nationals, in particular over diplomatic and military personnel. To that end, it sponsored Security Council resolution 1422, which was unanimously adopted on 12 July 2002 under Chapter VII of the UN Charter. By this resolution the Security Council, purportedly acting under Article 16 of the ICC Statute, requests that the ICC not commence an investigation or prosecution 'involving current or former officials or personnel' from a State that is not party to the ICC Statute, for a renewable 12 month period running from 1 July 2002 (the date on which the Statute came into force). The relevant provisions of the Resolution provide that the Security Council:

> 1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
> 2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;
> 3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations; […]

We address the terms and effect of this resolution below.

7. The United States has also proposed a large number of bilateral agreements with other States (both signatories and non-signatories to the ICC Statute) which aim to prevent the State concerned from transferring through whatever procedure, without the consent of the United States, any 'current or former Government officials, employees (including contractors), or military personnel or nationals' of the United States either to the ICC or to a third State or entity with the purpose of eventual transfer to the ICC. The scope of these agreements is intended to be broader than that provided by Security Council resolution 1422, in terms of the individuals to be included. The agreements also provide that if the State transfers any such persons to a third State, it cannot agree to the transfer of such individuals by the third State to the ICC without the permission of the United States. Non-signatories to the ICC Statute are also obliged, subject to their international legal obligations, not knowingly to co-operate in the transfer of any such individuals by any entity to the ICC without the consent of the United States. Some of these agreements apply only to United States personnel; others are reciprocal.

8. An example of the standard form of such agreements as of July 2002 is at Annex 1. It provides as follows (with paragraphs lettered and enumerated for identification purposes):

> A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,
> B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,
> C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,
> D. Bearing in mind Article 98 of the Rome Statute,

E. Hereby agree 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 X. [This paragraph is included only in reciprocal agreements]
4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X 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.
5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

9. In addition, the following paragraph is included (or to be included) in agreements intended for States that are not parties or signatories to the ICC Statute:

> F. Each party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender or transfer of a person of the other party to the International Criminal Court.

10. The United States takes the view that these agreements are 'expressly contemplated' by Article 98(2) of the Rome Statute.[2] Article 98(2) provides that:

> 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.

11. We understand that at least 25 Agreements have been signed by the United States, some with parties to the ICC Statute, some with signatories which have not yet ratified, and some with non-parties. The Agreements require ratification by both parties.

12. We understand that various institutions within the European Union – including the Legal Service of the Commission, the Parliament and the Council – have made determinations or expressed opinions on the legal issues arising out of the bilateral non-surrender agreements. We note that on 12 September 2002, the European Parliament passed a resolution which criticised the bilateral non-surrender agreements in a number of respects. The preamble declares *inter alia* that the Agreements constitute a 'misuse' of Article 98 (para. D), and that the US pressure on other States to sign such agreements 'should not succeed with any country' (para. D). In paragraph 3, the Parliament's resolution states that it

> [f]irmly believes that the ICC States Parties and Signatory States are obliged under international law not to defeat the object and purpose of the Rome Statute, under which, according to the Preamble, 'the most serious crimes of concern to the international community as a whole must not go unpunished' and that States Parties are obliged to cooperate fully with the Court, in accordance with Article 96 of the Rome Statute, thus preventing them from entering into immunity agreements which remove certain citizens from the States' or the International Criminal Court's jurisdictions, undermining the full effectiveness of the ICC and jeopardising its role as a

[2] Statement of Ambassador Negroponte, United States Permanent Representative to the UN, 12 July 2002.

> complementary jurisdiction to the State jurisdictions and a building block in collective global security.

13. The Council of the European Union adopted a common position strongly supportive of the ICC, which was revised on 11 June 2002. On 30 September 2002, the Council adopted Conclusions on the ICC, which contained in an Annex a set of 'Guiding Principles' concerning arrangements made between States Parties to the Rome Statute and the US regarding the transfer of individuals to the ICC. The Guiding Principles state that the entering into the proposed bilateral non-surrender 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…

14. However, the Council's Guiding Principles envisage that an EU Member State could enter into a bilateral non-surrender agreement provided that such agreement satisfied certain conditions. In particular, the agreement:

> should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court 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…
>
> should only cover persons who are not nationals of an ICC State Party; …
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> should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute.

15. The Guiding Principles further state that:

> [s]urrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute…
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> [t]he arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force.

Part II: The Position of States Parties to the Rome Statute with Respect to Agreements sought under Article 98(2)

16. In analysing these issues it is necessary to distinguish between the position of States parties to the Rome Statute, States which are signatories but have not yet ratified, and States which are not parties at all. Moreover in terms of the rules concerning the relations between treaties (as set out in Articles 30(4) and 41 of the Vienna Convention on the Law of Treaties) it might make a difference whether a bilateral non-surrender agreement was concluded before or after the other State became a party to the Rome Statute. For the sake of simplicity we will deal principally with the situation of a State which is already a party to the Rome Statute and which is called on by the United States to enter into a bilateral non-surrender agreement in the terms set out above. We will also assume that the State in question is a party without relevant reservations to the other international conventions defining crimes within the jurisdiction of the ICC – viz., the Genocide Convention, the 1949 Geneva Conventions and the two Protocols of 1977, as well as a party to the Optional Clause of the Statute of the International Court.

(i) Article 98 in context

17. Article 98 of the ICC Statute is one of 16 Articles in Part 9 of the Statute, concerned with 'International Cooperation and Judicial Assistance'. Under this Part, the States Parties to the Statute have a general obligation to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court' (Art. 86), and the Court has the authority to make requests to States Parties for cooperation (Art. 87(1)(a)). The Court may also invite any State which is not a party to the ICC Statute to provide assistance to the Court (Art. 87(5)). By Article 87(7), where a State Party fails to comply with a request for cooperation (under Article 87(1)) in a manner which is contrary to the provisions of the Statute, the Court

> may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

18. Article 89 (Surrender of persons to the Court) authorises the Court to transmit a request for the arrest and surrender of any person 'to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person' (Art. 89(1)). In such circumstances Article 89(1) provides that

> States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

19. Article 95 provides that where there is an admissibility challenge under consideration by the Court pursuant to Articles 18 or 19 of the Statute, the requested State may postpone the execution of a request under Part 9 of the Statute pending a determination by the Court.[3] Article 97 provides a State Party which receives a request under Part 9 in relation to which it identifies a problem which may impede or prevent the execution of the request 'shall consult with the Court without delay in order to resolve the matter'.

20. Article 98 is entitled 'Cooperation with respect to waiver of immunity and consent to surrender'. It provides in full as follows:

> (1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
>
> (2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

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[3] Article 18 addresses a situation where a State informs the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. Article 19 requires the Court to satisfy itself that it has jurisdiction in any case brought before it.

(ii) Article 98(2): two preliminary points

21. Two preliminary points may be made in relation to Article 98(2). First, it is important to stress that Article 98(2) imposes an obligation on the Court, not on the States Parties to the Statute, still less on other States. In effect it prevents the Court from proceeding with an Article 89(1) request to a State for the surrender of a person in certain circumstances. Article 98(2) does not impose any rights or obligations directly on any State Party to the Statute. In its own terms, it does not prevent a State Party from entering into an agreement which could have the effect of preventing the Court from proceeding to an Article 89(1) request. Rather, it operates to establish the conditions under which the Court may 'proceed with a request'. On the other hand it assumes that, in cases where the Court may properly make a request, a State party to the Statute will be obliged to give effect to it. In short, Article 98(2) defines the proper scope of operation of the Court, and in that way limits what is permissible for a State Party.

22. Thus the issue to be addressed is the extent to which a State Party may, by entering into a bilateral non-surrender agreement, prevent the Court from proceeding to an Article 89(1) request. Putting it another way, can a State Party freely define the extent of the Court's capacities by entering into a bilateral non-surrender agreement with a non-Party, or does Article 98(2) operate to limit the entitlement of a State Party to refuse an Article 89(1) request from the Court?

23. The second preliminary point is this. The combined effect of Article 98(2) and the other provisions in the Rome Statute concerning the obligations of States to comply with requests by the Court only come into play once the Court proceeds to make a particular request pursuant to its authority under Article 89(1). In practical terms, it is the reliance upon an incompatible bilateral non-surrender agreement to refuse an Article 89(1) request from the Court which would render the State Party in breach of its obligations to the Court and to other States Parties to the Statute. In other words, even if a State Party may proceed to enter into a bilateral non-surrender agreement, it cannot expect to

be entitled to rely on such an agreement vis à vis the Court (and having regard to its obligations to other State parties) unless it properly falls within the scope of Article 98(2). Ultimately it will be a matter for the Court to determine whether or not it is entitled to proceed to an Article 89(1) request in the circumstances of the case.[4]

(iii) The scope of Article 98(2) of the Statute

24. The proper scope of the Court's powers to request surrender, notwithstanding a bilateral non-surrender agreement, turns on the proper interpretation to be given to the object and purpose of the ICC Statute and its Article 98. In this regard a well-established principle of international law is of singular importance: the States parties to the ICC Statute have an obligation to each other not to act in such a way as to "deprive" a treaty of its object and purpose, or to undermine its spirit: see *Case Concerning Military and Paramilitary Activities (Nicaragua v United States)*, 1986 ICJ Reports 14, at 138 (paras. 275-6).

25. It is therefore necessary to identify the object and purpose of the ICC Statute. The rules governing treaty interpretation are reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, and they are now broadly recognised as reflecting customary international law. The ICC Statute and the provisions of Article 98(2) are to be interpreted in accordance with their ordinary meaning, in their context, and in the light of the treaty's object and purpose (Article 31).[5] To the extent that any ambiguity exists or the result

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[4] In this regard, it is not unusual for States to be subject to potentially conflicting obligations, particularly as they arise under different treaties. It might be argued that the act of becoming a party to a bilateral non-surrender agreement, if it went beyond the scope of the agreements permitted under Article 98(2), could constitute an intention to breach the relevant obligations of the Rome Statute, and that this intention would itself be unlawful. This argument, whatever its merits, presupposes that in the event of a particular request that runs counter to a State Party's obligations under an Article 98 agreement (in circumstances that fall outside the scope of Article 98(2)), the State in question will necessarily choose its obligations under the Article 98 Agreement over those contained in the Rome Statute. In our view it is questionable whether an intention to breach an existing obligation can be inferred from the mere existence of a subsequent Agreement that contains potentially conflicting obligations, where neither set of obligations are yet in play (due to the requirement of a request by the Court for their application).

[5] Article 31 (General rules of interpretation) provides:
'1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

would be manifestly absurd or unreasonable, recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion (Article 32).[6]

26. In our view the object and purpose of the ICC Statute is to put in place effective arrangements to prevent impunity for the crimes over which the ICC will have jurisdiction (genocide, war crimes, crimes against humanity). The ICC has been established to ensure that persons subject to the jurisdiction of a State party to the Statute who are suspected of committing one of these crimes are subjected to proper investigation, if a sufficient case exists are prosecuted, and if found guilty, are duly punished for their crimes. If national criminal justice processes are adequate to ensure investigation, prosecution and punishment then they should be used: this is the notion of *complementarity* expressed in the preamble and in Articles 1 and 17 of the ICC Statute. But if there is a significant risk that a suspect will escape investigation and prosecution, then the ICC is intended, in principle, to fill the gap. The overriding aim is thus not international prosecution as such, it is the avoidance of impunity.

27. The establishment of the ICC responds to the concern that, with limited exceptions, the application and enforcement of international criminal law has

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2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.'

[6] Article 32 (Supplementary means of interpretation) provides that:
'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.'

depended upon domestic enforcement by States,[7] and that States have frequently demonstrated that they were not willing or able to enforce the law. The ICC has been established to address this deficiency. This object and purpose is reflected in the Preamble of the Rome Statute, and in particular the fourth, fifth and sixth preambular paragraphs, which provide:

> 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,
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes…

28. In this regard we stress that the object and purpose of avoiding impunity is closely related to the principle of complementarity, which provides that the ICC may exercise its jurisdiction only when national criminal justice processes have been unwilling or genuinely unable to do so (Article 17). In the words of the Preamble,

> the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

29. As Article 1 puts it, the jurisdiction of the International Criminal Court 'shall be complementary to national criminal jurisdictions'. The Statute of the Court assumes that it will be first and foremost for investigation and prosecution to occur at the national level, in accordance with the domestic legal system of the relevant State Party. The establishment of the ICC is premised on the basic principle that States are to be given the first opportunity to exercise criminal jurisdiction. This is reflected in Article 17(1) of the Statute, which provides for the inadmissibility of a case before the Court where

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[7] The exceptions relate to the arrangements established by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) which are territorially and temporally limited. In addition to these international tribunals, there are currently two 'mixed' judicial institutions, in Sierra Leone and East Timor, comprising both international and domestic elements, and plans to create a further institution of this type in Cambodia.

> 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;
> 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;

30. The ICC will only have jurisdiction in accordance with these principles, or where the person has already been tried for the conduct in question (Art. 17(1)(c)). In our view it is implicit in the requirements of Article 17(1)(a) and (b) that the ICC Statute imposes upon States Parties a general obligation to investigate allegations relating to the crimes identified in the Statute and, if a case is made out, to ensure that the persons concerned do not escape prosecution. In our view, this general obligation informs the Rome Statute as a whole.[8]

31. The attainment of the object and purpose of the ICC Statute depends on two factors: first, the number of States that become party to the Statute, and second, the extent to which States fulfil their obligations under the Statute, in particular as regards co-operation with the Court under Part 9, including in particular Article 89(1).

(iv) The object and purpose of the ICC Statute and other international obligations

32. The avoidance of impunity as the object and purpose of the ICC Statute is consistent with obligations arising under general international law and specific treaties. Indeed, the obligation to investigate and, if warranted, to prosecute crimes which are within the jurisdiction of the Court arises also under general international law and specific treaties. The Preamble to the Rome Statute affirms that

[8] This is hardly surprising, since such an obligation already inheres in the substantive conventions, the effectiveness of which the Rome Statute was intended to ensure. For example under Article I of the Genocide Convention of 1948, States parties undertake "to prevent and to punish" persons committing genocide.

> ...it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crime

The obligation to investigate and, if warranted, to prosecute which arises in numerous treaties imposes additional obligations upon State parties which have subscribed to their provisions. For example, Article VI of the 1948 Genocide Convention states:

> Persons charged with genocide or any other acts enumerated in [the Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.

The 1949 Geneva Convention on the protection of civilians goes further. It commits parties to enact "any legislation necessary to provide effective penal sanctions for committing, or ordering to be committed, […] grave breaches of the … Convention".[9] It establishes a further, positive obligation on parties to

> search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with its own legislation, hand such persons over for trial to another [party] concerned, provided such [party] has made out a prima facie case.[10]

Similar commitments exist in other international conventions subsequently adopted. The 1973 Apartheid Convention provides that a person charged with the crime of apartheid may be tried "by a competent tribunal of any State Party to the Convention which may acquire jurisdiction of the person of the accused" and obliges States Parties to "adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined … whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State …"[11] The 1984 Torture

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9 Article 146.

10 *Ibid*.

11 Arts. V and IV(b). International penal tribunals may also exercise jurisdiction.

Convention requires parties to establish jurisdiction over offences of torture when the offence is committed in its territory, when the alleged offender is one of its own nationals, or when the victim is one of its nationals if it considers it appropriate.[12] It also requires the parties to establish jurisdiction over Convention offences "in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him".[13] In relation to each of these cases the parties must prosecute or extradite all such persons.[14] The implications of these and similar other requirements are addressed below.

(v) Article 98 as a limitation on the object and purpose of the Rome Statute

33. The general object and purpose and of the ICC Statute is, however, subject to limitations which States Parties have accepted. Article 98 identifies two sets of obligations that may lawfully prevent a State Party from acceding to a request to surrender a person to the Court – State and diplomatic immunity (under Article 98(1)), and a certain class of international agreements (under Article 98(2)). On its own terms, therefore, the ICC Statute limits the possibility of the complete realization of the policy of avoiding impunity by ensuring investigation or prosecution of persons within the territory of a State Party. The general object and purpose of the Rome Statute (to remove impunity) is therefore qualified by Article 98, which does not in express terms require that a person returned to a 'sending State' will be subject to investigation or prosecution. In this respect the Rome Statute may be contrasted with the ILC's 1994 draft Statute, which did expressly so require.[15]

34. The decision made at the Rome Conference to recognize that certain obligations would be inconsistent with the general approach of guaranteeing subjection to a criminal justice process (avoiding impunity) thus qualifies the general object and purpose of the Rome Statute. Notwithstanding other views,

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12 Art. 5(1).
13 Art. 5(2).
14 Art. 7(1).
15 See draft Articles 53 and 54 of the ILC draft Statute, in *ILC Ybk 1994*.

the object and purpose of the Rome Statute cannot be understood as being the prevention of all impunity by guaranteeing subjection to a criminal justice process in each and every case. Rather, it is the provision of a substantial guarantee, subject to the two qualifications reflected in Article 98.

35. In interpreting the meaning and effect of Article 98(2), having regard to the object and purpose of the treaty, it is therefore necessary to take into account the balance that has been struck by the ICC Statute and to construe the limitations appropriately having regard to their terms and to the context. In our view the proper approach to be taken is interpreting the balance that has been struck in the ICC Statute in terms of the promotion of two competing objectives: the Parties' obligation to ensure investigation or prosecution, on the one hand, and to respect certain international obligations, on the other. The question which arises is this: in relation to Article 98(2), what international obligations are to be respected, and under what conditions? We turn now to this first question.

Question 1: Would entering into bilateral non-surrender agreements be compatible with the obligations of States Parties to the ICC Statute? On what bases might such agreements be found not to be compatible?

36. As noted above, the obligation of a State Party under Article 89(1) is to comply with a request for the transfer of an individual to the Court in circumstances when the Court's request is validly made. For present purposes this turns on whether or not the request for a transfer runs counter to a provision in an international agreement falling within the scope of Article 98(2). Our analysis therefore addresses the question of whether or not the bilateral non-surrender agreements sought by the United States fall within the class of agreements envisaged by Article 98(2).

37. Three main arguments have been advanced by as to the incompatibility of the agreements sought by the United States' with the ICC Statute:

(1) that Article 98(2) covers only agreements that existed at the time of the signing of the ICC Statute, and subsequent agreements following the same model as such existing agreements, and the US Agreements fall outside these categories; and

(2) that Article 98(2) covers a narrower set of agreements, in terms of subject matter, than the US Agreements; and

(3) that Article 98(2) only covers agreements that provide a sufficient guarantee of investigation or prosecution, which the US Agreements do not.

We address each argument in turn.

(i) Article 98(2) covers only pre-existing agreements

38. Certain commentators assert that Article 98(2) is limited to agreements that existed at the time of the signing (or ratification) of the Rome Statute. But they do not provide any supporting evidence from the negotiating history of the Statute for this contention.[16] It is difficult to escape the conclusion that the ordinary meaning of the words 'obligations under international agreements' in Article 98(2) is not limited to existing international agreements. This provision contrasts with the approach elsewhere in Part 9 of the Statute, which includes the qualifying word 'existing' in Article 90(6)[17] and Article 93(3).[18] Against that background the claim that bilateral non-surrender agreements are limited to existing agreements is not plausible.

(ii) Article 98(2) covers a narrower set of agreements in terms of subject matter

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[16] K. Prost and A. Schlunk, Art. 98, in O. Triffterer (ed)., *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes*, Article by Article, at 1131 at 1131 ("All States participating in the negotiations in Rome had concerns about conflicts with existing international obligations. Thus there are several provisions with Part 9, including those in articles 90, 93 para. 9 and 98 which address that concern."). See also Hans-Peter Kaul and Claus Kress, Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, (1999) 2 Y.B.Int'l Hum.L. 143, 165; Christopher Keith Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court,' (2000) 94 *AJIL*. 773, 786n.36.

[17] "In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person…" (emphasis added).

[18] "Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application…" (emphasis added).

40. Another view of Article 98(2) is that it was only intended to permit two categories of agreement. The first category, in the field of international criminal co-operation, addresses a problem caused by the fact that many bilateral extradition treaties prohibit re-extradition. This category comprises agreements providing for the transfer of a person to another State, with the proviso that the person in question would be returned to the State of origin (and not a third State or entity), after the purpose for the original transfer had been achieved, unless consent for transfer elsewhere had been obtained from the State of origin. Clearly a request for a transfer by the ICC, in the absence of consent by the State of origin, could contravene a bilateral extradition treaty of this kind. The second category is the general category of 'Status of Forces Agreements' (SOFAs), concerning the presence of military forces and associated personnel in foreign States.

41. Is Article 98(2) limited to these two types of agreements? In terms of the subject matter of the agreements, Article 98(2) refers only to agreements 'pursuant to which the consent of a sending State is required to surrender a person of that State to the Court'. The ordinary meaning of this language is not limited to the two types of agreement described above. On an 'ordinary meaning' approach Article 98(2) appears to cover any agreement including such an obligation. There is nothing in the context of Article 98(2) to support a more limited reading, nor, it seems, is there anything in the *travaux préparatoires* which supports a more limited reading.

42. The argument that Article 98(2) is limited to these two categories of agreements appears to rely on the commentary by Prost and Schlunk (in Triffterer).[19] But there is nothing in that commentary to support the view. It is not clear from the commentary that the two classes mentioned were intended to be exhaustive. The commentary makes no reference to any negotiating history or text. Indeed, the reference to the term 'sending State' in Article 98(2) suggests that the first class of agreements identified in the Triffterer commentary may not have been intended to have been covered.

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[19] Prost & Schlunck, above note 16, at 1133.

43. The scope for reaching agreements is, however, limited by the use of the term 'sending State'. What does it mean? The ordinary meaning suggests that the presence of a person on the territory of a requested State must arise as a result of an act of the sending State (e.g., in sending to the requested State a diplomat or as a member of a visiting military force pursuant to a SOFA). On this basis, it is not sufficient for such a person to be a national of the State concerned. As a matter of ordinary meaning, a tourist or a contractor is not a 'sent' person, any more than would be a former foreign minister visiting a State Party in a private capacity. In our view the key factor requiring a nexus to the third State is not the status of the person or the activity he or she is performing, but rather the circumstances leading to his or her presence on the territory of the requested State Party. Such nexus would be assumed for persons who enjoy a certain status and are performing a particular activity, such as officials of the third State, e.g. a government minister or an ambassador or a soldier, who is in the territory of the requested State with the consent of that State to engage in official business of the sending State.

44. In this regard, it should be noted that the US Agreements define the individuals covered by the obligation of consent as

> current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.

In our view this 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 US go well beyond the scope of the agreements envisaged by Article 98(2). We endorse the approach taken by the EU Guidelines, which provide *inter alia* that any solution in terms of Agreements entered into with the US…

> should only cover persons present on the territory of a requested State because they have been sent by a sending State.

45. In summary, we have seen nothing in the language, context or history of Article 98(2) which limits its application to particular types of agreement, in terms of subject matter. For present purposes, the limitation imposed by Article 98(2) concerns the relationship between the relevant person and the 'sending State': the person who is present on the territory of the requested State Party must have a nexus with the 'sending State' which goes beyond mere nationality, and his or her presence must have been occasioned by some positive act of the sending State.

(iii) Article 98(2) only covers agreements that provide a guarantee of investigation and, where warranted, prosecution

46. A third claim posits the view that Article 98(2) only covers agreements containing a guarantee of investigation and, where warranted, prosecution, and that the US agreements fall short of this. We note that the EU Council's Guidelines provide that any Agreement entered into with the US by an EU Member State should provide for a guarantee of investigation or prosecution. Here it may be appropriate to distinguish between existing agreements and new agreements.

47. As to existing agreements, it is apparent that there is nothing in Article 98(2) that expressly requires Parties to the Statute to decline to give effect to them if they do not include a requirement to investigate or prosecute. In our view no such requirement can be read into Article 98(2), although there is nothing in that provision which limits the right of a State Party to the Statute to seek to renegotiate an existing agreement to give effect to such a requirement. The matter is governed by Article 30(4) of the 1969 Vienna Convention on the Law of Treaties, which provides that

> When the parties to the later treaty [i.e. the ICC Statute] do not include all the parties to the earlier one… as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

48. As to agreements entered into by a State after it has become a party to the ICC Statute (which we will refer to as "new agreements," and covers the renewal

of agreements originally entered into before the ICC Statute), the situation is different, in our view. Having become a Party to the ICC Statute a State is required to take all steps necessary to give effect to its obligations under the Statute, including the obligation not to deprive the Statute of its object and purpose. For the reasons set out above, this object and purpose includes a commitment to prevent impunity, to ensure 'the effective prosecution' of the most serious crimes (Preamble) and to investigate or prosecute all cases involving matters over which it has jurisdiction (Article 17(1)). Accordingly, a State Party which enters into a new agreement which has (or may have) the effect of immunizing persons within the jurisdiction of the ICC from prosecution at either international or national level contradicts the obligation not to deprive the Statute of its object and purpose. In our view it would not be compatible with that State Party's obligations under the ICC Statute, both to other State Parties and to the Court. It may also be incompatible with the general duty under international law and specific treaties to investigate and, if warranted, to prosecute international crimes.

49. The object and purpose of the Rome Statute implies that where a person alleged to have committed an ICC crime is on the territory of a State Party to the Rome Statute, that person should not be transferred to a third State unless guarantees are put in place to ensure that such person is investigated or prosecuted in accordance with the criminal jurisdiction of the third State. If a State Party, in such circumstances, has reason to believe that a third State is not willing or is genuinely unable to so investigate or prosecute then the person concerned should not be transferred to the third State.

50. Any new agreement should therefore make clear provision to ensure that the 'sending' State subjects the person to effective investigation and, where warranted, prosecution. Additionally, any new agreement ought also to make provision for the re-transfer to the repatriating State of any person who is not subject to effective investigation or prosecution in a third State.

51. In the event that a new agreement does not contain such a provision, and/or a person is transferred to a 'sending State' and not subjected to investigation or

prosecution, the terms of Article 30(4) of the 1969 Vienna Convention provide that the new agreement would govern the mutual rights and obligations of its parties. However, Article 30(5) provides that Article 30(4) is 'without prejudice … to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty'. Thus a State Party to the ICC may be internationally responsible for the adoption or application of a new agreement which is inconsistent with its obligations under the ICC Statute, in particular under Article 89(1).

Conclusion

52. In conclusion, it is our opinion that the language of Article 98(2) of the ICC Statute does not permit a State party to enter into an agreement which provides for the return to a third State of any person who cannot objectively be treated as having been 'sent' by that State. It is also our opinion that the object and purpose of the ICC Statute precludes a State party from entering into an agreement the purpose or effect of which may lead to impunity.

Question 2: Would entering into bilateral non-surrender agreements be compatible with the obligations of signatories to the ICC Statute? On what bases might such agreements be found not to be compatible?

53. The obligations of a signatory to the ICC Statute are governed by Article 18 of the 1969 Vienna Convention on the Law of Treaties. This provides that:

> 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;
>
> …

54. There is almost no practice or judicial authority on the application of Article 18 of the Vienna Convention, and also uncertainty as to whether it reflects a

rule of customary law and the extent of the obligation.[20] The position has been summarised as follows:

> The obligation in Article 18 is only to 'refrain' (a relatively weak term) from acts which would 'defeat' (a strong term) the object and purpose of the treaty. The signatory state must therefore not do anything which would affect its *ability* fully to comply with the treaty once it has entered into force. It follows that it does not have to abstain from all acts which will be prohibited after entry into force. But the state may not do an act which would (not merely might) invalidate the basic purpose of the treaty. Thus, if the treaty obligations are premised on the *status quo* at the time of signature, doing something before the entry into force which alters the *status quo* in a way which would prevent the state from performing the treaty would be a breach of the article."[21]

55. The question which arises is this: would the conclusion of a bilateral non-surrender agreement by a signatory to the ICC Statute prevent that State from performing its obligations to the Court and to other State parties to the ICC Statute? The answer would appear to be yes, both in relation to the category of persons addressed by a bilateral non-surrender agreement and the object and purpose of avoiding impunity. The better view, therefore, is that a signatory should avoid entering into a bilateral non-surrender agreement which may not be compatible with the ICC Statute and its Article 98.[22]

Question 3: How will it be determined whether the ICC should respect the terms of bilateral non-surrender agreements?

57. The answer to this question depend upon the circumstances in which a difference of the view concerning the conclusion or application of an agreement might arise.

58. If the issue arises in the context of a request for a person to be transferred to the Court (under Article 89(1) of the Statute) then it will likely be for the Court to determine whether the terms of the bilateral non-surrender agreement are compatible with the Statute. This is because in principle the right of the

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20 See e.g. T. Aust, *Modern Treaty Law and Practice* (2000), 94.

21 *Ibid* (emphasis in original).

22 See e.g. *Megalidis v Turkey*, Turkish-Greek Mixed Arbitral Tribunal, 26 July 1928, 4 *ILR* 395.

Court to make an Article 89(1) request for surrender is to be settled by the Court itself. The Court's involvement would be triggered by a request from the Prosecutor (to the Pre-Trial Chamber) of a warrant of arrest or a summons to appear, under Article 58 of the Statute, and in particular Article 58(5) ("On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9"). Assuming that a warrant of arrest has been issued, then the scheme envisaged by Part 9 of the Statute is likely to operate as follows:

> (1) In accordance with Article 89(1) of the Statute the Court will transmit to a State Party a request for the arrest and surrender of a person on the territory of that State Party;
>
> (2) If the requested State Party considers that the request relates to a person who is covered by an agreement such that it may impede or prevent the execution of the request, it must (without delay) enter into consultations with the Court to resolve the matter, under Article 97 of the Statute;
>
> (3) Article 97 consultations will take place between the State Part and the Court;
>
> (4) The Court will then form a view as to whether or not it agrees with the view of the requested State Party; if it does so agree, it will not proceed with the request, as per Article 98(2) of the Statute; if it does not so agree, it will proceed with the Article 89(1) request;
>
> (5) If the Court has proceeded and the requested State Party then fails to comply with the request under Article 89(1), so as to prevent the Court from exercising its functions and powers under the Statute, the Court may make a finding to that effect (Article 87(7));
>
> (6) The finding of the Court is determinative (see Article 119(1), providing that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court);
>
> (7) The Court may also refer the matter to the Assembly of States Parties (Article 87(7)); and
>
> (8) The Assembly of States Parties will consider the question of non-cooperation (Article 112(2)(f)).

59. By this route it will be for the Court to decide whether or not a State Party is obliged to surrender a person who is the subject of an Article 89(1) request. The issue would arise, therefore, at the stage where the Court contemplated a request. It is unlikely that the Court would be willing to make a determination in the abstract, i.e. where a State Party has concluded (rather than sought to apply) a bilateral non-surrender agreement. It is also unlikely that the Court would proceed to make a request without first having considered any issues which may arise in relation to an agreement. In deciding whether or not to proceed to a request the Court (which could adopt a ruling under Article 19(3) pursuant to a request from the Prosecutor) would have to consider whether the person potentially subject to the request for surrender came within the scope of the agreement, so as to permit the requested State to decline surrender, and, if yes, whether there were any other (non Article 98(2)) grounds for declining to proceed to an Article 89(1) request (e.g. whether any aspects of the agreement at issue in preventing automatic transfer are compatible, perhaps because the agreement in question covers a broader class of individuals than those who have been 'sent' by the third State).

60. We note also the possibility that the compatibility of a bilateral non-surrender agreement with the Statute could, conceivably, be addressed by another route, which might be triggered by the conclusion of an Agreement. Article 119 of the Rome Statute provides:

> 1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
> 2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

61. For present purposes, a 'dispute' within the meaning of Article 119(1) would relate to the question of whether or not a potential request by the ICC would be precluded by a bilateral non-surrender agreement: the 'judicial function' of the ICC in issue would be the making of a request. As indicated above, the

effect of the Article is that any dispute concerning the exercise of this function – whether arising at the time a request is being contemplated by the Court, or after such request has been made – is to be settled by the Court itself. However, Article 119(2) refers to disputes relating to the interpretation or application of the Statute, other than those concerning the judicial functions of the Court, between two or more States Parties. For present purposes, such a dispute would relate not to whether or not the Court was obliged to respect the agreements, but the distinct question of whether or not the conclusion (or possibly the maintenance) of such an agreement by a State Party was contrary to the ICC Statute. Here the dispute would be referred to the Assembly of States Parties, which may seek to resolve the dispute (perhaps by the adoption of a resolution authoritatively interpreting Article 98(2), and having the required two-thirds majority of those present and voting: see article 112(7)(a)). Alternatively, the Assembly could make a recommendation on further means of dispute settlement, including the referral of the matter to the International Court of Justice. The Assembly has not been authorised to make a request to the ICJ for an Advisory Opinion.

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