



CICC MEMO

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TO: Coalition members, government representatives
FROM: Coalition Secretariat
DATE: August 23, 2002
RE: Bilateral agreements proposed by US government

The following memo addresses some the myriad legal and political implications of the conclusion of the so-called “Article 98 agreements” the US government is currently seeking in capitals worldwide, already dubbed by leading legal experts as “impunity agreements”. The memo is based on extensive discussions with Coalition legal experts and governmental legal experts who followed or participated in the negotiations on this subject at the Rome Diplomatic Conference. It also reflects the views of military and other experts consulted for purposes of developing this analysis. The Coalition would welcome additional comments on this memo from government and other experts.

The US-proposed “Article 98” agreements are contrary to the language and intent of Article 98 and are therefore prohibited under the Rome Statute

1. The so-called “article 98” agreements the US currently seeks are constituted solely for the purpose of providing individuals or groups of individuals with immunity from the ICC. As such, these agreements are contrary to the purpose of article 98(2) and do not legitimately fall within its scope. This is clear from the language of article 98(2) and from its negotiating history, as recalled by key delegates to the negotiations, including the coordinator of the working group that oversaw negotiations on article 98. Because such agreements do not legitimately fall within the scope of article 98(2) and because their effect is to prevent States Parties from meeting their obligations under the Rome Statute, they constitute a breach of articles 27, 86, 87, 89 and 90 of the Rome Statute. They also constitute a breach of article 18 of the Vienna Convention on the Law of Treaties, which applies to Rome Statute States Parties and signatories alike, and are likely to create conflicts for States between their obligations under the Geneva and Genocide Conventions and under the Rome Statute, as well as their obligations under their own extradition regimes.

2. **The negotiating history of article 98, as recalled by key delegates, reflects that delegates clearly never intended to allow for the conclusion of agreements such as those that the US seeks.** Further, the delegates negotiating article 98 never intended to allow the conclusion of *new* agreements based on article 98. Rather, delegates sought to address potential conflicts between the Rome Statute and *existing* international obligations or new international obligations based on existing precedent (as in the case of new SOFAs following the expansion of NATO).¹

¹ The term “existing international obligations” is utilized twice and the term “existing fundamental obligations at international law” once in a key commentary on article 98, co-written by a delegate from Canada. Kimberly Prost/Angelika Schlunck, “Article 98: Cooperation with respect to waiver of immunity and consent to surrender,”

3. It should be noted in this regard that the US did not even primarily drive negotiations on article 98. The article was developed because a number of countries, including strong supporters of the Court, had concerns about the potential for conflict between the Statute and existing fundamental obligations at international law.² These existing fundamental obligations which were of concern to States were primarily obligations to respect diplomatic or state immunity, as framed in the Vienna Convention on Diplomatic Relations.³ Of secondary concern were obligations arising from agreements such as Status of Force agreements (SOFAs). Some NATO States in particular expressed a desire to see the standard provisions of SOFA agreements and similar agreements recognized in article 98. Recognition of new or renewed SOFAs, according to key delegates, would not contravene the Rome Statute or the Vienna Convention on the Law of Treaties, because the standard provisions of such agreements were clearly contemplated within the scope of article 98 and do not fundamentally change from one agreement to another. In other words, these fundamental existing obligations do not substantially change for States that choose to become parties to the Rome Statute and for whom such obligations must be taken into account.

4. Application of the negotiating history of the treaty is relevant where a particular interpretation of a treaty would “[lead] to a result which is manifestly absurd or unreasonable.”⁴ Clearly, agreements concluded in line with the US interpretation of article 98(2) would lead to such an absurd or unreasonable result, by allowing non-State parties to subvert the fundamental principle of the Rome Statute that anyone—regardless of nationality—committing genocide, crimes against humanity, or war crimes on the territory of a State Party is subject to the jurisdiction of the International Criminal Court.⁵ The overall object and purpose of the Rome Statute is to ensure that those responsible for the worst possible crimes are brought to justice in all cases, primarily by States, but as a last resort, by the International Criminal Court. Thus, any agreement that precludes the ICC from exercising its complementary function of acting when a State is unable or unwilling to do so, defeats the object and purpose of the Statute. The Vienna Convention on the Law of Treaties reinforces the conclusion that the US approach to article 98 is unreasonable, noting that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.”⁶

in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE (Triffterer ed., 1999), 1131, 1131.

² *Id.* at 1131, 1132.

³ U.N. Doc. A/CONF.20/13 (16 Apr. 1961).

⁴ Article 32, Vienna Convention on the Law of Treaties.

⁵ A key component of the object and purpose of the Statute is incorporated in Article 27 in the fundamental principle that no one is immune for crimes under international law such as genocide, crimes against humanity or war crimes. Article 27 (1) provides that the Rome Statute “shall apply equally to all persons without any distinction based on official capacity”, and Article 27 (2) states that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.⁵ That jurisdiction, apart from a referral of a situation pursuant to Chapter VII of the United Nations Charter, extends under Article 12 of the Rome Statute to crimes committed by any person over the age of 18, regardless of nationality, in the territory of a state party or state making a special declaration and to crimes committed by a national of one of these states.

⁶ Article 31(1), Vienna Convention on the Law of Treaties.

5. **In addition, the *language* of article 98(2) clearly does not allow for the kind of agreements the US is lobbying for around the world.** The US-proposed “article 98” agreements seek to prevent surrender to the ICC rather than seeking the return of persons to the US. (See Annex I, draft “article 98” agreement template.) In fact, the US-proposed agreements seek to amend the terms of the treaty by effectively deleting the concept of the “sending State” from article 98(2). The term “sending State” is a critical element of article 98(2). According to a government delegate who has consulted military experts, the term “sending State,” as utilized in article 98(2), is a term used almost exclusively in SOFA agreements and Status of Mission Agreements (SOMAs). This indicates that the language of article 98(2) is intended to cover only SOFAs, SOMAs and similar agreements.

6. However, the concept of “sending State” is rendered completely irrelevant in the US-proposed “article 98” agreements. The definition of person used in the US draft agreement is so broad it would include a number of categories of persons that are not covered by the types of agreements under the purview of article 98(2). SOFA agreements, for example, restrict their coverage to **current** serving military and related civilian personnel who are sent to a country for a specific purpose. The agreements the US seeks would cover **former** government officials, employees and military personnel. In particular it should be noted that these agreements could also include non-American defense contractors manufacturing anything for the US armed forces. In this case, governments could find themselves in the unimaginable situation of being unable to surrender their own nationals to the ICC. In addition, any non-American nationals serving as members of the US armed forces would receive immunity under these agreements. The US armed forces has members from many different countries, so this is a wider concern than it might otherwise seem. These agreements would essentially include any such persons, regardless of their reason for being on the territory of the State concerned (government, military or personal business or holidays.) **No possible interpretation of the term "sending State" can justify such a definition.** In accordance with the language of article 98(2) and the intent of the delegates who negotiated the language, the individual must be someone who was sent to another country under some form of international agreement, be it a SOFA, a SOMA or an extradition treaty. States approached to enter into these agreements will have to carefully consider the ramifications if they receive a request from the Court for surrender involving a person as defined in the US agreement, who has not been sent to their State pursuant to an international agreement. It is unlikely that the Court will be satisfied that such cases fall under article 98(2).

7. In this regard, the language of article 90 of the Rome Statute must be taken closely into account. Article 90 addresses competing requests for the surrender of a person. A State Party that receives competing requests from the Court and from another State must always give priority to the Court’s request, where the Court can show that the relevant case is admissible—that no State is willing or able to undertake the investigation and prosecution of that person.⁷ Even where the State issuing the competing request is a non-State Party and where the State contemplating surrender of that person has an international obligation to the non-State Party to extradite the person concerned, surrender to the non-State Party can still only happen after a series of factors are taken into consideration.⁸ This balancing of interests can only occur

⁷ Article 90(2), (3) and (4), Rome Statute of the International Criminal Court.

⁸ These factors touch in particular upon the interests of the non-State Party (whether the crime was committed in its territory and the nationality of the victims and of the person sought) and the possibility of subsequent surrender to the Court. Article 90(6), Rome Statute of the International Criminal Court.

where there is a formal request for extradition from the non-State Party for purposes of investigation and possible prosecution for the same crimes for which the Court seeks the person's surrender. The US-proposed 'article 98' agreements do not fit within the purview of article 90 because the US-proposed agreements do not seek return of the individual for purposes of ensuring accountability, through official extradition mechanisms, but only to ensure impunity.

8. Along these lines, it is clear from the draft text that the US is not concerned with undertaking the investigation or prosecution of potential international crimes. In Preambular Paragraph C of the so-called "article 98" agreement, the US suggests its intention, broadly stated, to investigate and prosecute **where appropriate** its own personnel. However, the agreement itself makes no provision for return of individuals to the US for this purpose. This "where appropriate" language, coupled with the rest of the agreement, is a fundamental subversion of the complementarity principle of the Rome Statute. Part 2 of the Rome Statute recognizes the primary responsibility of national jurisdictions to investigate and where necessary prosecute international crimes. Where those jurisdictions fail or are unable to take up their responsibilities, the Statute provides the ICC with the necessary jurisdiction to address these crimes. The proposed US "article 98" agreements would deny the Court its jurisdiction. Further, it should be noted that a request from the Court for surrender, which an "article 98" agreement with the US would demand that a State deny, can only be issued when the Court has clearly demonstrated that the case is admissible—that no State is willing or able to undertake investigation and prosecution of the crime concerned. This assessment by the Court would include an evaluation of US capacities and intentions, suggesting that fulfillment of obligations under an "article 98" agreement would only have the effect of returning a person to a jurisdiction that has no intention of holding them accountable for their actions. States that uphold these agreements will contravene their obligations under Part 2 and Part 9 of the Rome Statute (in particular articles 86, 87, 89 and 90), as well as under article 27 of the Statute, which disallows any immunity from the Court and serves as a fundamental counterpoint to article 98. Finally, States that uphold such agreements could also be in contravention of their obligations under the Geneva and Genocide Conventions, which enshrine the legal principle of *aut dedere aut judicare*—the responsibility of States either to prosecute such individuals or to extradite them to a jurisdiction that will.

9. By contrast, it should be noted that the standard provisions of SOFA agreements and similar agreements included under article 98(2) emphasize the retention by sending States of primary jurisdiction but do not deny other legitimate sources of jurisdiction. Rather, they establish sending States as the priority jurisdiction. Often, in the case of extradition agreements and in the case of newer SOFA agreements, there are even provisions that allow receiving States to keep jurisdiction in cases of overriding national interest or of widespread public concern. In this regard, SOFAs and similar agreements fit into the framework of the Rome Statute, which centers on the principle of complementarity and the primary responsibility of national jurisdictions for investigations and prosecutions that they are willing and able to carry out. According to some Coalition members, it is likely that future SOFAs and similar agreements, when negotiated, will be drafted so as to take into consideration the obligations of States Parties under the Rome Statute, to respect the complementarity regime of the ICC and to ensure that their national judicial processes do not shield any persons from accountability. The compromise in article 98, to address the modest conflict between these existing legal obligations and those under the Statute, does not undermine the Court's methods of work or its relationship with national jurisdictions.

10. Finally, States that conclude so-called “article 98” agreements with the US, according to experts on extradition law, are very likely to come into contradiction with their existing obligations under their own extradition regimes. Operative paragraphs 3 and 4 of the US draft agreement address what is known as “re-extradition.” The US draft prohibits re-extradition to the ICC without the explicit permission of the US. However, bilateral extradition treaties permit re-extradition if the country that originally extradited the person consents. The US draft agreement therefore purports to deny the original extraditing country this power of consent. States concluding such agreements with the US would likely need to renegotiate existing extradition treaties to take into account this loss of the traditional consent power.

11. **It is clear that the US is only concerned with preventing the ICC from fulfilling its mandate.** That the US should seek to aggressively undermine the Court is not a surprise. It is for this reason that the US nullified its signature of the Rome Statute, to attempt to free itself legally to attack the Court. However, States Parties have explicit obligations to the Court under the Rome Statute, and States Parties and even signatories have an obligation under the Vienna Convention on the Law of Treaties not to defeat the object and purpose of the treaty. This memo has also outlined fundamental obligations under the Geneva and Genocide Conventions and under extradition treaties that come into conflict with the US-proposed “article 98” agreements. The two States that have concluded so-called “article 98” agreements with the US—Romania and Israel—are therefore in breach of their international obligations. States that may be considering concluding so-called “article 98” agreements that would effectively exempt only US nationals and not their own nationals, as Romania has done, would still be in breach of their international obligations.

12. On a final note, it is clear that the accumulation of so-called “article 98” agreements would have a detrimental effect on the global ratification process, as States begin to perceive the ICC as meting out justice only for some nationals and not others. The impact of this perception on the Court’s capacity to fulfill its mandate should not be disregarded.

Recommendations

13. The Coalition for the ICC encourages governments not to make a decision about entering into such a bilateral agreement with the US government until they have had the opportunity to consult with other governments and completed a thorough analysis of the legal implications.

14. In this regard, we strongly encourage governments to request that the agenda of the meeting of the Assembly of States Parties, which will take place from 3-10 September 2002 in UN headquarters in New York, provide time for a discussion of this matter of extreme importance to States Parties to the Rome Statute.

15. Finally, the Coalition respectfully requests that the Assembly of States Parties adopt an interpretative agreement regarding Article 98 of the Rome Statute, as has been requested by members of the Assembly, which will further assist countries in their analysis.

Annex I

US-Proposed “Article 98” agreement template

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.
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.

NB: An additional paragraph is included in agreements intended for countries that are not parties or signatories to the Rome Statute: “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.