

# Article 98(2) of the Rome Statute: America's Original Intent

David Scheffer\*

## Abstract

*The author argues that Article 98(2) only covers those agreements of bilateral or multilateral character between or among nations (whether party or non-party to the Rome Statute) and/or international organizations (such as the ICC or the UN) that provide for non-surrender to the ICC of a nation's military or official personnel and related civilian component sent abroad on official mission by such nation. The agreements were not intended to cover individuals acting abroad in a private capacity or independently for foreign government or international organization purposes. Indeed, in contributing to the drafting of that provision of the Statute, the US delegation did not seek to protect the entire body of US nationals, such as the many US nationals who are engaged outside the United States as humanitarian aid workers, as journalists, as staff of the UN or intergovernmental relief agencies, as representatives of NGOs, as expatriate employees of private companies, or as tourists. In contrast, the bilateral non-surrender agreements negotiated by the current US Administration are intended to cover not only current or former government officials, government employees (including contractors), and military personnel, but also all US nationals, including those acting in a strictly private capacity. To find a solution to the inconsistency between Article 98(2) and these agreements, the author suggests that existing bilateral US non-surrender agreements should be rectified with a US public declaration confirming that the reference to 'nationals' in such agreements is interpreted by the US Government to mean the US civilian component of a military deployment. New or amended agreements negotiated by the United States with foreign governments or international organizations should limit the scope of application to official and military personnel of the 'sending State,' covering them for actions they undertook in their official capacity.*

\* Visiting Professor at The George Washington University Law School and the former US Ambassador at Large for War Crimes Issues (1997–2001), when he headed the US delegation to the United Nations negotiations on the International Criminal Court.  
[djscheffer@law.gwu.edu]

*Consequently, employees of private contractors would be covered by the agreements to the extent that they are accurately described as persons directly contracted by the sending State to undertake work associated with official missions and are held legally accountable (including under criminal law) before US courts for their performance.*

## 1. The Proper Interpretation of Article 98(2)

The proper interpretation of Article 98(2) of the Rome Statute of the International Criminal Court (ICC)<sup>1</sup> should draw from the rules of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>2</sup> Although the United States has not become a State Party of the Rome Statute, and therefore is not a ‘party’ that falls within the guidelines for interpretation set forth in Article 31 of the Vienna Convention, its intensive participation in the negotiation and drafting of the Rome Statute, the Rules of Procedure and Evidence, and the UN–ICC Relationship Agreement is relevant in terms of what States Parties (and signatory states that have yet to ratify the Rome Statute or non-signatory states that have yet to accede to it) understand to have been the original intent behind particular provisions, notably Article 98(2). Article 32 of the Vienna Convention permits recourse to the preparatory work in which negotiating states (regardless of their current status under the treaty) participated. The Bush Administration agrees that such supplemental

1 Article 98(2) ICCSt. provides as follows:

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.

2 Art. 31 Vienna Convention provides in part as follows:

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 . . .

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 . . .

4. A special meaning shall be given to a term if it is established that the parties so intended.

Art. 32 Vienna Convention provides as follows:

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.

material should be consulted but arrives at conclusions that overlook what the US Government's own negotiating experience reveals.<sup>3</sup>

Subsequent agreement and practice relating to the Rome Statute should include the critical years of 1999 and 2000, immediately following the Rome Conference of 1998, when Article 98(2) was central to the efforts of the United States to negotiate a procedural rule as well as a section to the UN–ICC Relationship Agreement that was based upon Article 98(2) protection. The latter exercise clearly pointed to how the Clinton Administration interpreted the meaning of Article 98(2), which it considered essential to its decision to sign the Rome Statute on 31 December 2000. Subsequent interpretation and implementation of Article 98(2) by the Bush Administration, namely the conclusion of 99 bilateral non-surrender agreements with foreign governments, seriously diverges from the original intent of the drafters of Article 98(2), particularly the United States as its primary sponsor beginning in 1995 and continuing to the end of the Clinton Administration in January 2001.<sup>4</sup>

In this article, I establish the context for Article 98(2) within the overall framework of the Rome Statute and then discuss the original intent of the US delegation in pressing for the provision, the evidence of original intent as demonstrated by US negotiating strategy in the immediate aftermath of the Rome Conference, the derivation and proper interpretation of the term 'sending State' in Article 98(2), and the confirmation of that intent in action by the US Congress and inferentially by the UN Security Council. I conclude with a proposal on how to resolve the seeming impasse between the US Government and other governments over the use of the bilateral non-surrender agreements.

## 2. The Context of Article 98(2) Within the Framework of the Rome Statute

There are two overarching purposes in the Rome Statute: to bring to justice, and thus end impunity for, perpetrators of atrocity crimes (genocide, crimes against humanity and serious war crimes) of relatively high magnitude or

3 See L. Bloomfield, 'The U.S. Government and the International Criminal Court', Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, New York, 12 September 2003, at 6, available online at [http://www.amicc.org/docs/Bloomfield9\\_03.pdf](http://www.amicc.org/docs/Bloomfield9_03.pdf) (visited 9 December 2004). Bush Administration officials never interviewed the head of the US delegation, namely myself, to try to ascertain the complete record.

4 I have chosen to refer to these agreements as 'bilateral non-surrender agreements' rather than the more popular term, 'bilateral immunity agreements'. Article 98(2) establishes a right of non-surrender of a suspect and does not grant him or her immunity per se. The suspect may still be brought to justice in national courts or through other procedures (some explained in this article) before the ICC.

gravity,<sup>5</sup> and to encourage national investigations and prosecutions of such crimes before resorting, if necessary, to the ICC. It would be a perverse mangling of negotiating intent to conclude in hindsight that negotiators aimed with Article 98 to ensure *impunity* for atrocity crimes. Rather, their intent was to preserve certain protection from prosecution before the ICC as a matter of customary international law and treaty law. But the preservation of that protection was never intended to shield most suspects from investigation and, if merited, prosecution before a competent court of law. No State Party to the Rome Statute would be expected to negotiate an agreement with another government that would facilitate a suspect's impunity from all forums of justice for the atrocity crimes that the ICC is designed to investigate and prosecute. The US delegation contemplated in its discussions pertaining to Article 98(2) that particular international agreements—either already in force or that would be negotiated and ratified in the future and which establish jurisdictional responsibilities for investigating and prosecuting criminal charges against certain individuals before national courts—could be used to avoid surrender of particular types of suspects to the ICC.

The Rome Statute appears on first impression to present a clash of principles. Article 27 prohibits exempting any official of a government from the jurisdiction of the ICC, despite immunities or special procedural rules that may attach to the official capacity of the person under national or international law. Article 89(1) requires States Parties to comply with the Court's requests for arrest and surrender. (A non-party State obviously has no obligation to surrender a suspect in its custody to the ICC.) In Part IX (Cooperation) of the Rome Statute, however, Article 98 sets forth the exceptions to the rule of surrender but it does not seek to deny the Rome Statute's core purpose of fighting impunity. Rather, Article 98 invites strategies that remain faithful (to the extent that international law permits) to such purpose.

### *A. Article 98(1) Non-Surrender Obligation*

Article 98(1) prohibits the ICC from proceeding with a request for surrender or assistance when obligations under international law regarding sovereign or diplomatic immunity require the requested State (whether or not a party to the Rome Statute) to shield a person or property of a 'third State' present on the territory of the requested State from criminal prosecution in its courts. The procedure in such situations (absent the ICC) normally has been deportation to the third State or waiver by the third State for prosecution in the requested State. Thus, a State Party that has present in its territory an alien who enjoys sovereign or diplomatic immunity under international law and against whom the ICC has issued an arrest warrant would honour such immunity to the

5 The term 'atrocity crimes' is further explained in D.J. Scheffer, 'The Future of Atrocity Law', 25 *Suffolk Transnational Law Review* (2002), at 393–420.

extent that a third-State waiver were not obtained by the ICC. The State Party might choose to declare the suspect *persona non grata* and deport the suspect back to his or her national jurisdiction if it decides that permitting such an individual to remain on its territory with immunity from prosecution (before its national courts or the ICC) would be politically untenable or a denial of justice, or both. The immunity protection would be lifted if the receiving State is a State Party to the Rome Statute and, thus, under an obligation to surrender (or competently investigate and prosecute under complementarity rules) any of its nationals, regardless of their official capacity. If, however, the receiving State of the suspect is a non-party to the Rome Statute, then such suspect may never face the bar of the ICC in the absence of a Security Council referral under section 13(b) of the Rome Statute. Of course, he might ultimately face justice in his state of nationality if deported there. However regrettable such uncertainty may be, it is a reality that the Rome Statute contemplates.

With respect to a surrender request involving *two States Parties*, a means could be found to achieve a successful surrender of the suspect to the ICC, even where Article 98(1) immunity exists. The Rome Statute does not impose any explicit duty on a State Party to deport the ICC-targeted alien to his or her national jurisdiction in the event that it, too, is a State Party that would be obligated to surrender the individual to the ICC (pursuant to Article 27) or satisfactorily investigate and prosecute the suspect pursuant to complementarity procedures. But, under Article 97, the State Party where the suspect is located would be obligated to consult with the Court to resolve the matter and, in that process, it might be expected that such a remedy (deportation to the suspect's national jurisdiction which also is a State Party) would be strongly pressed by the ICC in order to achieve successful surrender to the Court (or national investigation and prosecution) once the suspect arrives in his national (and State Party) jurisdiction.

### ***B. Article 98(2) Non-Surrender Obligation***

Article 98(2) introduces another obligation not to request surrender of a suspect to the ICC in circumstances normally unrelated to the protection afforded by sovereign or diplomatic immunity. The text of Article 98(2) does not seek to limit the type of international agreement that would prohibit surrender of particular types of persons to the Court. Yet, the scope of non-surrender is, and was intended to be, limited by explicit use of the term 'sending State'.

In the event that both the requested and sending States are State Parties to the Rome Statute, then the existence of such an international agreement between them would not necessarily deprive the ICC of jurisdiction. The requested State Party would have to undergo an Article 97 consultation with the Court. That consultation could lead the ICC to press the requested State Party to deport the suspect to the sending State Party jurisdiction. If that were to occur, the sending State Party then would be obligated to comply with the

arrest and surrender obligation of Article 89(1) regarding any such suspect. Under admissibility procedures (Articles 17–19), both or either of the sending State and the receiving State could seek at an early stage to conduct national investigation and prosecution of the suspect, thus depriving the ICC (at least initially) of any jurisdiction that ultimately could lead to a request for surrender of the suspect.

It is possible, perhaps probable, that a receiving State that is not a State Party could insulate a suspect from surrender to the ICC under an Article 98(2) agreement, particularly when the sending State is also a non-party. That is an entirely predictable outcome with respect to non-parties. But where the receiving State is a State Party, then the required Article 97 consultation with the Court probably would point to a strategy—investigation and prosecution in the receiving State’s jurisdiction, if possible, or perhaps a criminal investigation pursuant to the terms of the international agreement (such as a Status of Forces Agreement or Status of Mission Agreement), thus avoiding impunity. Within the constraints of his complementarity obligation under Article 18 of the Rome Statute, the ICC Prosecutor might seek to warn the State Party, well in advance of any arrest warrant, that the Court may take interest in an alien possibly covered by the bilateral non-surrender agreement and present on that State Party’s territory. Then, such State Party might strategize with the Prosecutor about the permissible steps that the State Party could take to seek to serve the interests of justice regarding such alien.

### 3. The Meaning of the ‘Sending State’ in Article 98(2)

The key limitation on the scope of the international agreement referenced in Article 98(2) is the term ‘sending State’. The United States was the ‘sending State’ of about 550,000 military personnel and dependants, deployed globally outside US territory as of November 2004. The use of the term ‘sending State’ derives from the original American effort, very early in the ICC negotiations, to preserve the rights accorded to its official personnel covered by status of forces agreements (SOFAs) between the United States and scores of foreign governments and Status of Mission Agreements (SOMAs) that typically are negotiated in connection with United Nations or multinational military operations. That requirement was advanced by US negotiators during initial discussions about a permanent international criminal court with other governments in 1995. The objective was to ensure that nothing we would negotiate for the establishment of the ICC would undermine the protection and procedures regarding criminal investigations that US personnel have under SOFAs and SOMAs, which exist in part to achieve the purpose of criminal investigation and prosecution of US personnel deployed in foreign jurisdictions. Thus, our objective was not to achieve immunity per se for such individuals, but to ensure that they would be subject only to the judicial procedures set forth in the relevant SOFA or SOMA, and in no other treaty.

The term 'sending State' is commonly used in SOFAs to mean 'the Contracting State to which the Force belongs'.<sup>6</sup> In addition to military personnel, the SOFA typically will encompass 'the civilian component if it accompanies a Force and is in the employ of an Armed service of a Force'.<sup>7</sup> There is a complex formula to determine which civilians and dependants actually fall within the military jurisdiction of the sending State and discussion of that formula is beyond the reach of this article.<sup>8</sup> But the essential point to consider regarding the ICC is that whatever range of official and military personnel and related civilian component is covered by the particular SOFA or SOMA, those persons would be subject to a separate regime of criminal procedure and hence not surrendered to the ICC.<sup>9</sup> That was the original intention of the US delegation in pressing so hard and so consistently through the years of negotiation prior to and during the Rome Conference for the language that ultimately emerged as Article 98(2). It was one of many safeguards from ICC investigations and prosecutions of US personnel (official, military and related civilians) as the Rome Statute evolved into its final text on 17 July 1998.

By the time of the Rome Conference, the language for Article 98(2) had developed into a more generic text that covered 'persons' of a 'sending State', which clearly would cover persons sent officially by a state into a foreign jurisdiction under the authority of the sending State. The US delegation was very comfortable with that progression of text, as it strengthened the safeguard beyond where we had started the discussion in 1995 to incorporate, for example, the US diplomatic corps, Peace Corps workers, officials of the US Agency for International Development, and US civilian and military leaders who travel officially abroad. We recognized, however, that a SOFA or SOMA is limited in its coverage to the US military force and related civilian component covered by the particular agreement. So coverage of other personnel of the US Government might require negotiation and conclusion of an Article 98(2) international agreement that would cover the additional officials and personnel, and we anticipated doing so either with governments in jurisdictions where we believed the practical need was greatest for such protection or with the ICC directly if that proved possible.

I often would remark about the language of Article 98(2) through the years of negotiation that it was not the intention of the United States to shield individuals acting in a private capacity. We were not aiming, I confirmed, to seek immunity from surrender to the ICC of US citizens who act as mercenaries or in other strictly private capacities (however noble) overseas.

6 S. Lazareff, *Status of Military Forces Under Current International Law* (Leyden: Sijthoff, 1971), at 102.

7 *Ibid.*, at 103.

8 *Ibid.*, at 92–102.

9 The exception to this principle, however, would be nationals of the receiving State who are in the employ of the sending State in the event that the receiving State is a State Party to the Rome Statute.

Our concern was solely to ensure that there is an opportunity under the Rome Statute to use our SOFAs and SOMAs to their maximum effect and to negotiate additional agreements that would extend the range of protection to cover other persons on official mission of the US Government in foreign jurisdictions.<sup>10</sup>

Some commentators, reflecting what they describe as the intent of certain delegates to the ICC negotiations, have contended that the intention of Article 98(2) was to cover only *existing* agreements<sup>11</sup> or renewals of previous agreements, such as SOFAs.<sup>12</sup> If that were true, then it would be nonsensical to argue that Article 98(2) does not cover the SOFAs that existed at the time at which the Rome Statute was concluded. It would be equally incorrect to argue that Article 98(2) only covers SOFAs and SOMAs that existed prior to either 17 July 1998 or 1 July 2002 when the Rome Statute entered into force. The plain text of Article 98(2) belies that interpretation.<sup>13</sup> The original US negotiating intent was to provide for a means within the Rome Statute to

- 10 One scholar has questioned the relevance of SOFAs under Art. 98(2) by arguing that since no such agreements specifically refer to the ICC, then they do not comply with the requirements of the provision. See J.J. Paust, 'The Reach of ICC Jurisdiction Over Non-Signatory Nationals', 33 *Vanderbilt Journal of Transnational Law* (2000), at 14. Article 98(2) does not require explicit mention of the ICC in a bilateral agreement, and that point was never stressed during the negotiations. There are many forms of language which can render the required effect without specifically referring to the ICC. The alternative view would lead to the absurd result that years of negotiations resulted in a provision that has nothing to do with a primary objective of those negotiations. We clearly intended existing SOFAs and SOMAs to be part of the package of international agreements that would qualify as Art. 98(2) agreements. We viewed the criminal procedures set forth in SOFAs and SOMAs as ensuring a process that would lead to surrender only to a judicial forum stipulated by the jurisdictional requirements of the SOFA or SOMA itself, and to no other.
- 11 It is not clear whether they mean existing at the time of the conclusion of the Rome Conference on 17 July 1998 or when the Rome Statute entered into force on 1 July 2002.
- 12 See, e.g. Coalition for the International Criminal Court, *Fact Sheet: US Bilateral Immunity Agreements or So-Called 'Article 98' Agreements*, at 2, available online at <http://www.iccnw.org/pressroom/factsheets/FS-BIAsNov2004.pdf> (visited 10 December 2004). See also H.-P. Kaul and C. Kreß, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises* (Hague: TMC Asser Press, 2000), 164–165. Although Kimberly Prost and Angelika Schlunk write that, 'States participating in the negotiations in Rome had concerns about conflicts with existing international obligations,' it is unclear whether they view Article 98(2) as covering only those international obligations 'existing' on either 17 July 1998 or 1 July 2002. See K. Prost and A. Schlunk, 'Article 98: Cooperation with respect to waiver of immunity and consent to surrender', in H. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 1131–1133.
- 13 J. Crawford, P. Sands and R. Wilde, 'Joint Opinion: 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', 5 June 2003, at 18, available online at [http://www.humanrightsfirst.org/international.justice/Artt98\\_061403.pdf](http://www.humanrightsfirst.org/international.justice/Artt98_061403.pdf) (visited 10 December 2004). These experts also correctly conclude that Article 98(2) is not limited to two categories of agreements (bilateral extradition treaties and SOFAs), but they also question whether bilateral extradition treaties necessarily conform to the 'sending State' terminology of Article 98(2). *Id.* at 19. The US delegation never denied this possibility (which would protect

negotiate future international agreements for non-surrender of US personnel. This was intended to include, in addition to then-existing SOFAs and SOMAs, stand-alone Article 98(2) agreements when necessary and future SOFAs and SOMAs that either would be of amended character or new agreements negotiated from scratch.

#### 4. Intent as Revealed by the US Negotiating Strategy After the Rome Conference

An important factor in understanding the US intention behind Article 98(2) is how the US delegation interpreted it during the two-and-a-half years of negotiation that immediately followed the Rome Conference. The Clinton Administration advanced proposals to achieve greater protection for US military and official personnel from the jurisdiction of the ICC for the indeterminate number of years during which we were certain that the United States would remain a non-party, even under the best of circumstances for ratification. The US strategy through January 2001 always hinged on protection of military and official personnel and not on achieving any special protection (beyond complementarity) of US nationals operating in their private capacity outside the United States.<sup>14</sup>

The US proposal shared with other governments in March 2000 was limited in its scope to ensuring the non-surrender to the ICC of 'a national who acts within the overall direction of a UN Member State, and such directing State has so acknowledged...'<sup>15</sup> This protection was to cover only those nationals acting 'within the overall direction' of the 'directing State', meaning official and military personnel, and only when the 'sending State' is not a State Party to the Rome Statute and only when it has acknowledged that the national acted at the direction of the non-party State. (The proposal also excluded any 'directing State' subject to UN Security Council Chapter VII enforcement action from such protection and, in a modified version

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individuals the United States is willing to extradite to a foreign jurisdiction for prosecution) and, under heavy pressure from the US senate, the Clinton Administration negotiated bilateral extradition treaties that prohibit surrender to the ICC of extradited individuals without prior US consent. But the US delegation focused its attention on SOFAs and future negotiated agreements pertaining to the deployment of military and official personnel on mission for the US Government.

14 US nationals operating in their private capacity are subject to the criminal jurisdiction of whatever foreign jurisdiction in which their actions occur—a point so often overlooked by US critics of the ICC. Ironically, if US authorities were to use the complementarity protection of the Rome Statute in a cooperative manner, it may afford such US nationals greater protection from the jurisdiction of foreign courts than they would have had in the absence of the ICC.

15 For the full text and discussion of the US proposal, see D.J. Scheffer, 'Staying the Course with the International Criminal Court', 35 *Cornell International Law Journal* (November 2001–February 2002), at 78–80.

in September 2000, excluded internal conflicts from such protection.<sup>16</sup>) This proposal was intended for incorporation in the Relationship Agreement between the United Nations and the ICC (Relationship Agreement)—a document being drafted and negotiated during 2000.

The US-proposed provision for the Relationship Agreement was directly associated with a second US proposal relating to Article 98(2) for inclusion in the ICC's Rules of Procedure and Evidence—a supplemental document also being negotiated among governments in 2000. The US objective was to ensure that the Relationship Agreement would constitute, assuming the adoption of our proposal in its text, an Article 98(2) international agreement that the Court would honour. We wanted to confirm that strategy with a specific rule of procedure that interpreted Article 98(2) to cover the prospect of an agreement between two international organizations, namely the Relationship Agreement and the possibility of a future agreement between the ICC and the United States that we might seek in order to address the issue of surrender to the Court. We considered this strategy justifiable within the meaning of the term 'international agreement' found in Article 98(2) and as it might be further clarified in the Relationship Agreement between the United Nations and the ICC and the Rules of Procedure and Evidence. Regardless of how certain other governments and non-governmental organizations (NGOs) interpreted 'international agreement' under Article 98(2), we viewed it as an opportunity only available in the context of a 'sending State' and its official personnel deployed into a foreign jurisdiction, and not as an opening for private citizens to piggyback on the rights that would be afforded to official personnel.

If we had been successful in incorporating the March 2000 proposal in the Relationship Agreement, then, for the period of time that the United States was not a ratified party to the ICC, it would have Article 98(2) coverage globally pursuant to the terms of the proposal. Later, if the United States moved towards ratification of the Rome Statute, it conceivably might be in a position to leverage negotiation of an ICC–US agreement on Article 98(2) protection as a precondition for such ratification and obviate the need for US negotiation of numerous bilateral Article 98(2) agreements. Some of our foreign colleagues regarded this as an unacceptable application of exceptionalism. But we knew well that two-thirds of a largely conservative US Senate would need to approve the treaty for ratification, and they would seek prior advice from the Joint Chiefs of Staff of the US Armed Forces. A pragmatic means would have to be found to facilitate US participation in the ICC before such advice and votes could be secured by any administration in the future.

16 See D.J. Scheffer, Address at American University, 'Evolution of U.S. Policy Toward the International Criminal Court', 14 September 2000, available online at [http://www.state.gov/www/policyremarks/2000/000914\\_scheffer.au.html](http://www.state.gov/www/policyremarks/2000/000914_scheffer.au.html) (visited 12 December 2004).

Rule 195(2) was successfully incorporated into the Rules of Procedure and Evidence adopted by consensus on 30 June 2000.<sup>17</sup> Though our view was contested by some at the time, we viewed Rule 195(2) as the vehicle for an international agreement, such as the Relationship Agreement or a future ICC–US agreement, that we hoped would include the kind of protection from surrender to the ICC for official ('sent') persons stipulated in Article 98(2).

In all of these negotiations, we made very clear, both in the US-proposed text for the Relationship Agreement and in describing its linkage to Article 98(2), that the US Government was focused on non-surrender protection for official personnel. All of our efforts during 2000 in connection with the US negotiating effort and reaction to the proposed American Service Members Protection Act focused exclusively on ensuring that personnel of the US armed forces and of government officials or, as expressed in the US proposal of March 2000, a national acting under the overall direction of his or her non-party State and whose action is acknowledged by such state, would not be subject to surrender to the ICC while the United States is a non-party to the treaty. There was no publicly stated interpretation of Article 98(2) by US officials at the time to broaden its coverage to private individuals who also are nationals of the United States. At no time during the final months of the Clinton Administration was serious consideration given to broadening our understanding of Article 98(2) to seek new bilateral agreements that would cover US nationals acting in strictly private capacities abroad.

Indeed, public statements by US officials following the Rome Conference and particularly in the year 2000, when the dual strategy was pursued, confirmed the US understanding of the limited scope of the Article 98(2) protection. For example, during the Senate hearing immediately following the Rome Conference, I exchanged views with Senator Joseph Biden of the Senate Foreign Relations Committee about the protection Article 98(2) could afford the United States. Our exchange focused on SOFAs and I stressed the importance of Article 98(2), particularly with respect to SOFAs.<sup>18</sup> If I had thought at the time that Article 98(2) was meant to cover US nationals acting in their private capacity as well, that is a point I would have been eager to make at that hearing in order to demonstrate the safeguards that the United States should be pursuing, even as a non-party to the Rome Statute. At McGill University on 28 January 1999, I stressed that while the US focus was on

17 Rule 195(2) ICC RPE provides as follows:

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.

18 *Is a U.N. International Criminal Court in the U.S. National Interest?* Hearing Before the Subcomm. On International Operations of the Senate Comm. on Foreign Relations, 105th Cong., 2nd Sess. (S.Hrg. 105–724), at 20–21 (1998), available online at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105\\_senate\\_hearings&docid=f:50976.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:50976.pdf) (visited 12 December 2004).

whether the Rome Statute would expose American soldiers to the jurisdiction of the ICC, it was not the position of the United States that no American citizen could ever appear before the ICC.<sup>19</sup> In July 2000, Walter Slocombe, Under Secretary of Defense for Policy, and I testified publicly and referred repeatedly to Article 98(2) agreements strictly in terms of protection of official US Government personnel. For example, Slocombe stated '[W]e attach very high importance to making an attempt, which is now in progress, to ensure that nationals of non-party States, acting pursuant to official instructions, acting on behalf of their countries, cannot be prosecuted.'<sup>20</sup>

## 5. The Bush Administration's Policy

As of October 2004, the United States had signed 95 bilateral non-surrender agreements with foreign governments, of which 68 are States Parties or signatories to the Rome Statute.<sup>21</sup> Among them, at least 29 have been either ratified by a foreign parliament or are regarded by the other party as executive agreements not requiring ratification.<sup>22</sup> The US Government regards all of the bilateral non-surrender agreements as executive agreements not requiring Senate approval for treaty status under US law. Its reliance on Article 98(2) is one of two examples (the other being Article 16, see below) where, despite its anti-ICC posture, the Bush Administration cynically has invoked key provisions of the Rome Statute to advance its national policy.

The standard-form language of the Bush Administration's bilateral non-surrender agreements (at least those that have been publicly disclosed) defines

19 D. Scheffer, 'The U.S. Perspective on the International Criminal Court', 46 *McGill Law Journal* (November 2000), at 273.

20 *The International Criminal Court, Hearing Before the House Comm. on International Relations*, 106th Cong., 2nd Sess. (Serial No. 106–176) at 43 (2000), available online at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?IPAddress=wais.access.gpo&dbname=106\\_house\\_hearings&docid=f:68483.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?IPAddress=wais.access.gpo&dbname=106_house_hearings&docid=f:68483.pdf) (visited 13 December 2004).

21 Ambassador Larry Napper, US Mission to the OSCE, 'Reply on the International Criminal Court and Article 98 Agreements', OSCE Human Dimension Implementation Meeting, Warsaw, Poland, 8 October 2004, available online at <http://www.amicc.org/docs/Napper%2010-12-04.pdf> (visited 10 December 2004).

22 See Coalition for the International Criminal Court, *Status of US Bilateral Immunity Agreements (BIAs)*, available online at [http://www.iccnw.org/documents/otherissues/impunityart98/BIAsByRegion\\_current.pdf](http://www.iccnw.org/documents/otherissues/impunityart98/BIAsByRegion_current.pdf) (visited 9 December 2004). The US State Department does not disclose the precise status of the bilateral non-surrender agreements, namely, which are in force between both parties and which are not yet in force. The text of some agreements remains undisclosed and their exact status has not yet been revealed. Nonetheless, a number of bilateral non-surrender agreements would appear not yet to be in force. Forty-five countries have publicly refused to sign such agreements and more than 50 of the States Parties of the ICC have not signed such agreements, despite the loss of US aid that some suffer or may suffer as a consequence; *ibid.* Such numbers reflect, particularly by European Union governments and others, continuing opposition to the Bush Administration's interpretation of Art. 98(2).

the 'persons' to be covered by the particular agreement to be 'current or former Government officials, employees (including contractors), or military personnel or *nationals* of one Party'<sup>23</sup> (emphasis added). The Bush Administration contends that such bilateral non-surrender agreements are Article 98(2) agreements and that all US citizens of whatever character are covered by any such agreement. It further contends that the US position on scope of the bilateral non-surrender agreements, namely that it includes US citizens acting in their private capacity, 'is legally supported by the text, the negotiating record, and precedent.'<sup>24</sup> Yet, the legal analysis that would support such an assertion has never been made public.

The record of the Clinton Administration, as elaborated in this article, does *not* support either such a statement or other representations that the bilateral non-surrender agreements purporting to cover all US nationals (particularly the range claimed by the Bush Administration) are legitimate mechanisms provided for in the Rome Statute itself.<sup>25</sup> The European Union has strongly contested the Bush Administration's expansive interpretation of the scope of Article 98(2), analyzed it legally, and proposed guidelines for bilateral non-surrender agreements between EU members and the United States.<sup>26</sup> In my view, one of the most accurate interpretations of Article 98(2) disputing the Bush Administration's interpretation was prepared by English barristers, James Crawford, Philippe Sands and Ralph Wilde, in June 2003.<sup>27</sup>

I found remarkable the 17 September 2003 statement of Lincoln Bloomfield, Assistant Secretary of State for Politico–Military Affairs of the US State Department, in which he argued the case for why the US bilateral non-surrender agreements 'apply to all American citizens'. It is because, he said, the 'United States is a nation of immigrants; we have familial ties to localities all over the world. Our national interests know no bounds'. He then listed as requiring special protection, in addition to military interests, such private American interests abroad as found in business (including American

23 'Proposed Text of Article 98 Agreements with the United States', July 2002, available online at <http://www.iccnw.org/documents/otherissues/impunityart98/USArticle98Agreement/Aug02.pdf> (visited 10 December 2004).

24 L. Bloomfield, 'The U.S. Government and the International Criminal Court', Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, New York, 12 September 2003, at 3, available online at [http://www.amicc.org/docs/Bloomfield9\\_03.pdf](http://www.amicc.org/docs/Bloomfield9_03.pdf) (visited 9 December 2004).

25 J. Bolton, 'American Justice and the International Criminal Court', 3 November 2003, at 2, available online at [http://www.amicc.org/docs/Bolton11\\_3\\_03.pdf](http://www.amicc.org/docs/Bolton11_3_03.pdf) (visited 10 December 2004).

26 A comprehensive collection of EU declarations, resolutions and other documents pertaining to Art. 98(2) agreements is available online at <http://www.amicc.org/usinfo/reaction.html#EU> (visited 10 December 2004). A recent reaffirmation of the EU guidelines is found in the statement made on behalf of the EU before the United Nations, 2 December 2004, available online at <http://www.amicc.org/docs/EU%20statement%20GA%20adopts%20ICC%20resolution.pdf> (visited 10 December 2004) and described in UN Press Release GA/10309, 59th UNGA, 65th Mtg, 2 December 2004.

27 See *supra*, note 13.

corporations and their executives posted in resource extraction areas where separatist or competing territorial claims remain unsettled), educational institutions, media and NGOs. Left out of Bloomfield's list were Americans hired as mercenaries or as private contractors for projects that Washington could not have lawfully contracted for itself. He feared that 'The potential for accusations giving rise to politically motivated prosecutions cannot neatly be parsed among Americans.'<sup>28</sup> Bloomfield's perspective on foreign engagement of US citizens could be easily associated with the foreign activities of citizens of other major transnational economic, cultural and military powers in the world, thus undermining any peculiar US requirement for such protection.

Though, as a government official, I often spoke of the grave risk of politically motivated prosecutions against American officials and military personnel, neither I nor other top US officials in the Clinton Administration aligned such concerns, in the context of the ICC, with the fate of strictly private American citizens abroad. The original intent behind Article 98(2) was relegated to persons acting at the *direction* of the 'sending State'. Whatever their arguable merit, the extraordinary leaps into the private sector, as demonstrated by Bush Administration officials, were never contemplated during the long years of negotiation that preceded and immediately followed adoption of Article 98(2).<sup>29</sup>

According to the Bush Administration's novel reading of Article 98(2), all US nationals, regardless of their professional identification or purpose for being in the foreign jurisdiction, would be covered in the bilateral non-surrender agreement between the United States and the government of the relevant foreign jurisdiction. Essentially, the Bush Administration would read 'sending State' in Article 98(2) to mean both the 'sending State' of the official and military personnel, including national and non-national employees, and the *State of nationality* of the person (acting in any capacity abroad) for whom the government seeks protection under Article 98(2).

28 *Ibid.*, at 4. Another broad application of Art. 98(2) was described by John R. Bolton, Under Secretary for Arms Control and International Security, US State Department, in his speech, 'American Justice and the International Criminal Court', 3 November 2003, available online at [http://www.amicc.org/docs/Bolton11\\_3\\_03.pdf](http://www.amicc.org/docs/Bolton11_3_03.pdf) (visited 10 December 2004). ('Accordingly, in order to protect all of our citizens, the United States is engaged in a worldwide effort to conclude legally binding, bilateral agreements that would prohibit the surrender of U.S. persons to the Court. . . . We must guarantee the necessary protection to our media, delegations of public and private individuals traveling to international meetings. . . . people engaged in commerce and business abroad. . . . The orderly conduct of news reporting. . . economic activity, tourism. . . humanitarian programs, cultural and education exchanges, and other contacts between peoples around the world depend upon rules that are fair, well understood, and subject to appropriate due process.' *Ibid.*, at 1–2.)

29 The Clinton Administration's position on the limited scope of Art. 98(2) agreements should not be confused with other legal arguments examining the jurisdiction of the ICC over non-party State nationals. See D.J. Scheffer, 'How to Turn the Tide Using the Rome Statute's Temporal Jurisdiction', 2 *Journal of International Criminal Justice* (2004), 26–34; D.J. Scheffer, 'Staying the Course with the International Criminal Court', 35 *Cornell International Law Journal* (November 2001–February 2002), at 54–72, 77–82 and 86–100.

Bloomfield described the Vienna Convention on Consular Relations (VCCR) as using the term 'sending State' in a manner that 'refers to all persons who are nationals of the sending State'.<sup>30</sup> But he incorrectly inferred from this reading that, for the purposes of Article 98(2), 'sending State' must mean the State of nationality of the person against whom an arrest warrant has been issued by the ICC. The VCCR uses 'sending State' *only* as a term that refers to the State that has *sent* consular officers to the foreign jurisdiction. Where the VCCR refers to a 'national' of the 'sending State', the latter term is a reference not to that national's State of nationality, but rather to the State that has sent consular officials to the foreign jurisdiction.<sup>31</sup> In fact, the US State Department defines the 'sending' country in the VCCR as 'the country that has sent the consular official abroad'<sup>32</sup>—not as the State of nationality.

The International Law Commission, which prepared the VCCR, found it 'unnecessary to define expressions the meaning of which is quite clear, such as "sending State" and "receiving State"'.<sup>33</sup> Nonetheless, in its commentary on Article 4 (Establishment of a consulate) of the VCCR, the International Law Commission found that "The expression "sending State" means the State which the consulate represents."<sup>34</sup> The act of sending government officials into and establishing consulates in the foreign jurisdiction (the 'receiving' State) thus defines the 'sending' State. If that formula holds for Article 98(2), as the Bush Administration would have one believe, then the United States as 'sending State' must be the State that has *sent* government officials (civilian or military) into the foreign jurisdiction. Its definition as 'sending State' does not rest with any identification as the State of nationality of the person in question. In fact, the use of the term 'sending State' in extradition treaties (including US extradition treaties, where it is commonly found) is generally *not* the State of nationality. Rather, the term refers to the State that will extradite to the receiving State a national of the receiving State or some other individual wanted for prosecution in the receiving State.<sup>35</sup>

If one were to accept the Bush Administration's understanding of the meaning of 'sending State', then it is curious why the term has not been used

30 Bloomfield, *supra* note 24, at 3.

31 "The terms "sending State" and "receiving State" are used throughout [VCCR]. "Sending State" refers to the state of origin of the foreign consulate. Similarly, the term "receiving State" refers to the host state where the foreign consulate is located.", H.S. Schiffman, 'Breard and Beyond: The Status of Consular Notification and Access under the Vienna Convention', 8 *Cardozo Journal of International and Comparative Law* (2000), at 30, note 6.

32 US State Department, 'Consular Notification and Access, Part 5: Legal Material', 1–19, at 2, available online at <http://travel.state.gov/law/notification5.html> (visited 9 December 2004).

33 *Report of the International Law Commission Covering the Work of Its Thirteenth Session* (1 May–7 July 1961), UNGA 16th Session, Supplement No. 9 (A/4843), 1961, 1–41, at 5.

34 *Ibid.*, at 7.

35 The term 'sending State' occurs frequently in US extradition treaties. The term is used to define the procedures by which a state ('requesting State' or 'receiving State') may request another state ('sending State') to deliver a person within the control of the sending State into the custody of the receiving State.

to mean the ‘State of nationality’ in treaties where it could have easily been invoked with such meaning, but was not. An example would be the Treaty of Amity, Economic Relations and Consular Rights between the United States and Oman.<sup>36</sup> Like other friendship and commerce treaties, the treaty with Oman contains numerous references to the rights of nationals in the treaty party’s foreign jurisdiction. But, instead of referring to the nationals of the ‘sending State’, the text simply refers to nationals ‘of the other party’, and instead of using ‘of the sending and receiving States’, the text uses ‘of either party’. Because the purpose of such friendship and commerce treaties is to promote private commercial activities by nationals (as well as companies and vessels) of each party on the territory of the other party, it would be inaccurate to use the term ‘sending State’ in such treaties.

Where there is reference to a ‘sending State’ in a friendship and commerce treaty, such as the one between the United States and the Kingdom of Nepal,<sup>37</sup> it is used strictly in the context of the State with a consular or diplomatic office in the ‘receiving State’ and the reference to ‘nationals of the sending State’ refers only to the officials of the ‘sending State’ and their respective families—all of whom are present in the foreign jurisdiction, because the consular and diplomatic officers and employees have been assigned to or employed in the receiving State by the sending State. Any nationals of the receiving State are not covered by the protection accorded to this limited category of nationals from the sending State. Elsewhere in the US–Nepal treaty, references to all nationals, including those present solely in their private capacity, do not invoke the ‘sending State’ terminology. For example, instead of the treaty reading, ‘Nationals of either sending State shall be received and treated in accordance with the requirements and practices of generally recognized international law’, the treaty reads ‘Nationals of the Kingdom of Nepal in the United States of America and nationals of the United States of America in the Kingdom of Nepal shall be received and treated . . .’<sup>38</sup>

Clearly, it would be inaccurate to claim that ‘sending State’ necessarily means ‘State of nationality’ of the person in question. In fact, the Bush Administration defeats its own logic by interpreting ‘sending State’ to have the same meaning as the ‘State of nationality’ because if that were the case, it would exclude non-nationals who are sent overseas on official missions, particularly military operations and deployments, by the US Government. The Bush administration would seek to transform the wording in the bilateral non-surrender agreement of ‘current or former Government officials, employees (including contractors), or military personnel or nationals of one party’ into a meaning compatible with ‘sending State’ in Article 98(2). Yet, if the national of one party in fact has not been sent by that party into the other party’s jurisdiction, then there is no way to square the circle and claim that the

36 1960 WL 57263 (US Treaty), TIAS No. 4530.

37 1947 WL 26322 (US Treaty), TIAS No. 1585.

38 *Ibid.*, Section 6.

bilateral non-surrender agreement mirrors the requirement of Article 98(2) that the person be of the sending State. If the 'national' was never sent into the foreign jurisdiction by the sending State, then he or she falls outside the literal and intended meaning of a person from a 'sending State' in an international agreement that qualifies as an Article 98(2) agreement. A person's State of nationality does not necessarily, and in fact usually does not, literally 'send' that person into a foreign jurisdiction. Far more people travel the world on business and as tourists, and work and reside as expatriates in their private capacity, with no governmental direction whatsoever, than there are persons deployed in foreign jurisdictions at the direction and employ of their respective States of nationality.<sup>39</sup>

The logical and historically accurate reading of Article 98(2) of the Rome Statute is one that recognizes that some meaning must be attached to 'sending State'—that the term stands for something that can be ascertained by the ICC and governments. International treaty practice has long used the term 'sending State' as meaning a State that either has sent official personnel to or established an official presence in another State, or has extradited someone requested by the receiving State, and that such act of 'sending' creates the context within which any reference to 'nationals' or 'persons' in the treaty is understood. It would be particularly egregious to interpret Article 98(2) in such a way as to eviscerate the term 'sending State' by regarding it as essentially meaning 'State of nationality'. If that were the original intent of the negotiators, we simply would have used the term 'State of nationality'. But we used the term 'sending State' because our entire negotiating history behind the provision that became Article 98(2) referenced the officials and military personnel deployed by the 'sending State' into a foreign jurisdiction.<sup>40</sup>

39 Estimates vary on the number of private US citizens living abroad, but it ranges between four and six million. The number of US citizen tourists visiting foreign destinations in 2002 was estimated at almost 23.4 million.

40 My brief reference to the protection 'of any American citizen' or 'any American' in describing Art. 98(2) agreements in two law review articles that I drafted and published in 2001 reflected a shorthand and technically incomplete description of the potential for such agreements without taking care to describe them with precision. See D.J. Scheffer, 'A Negotiator's Perspective on the International Criminal Court', 167 *Military Law Review* (2001), at 18 (I also wrote that a future negotiation by the United States of an Art. 98(2) agreement with the ICC should seek to 'protect American service members from surrender . . .', *ibid.*); and D.J. Scheffer, 'Staying the Course with the International Criminal Court', 35 *Cornell International Law Journal* (November 2001–February 2002), at 90. If my objective had been to precisely define the scope of Americans to be covered by an Art. 98(2) agreement in these articles, I would have clarified the relationship that such term would have had, if used, with the term 'sending State' in the text of Art. 98(2) and the negotiating history behind the provision—an oversight I profoundly regret. I sought soon thereafter to rectify these descriptions by providing a more complete explanation of the intent behind Art. 98(2) in my article 'Original Intent at the Global Criminal Court', *Wall Street Journal Europe*, 20 September 2002, available online at <http://www.iccnw.org/pressroom/membermediastatements/2002/09.20.02-UNAUSA-WSJ-A980OpEd.pdf> (visited 10 December 2004).

US bilateral consular agreements reflect the accurate meaning of ‘sending State’ as meaning ‘the High Contracting Party by whom the consular officer is appointed’. There is no effort in those agreements to define ‘sending State’ as the ‘State of nationality’ of the person in question. The entire context of a consular agreement is the sending of consular officials abroad. In SOFAs, the meaning of ‘sending State’ relates solely to the state that has sent members of the State’s armed forces, their dependents and the civilian component employed by such armed forces into the foreign jurisdiction. The term used in SOFAs is ‘personnel’ (namely, official persons) of the sending State. This is because the entire context of the SOFA is military, i.e. the sending of a military force (not of nationals *per se*) to a foreign jurisdiction. The entire context of an extradition treaty is the sending of a suspect from the jurisdiction of initial custody to another jurisdiction, which often is the State of nationality of that suspect (but which, in an extradition context, is actually the receiving State).

## 6. The Article 98 Waiver Provision in the American Service Members Protection Act

The Bush Administration has been negotiating bilateral non-surrender agreements, not only as a reflection of its own reading of Article 98(2) and the protection it can afford even non-party States (such as the United States), but also as a direct consequence of the conditionality for military and, as recently amended, economic assistance to foreign governments set forth in extraordinarily punitive fashion in the American Service Members Protection Act (ASPA).<sup>41</sup> Yet, nothing in ASPA points to the need to negotiate bilateral non-surrender agreements of such broad application as those that have been negotiated and concluded by the Bush Administration. The Article 98 waiver provision of ASPA refers only to bilateral agreements that prevent ‘the International Criminal Court from proceeding against United States *personnel* present in such country’<sup>42</sup> (emphasis added). ASPA does not require the agreement to cover all US *nationals* present in such country. Further, under ASPA, the only individuals whom the President is authorized to use all means necessary and appropriate to bring about the release of, if they are detained or imprisoned by, on behalf of, or at the request of the ICC, are those who are *military personnel* or have some other *official relationship* with the US Government or, for so long as such government is not party to the ICC, a NATO member country government or a major non-NATO ally government.<sup>43</sup> There is no authority to use all means necessary and appropriate to bring about the release of US nationals who have no official relationship with the US Government, or the nationals of relevant NATO or major non-NATO

41 USCA §§ 7421–7433 (2002).

42 USCA § 7426(c)(2002).

43 USCA §§ 7427(b) and 7432(3, 4) (2002).

allies who have no official relationships with their respective governments. The preambular language of ASPA also refers only to official personnel and makes no mention of covering all US nationals. Nothing in the legislative history and floor debates of ASPA, including the recent amendment that broadened the punitive measures to include termination of economic assistance,<sup>44</sup> points with clarity to any intention on the part of US lawmakers to seek the protection of *all* US nationals in the conclusion of Article 98(2) agreements with foreign governments, even though the opportunities clearly existed to broaden the language of coverage if that had been the intent of Congress.

## 7. The Limited Scope of the Relevant Clauses in UN Security Council Resolutions

When the Bush Administration sought additional protection from ICC jurisdiction for US personnel engaged in UN-authorized peace operations beginning in 2002, the language used in Security Council Res. 1422 (2002) and 1487 (2003) did not seek to protect all US nationals, including the many US nationals who are engaged in UN theatres of operation as humanitarian aid workers, journalists, staff of the United Nations and inter-governmental relief agencies, representatives of NGOs and private contractors. The language in each of the resolutions prevented the ICC, 'consistent with the provisions of Article 16 of the Rome Statute', from investigating or prosecuting any case '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' for a 12-month period.

The American resort to Article 16 of the Rome Statute for this kind of blanket immunity from ICC investigation and prosecution for at least one year was highly unorthodox and not at all what the framers of the Rome Statute, including the US delegation, had in mind when Article 16 was negotiated. Nonetheless, it is instructive that even with the heavy hand of the Security Council in resolutions designed by the Bush Administration to mirror the spirit of Article 98(2), only a limited category of official individuals were to be exempted from ICC scrutiny.<sup>45</sup> If Article 98(2) had been meant to cover all nationals of a 'sending State', which, in a UN operation, would be the 'contributing State', one would assume that a parallel intent would have been reflected in the Security Council's resolutions. But the United States did not achieve

44 See C. Lynch, 'Congress Seeks to Curb International Court', *Washington Post*, 26 November 2004, at A2; Citizens for Global Solutions, 'Budget Bill Passes to Sanction Pro-ICC Countries', 8 December 2004, available online at [http://www.globalsolutions.org/programs/law\\_justice/news/nethercutt11.23.html](http://www.globalsolutions.org/programs/law_justice/news/nethercutt11.23.html) (visited 13 December 2004).

45 There has been no successor UN Security Council resolution since June 2004, after the US had to abandon a renewal effort in the face of determined resistance in the Council. The US statement acknowledging this is available online at <http://www.un.int/usa/04.111.htm> (visited 13 December 2004).

broad application of the Security Council protection to cover contributing State private contractors and nationals acting privately in conjunction with the UN operation.

## 8. A Proposed Solution

The Bush Administration may encounter significant risks with its bilateral non-surrender agreements. If and when a State Party refuses to transfer a suspect to the ICC because of a conflicting obligation under its bilateral agreement with the United States, the ICC judges will examine such agreement to determine whether it qualifies as an Article 98(2) agreement that can be invoked by the State Party. The mere fact that the US Government or even the State Party designates the bilateral non-surrender agreement as an Article 98(2) agreement would not be dispositive of the judges' ruling. The judges of the ICC have the discretion to determine in a specific case that any such agreement, at least in part, does not qualify as an Article 98(2) agreement. An ICC State Party that is party to a bilateral non-surrender agreement with the United States may find the Court requesting the surrender of a US citizen who is present in the territory of such State Party, not because he is a person of the 'sending State', but rather because he is on the State Party's territory in a private capacity and therefore outside of an Article 98(2) construct. Alternatively, the ICC judges may regard the entire bilateral non-surrender agreement as unqualified to be an Article 98(2) agreement because it overreaches to include persons not covered by Article 98(2). In either situation, the State Party will be under pressure from the ICC and its States Parties to comply with its Rome Statute obligations, even though such compliance may violate the US bilateral non-surrender agreement, and it will be under pressure from the United States to refuse surrender of the suspect due to the bilateral non-surrender agreement.

How can a solution emerge from this unnecessary mess? Existing bilateral non-surrender agreements could be rectified with a US public declaration confirming that the reference to 'nationals' in such agreements will be interpreted by the US Government to mean the US civilian component of a military deployment. New or amended agreements negotiated by the United States with foreign governments should limit the scope of application to official and military personnel of the 'sending State', and to cover them for actions they undertook in their official capacity. Thus, former officials and personnel would be covered for actions they took while in the service of the sending state, such as the United States. Private contractors may qualify for coverage only to the extent that they can be described as persons of the sending State, are directly contracted by the US Government to undertake duties in the foreign jurisdiction in connection with an official mission, and are held accountable (including criminal responsibility) before US courts for their performance. But in order to ensure that impunity for atrocity crimes would not be the end result of the bilateral agreement (recalling the procedures that should render justice

under SOFAs and SOMAs), the 'sending State' should commit itself in the Article 98(2) agreement to full investigation and, if warranted, prosecution of persons of the 'sending State' who are suspected of committing such crimes, particularly if arrest warrants against such persons have been issued by the ICC. The European Union has sought (so far without success) a similar assurance as a pre-condition to any of its members entering into an Article 98(2) agreement with the United States.<sup>46</sup> Such a provision would greatly facilitate a State Party's compliance with the Article 98(2) agreement by permitting it to point to an effective exercise of complementarity by the sending State.

The Bush Administration also should issue a declaration that designates all US SOFAs and SOMAs covering US personnel as Article 98(2) agreements to the extent that their terms (which can vary) require criminal jurisdiction to be allocated in a specific manner between the parties to such agreements and such criminal jurisdiction covers the atrocity crimes within the jurisdiction of the ICC. The bottom line of such a declaration must be that a suspect of an atrocity crime will be investigated and, if merited, prosecuted pursuant to the procedures of the SOFA or SOMA. Such a presidential declaration would not be regarded as credible if it sought to shield individuals from any investigation whatsoever of atrocity crimes by simply designating SOFAs and SOMAs as Article 98(2) agreements.

Assuming, however, that the Bush Administration continues vigorously to pursue bilateral non-surrender agreements with the same overreach and bullying leverage that it has demonstrated up to the present, there may well be an inevitable confrontation with the judges of the ICC some day and the foreign government caught in the Article 98(2) imbroglio of Washington's design. Such an outcome will be unfortunate, as the Bush Administration could have secured, pursuant to a faithful reading of Article 98(2) and with very little dispute, a wide range of ICC non-surrender protection for its official and military personnel (active and retired) if it had chosen a policy consistent with the original intent and text of the treaty.

46 See sources listed at *supra* note 26.