

U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties

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I. Introduction

The overtly negative, or even hostile, position the government of the United States has taken on the issue of the International Criminal Court (ICC) – after playing an active role in the preparatory work leading up to the adoption of the ICC Statute, in particular the Rome Conference in 1998 – is a matter of common knowledge. It has received ample attention from the media as well as NGOs, and forms the subject of numerous academic publications.¹ The adverse attitude culminated in President George W. Bush’s retraction of the signature of the United States on the ICC Statute on 6 May 2002.² Moreover, being under the

¹ Compare only S.B. Sewall/ C. Kaysen, *The United States and the International Criminal Court, National Security and International Law*, 2000; D. Mundis, “The United States of America and International Justice”, *Journal of International Criminal Justice* 2 (2004), 2 et seq.; P.W. Kahn, “Why the United States Is So Opposed”, <www.crimesofwar.org/icc_magazine/icc-kahn.html> (last visited 20 May 2004); R. Wegdwood, “The International Criminal Court: An American View”, *EJIL* 10 (1999), 93 et seq. (105); *id.*, “The Irresolution of Rome”, *Law & Contemp. Probs* 64 (2001), 193 et seq.; K. Ailslieger, “Why the United States Should Be Wary of the International Criminal Court”, *Washburn Law Journal* 39 (1999), 80 et seq. (all with further references).

² Letter by John R. Bolton to the Secretary General of the UN of 6 May 2002, cited in: Richard Boucher, Press Statement, International Criminal

impression that merely not joining the Court would insufficiently protect its national interests, the United States has embarked on a campaign to actively ensure that the Court will not exercise jurisdiction over its nationals.

Comments on U.S. policy range from “disbelief and bewilderment”³ over harsh criticism to support. It has been observed that prospects for U.S. participation in the ICC in the foreseeable future look slim.⁴ While the rhetoric on both sides of the divide continues to get progressively intemperate, commentators have drawn attention to the fact that much energy is wasted on criticising the U.S. approach and have proposed to “learn to deal with rejection”.⁵ This contribution proceeds from this basis and, rather than examining the U.S. position from a point of view of international policy, attempts to legally analyse a specific manner the U.S. rejection of the ICC has taken, i.e. efforts to prevent the surrender of U.S. nationals to the ICC by way of concluding a series of bilateral agreements with as many countries as possible. These accords have sometimes somewhat polemically been referred to as “bilateral impunity agreements”,⁶ or, given that they are purportedly based on article 98 (2) of the ICC Statute, simply “article 98 agreements”. To avoid pre-judgement of the legal quality of those agreements, as well as to steer clear of resorting to “international polemics”, the present article adopts the more neutral term “bilateral non-surrender agreements”.⁷

Court: Letter to UN Secretary General Kofi Annan, <www.state.gov/r/pa/prs/ps/2002/9968.htm> (last visited 24 May 2004).

³ H. Corell, “A Question of Credibility”, available at <<http://www.iccnw.org/documents/declarationsresolutions/unbodies/CorellHansArticleonUS-ICC23May04.pdf>> (last visited 25 May 2004).

⁴ P.M. Wald, “Is the United States’ Opposition to the ICC Intractable?”, *Journal of International Criminal Justice* 2 (2004), 19 et seq.

⁵ W. M. Reisman, “Learning to Deal with Rejection: The International Criminal Court and the United States”, *Journal of International Criminal Justice* 2 (2004), 17 et seq.

⁶ Amnesty International, “International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes”, August 2002, available at <[http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR400252002ENGLISH/\\$File/IOR4002502.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR400252002ENGLISH/$File/IOR4002502.pdf)> (last visited 5 June 2004).

⁷ The term has been introduced by J. Crawford, P. Sands and R. Wilde in their 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, para. 21, available at

It does not seem too probable that cases before the ICC involving bilateral non-surrender agreements may start any time soon, given that, as one commentator has sardonically observed, “there is greater likelihood that elephants will soon learn to fly than that an ICC Prosecutor will soon provoke an international confrontation by indicting American peacekeepers [...]”.⁸ However, the agreements raise interesting questions of treaty interpretation and conflict between treaties that go beyond the immediate context of (potential) judicial activity and thus merit closer scrutiny.

This article sets out with a short overview of the objections against the ICC proffered by the United States and the action taken by the United States to secure its nationals from the jurisdiction of the ICC (II.). It continues with a legal analysis of the bilateral non-surrender agreements concluded by the United States in the light of the ICC Statute (III.). The last part will focus on questions of conflict of treaties under international law and offer some reflections on possible consequences of the agreements in terms of state responsibility (IV.).

II. U.S. Objections to the International Criminal Court and Efforts to Prevent the Exercise of Jurisdiction by the Court over U.S. nationals

1. U.S. Objections to the ICC

The long list of objections by the United States administration to the ICC is encapsulated in a statement of a senior member of the Bush administration, arguing that the “ICC is an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence”.⁹ Several major specific concerns with the ICC as an institu-

www.humanrightsfirst.org/international_justice/Art98_061403.pdf (last visited on 6 June 2004).

⁸ N.A. Combs, “Establishing the International Criminal Court”, *International Law FORUM du droit international* 5 (2003), 77 et seq. (79).

⁹ J.R. Bolton, “American Justice and the International Criminal Court”, Remarks at the American Enterprise Institute, 3 November 2003, available at www.state.gov/t/us/rm/25818.htm (last visited 20 May 2004). See also U.S. Department of State, Bureau of Political-Military Affairs, “The Inter-

tion have been voiced by the United States, which may be briefly summarised as follows:¹⁰ (1.) danger of frivolous and politically motivated investigations and prosecutions against United States nationals, in particular because of the Prosecutor's competence to trigger proceedings;¹¹ (2.) inadequate safeguards of fair trial rights of the accused in the procedure of the ICC, in particular the right to be tried by jury;¹² (3.) general concerns about United States national sovereignty, in particular the purportedly unlawful jurisdictional reach of the ICC over nationals of non-State Parties;¹³ (4.) extension of crimes beyond what is recognised by customary international law;¹⁴ (5.) a certain uneasiness with the po-

national Criminal Court", Fact Sheet of 2 August 2002, available at <www.state.gov/t/pm/rls/fs/2002/23426.htm> (last visited 24 May 2004).

- ¹⁰ This general summary is based on an overview of several sources, such as U.S. Department of State, Bureau of Political-Military Affairs, "The International Criminal Court", Fact Sheet of 2 August 2002, available at <www.state.gov/t/pm/rls/fs/2002/23426.htm> (last visited 24 May 2004); J. Trahan/ A. Egan, "U.S. Opposition to the International Criminal Court", *Human Rights* 30 (2003), 10.
- ¹¹ For a discussion of the powers of the Prosecutor under the ICC Statute see V. Röben, "The Procedure of the ICC: Status and Function of the Prosecutor", *Max Planck UNYB* 7 (2003), 513 et seq. (540); G. Turone, "Powers and Duties of the Prosecutor", in: A. Cassese/ P. Gaeta/ J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 2002, Vol. 2, 1137 et seq.
- ¹² See S. Stapleton, "Ensuring a fair trial in the International Criminal Court", *N.Y.U.J. Int'l L. & Pol.* 31 (1999), 535 et seq.; S. Zappalà, "The Rights of the Accused", in: Cassese/ Gaeta/ Jones, see note 11, 1319 et seq.
- ¹³ See for example J. Paust, "The Reach of the ICC Jurisdiction over Non-Signatory Nationals", *Vand. J. Int'l L.* 33 (2000), 1 et seq.; M. Morris, "High Crimes and Misconceptions: The ICC and Non-Party States", *Law & Contemp. Probs* 64 (2001), 13 et seq.; M. Bergsmo, "Occasional remarks on certain state concerns about the jurisdictional reach of the International Criminal Court, and their possible implications for the relationship between the Court and the Security Council", *Nord. J. Int'l L.* 69 (2000), 87 et seq.; M. Scharf, "The ICC's jurisdiction over the Nationals of Non-State Party States: A Critique of the U.S. Position", *Law & Contemp. Probs* 64 (2001), 67 et seq.
- ¹⁴ For a discussion of the jurisdiction *ratione materiae* of the Court see M. Wagner, "The ICC and its Jurisdiction – Myths, Misperceptions and Realities", *Max Planck UNYB* 7 (2003), 409 et seq. (413).

tential inclusion of the crime of aggression;¹⁵ (6.) the perceived lack of influence of the UN Security Council as the primary organ for ensuring international peace and security.¹⁶

In the light of perceived or actual anti-Americanism around the globe, the concern seems to prevail that the ICC might be used by less potent states to second-guess foreign policy decisions of the United States and ultimately as an instrument of vendetta against United States foreign policy,¹⁷ as well as, more specifically, endanger the success of peacekeeping and humanitarian missions in which United States military forces and civilian personnel participate by subjecting American citizens to baseless, politically motivated prosecutions.¹⁸ Another concern may be the prospect of the eventual inclusion of the crime of aggression into the ICC Statute, which would obviously have an enormous impact on decisions to use force for the solution of international disputes.¹⁹

The legal merits of such criticism have been analysed in numerous academic comments²⁰ and it would exceed the framework of this article to recapitulate this discussion here. For present purposes, a short synopsis of United States reactions on a national and international level inspired by these objections should suffice.

¹⁵ W.M. Reisman, "The Definition of Aggression and the ICC", *Proceedings of the 96th Annual Meeting of the American Society of International Law* (2002), 181 et seq.

¹⁶ Compare Wedgwood, see note 1, 97.

¹⁷ M. Tia Johnson, "The American Servicemembers' Protection Act: Protecting Whom?", *Va. J. Int'l L.* 43 (2003), 405 et seq. (450).

¹⁸ T.M. Franck/ S.H. Yuhan, "The United States and the International Criminal Court: Unilateralism Rampant", *N.Y.U.J. Int'l L. & Pol.* 35 (2003), 519 et seq.; W.L. Nash, "The ICC and the Deployment of U.S. Armed Forces", in: Sewall/ Kaysen, see note 1, 153 et seq. (*passim*), D.R. Sands, "ICC seen as 'forum' for hits on U.S., allies", *Washington Post* of 18 May 2004.

¹⁹ Compare Wedgwood, see note 1, 105; C.C. Joyner/ C.C. Posteraro, "The United States and the International Criminal Court: Rethinking the Struggle Between National Interests and International Justice", *Criminal Law Forum* 10 (1999), 359 et seq. (365); D. Orentlicher, "Unilateral Multilateralism: United States Policy toward the International Criminal Court", *Cornell Int'l L. J.* 36 (2004), 415 et seq. (421).

²⁰ Compare only: G. Hafner/ K. Boon/ A. Rübesame/ J. Huston, "A Response to the American View as Presented by Ruth Wedgwood", *EJIL* 10 (1999), 108 et seq.; Frank/ Yuhan, see note 18, 541.

2. Activities undertaken by the U.S. to exempt U.S. Nationals from the Jurisdiction of the Court

After the adoption of the ICC Statute, the United States government took multiple steps to ensure that, while it remained non-party to the treaty, no member of U.S. forces and, eventually, no U.S. citizen, would be exposed to the jurisdiction of the ICC. These efforts took place in various “battlefields”, both on the domestic and international level, such as the Preparatory Commission for the International Criminal Court²¹, the UN Security Council and in bilateral negotiations.

a. Security Council Resolutions 1422 (2002), 1487 (2003), 1497 (2003)

On 30 June 2002, the United States vetoed a Security Council resolution to extend for six months the mandate of the UN peacekeeping mission to Bosnia. As condition for its consent, it demanded a clause in the resolution guaranteeing that U.S. military personnel serving on the mission in Bosnia-Herzegovina would not be subject to the jurisdiction of the ICC.

Following arduous negotiations, the Security Council unanimously passed S/RES/1422 (2002) of 12 July 2002. Acting under Chapter VII of the UN Charter, 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; [...]”.

The legal validity of this part of the resolution has been doubted on various grounds, in particular the lack of the requirements of Article 39

²¹ Compare C.K. Hall, “The First Five Sessions of the UN Preparatory Commission for the International Criminal Court”, *AJIL* 94 (2000), 773 et seq. (785). For a discussion of rule 195 (2) of the Rules of Procedure and Evidence, see at III. 3.

UN Charter (existence of a threat to the peace, breach of the peace or act of aggression) as well as the compatibility with article 16 of the ICC Statute.²² Nevertheless, the Security Council extended the deferral for one more year in resolution S/RES/1487 (2003) of 12 June 2003. An even broader exemption of personnel participating in a Multinational Force in Liberia was included in S/RES/1497 (2003) of 1 August 2003, initially drafted by the United States.²³

On 23 June 2004, the Bush administration abandoned its proposal to seek a second renewal of S/RES/1422 by reason of adamant opposition of other Security Council members and the slim prospect of reaching the necessary majority in the Council.²⁴ Commentators mostly related the failure to secure a majority to the scandal over abuse of U.S. detainees in Iraq and Afghanistan. In the absence of a renewal, the U.S. has signalled that the negotiation of bilateral non-surrender agreements is now a priority in order to avoid the exercise of jurisdiction by the ICC over U.S. nationals.²⁵

²² See A. Zimmermann, “‘Acting under Chapter VII (...)’ – Resolution 1422 and Possible Limits of the Powers of the Security Council”, in: J.A. Frowein/ K. Scharioth/ I. Winkelmann/ R. Wolfrum (eds), *Verhandeln für den Frieden – Negotiating for Peace, Liber Amicorum Tono Eitel*, 2003, 253 et seq.; S. Heselhaus, “Resolution 1422 (2002) des Sicherheitsrates zur Begrenzung der Tätigkeit des Internationalen Strafgerichtshofes”, *ZaöRV* 62 (2002), 907 et seq.

²³ Its operative para. 7 reads:
 “7. Decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State; [...]” See S.D. Murphy, “Contemporary Practice of the United States Relating to International Law, U.S. Support for Multinational Intervention in Liberia”, *AJIL* 98 (2004), 193 et seq.

²⁴ C. Lynch, “U.S. Abandons Plan for Court Exemption”, *Washington Post* of 24 June 2004; W. Hoge, “U.S. Drops Plan to Exempt G.I.’s From U.N. Court”, *New York Times* of 24 June 2004. See also: F.L. Kirgis, “U.S. Drops Plan to Exempt G.I.’s from U.N. Court”, *ASIL Insights*, July 2004, available at <www.asil.org/insights/insigh139.htm> (last visited 27 July 2004).

²⁵ Statement by J.B. Cunningham, Deputy U.S. Representative to the United Nations, on the ICC, at the Security Council Stakeout, 23 June 2004, available at <www.un.int/usa/04_111.htm> (last visited 3 August 2004).

b. American Servicemembers' Protection Act

Following two earlier unsuccessful attempts at passing it,²⁶ the American Servicemembers' Protection Act²⁷ (ASPA) was approved with strong bipartisan support by both houses of Congress and signed into law by the President on 2 August 2003. The most relevant provisions of the Act, Sections 2004 to 2007, contain numerous restrictions on interaction by United States Federal or State government entities or courts with the ICC. Amongst the prohibitions on co-operation with the Court are the ban on responding to requests for co-operation by the ICC, to extradite any person from the United States to the Court, to use any appropriated funds to assist the Court or to conduct investigative activities relating to a proceeding at the ICC (Section 2004). Furthermore, the Act proscribes transfer of classified national security information to the ICC (Section 2006), prohibits United States military assistance to States Parties of the ICC, subject to the possibility of Presidential waiver (Section 2007). Section 2005 addresses the participation of United States military in UN peacekeeping or peace enforcement operations and merits being partially quoted:

“(b) RESTRICTION- Members of the Armed Forces of the United States may not participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations, the creation of which is authorized by the United Nations Security Council on or after the date that the Rome Statute enters into effect pursuant to Article 126 of the Rome Statute, unless the President has submitted to the appropriate congressional committees a *certification* described in subsection (c) with respect to such operation.

(c) CERTIFICATION- The certification referred to in subsection (b) is a certification by the President that--

(1) *members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court* because, in authorizing the opera-

²⁶ L.V. Faulhaber, “American Servicemembers’ Protection Act”, *Harvard Journal on Legislation* 40 (2003), 537 et seq. (544).

²⁷ 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820 (2002).

tion, the United Nations Security Council permanently exempted, at a minimum, members of the Armed Forces of the United States participating in the operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by them in connection with the operation;

(2) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because each country in which members of the Armed Forces of the United States participating in the operation will be present either is not a party to the International Criminal Court and has not invoked the jurisdiction of the International Criminal Court pursuant to Article 12 of the Rome Statute, or has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against members of the Armed Forces of the United States present in that country; [...].²⁸

c. Bilateral Non-Surrender Agreements

As envisaged under ASPA, negotiations for the conclusion of bilateral non-surrender agreements commenced in the late summer of 2002 as part of a major diplomatic campaign.²⁹ The first agreement was signed with Romania in August 2002.³⁰ As of June 2004, it appears that 89 countries have already signed bilateral agreements with the United States. The administration has signalled that more may soon be added to the list.³¹ The United States has made it a priority to ensure that *all* U.S. nationals are covered by the terms of the agreements.³² The agree-

²⁸ Emphasis added.

²⁹ In April 2002, all U.S. ambassadors were asked to examine whether other nations were willing to conclude bilateral agreements protecting United States nationals from ICC jurisdiction. At the same time, considerable diplomatic and financial pressure was exerted. See D. McGoldrick, "Political and Legal Responses to the ICC", in: D. McGoldrick / P. Rowe/ E. Donnelly (eds), *The Permanent International Criminal Court, Legal and Policy Issues*, 2004, 389 et seq. (424).

³⁰ McGoldrick, see above, 427.

³¹ See C. Giacomo, "US Pushes World Court Immunity Amid Iraq Scandal", *Washington Post* of 14 May 2004.

³² Bolton, see note 9.

ments sought by the United States are either one-sided or reciprocal, depending on the political situation. A standard proposal would read that the two parties:³³

“Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

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 the International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

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,

Bearing in mind Article 98 of the Rome Statute,

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, for the purpose of surrender to or transfer to the International Criminal Court.
3. [*this paragraph for reciprocal agreements only*] 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 the 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

³³ Cited after: S.D. Murphy, “Contemporary Practice of the United States Relating to International Law, International Criminal Law”, *AJIL* 97 (2003), 200 et seq. (201-202).

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”.

The conclusion of bilateral non-surrender agreements has spurred criticism from individual states, international organisations and NGOs.³⁴ On 25 September 2002, the Parliamentary Assembly of the Council of Europe adopted Resolution 1300 (2002), voicing its uneasiness with the agreements.³⁵ In Resolution 1336 (2003), the Assembly reiterated its concern³⁶.

³⁴ Several NGO’s have released detailed analyses of the issue, see Amnesty International, see note 6; Human Rights Watch, “Bilateral Immunity Agreements”, 20 June 2003, available at <<http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf>> (last visited 5 June 2004).

³⁵ The relevant part of the resolution reads: “9. [...] the Assembly is greatly concerned by the efforts of some states to undermine the integrity of the ICC treaty and especially to conclude bilateral agreements aimed at exempting their officials, military personnel and nationals from the jurisdiction of the court (exemption agreements). 10. The Assembly considers that these exemption agreements are not admissible under the international law governing treaties, in particular the Vienna Conventions on the Law of Treaties, according to which states must refrain from any action which would not be consistent with the object and the purpose of a treaty. 11. The Assembly recalls that states parties to the ICC treaty have the general obligation to co-operate fully with the court in its investigation and prosecution of crimes within its jurisdiction (Article 86) and that the treaty applies equally to all persons without any distinction based on official capacity (Article 27). It considers that the exemption agreements are not consistent with these provisions”.

³⁶ “8. The Assembly regrets the ongoing campaign by the United States to convince state parties to the Rome Statute of the ICC, including member states of the Council of Europe, to enter into bilateral agreements aimed at subjecting these states’ co-operation with the ICC, in cases concerning United States citizens accused of crimes giving rise to the jurisdiction of the

As part of the United States campaign, the Member States of the European Union were individually approached with a view to negotiating non-surrender agreements, making it necessary to adopt a common position in order to avoid a divergence of approaches to the issue within the Union. At its meeting in Copenhagen in 2002, the European Council adopted conclusions on the ICC and developed a set of principles “to serve as guidelines for Member States when considering the necessity and scope of possible agreements or arrangements in responding to the United States’ proposal”:³⁷

“ANNEX:

EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court

The guiding principles listed below will preserve the integrity of the Rome Statute of the International Criminal Court and – in accordance with the Council Common Position on the International Criminal Court – ensure respect for the obligations of States Parties under the Statute, including the obligation of States Parties under Part 9 of the Rome Statute to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes falling within the jurisdiction of the Court.

The guiding principles are as follows:

- *Existing agreements*: Existing international agreements, in particular between an ICC State Party and the United States, should be taken into account, such as Status of Forces Agreements and agreements on legal cooperation on criminal matters, including extradition;

ICC, to prior agreement by the United States Government. 9. The Assembly considers that such agreements are in breach of the Rome Statute of the ICC (in particular its Articles 27, 86 and 98, paragraph 2 which allow only narrowly-defined exemptions within the framework of status of force [sic] agreements), and of Article 18 of the Vienna Convention on the Law of Treaties, according to which states must refrain from any action which would not be consistent with the object and purpose of a treaty”.

³⁷ 2450th Council Session (General Affairs and External Relations), 30 September 2002, Doc. No. 12134/02 (Presse 279), available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/gena/72321.pdf> (last visited 25 May 2004).

- *The US proposed agreements*: Entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties;
- *No impunity*: any solution 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;
- *Nationality of persons not to be surrendered*: any solution should only cover persons who are not nationals of an ICC State Party;
- *Scope of persons*:
 - Any solution should take into account that some persons enjoy State or diplomatic immunity under international law, *cf.* Article 98, paragraph 1 of the Rome Statute.
 - Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, *cf.* Article 98, paragraph 2 of the Rome Statute.
 - Surrender 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.
- *Sunset clause*: The arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force.
- *Ratification*: The approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state”.

In its Common Position 2003/444/CFSP on the ICC, the Council calls upon the Union and its Member States to “continue, as appropriate, to draw the attention of third States to the Council Conclusions of 30 September 2002 on the International Criminal Court and to the Guiding Principles annexed thereto, with regard to proposals for agreements or arrangements concerning conditions for the surrender of

persons to the Court”.³⁸ Most recently, the Troika of the European Union has undertaken a demarche with the U.S. State Department on the question of bilateral non-surrender agreements, stressing that the EU will continue to oppose efforts undermining the integrity of the ICC and underlining its commitment to the Guiding Principles.³⁹

III. The Consistency of Bilateral Non-Surrender Agreements with the ICC Statute

The issue under analysis in this part is whether bilateral non-surrender agreements are capable of producing effects as intended by the United States, i.e. to prohibit the Court from proceeding with a request for surrender under article 98 of the ICC Statute. To this end, an intra-ICC Statute approach needs to be adopted, meaning that the agreements have to be scrutinised in the light of the provisions of the ICC Statute. Depending on the answer found, it will be necessary to turn to the broader issue of the consequences of those agreements under general international law, in particular rules on international treaties and state responsibility.

1. Article 98 in the Context of the ICC Statute

Article 98 is part of the co-operation regime of the ICC (Part 9: “International Cooperation and Judicial Assistance”). It has become a truism to state that state co-operation is an essential requirement for the success of the ICC, given that, as opposed to domestic courts, international tribunals cannot rely on enforcement agencies of their own.⁴⁰

³⁸ Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, OJ L 150/67.

³⁹ Statement by the Presidency on behalf of the European Union on reaffirming the EU position supporting the integrity of the Rome Statute, Doc. No. 11680/04 (Presse 235) P 85/04, available at <http://ue.eu.int/uedocs/cms_Data/docs/pressdata/en/cfsp/81560.pdf> (last visited 3 August 2004).

⁴⁰ A. Cassese, “The Statute of the International Criminal Court: Some Preliminary Reflections”, *EJIL* 10 (1999), 144 et seq. (164); B. Swart, “International Cooperation and Judicial Assistance, General Problems”, in: Cassese/ Gaeta/ Jones, see note 11, 1589 et seq.

Under article 86, all States Parties – and generally only those⁴¹ – are under an obligation to co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court, in accordance with the provisions of the ICC Statute. The Court may also invite “any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis” (article 87 (5)(a)). The obligation to co-operate is thus based on treaty law, rather than on a Security Council resolution, as is the case with the *ad hoc* international criminal tribunals.⁴²

One form of such co-operation and assistance is the arrest and surrender⁴³ of a person⁴⁴ by any state which the Court may request if that person may be found in the territory of that state (article 89). As is clear from the wording of article 89, the Court is not precluded from addressing such a request to non-State Parties. However, according to the *pacta tertiis* rule,⁴⁵ only States Parties must comply with requests under article 89 (1), second sentence,⁴⁶ unless non-States Parties have accepted the Court’s jurisdiction on an *ad hoc* basis in accordance with article 12 (3), or entered into an *ad hoc* arrangement or other binding agreement with the Court under article 87 (5), in which case they are under the same obligation, subject to the provisions of the agreement. The same holds true in case of Security Council referrals under article 13 (b) of the Statute.⁴⁷

⁴¹ G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, 2nd edition, Vol. I/3, 2003, 1146.

⁴² See S/RES/827 (1993) of 25 May 1993, operative para. 4; S/RES/955 (1994) of 8 November 1994, operative para. 2.

⁴³ The term “surrender” is defined, for the purposes of the Rome Statute, in article 102 ICC Statute, by virtue of which “‘surrender’ means the delivering up of a person by a State to the Court, pursuant to this Statute”.

⁴⁴ The content of a request for arrest and surrender is specified in article 91 ICC Statute.

⁴⁵ Arts 34, 35 VCLT.

⁴⁶ The duty to comply with such requests for arrest and surrender is also contained in article 59 (1) in relation to arrest warrants.

⁴⁷ A. Ciampi, “The Obligation to Cooperate”, in: Cassese/ Gaeta/ Jones, see note 11, 1607 et seq. (1609). *Ciampi* also argues that a co-operation obligation on all UN Member States may be imposed by the Security Council in case of State Party referrals and *proprio motu* investigations by the Prosecutor if the Security Council decided that co-operation with the Court is needed in a situation amounting to a threat to the peace. To the question

Systematically speaking, article 98 is an exception to the duty to surrender a person to the Court.⁴⁸ It is also a tribute to the fact that the Court is not based on a Chapter VII Security Council resolution which would place the co-operation regime above other international obligations by virtue of article 103 UN Charter.⁴⁹ The negotiating history of article 98 appears to be somewhat uncertain, as it was added to the draft text of the ICC Statute only in the final days of the Rome conference.⁵⁰ It reads:

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

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”.

whether the Security Council may broaden the scope of co-operation obligations for State Parties, see J. Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut*, 2003, 107-108.

⁴⁸ D. Fleck, “Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?”, *Journal of International Criminal Justice* 1 (2003), 651 et seq. (654); *id.*, “Article 98 of the ICC Statute and the Conclusion of New Status of Forces Agreements”, *Rev. Dr. Mil. Dr. Guerre* 42 (2003), 207 et seq. (208); M. Ch. Bassiouni, *Introduction to International Criminal Law*, 2003, 533; Orentlicher, see note 19, 424; Internal Opinion of the Legal Service of the EU Commission, reprinted in: *HRLJ* 23 (2002), 158.

⁴⁹ For a discussion of the co-operation obligations under the ICTY Statute see *Prosecutor v. Tihomir Blaškić*, Appeals Chamber, 29 October 1997, Case IT-99-14-AR 108 *bis*.

⁵⁰ See J. Pejić, “The United States and the International Criminal Court: One Loophole Too Many”, *University of Detroit Mercy Law Review* 78 (2001), 267 et seq. (286); P. Saland, “International Criminal Law Principles”, in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, 1999, 189 et seq. (202, fn. 25).

If applicable, article 98 is not only a “justification” for the refusal of co-operation by a State Party, but first and foremost an obligation of the Court itself⁵¹ (“The Court may not proceed”) which it has to take into account *proprio motu* prior to making the request.⁵² The Statute thus makes the taking into consideration by the Court of potentially competing international obligations of the state to be requested a prerequisite for the legality of the request.⁵³ This is confirmed by rule 195 (1) of the Rules of Procedure and Evidence, which provides that information on problems raised by a request in respect of article 98 shall be provided by the requested state to “assist the Court in the application of article 98”.⁵⁴

The rationale of article 98 is to protect the requested State Party from being faced with conflicting obligations under international law as to the a third state on the one hand (respect for immunity, or the requirement for consent, respectively) and the ICC on the other hand (duty to surrender following a request),⁵⁵ and hence ultimately to protect that State Party from incurring international responsibility.⁵⁶ Con-

⁵¹ Crawford/ Sands/ Wilde, see note 7, para. 21.

⁵² B. Broomhall, “The International Criminal Court: A Checklist for National Implementation”, in: *Nouvelles Etudes Pénales 13 quater* (1999), 113 et seq. (137).

⁵³ Meißner, see note 47, 120.

⁵⁴ For the drafting history of rule 195 see F. Harhoff/ P. Mochochoko, “International cooperation and judicial assistance”, in: R. Lee (ed.), *The International Criminal Court: elements of crimes and rules of procedure and evidence*, 2001, 637 et seq. (665 et seq.); K. Kittichaisaree, *International Criminal Law*, 2001, 283 et seq.; I. Garnter, “The Rules of Procedure and Evidence on Co-operation and Enforcement”, in: H. Fischer/ C. Kreß/ S.R. Lüder (eds), *International and National Prosecution of Crimes Under International Law. Current Developments*, 2001, 423 et seq. (430 et seq.).

⁵⁵ Meißner, see note 47, 120; D. Akande, “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits”, *Journal of International Criminal Justice* 1 (2003), 618 et seq. (643); P. Mori, “Gli accordi di esenzione ex art. 98 dello Statuto della Corte Penale Internazionale”, *Riv. Dir. Int.* 86 (2003), 1000 et seq. (1014); C. Stahn, “Gute Nachbarschaft um jeden Preis? Einige Anmerkungen zur Anbindung der USA an das Statut des Internationalen Strafgerichtshofs”, *ZaöRV* 60 (2002), 631 et seq. (654); J. Herbst, “Immunität von Angehörigen der U.S.-Streitkräfte vor der Verfolgung durch den IStGH?”, *EuGRZ* 29 (2002), 581 et seq. (583).

⁵⁶ C. Kreß, “Römisches Statut des Internationalen Strafgerichtshofs – Vorbemerkungen”, in: H. Grützner/ P.G. Pötz (eds), *Internationaler Rechtshilfe-*

sequently, article 98 (2) is only applicable if the “requested state” under article 98 (2) is a State Party, or a state which has accepted co-operation duties *vis-à-vis* the Court, since other states could never find themselves in a situation of conflicting obligations, given that they are not obliged to comply with requests for surrender (article 89 (1)).

It is for the ICC to resolve any questions of interpretation raised by article 98.⁵⁷ Whereas, generally, it is for the Member States to interpret a treaty,⁵⁸ the treaty may itself confer such competence on a court.⁵⁹ In the case of the ICC Statute, this does not only follow from article 119 (1),⁶⁰ but also from the power of the Court under article 87 (a) to make

verkebr in Strafsachen, 2nd edition, 2002, Vor III 26, MN 248. Akande sees the primary *ratio* of article 98 (2) in protecting the interests of non-State Parties, see note 55, 643.

⁵⁷ Crawford/ Sands/ Wilde, see note 7, para. 23; G. Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, 2002, 171.

⁵⁸ J. Klabbers, *An Introduction to International Institutional Law*, 2002, 101.

⁵⁹ I. Brownlie, *Principles of Public International Law*, 6th edition, 2003, 602.

⁶⁰ See A. Pellet, “Settlement of Disputes”, in: Cassese/ Gaeta/ Jones, see note 11, 1841 et seq. (1843). The demarcation of disputes concerning the “judicial functions” of the Court (article 119 (1)) and other disputes is doubtful. As a general guideline it may be said that “judicial functions” include all matters concerning the jurisdiction *ratione materiae, loci and temporis* of the Court, the core area of judicial activity, but also all areas of operation of the Court that are closely connected with the effective implementation and enforcement of that jurisdiction without which the Court could not properly fulfil its mandate. This must necessarily include matters of state co-operation. In addition, article 119 (2) only speaks of disputes “between two or more State Parties”, not of disputes between the Court and a Member State as to the obligations arising under the Statute. The fact that the Court may refer instances of non-compliance to the Assembly of States Parties or to the Security Council under article 87 (7) does not imply that these bodies may make a finding of their own on the question of whether the State Party in question has indeed breached its obligations towards the Court. It is merely an expression of the fact that the Court has not been vested with enforcement powers *vis-à-vis* a State Party. See G. Sluiter, “The Surrender of War Criminals to the International Criminal Court”, *Loy. L. A. Int’l Comp. L. Rev.* 25 (2003), 605 et seq. (614). For a discussion of the procedural implications of article 119 (2) see R. Higgins, “The relationship between the International Criminal Court and the International Court of Justice”, in: H.A.M. von Hebel/ J.G. Lammers/ J. Schukking (eds), *Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos*, 1999, 163 et seq. (164).

requests to States Parties for co-operation, and under article 89 (1) to specifically request surrender of a person. It is generally accepted in the law of international organisations that such organisations must have the competence to interpret their constitutive elements in the course of their application. The ICC being not only an international organisation, but also an international judicial body, may thus conclusively decide any conflicts as to the interpretation of its provisions *vis-à-vis* State Parties. As a consequence, the requested State Party does not have the right to refuse co-operation in relation to a request at its own discretion, relying on an interpretation of its own.⁶¹ In interpreting the Statute, regard must be had to the general rules of interpretation as contained in the Vienna Convention on the Law of Treaties.⁶²

2. Article 98 (1): State or Diplomatic Immunity

Even though analysis of bilateral non-surrender agreements normally focuses on article 98 (2), bilateral non-surrender agreements refer to “current or former Government officials” and “military personnel”, groups which are possibly addressed by article 98 (1). Pursuant to this provision, the Court may not issue a request if its execution would force the requested state to breach its international obligations “with respect to the State or diplomatic immunity of a person or property of a third State”. Article 98 (1) is a dynamic reference to general international law, in particular the customary international law of immunity.

⁶¹ W. Bourdon/ E. Duverger, *La Cour pénale internationale: Le statut de Rome*, 2000, 264; C. Krefß, “Völkerstrafrecht in Deutschland”, *Neue Zeitschrift für Strafrecht* 2000, 618 et seq. (622).

⁶² The VCLT is applicable to treaties establishing international organisations by virtue of its article 5. The ICJ has confirmed this in several decisions: *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 151 et seq. (157); *Legality of the Use By a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 66 et seq. (74, para. 19). See also H. G. Schermers, “The Legal Bases of International Organization Action”, in: R.J. Dupuy (ed.), *Manuel sur les organisations internationales*, 2nd edition, 1998, 401 et seq. (406). The applicability of the Convention in the context of judicial activity by the Court, which is not a party to the Convention, follows from article 21 (b) of the Statute (“applicable treaties”).

Given that this area of law is in “constant evolution”,⁶³ the Statute is hence open for further developments as might occur *in futuro*, in particular as regards possible further limitations of immunity.⁶⁴ The following section will sketch the current state of the law of immunity and analyse its significance for bilateral non-surrender agreements.

a. General International Law

aa. State Immunity in General

The law concerning the immunity of state officials commonly distinguishes between two distinct yet related concepts: immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity). In relation to both issues, the essential questions are: (1.) who is entitled to immunity; and (2.) how far does immunity extend, both in terms of acts covered and temporal scope?

Immunity *ratione personae* has a very limited scope of personal application: only heads of state, heads of government, foreign ministers and possibly other high-ranking state officials, such as senior members of cabinet,⁶⁵ if abroad, are included, regardless of whether they travel in an official or private capacity, and for acts committed prior to or during their term of office. Mid-level and low-level state officials, i.e. by far the majority, do not enjoy immunity *ratione personae*.

In terms of temporal application, the far-reaching protection of personal immunity is limited to *incumbent* state officials, as immunity is not granted “for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States”,⁶⁶ a rationale not applicable after their leaving office. On the other hand, at least according to the ICJ, the scope of material application is very broad in that immunity *ratione personae* does not allow for excep-

⁶³ ICJ, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), ICJ Reports 2002, 182 et seq., Joint Separate Opinion of Judges *Higgins, Kooijmans* and *Buergenthal*, reprinted in *ILM* 41 (2002), 536 et seq. (589, para. 75).

⁶⁴ A. Zimmermann, “Role and Function of International Criminal Law in the International System After the Entry into Force of the Rome Statute of the International Criminal Court”, *GYIL* 45 (2002), 35 et seq. (48).

⁶⁵ A. Cassese, *International Criminal Law*, 2003, 265.

⁶⁶ ICJ, *Congo v. Belgium*, see note 63, 549 (para. 53).

tions,⁶⁷ not even in the case of international crimes. As the only possible exception to the absolute immunity of *incumbent* high state officials as a matter of customary international law,⁶⁸ the ICJ identifies in an *obiter dictum* the prosecution before an international criminal court, where it has jurisdiction.⁶⁹ This may be explained by the consideration that customary international law immunity finds its justification in the principle of sovereign equality of states, which is not a decisive factor in the context of prosecutions before international courts provided with jurisdiction over former or acting heads of states.⁷⁰

Critics may argue that this reasoning only applies as between Member States of the treaty establishing the international court, even though the ICJ did not expressly limit the exception to that situation and hence leaves open the possibility that high state officials of states not parties to that treaty may also be subject to prosecution by these institutions.⁷¹ The substance of the issue is whether the customary international law rule providing for absolute immunity of incumbent high-ranking state officials in *national* jurisdictions, as spelled out clearly in *Congo v. Belgium*, can automatically be applied (*quasi* by analogy⁷²) also before *international* courts established by a limited number of states by way of treaty.⁷³ Against such a proposition it could be argued that such a prohibitive rule would itself have to be deducted from state practice and

⁶⁷ ICJ, *Congo v. Belgium*, see note 63, 551 (para. 58).

⁶⁸ See G. Werle, *Völkerstrafrecht*, 2003, 456.

⁶⁹ ICJ, *Congo v. Belgium*, see note 63, 551 (para. 61); S. de Smet, "The Immunity of Heads of States in US Courts after the Decision of the International Court of Justice", *Nord. J. Int'l L.* 72 (2003), 313 et seq. (319).

⁷⁰ B. Stern, "Immunities for Head of State: Where Do We Stand?", in: M. Lattimer/ P. Sands (eds), *Justice for Crimes Against Humanity*, 2003, 73 et seq. (85); Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor* (Case No. SCSL-2003-01-AR72(E)), Decision on Immunity from Jurisdiction, 31 May 2004, at para. 51, available at <www.sc-sl.org>.

⁷¹ Compare Kreß, see note 56, MN 245.

⁷² For a discussion whether analogy is a permissible means of applying customary international law, see A. Bleckmann, "Zur Feststellung und Auslegung von Völkergewohnheitsrecht", *ZaöRV* 37 (1977), 504 et seq. (525).

⁷³ For this approach see D. Akande, *unpublished paper*, quoted by P. Sands "Immunities before international courts", Guest Lecture Series of the ICC Office of the Prosecutor, 28 (para. 51), available at <www.icc-cpi.int/library/organs/otp/Sands.pdf> (last visited 5 June 2004).

opinio juris to be a principle of customary international law,⁷⁴ and that in the absence of such a rule, no immunity would exist. At least one commentator has maintained that the denial of immunity for incumbent high state officials in case of *international* prosecution for international crimes itself has become a rule of customary international law.⁷⁵ This view appears to be increasingly supported by international judicial institutions other than the ICJ, i.e. the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷⁶ and the Special Court for Sierra Leone.⁷⁷

After their term of office has ended, high state-officials cease to enjoy immunity *ratione personae*, leaving “residual” immunity for acts performed during their term of office in an official capacity (immunity *ratione materiae*). Consequently, acts committed prior or subsequent to their period of office, as well as those acts committed in a private capacity during that period, are no longer covered.⁷⁸

Immunity *ratione materiae* (functional immunity) exists in relation to acts of any state official performed as part of his or her official duties, regardless of where they may be performed.⁷⁹ Immunity attaches to those acts also after the official has left office, and only ends if the state on behalf of which the person has acted ceases to exist.⁸⁰ How to distinguish between acts carried out in an official or private capacity – whether by looking at the objective character of the act or the subjective purpose of the author – is a matter not satisfactorily determined under international law.⁸¹ A common view is that immunity *ratione materiae* does not apply where international crimes, in particular core

⁷⁴ For this approach Sands, see above, 29 (para. 55).

⁷⁵ Werle, see note 68, 456. This again raises questions of the United States possibly being a persistent objector to this rule, compare Zimmermann, see note 64, 48.

⁷⁶ ICTY, *Prosecutor v. Slobodan Milošević*, Decision on Preliminary Motions of 8 November 2001, para. 28, available at <www.un.org/icty/milosevic/trialc/decision-e/1110873516829.htm>.

⁷⁷ *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, see note 70, para. 52.

⁷⁸ ICJ, *Congo v. Belgium*, see note 63, para. 61.

⁷⁹ P. Gaeta, “Official Capacity and Immunities”, in: Cassese/ Gaeta/ Jones, see note 11, 975 et seq.

⁸⁰ S. Wirth, “Immunity for Core Crimes? The ICJ’s Judgment in the *Congo v. Belgium* Case”, *EJIL* 13 (2002), 877 et seq. (883).

⁸¹ de Smet, see note 69, 321.

crimes as set out under article 5 of the ICC Statute are in question.⁸² This view coincides with the argument that international crimes can under no circumstances be considered as acts performed in an official capacity.⁸³

bb. Diplomatic Personnel

The 1961 Vienna Convention on Diplomatic Relations distinguishes between three categories, i.e. members of the diplomatic staff, of the administrative and technical staff, and of the service staff, and grants degrees of immunity in a descending scale of protection.⁸⁴ According to article 31 of this Convention, which reflects customary international law,⁸⁵ diplomatic agents are completely immune from the criminal jurisdiction of the receiving state. Article 39 (2) clarifies that this absolute immunity *ratione personae* ceases to exist once the diplomat leaves his or her post, after which he or she only enjoys immunity for official acts (immunity *ratione materiae*). The overall position of diplomats in terms of immunity is thus essentially comparable to that of high-ranking state officials. Whether the apparently emerging rule that (incumbent) state officials may not enjoy immunity before international tribunals is also applicable to diplomats is an interesting question, given that these immunities are not only based on customary law, but also crystallised in international treaties. If the development of customary international law concerning diplomatic immunities went in this direction, this could possibly have an impact on the interpretation of relevant treaty instruments in accordance with article 31 (3)(c) VCLT.⁸⁶

Alongside the protection granted to them as a matter of treaty law, diplomats, as state officials, also enjoy immunity *ratione materiae* under customary international law for acts committed in their official ca-

⁸² S. Wirth, "Immunities, related problems, and article 98 of the *Rome Statute*", *Criminal Law Forum* 12 (2001), 429 et seq. (437); Gaeta, see note 79, 982.

⁸³ Kreß, see note 56, MN 245. See also *Congo v. Belgium*, Joint Separate Opinion of Judges *Higgins, Kooijmans* and *Buergenthal*, see note 63, 591 (para. 85).

⁸⁴ H. Fox, *The law of state immunity*, 2002, 450.

⁸⁵ Brownlie, see note 59, 351.

⁸⁶ "There shall be taken into account, together with the context: (c.) any relevant rules of international law applicable in the relations between the parties".

capacity, granting them protection not only *vis-à-vis* the host state, but any third state.⁸⁷

cc. Military Personnel

Military personnel stationed on official mission in another state, and with the consent of that state, enjoy functional immunity (immunity *ratione materiae*) under customary international law as organs of their sending state.⁸⁸ This immunity exists in order to ensure co-operation between the sending and the receiving state. In principle, where serving military personnel commit crimes, they may not be arrested or prosecuted, nor may their property be violated by the receiving state except in the case of the consent of the sending state or an agreement between the two states allowing for such action to be taken, a rule which is (debatably) said to extend even to international crimes.⁸⁹ In most cases, however, the position of visiting forces will be governed by Status of Forces Agreements (SOFAs), for which article 98 (2), rather than article 98 (1), may be pertinent.

b. Position under the ICC-Statute

The ICC-Statute contains two provisions relevant to the question of immunities for state officials, i.e. arts 27 and 98 (1). Article 27 reads:

“Irrelevance of official capacity:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

⁸⁷ Wirth, see note 80, 883. Compare also K. Doehring/ G. Ress, “Diplomatische Immunität und Drittstaaten – Überlegungen zur erga omnes-Wirkung der diplomatischen Immunität und deren Beachtung im Falle der Staatensukzession“, *AVR* 37 (1999), 68 et seq. (91 et seq.); Fox, see note 84, 457 et seq.

⁸⁸ Fleck, see note 48, 662; compare also Fox, see note 84, 461.

⁸⁹ Fleck, see note 48, 663. In (international) armed conflict, immunity *ratione materiae* for military personnel has been abrogated by the rules concerning international armed conflict, compare Wirth, see note 82, 450.

2. 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”.

In the light of the state of customary law as illustrated above, article 27 clarifies two issues: paragraph 1 extends the possibility of incurring individual criminal responsibility to all state officials, thereby abrogating any functional immunities which may prevent such responsibility. Second, paragraph 2 excludes the procedural consequences of immunity.

Articles 27 and 98 (1) ostensibly seem to conflict with one another, given that article 27 establishes a far reaching abrogation of immunity for state officials, whereas article 98 (1) obliges the Court to take into account issues of immunity when issuing a request for surrender or assistance. However, both norms can be reconciled looking at their systematic position: application of article 98 (1), contained in Part 9 of the Statute, is limited to co-operation, determining when the Court may request the surrender of a person, whereas article 27 essentially concerns questions of the exercise of jurisdiction of the Court.⁹⁰

With regard to article 27, some important observations have to be made: first, as between State Parties, it constitutes an *inter se* and *a priori* abrogation of all claims to immunity in any case before the Court, and as such necessarily has to influence the interpretation of article 98 (1) in cases involving State Parties, meaning that a State Party may not refuse a request for surrender in relation to one of its nationals or a national of another State Party on that ground.⁹¹ Article 98 (1) can thus only have relevance in relation to nationals of non-State Parties.⁹²

In relation to state officials of non-State Parties, the question of whether the Court is barred from proceeding despite article 27 depends on the applicability of that provision in this particular situation. While some argue that the Court equally has jurisdiction regardless of their

⁹⁰ For a discussion of the relationship between arts 27 and 98 compare D. Sarooshi, “The Statute of the International Criminal Court”, *ICLQ* 48 (1999), 387 et seq. (391); Gaeta, see note 79, 992 et seq.

⁹¹ Wirth, see note 82, 452, draws attention to the fact that for *national* prosecutions immunities remain unaffected; Gaeta, see note 79, 994; D. Robinson, “The Impact of the Human Rights Accountability Movement on the International Law of Immunities”, *CYIL* 40 (2002), 151 et seq. (171).

⁹² Stern, see note 70, 87. Apparently different Sarooshi, see note 90, 392 with fn. 25.

official capacity, provided that the alleged crime was committed on the territory of a State Party or the case was referred to the Court by the Security Council under Chapter VII of the UN Charter,⁹³ others consider this approach a violation of the *pacta tertiis* rule, arguing that “a treaty establishing an international tribunal is not capable of removing an immunity which international law grants to officials of States that are not party to the treaty”.⁹⁴ In any case, article 98 (1) prohibits the Court to request surrender of that person.

c. Effects of the Non-Surrender Agreements in the Light of the Law of Immunity

As far as immunity is granted to government officials, diplomats or military personnel under international law, the persons concerned fall under the scope of article 98 (1), making it impossible for the Court to request their surrender without ensuring the co-operation of the state of nationality first, unless this state is party to the ICC Statute. For these categories, the validity of bilateral agreements is not decisive, or, differently put, as far as the agreements concern this group of persons, they are without doubt compatible with Part 9 of the ICC Statute. However, recent developments make it seem debatable whether customary international law in fact recognises such immunities for international crimes in the context of international prosecutions any longer. The recent decision of the Special Court for Sierra Leone in the *Taylor* case⁹⁵ may be indicative of a consolidation of the view that the days of such immunity are numbered.⁹⁶ This necessarily affects the scope of ar-

⁹³ Sands, see note 73, 12 (para. 16).

⁹⁴ Akande, unpublished paper, see note 73; Wirth, see note 82, 453; Gaeta, see note 79, 995.

⁹⁵ See note 70.

⁹⁶ It should be noted that this question also has necessary implications on the complementarity regime of the ICC. If national courts may *not* prosecute (incumbent) heads of states and other high state officials due to their absolute immunity while international tribunals, such as the ICC, would not be hindered to proceed, those states would theoretically always have to be considered “unable” or “unwilling” to investigate and prosecute the person concerned. This in turn signifies that the case would always be admissible, which would seem to be in conflict with the basic principle that the ICC is a court of last resort and subsidiary to national justice systems. Compare generally M. Benzing, “The Complementarity Regime of the International

article 98 (1), and consequently transfers the categories of persons which may formerly have fallen under article 98 (1) to article 98 (2), meaning that they would only be protected by the bilateral non-surrender agreements, rather than customary law concerning immunities.

It must be stressed, however, that the vast majority of persons covered by the terms of the bilateral agreements do not enjoy immunity under customary international law in the first place. To see whether the Court would still be hindered to request their surrender, the agreements will have to be analysed against the backdrop of article 98 (2).

3. Article 98 (2): Requirement of Consent of a Sending State

In order to produce the desired effect of preventing a request for the surrender of United States nationals to the ICC under article 98 (2) of the ICC Statute and ultimately their surrender to the Court, the bilateral non-surrender agreements would have to fall within the class of agreements envisaged by that provision. Generally, article 98 (2) addresses possible conflicts of obligations of a requested state (normally a State Party)⁹⁷ *vis-à-vis* the ICC on the one hand and the sending state on the other hand.

Interestingly, rule 195 (2) of the Rules of Procedure and Evidence at first glance has a broader scope of application and would also cover obligations of the ICC as an international organisation towards states. It reads:

“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”.

However, it is clear from the text of article 98 (2) that “obligations” in the sense of that provision refer exclusively to those of the state re-

Criminal Court: International Criminal Justice Between State Sovereignty and the Fight against Impunity”, *Max Planck UNYB* 7 (2003), 591 et seq.

⁹⁷ Bilateral non-surrender agreements concluded between two non-States Parties would seem to be unproblematic, see A. Zimmermann/ H. Scheel, “Zwischen Konfrontation und Kooperation – Die Vereinigten Staaten und der Internationale Strafgerichtshof”, *Vereinte Nationen* 4 (2002), 137 et seq. (143).

quested to surrender a person to the Court. The term cannot reasonably be construed to extend to obligations of the ICC itself pursuant to international agreements as may be concluded by the Court.⁹⁸ Even though the Rules of Procedure and Evidence may generally constitute a subsequent agreement in the sense of article 31 (3)(a) VCLT, they first have to be interpreted in accordance with the Statute.⁹⁹ The reference of Rule 195 (2) to article 98 (2) confirms that it cannot go beyond the application of that norm, making it essentially redundant. Furthermore, as evidenced by article 51 (5) ICC Statute, in the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

a. Is Article 98 (2) *a priori* limited to Status of Forces Agreements and Extradition Treaties?

Many commentators point out that article 98 (2) has been drafted to specifically address the concern of obligations of host states under Status of Forces Agreements,¹⁰⁰ and possibly extradition treaties. This fact is sometimes used to argue that article 98 (2) must necessarily be limited to these categories of treaties, excluding any other form of agreement, including those under consideration here. What seems to be a historical interpretation of the norm must, however, as a matter of treaty law first be established by reference to the main techniques of in-

⁹⁸ C. Keitner, "Crafting the International Criminal Court: Trials and Tribulations in Art. 98 (2)", *UCLA J. Int'l L. & Foreign Aff.* 6 (2002), 232 et seq. (236); Kreß, see note 56, MN 247; M.H. Arsanjani, "The Rome Statute of the International Criminal Court", *AJIL* 93 (1999), 22 et seq. (40); Stahn, see note 55, 640. For the contrary view see D. Scheffer, "Staying the Course with the International Criminal Court", *Cornell Int'l L. J.* 35 (2002), 47 et seq. (77).

⁹⁹ This rule derives from article 51(5) ICC Statute. Before concluding that the two instruments are conflicting with each other, the Rules of Procedure and Evidence have to be interpreted in the light of the Statute to see whether a conflict can be avoided. It is also a general principle of treaty interpretation that instruments adopted under and within an existing treaty regime have to be interpreted in accordance with the overarching instrument, i.e. here the Rome Statute. In the same direction: Kreß, see note 56, MN 247. T. Maikowski, *Staatliche Kooperationspflichten gegenüber dem Internationalen Strafgerichtshof*, 2002, 211, concludes that Rule 195 (2) is inconsistent with article 98 (2).

¹⁰⁰ Arsanjani, see note 98, 41.

terpretation, as provided for by article 31 VCLT; i.e. the ordinary meaning to be given to the terms of the treaty (textual interpretation) in their context and in the light of its object and purpose, before resorting to the negotiating history only as a supplementary means of interpretation (article 32 VCLT).

b. The Requirement of “Consent of a Sending State”

Article 98 (2) requires that “the consent of a *sending state* is required to surrender *a person of that state* to the Court”. Taken together, the first requirement for article 98 (2) to be applicable thus is that the person to be surrendered to the Court is a “person of the sending state”, the second that the consent of the sending state is required to surrender that person to the Court.

aa. Person of the Sending State

It has been suggested that, in order to fall under the provision, persons the surrender of whom is requested must be “sent” to a “receiving state”.¹⁰¹ In other words, according to the ordinary meaning of the term “sending state”, it is required that the presence of that person on the territory of a requested state must result from a positive official act of the sending state,¹⁰² and that there be a relationship between the person and the sending state of a functional or organic character.¹⁰³ Furthermore, as a necessary corollary, the person must be present on the territory with the consent of the requested receiving state.

¹⁰¹ Akande, see note 55, 643. The International Opinion of the Legal Service of the EU Commission argues that the use of the technical term “sending state” *per se* limits the application of article 98 (2) to Status of Forces Agreements, see note 48, 158.

¹⁰² Crawford/ Sands/ Wilde, see note 7, paras 43-45; Sluiter, see note 60, 633 at fn. 95; see also the EU Guiding Principles cited under II. 2. c. The position of the U.S. State Department’s Legal Adviser’s Office explicitly states that the conventions cited support the view that the term “sending state” in article 98 does not rule out extending non-surrender agreements to “*all* persons who are nationals of the sending state”, see “The U.S. Government and the International Criminal Court”, Remarks by L.P. Bloomfield to the Parliamentarians for Global Action, 12 September 2003, available at <<http://www.state.gov/t/pm/rls/rm/24137pf.htm>>.

¹⁰³ Mori, see note 55, 1027.

Against this backdrop, the range of persons intended to be covered by the agreements appears quite ambitious: they are in particular designed to protect the “media, delegations of public and private individuals travelling to international meetings, private individuals accompanying official personnel, contractors working alongside official personnel (particularly in the military context), participants in exchange programs, former government officials, arms control inspectors, people engaged in commerce and business abroad, [and] students in government sponsored programs”.¹⁰⁴ If article 98 (2) is interpreted as portrayed above, it is indeed difficult to see how these categories, and U.S. nationals in general who are unquestionably covered by the text of bilateral non-surrender agreements, can fall under article 98 (2).¹⁰⁵ As has been pointed out, employees or contractors may have been recruited locally; former government officials and nationals in general may be ordinarily resident in the requested state or may be present in a private capacity, for instance for the purpose of business or tourism.¹⁰⁶

As substantiation for the view that the term “sending state” limits the application of article 98 (2) to those persons who have been officially “sent” to a receiving state, it is frequently submitted that the term “sending state” is used in standard Status of Forces Agreements, as well as the Vienna Convention on Diplomatic Relations (1961)¹⁰⁷ and the Vienna Convention on Consular Relations (1963),¹⁰⁸ and that the interpretation of the term under these instruments is relevant to the construction of article 98 (2).¹⁰⁹

However, the phrase “sending state” *as such* may not be indicative of the extent of protection *ratione personae* accorded under the instruments referred to. The Vienna Convention on Diplomatic Relations does not contain a definition of the term. Persons who have not been

¹⁰⁴ Bolton, see note 9.

¹⁰⁵ L. Caflisch, “Der Internationale Strafgerichtshof: Straftatbestände, Schutz der Menschenrechte, kollektive Sicherheit”, *Liechtensteinische Juristen-Zeitung* 24 (2003), 73 et seq. (81).

¹⁰⁶ Crawford/ Sands/ Wilde, see note 7, para. 44; Mori, see note 55, 1025.

¹⁰⁷ UNTS Vol. 500 No. 7310.

¹⁰⁸ UNTS Vol. 596 No. 8638-8640.

¹⁰⁹ Even though questions relating to these instruments, in particular the two Vienna Conventions, would normally arise under article 98 (1), they can nevertheless be considered for the purpose of interpreting the term “sending state” in article 98 (2), compare Mori, see note 55, 1027.

officially “sent” as diplomatic agents,¹¹⁰ but who work in close relation with, or in the immediate surroundings of, diplomats are also granted a graded protection, if they are not nationals of or permanently residing in the receiving state.¹¹¹ It is thus possible to say that in the two conventions cited, protection is also granted to persons who stand in a specific relationship to a “sent” person. The closer the person stands in relation to the personal or professional sphere of the person officially sent by the sending state, the higher the level of protection.

In the NATO SOFA¹¹², a “sending state” is defined as a contracting party to which personnel of the land, sea or air armed services of one contracting party belongs.¹¹³ It is recognised that, to fall under the protection of the SOFA, a member of forces has to be in the territory of the receiving state “in connection with ... official duties”, i.e. the member’s presence must be a result of official orders.¹¹⁴ The protection of the NATO SOFA, however, also extends to civilian components of such forces, who are defined as “civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of a Contracting Party, and who are not stateless persons, ... , nor nationals of, nor ordinarily resident in, the State in which the force is located”.¹¹⁵ The link between the civilian and the force he or she is “accompanying” must be an employer-employee relationship based on a contract.¹¹⁶

Consequently, even though the term “sending state” strongly suggests that article 98 (2) is limited to persons who have been “sent” by their state, the law of diplomatic and consular relations and the rules contained in SOFAs seem to sustain an interpretation of the term to the effect that article 98 (2) also encompasses persons having a “specific

¹¹⁰ Diplomatic agents may also be nationals or permanent residents of the receiving state. However, they only enjoy a limited immunity from jurisdiction of the receiving state, article 38 (1) Vienna Convention on Diplomatic Relations.

¹¹¹ Compare articles 37, 38 (2) Vienna Convention on Diplomatic Relations.

¹¹² Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces of 19 June 1951, UNTS Vol. 199 No. 2678.

¹¹³ Article 1(a) and (d).

¹¹⁴ W.T. Anderson/ F. Burkhardt, “Members of Visiting Forces, Civilian Components, Dependents”, in: D. Fleck (ed.), *The Handbook of the Law of Visiting Forces*, 2001, 51 et seq. (54).

¹¹⁵ Article 1 (b).

¹¹⁶ Anderson/ Burkhardt, see note 114, 55. The employment contract need not necessarily be concluded with the force as such, but may also associated with government agencies supporting the force.

nexus” to a state, a definition which goes beyond being “sent” on official or other mission. Put differently, it could be said that in order to fall under article 98 (2), a “person” may have a specific relationship either to a sending state *or* to a person who is present in the territory of a receiving state as the consequence of an official act of the sending state, either by way of the deployment of military forces, or diplomatic accreditation. It should be pointed out, however, that, even if one adopted this broader interpretation, the list of persons covered by the bilateral non-surrender agreements could still not be considered compatible with article 98 (2), given that it goes well beyond persons with a specific link to a state as defined above.

However, this broad view conflicts with the wording used in article 98 (2), which specifically refers to a “person of that [i.e.: the sending] state”. While this cannot be interpreted as requiring that the person concerned be a national of the sending state,¹¹⁷ it nevertheless must have an impact on the relationship required between the sending state and the person whose transfer is requested by the Court. While the above analysis has shown that the term “sending state” taken for itself may not be sufficient to require an act of “sending” in the sense of an official mission, the term “person of the sending state” may reasonably be construed to imply that persons must have been specifically sent by the state. A more detached relationship with the sending state cannot suffice.¹¹⁸

¹¹⁷ In particular, the Statute uses the term “a person of that [the sending] State” instead of “a national of that State”. Also compare the French version “une personne relevant de cet Etat” and the German official translation “Überstellung eines Angehörigen des Entsendestaates” which support this reading. Apparently different Crawford/ Sands/ Wilde, see note 7, paras 43 and 45.

See, however, the Spanish version of the text, which is equally authentic (article 128 ICC Statute). It reads “una persona *sujeta a la jurisdicción* de ese Estado” (emphasis added).

¹¹⁸ See also Non-paper, German ICC Task Force, “ICC – Supportive Interpretation of and Commentary to the EU General Affairs Council Conclusions on the International Criminal Court of 30 September 2002”, page 11, available at <www.iccnw.org/documents/USandICC/BIAs.html> (last visited 24 May 2004).

This interpretation also has consequences for the question of whether extradition treaties can possibly fall under article 98 (2), compare Crawford/ Sands/ Wilde, see note 7, para. 42; Meißner, see note 47, 128, maintains that extradition treaties are generally covered by article 98 (2).

bb. Consent of the Sending State

Furthermore, article 98 (2) requires that the agreement stipulates a requirement of prior consent of the sending state for a legal surrender of the sent person to the ICC. This consent requirement does not necessarily have to be explicitly stated in the agreement. The existence and, if applicable, the scope of the consent prerequisite, can be ascertained by interpreting the instrument in question.¹¹⁹ As far as the bilateral non-surrender agreements are concerned, the consent requirement is stated in express terms.

c. Questions of Time of Conclusion of the “International Agreement” in the Sense of Article 98 (2) of the Statute

Another issue is the frequently submitted view that article 98 (2) recognises only those agreements as giving rise to a competing obligation for the purposes of the provision which were concluded *before* the entry into force of the Statute for the requested state, or, even more restrictively, at the time of the signing of the ICC Statute.¹²⁰

It has been correctly pointed out that the text of article 98 (2), the starting point of any interpretation, does not in and of itself sustain such a conclusion.¹²¹ The drafting history may support the argument proffered; however, under the VCLT, the *travaux préparatoires* are of restricted relevance to treaty interpretation,¹²² in that they can only play a subsidiary role for the purpose of interpreting a norm, i.e. in order to confirm the interpretation found by application of article 31 VCLT, or to determine the meaning of a provision when the interpreta-

¹¹⁹ Meißner, see note 47, 130.

¹²⁰ See Keitner, see note 98, 232; K. Ambos, “‘Verbrechenselemente’ sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshofs”, *Neue Juristische Wochenschrift* 2001, 405 et seq. (409); Internal Opinion of the Legal Service of the EU Commission, see note 48, 158.

¹²¹ Maikowski, see note 99, 206; Kreß, see note 56, MN 250; S. Zappalà, “The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements”, *Journal of International Criminal Justice* 1 (2003), 114 et seq. (124).

¹²² See R. Bernhardt, “Evolutive Treaty Interpretation, Especially in the European Convention on Human Rights”, *GYIL* 42 (1999), 11 et seq. (14); C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 1996, 55.

tion according to article 31 leaves the meaning ambiguous or obscure or leads to manifestly absurd or unreasonable results.

Taking that into consideration, the step following a textual interpretation is the context in which the norm is placed within the Statute, including other provisions of the treaty.¹²³ It has been observed that, in contrast to article 98 (2), other provisions of Part 9 of the ICC Statute do use language which limits their application to already existing agreements. For example, arts 90 (6) and 93 (3) speak of “existing agreements” and article 97 (c) even of “pre-existing treaty obligations”.¹²⁴ From a systematic point of view, it is therefore not mandatory to restrict the application of the norm in all cases to agreements concluded before the entry into force of the ICC Statute.¹²⁵

Another aspect of contextual interpretation is the fact that article 98 is an exception to the general duty to co-operate as laid down in article 86. It has frequently been stated that, as a matter of principle, exceptions to a rule should be construed narrowly under international law,¹²⁶ especially where the treaty does not allow for reservations,¹²⁷ meaning that of two possible readings of a norm, the one diverging less from the

¹²³ J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law relates to other Rules of International Law*, 2003, 247.

¹²⁴ In effect, article 97 equally extends to agreements concluded *after* the coming into force of the Rome Statute. This is, however, not a case of article 97 (c), but falls under the general ambit of the norm (procedure of consultation with the Court in case of problems with the execution of a request), of which article 97 (c) is a mere illustrative example (Meißner, see note 47, 45, at fn. 315).

¹²⁵ Crawford/ Sands/ Wilde, see note 7, para. 38; apparently different Mori, see note 55, 1015.

¹²⁶ Zappalà, see note 121, 125; Internal Opinion of the Legal Service of the EU Commission, see note 48, 158; Amnesty International, see note 6, 2; Fleck, see note 48, 209. This rule is not uncontested, see EC Measures Concerning Meat and Meat Products (Hormones), Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R of 13 February 1998, para. 104: “(...) [M]erely characterizing a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty’s object and purpose, or, in other words, by applying the normal rules of treaty interpretation”. (reiterated in European Communities – Trade Description of Sardines, Appellate Body Report WT/DS231/AB/R of 26 September 2002, para. 272).

¹²⁷ Article 120 ICC Statute.

rule should be adopted. However, in this specific incident, this rule does not seem to be helpful for interpretation, given that the text and context do not leave the meaning of the norm ambiguous.

This is where an interpretation of the norm could end with the conclusion that article 98 (2) does not hinder a State Party to conclude bilateral agreements *after* the coming into force of the ICC Statute for that party. Indeed, several scholars do take the position that the textual and systematic interpretation inevitably sustain this position.¹²⁸

However, interpretation of the norm must necessarily include reference to its object and purpose,¹²⁹ which, along with the principle of in-

¹²⁸ Akande, see note 55, 645; Zappalà, see note 121, 124; Crawford/ Sands/ Wilde, see note 7, paras 46 to 51; Mori, see note 55, 1036. The latter three sources make the validity of bilateral non-surrender agreements subject to the imposition by those agreements of a duty on the non-State Party to investigate and, if warranted, prosecute the person whose transfer to the ICC is prevented by the agreement. This is either deduced from the object and purpose of the ICC Statute as a whole, i.e. to prevent immunity and to ensure the effective prosecution of the most serious crimes, inconsistently with which no State Party may enter into new agreements without breaching its obligations under articles 18 and 26 VCLT (Crawford/ Sands/ Wilde, see note 7, paras 48-49), or from the principle of complementarity (Mori, see note 55, 1034-35). This seems to be in line with the EU Guiding Principles, third indent.

¹²⁹ Article 31 of the VCLT seems to limit the interpretation to the object and purpose of the treaty *as a whole*, rather than allowing having regard to the *telos* of individual provisions for their interpretation. Indeed, some authors have consequently warned against relying on the object and purpose of single provisions of a treaty (J. Klabbers, "Some Problems Regarding the Object and Purpose of Treaties", *Finnish Yearbook of International Law* 8 (1997), 138 et seq. (152)). Among the arguments proffered is that all provisions of the Vienna Convention featuring the term "object and purpose" do so in relation to the treaty as a whole. In relation to article 31, this is on first sight confirmed by the fact that a treaty is to be interpreted in accordance with the "ordinary meaning to be given to the terms of the treaty in *their* [the terms'] context and in the light of its [the treaty's] object and purpose". However, if this were true, then article 31 could never apply to the interpretation of single treaty provisions, but only of whole instruments, as it begins with "*a treaty* shall be interpreted", an eminently unreasonable result. Moreover, referring to the object and purpose of the treaty as such may lead to unwarranted "interpretive activism" (see P. McRae, "The Search for Meaning: Continuing Problems with the Interpretation of Treaties", *Victoria University of Wellington Law Review* 33 (2002), 209 et seq. (221)). To avoid this, "treaty" in article 31 should be understood to in-

stitutional effectiveness, is of particular importance with respect to constitutive instruments of international organisations.¹³⁰ As indicated above, the object and purpose of the provision is the protection of the requested State Party from a scenario where it has conflicting international obligations as to the sending state and the ICC, and consequently would be faced with the choice of breaching one of those obligations. In essence, article 98 (2) seeks to prevent that state from incurring state responsibility by choosing to abide by one obligation while breaching the other. While this rationale does not in itself give any guidance as to whether bilateral non-surrender agreements concluded after the coming into force of the ICC Statute fall within the scope of the provision, it does limit its application if the following consideration is taken into ac-

clude individual treaty provisions, allowing to take into account the *ratio legis* of single provisions. This is in line with doctrine prior to the adoption of the Vienna Convention. See R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge*, 1963, 89. This does not mean that the overall object and purpose of the treaty may be disregarded to the effect that the treaty loses coherence; the result reached by interpreting provisions in the light of their object and purpose must always be checked against the overall purpose of the treaty as a whole. See H.F. Köck, "Zur Interpretation völkerrechtlicher Verträge", *Zeitschrift für öffentliches Recht* 53 (1998), 217 et seq. (225); R. Bernhardt, "Interpretation in International Law", *EPIL* Vol. II 2, 1995, 1416. This procedure is in fact used in the case law of the WTO, which frequently refers to the object and purpose of individual provisions, compare for instance: Canada – Certain Measures Affecting the Automotive Industry, Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R of 31 May 2000, para. 84; Argentina – Safeguard Measures on Imports of Footwear, Appellate Body Report WT/DS121/AB/R of 14 December 1999, para. 91. See also M. Lennard, "Navigating by the Stars: Interpreting the WTO Agreements", *JIEL* 5 (2002), 17 et seq. (28); J. Trachtman, "The Domain of WTO Dispute Resolution", *Harv. Int'l L. J.* 40 (1999), 333 et seq. (360).

¹³⁰ See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996, 66 et seq. (74); Dahm/ Delbrück/ Wolfrum, see note 41, 645; R. Jennings/ A. Watts, *Oppenheim's International Law*, 9th edition, Vol. I, parts 2 to 4 (1992), 1273 (at fn. 13); I. Seidl-Hohenveldern/ G. Loibl, *Recht der internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 7th edition, 2000, 247; D. Akande, "International Organizations", in: M.D. Evans (ed.), *International Law*, 2003, 269 et seq. (280); S. Young, "Surrendering the Accused to the International Criminal Court", *BYIL* 71 (2002), 317 et seq. (319).

Critical as to the significance of teleological interpretation in relation to international organisations: Klabbers, see note 58, 2002, 102.

count: wherever State Parties have manoeuvred themselves *willingly* into a situation of competing international obligations after they have become party to the Statute, they cannot in good faith take advantage of the protection of article 98 (2). In other words, the object and purpose of article 98 (2), i.e. to protect a State Party from inevitably competing obligations, finds its limits where that State Party, cognisant of its duty to co-operate fully with the Court, purports to effectively redefine or limit its obligations under the ICC Statute by way of excluding the potential surrender of the nationals of one state under a bilateral agreement.¹³¹

This result is consistent with the overall object and purpose of the ICC Statute, as expressed in its Preamble, i.e. to ensure that the most serious crimes do not go unpunished, to put an end to impunity and to contribute to the prevention of such crimes.¹³²

An additional consideration also buttresses the result found: the conclusion of an agreement that effectively prohibits a State Party from complying with a request for arrest and surrender may reasonably be considered a breach of the obligation to fulfil obligations of a treaty in good faith (article 26 VCLT), i.e. the obligation to co-operate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court as established under article 86 of the Statute, and not to manoeuvre oneself into a position where such co-operation is hampered or made impossible.¹³³ In addition, the conclusion of such agreements comes close to a *mala fide* redefinition of the jurisdiction

¹³¹ Kreß, see note 56, MN 250; Meißner, see note 47, 133. In essence, the mode of interpretation adopted here is one of “teleological reduction”, meaning that, even though from its text and context, a situation would fall under the norm, it is excluded as the norm, as judging from its *telos*, is formulated in too wide a manner. The scope of application of a norm thus is limited by its object of protection (*Schutzzweck*). It should be added that this method is not uncontested under international law. Compare A. Aust, *Modern Treaty Law and Practice*, 2000, 188, who states that “having regard to the object and purpose is more for the purpose of confirming an interpretation”.

¹³² Preamble, paras 4 and 5. Compare Dahm/ Delbrück/ Wolfrum, see note 41, 1159.

¹³³ Meißner, see note 47, 133; Fleck, see note 48, 209; T. Stein, “Der Internationale Strafgerichtshof – Start über Stolpersteine”, in: H. Fischer/ U. Froissart/ W. Heintschel von Heinegg/ Ch. Raap (eds), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck*, 2004, 559 et seq. (571). For a discussion of issues of state responsibility see at IV. 2.

ratione loci of the Court, as laid down in article 12 (2)(a) of the Statute.¹³⁴ It is a well accepted principle of international law that no party to a treaty may be exempt from its treaty obligations by way of breaching the treaty.¹³⁵ This fact also bears on the interpretation of article 98 (2), given that treaties are generally to be construed “in good faith” (article 31 (1) VCLT).

Finally, the negotiating history confirms the results found. At the Rome Conference, negotiators were concerned that states may be reluctant to ratify the Statute because of concerns to breach *previously* concluded agreements, in particular SOFAs and bilateral extradition treaties. Article 98 (2) was specifically introduced to address that concern.¹³⁶

Thus, article 98 (2) does not cover agreements concluded by a State Party with another state after the entry into force of the Statute for that State Party. It is questionable whether the same applies to non-surrender agreements concluded by a State Party after it has signed the ICC Statute, but the treaty is pending ratification. The answer depends on whether entering into such an agreement would defeat the object and purpose of the treaty (article 18 (a) VCLT). Several authors have argued to this effect, since making the compliance with the obligation to surrender pursuant to article 89 (1) dependent on the consent of a non-State Party would in essence be tantamount to a limitation of the jurisdiction of the ICC under Part 2 of the Statute.¹³⁷

One may legitimately ask what scope of application, if any, this interpretation leaves for article 98 (2).¹³⁸ Generally speaking, the norm covers those agreements (e.g. SOFAs or supplementary agreements to these) concluded before the entry into force of the ICC Statute which fulfil the requirements set out above.

¹³⁴ Kreß, see note 56, MN 250; see also M.A. Alcoceba Gallego, “La ilicitud internacional de los *acuerdos antídoto* celebrados por Estados Unidos para evitar la jurisdicción de la CPI”, *Anu. Der. Internac.* 19 (2003), 349 et seq. (363).

¹³⁵ A. Verdross/ B. Simma, *Universelles Völkerrecht, Theorie und Praxis*, 3rd edition 1984, 522.

¹³⁶ Werle, see note 68, 461.

¹³⁷ Kreß, see note 56, MN 250, similar Meißner, see note 47, 134.

¹³⁸ Especially if one agrees with *Fleck’s* view that neither standard SOFAs nor extradition treaties fall under the provision, see note 48.

d. Subsequent State Practice as an Interpretation Aid?

To give a complete account of the status of bilateral non-surrender agreements under article 98 (2), it is important to point to the possibility of the States Parties to influence the interpretation of a treaty norm by subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (article 31 (3)(b) VCLT).¹³⁹ Such practice, to be considered an interpretation aid under the VCLT, has to be concordant subsequent practice common to all parties.¹⁴⁰ Given the cacophonous reactions to United States efforts to conclude such agreements, such homogeneous practice is hardly likely to be distilled.¹⁴¹

4. Preliminary Conclusions

1. Bilateral non-surrender agreements are unproblematic as far as they have been concluded between two non-States Parties, since the ICC Statute does not impose any obligations on them in accordance with arts 34 and 35 VCLT.

2. Article 98 (2) does not cover the non-surrender agreements concluded by the United States insofar as they have been concluded with States Parties to the ICC Statute. First, they appear far too wide-reaching *ratione personae* in that they include all U.S. nationals. Second, the interpretation of article 98 (2) has shown that it only applies to pre-existing agreements.

¹³⁹ Compare Kreß, see note 56, MN 250.

¹⁴⁰ I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, 1984, 138.

¹⁴¹ See Zappalà, see note 121, 126. Apparently different Akande, see note 55, 645.

IV. Consequences of the Inconsistency in the Light of General International Law

1. Questions of the Law of Treaties concerning Conflicting Obligations

The discussion under III. above proceeded on the basis of an *intra*-ICC Statute perspective, i.e. from the point of view of the international organisation “International Criminal Court”, and endeavoured to show how the organisation may tackle bilateral non-surrender agreements under its own constitutive instruments.¹⁴² However, in the case of international organisations, two levels must be distinguished: the “internal” level of the organisation and the external level of general international law.¹⁴³ Whereas the ICC, in the light of discussion above, may essentially disregard the non-bilateral U.S. non-surrender agreements when applying Part 9 of the Statute, and States Parties remain under the obligation to surrender, they are still concluded as international agreements which in principle bind those states which have concluded such treaties with the United States, whether parties to the ICC Statute or not, and have to be observed by them *bona fide*. This section analyses the consequences of the inconsistency of the non-surrender agreements and the ICC Statute under the international law of treaties.

One may conceive various possible effects of the discrepancy between the two instruments. These range from the invalidity of the bilateral non-surrender agreements, insofar as they are concluded with a State Party, over their non-applicability to the validity and applicability of both treaties. To decide this matter, international law concerning conflicting treaty obligations under international law must be consulted.

a. Conflicts between Treaties under the Vienna Convention of 1969

It is generally assumed that a conflict between treaties arises where two (or more) treaty instruments contain obligations which, being mutually

¹⁴² I.e., for the present purposes, the Statute of the International Criminal Court and the Rules of Procedure and Evidence.

¹⁴³ W. Karl, “Treaties, Conflicts between”, *EPIL* Vol. IV 2, 2000, 935 et seq. (940).

exclusive, cannot be complied with simultaneously.¹⁴⁴ Whether such a conflict exists is to be ascertained by way of interpreting the instruments in question, meaning that the possibility to reconcile the two potentially conflicting instruments by way of harmonising interpretation has to precede the analysis of conflict.¹⁴⁵ As has been shown, the ICC Statute and the bilateral non-surrender agreements may indeed impose conflicting obligations on a State Party with respect to the surrender of United States nationals to the Court, meaning that a conflict situation in the above sense is given.

The primary norm for resolving conflicts between treaty obligations is article 30 VCLT.¹⁴⁶ For article 30 to be applicable, both treaties, i.e. in this case the ICC Statute and the bilateral non-surrender agreement, would have to relate to “the same subject-matter”, as specified in the chapeau and paragraph 1 of article 30. The term has not received much attention in judicial decisions or doctrine, even though it is the prerequisite on which the applicability of article 30 depends.¹⁴⁷ It has been argued in a somewhat general manner that the term should be construed strictly as not to render it meaningless.¹⁴⁸ Others have proposed a qualified test to give clearer contours to the term, submitting that treaties deal with different subject-matters where the similarity between them is not plainly evident.¹⁴⁹ However, the majority of scholars appears to construe the ordinary meaning of the term “relating to the same subject-matter” to be that a conflict or incompatibility between individual provisions of a treaty exist.¹⁵⁰ In the case at hand, both the ICC Statute

¹⁴⁴ Karl, see above, 936; G. Marceau, “Conflict of Norms and Conflicts of Jurisdictions – The Relationship between the WTO Agreement and MEAs and other Treaties”, *JWTL* 35 (2001), 1081 et seq. (1084).

¹⁴⁵ Karl, see note 143, 938. W. Jenks, “The Conflict of Law-Making Treaties”, *BYIL* 30 (1953), 401 et seq. (428).

¹⁴⁶ Like the interpretation of article 31 proffered here, article 30 does not only apply to entire treaties, but also to individual treaty provisions, E. Roucouas, “Engagements parallèles et contradictoires”, *RdC* 206 (1987), 9 et seq. (79).

¹⁴⁷ Compare R. Wolfrum, N. Matz, *Conflicts in International Environmental Law*, 2003, 148; N. Matz, *Wege zur Koordinierung völkerrechtlicher Verträge – Völkervertragsrechtliche und institutionelle Ansätze*, forthcoming, (Chapter 7 D), 2; Marceau, see note 144, 1090.

¹⁴⁸ Aust, see note 131, 183; Sinclair, see note 140, 98.

¹⁴⁹ Wolfrum/ Matz, see note 147, 151.

¹⁵⁰ Pauwelyn, see note 123, 365; E.W. Vierdag, “The time of the conclusion of a multilateral treaty: article 30 of the Vienna Convention on the Law of

as well as the non-surrender agreements evidently concern the same subject-matter: the question under what circumstances a person may be surrendered to the custody of the ICC.

Before looking at specific derogation rules contained in the Vienna Convention, regard must be had to the will of the parties concluding a treaty on the same subject-matter as they may have expressly provided for a solution to a potential conflict between the treaties. Thus, under article 30 (2) VCLT, the provisions of an earlier treaty shall prevail if a second treaty stipulates that “it is subject to, or that it is not to be considered as incompatible with”, the first treaty. From its wording, the provision does not require that the parties to both treaties are identical.¹⁵¹ This is confirmed by the systematic structure of article 30, as only paras 3 to 5 differentiate between successive treaties to which all states parties to the earlier treaty are parties, and those to which only some are parties. It may thus be argued that by explicit reference to the ICC Statute (“Bearing in mind article 98 of the Rome Statute”) the non-surrender agreements are to be read in conjunction with, and shall be compatible with the ICC Statute, and, in case of conflict, the ICC Statute is to prevail. However, this general reference cannot be regarded as a conflict or subordination clause. Rather than anticipating conflict and making provisions should it occur, the parties to these agreements obviously assume that they act in accordance with article 98 (2) and thus do not provide for a rule of priority. Section 2005 (c)(2) ASPA also seems to be based on the assumption that the agreements fall within the ambit of article 98 (2). Furthermore, given that it is the clear and unambiguous will of the parties to the agreements to prevent any surrender of the persons listed to the Court, the agreements cannot be read subject to an autonomous interpretation of the ICC Statute. In other words, applying article 30 (2) VCLT would distort the will of the parties.

Article 30 (3) not being applicable for lack of identity of parties, a solution may be sought in article 30 (4) VCLT. Lit.(b) of the said provision specifies that “When the parties to the later treaty do not include all the parties to the earlier one: (b) 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”. As

Treaties and related provisions”, *BYIL* 59 (1989), 75 et seq. (100); see also Jennings/ Watts, see note 130, 1212 (fn. 2).

¹⁵¹ M. Zuleeg, “Vertragskonkurrenz im Völkerrecht Teil I: Verträge zwischen souveränen Staaten”, *GYIL* 20 (1977), 246 et seq. (259).

a prerequisite, article 30 (4) stipulates that the two treaties in question are successive. To determine this temporal dimension, doctrine generally regards the time of the adoption of the treaty-texts as decisive,¹⁵² pursuant to which rule the 17 July 1998 would be the decisive date for the ICC Statute. It follows that all bilateral non-surrender agreements concluded by the United States to the present date are “later” treaties in the sense of article 30 VCLT.

In effect, article 30 (4) VCLT does not solve the conflict between the two treaties, in the sense of giving priority to one or the other, but rather confirms the validity of both obligations,¹⁵³ accepts the collision and points to the law of state responsibility (article 30 (5)). In the case at hand, the rule would thus result in a State Party having concluded a bilateral non-surrender agreement being obligated both under the ICC Statute as to other State Parties and the Court, and the United States under the bilateral agreement.

However, it is commonly accepted that article 30 (4) VCLT presupposes that a multilateral treaty forming one of the conflicting treaties in question can be broken up in a series of bilateral engagements,¹⁵⁴ in the sense that the conclusion of successive agreements will not infringe upon the legal position of States Parties to the earlier treaty.¹⁵⁵ It does not apply if treaties or obligations of an integral performance structure are involved,¹⁵⁶ where the force of the obligation for one party is not dependent on a corresponding performance by the other as it is not of a *do ut des* character.¹⁵⁷ Whereas earlier doctrine has focused on identifying “law-making” or “normative” treaties (*traités-lois* as opposed to

¹⁵² Sinclair, see note 140, 98; W. H. Wilting, *Vertragskonkurrenz im Völkerrecht*, 1996, 83; Meißner, see note 47, 132. Critical Vierdag, see note 150, 92 et seq.

¹⁵³ Pauwelyn, see note 123, 383.

¹⁵⁴ P. Reuter, *Introduction au droit des traités*, 3rd edition, 1995, 120; Dahm/Delbrück/Wolfrum, see note 41, 694; Zuleeg, see note 151, 261; Wilting, see note 152, 99; A. Bleckmann, *Völkerrecht*, 2001, 130.

¹⁵⁵ B. Simma, “From bilateralism to community interest in international law” *RdC* 250 (1994 VI), 216 et seq. (349).

¹⁵⁶ Simma, see above, 349.

¹⁵⁷ Compare Third Report by G.G. Fitzmaurice, Doc. A/CN.4/115, reprinted in: *ILCYB* 1958 (II), 20 et seq. (27 (article 19) and 44 (commentary)); S. Rosenne, *Breach of Treaty*, 1985, 87; Simma, see note 155, 336-337.

traités-contrats) and treaties establishing an objective regime¹⁵⁸ as treaties not susceptible to “bilateralisation”, this distinction has not been followed by the Vienna Convention¹⁵⁹ or international case-law, and is rejected by a majority of scholars, especially since most treaties include provisions both of the classical contractual type and of general rules not of a reciprocal nature.¹⁶⁰ As opposed to categorising entire treaties, it is, however, accepted that specific treaty obligations may have differing performance structures. Whereas some multilateral treaty obligations are essentially bilateral in their application, such as those contained in the Vienna conventions on diplomatic and consular relations, or treaties concerning humanitarian law, others are of a not mutually reciprocating (or synallagmatic) nature, but may more properly be labelled obligations *erga omnes partes*.¹⁶¹ This type of obligation is characterised by the fact that their performance is not (merely) effected as between States Parties to the treaty, but “rights and obligations of the parties to such treaties or particular treaty provisions are inextricably interrelated, form an indivisible whole, so that the obligations contained therein are *integral* in the sense of simply having to be performed by every party *vis-à-vis* every other party”.¹⁶²

Pigeon-holing the co-operation part of the ICC Statute into a category seems difficult. It is clear that the Statute does not, in the majority of its provisions, establish rights and duties as between the parties in the classical sense. It rather, and primarily, sets up an international organisation with international legal personality and, at its centre, with a judicial body having jurisdiction over the most serious crimes, which are committed by *individuals*. In some way, it is thus similar to human rights treaties, which also concern the position of the individual and thus are not effected between States Parties in the above sense. On the other hand, the Statute also resembles the Genocide Convention, where “the contracting states do not have any interest of their own; they merely

¹⁵⁸ See ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174 et seq.; Wilting, see note 152, 99 et seq.; E. Klein, *Statutsverträge im Völkerrecht*, 1980, 275 et seq.

¹⁵⁹ Compare Brownlie, see note 59, 608.

¹⁶⁰ Simma, see note 155, 335.

¹⁶¹ As opposed to obligations *erga omnes*, denoting obligations which are owed to the international community *as a whole*, which, in terms of treaty law, is an exception to the *pacta tertiis* rule. See L.A. Sicilianos, “The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility”, *EJIL* 13 (2002), 1127 et seq. (1136).

¹⁶² Simma, see note 155, 336 (emphasis added).

have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention".¹⁶³ Consequently, with regard to the performance structure of the Statute in general, just like in the case of the Genocide Convention, one "cannot speak of individual advantages to states, or the maintenance of a perfect contractual balance between rights and duties".¹⁶⁴ In the light of these characteristics, it is reasonable to conclude that the ICC Statute establishes obligations *erga omnes partes* which cannot be exhaustively be described as a mere bundle of bilateral obligations.¹⁶⁵ This conclusion is supported by the fact that obligations as set up by the Statute are not only owed to other States Parties, but also, and in the case of co-operation duties primarily, to the international organisation "ICC".

One could object to this analysis by contending that the typology presented above is valid only as regards *substantive* treaty obligations as opposed to purely *formal-procedural* obligations,¹⁶⁶ arguing that the crimes under the Statute, and possibly the jurisdiction and admissibility provisions of the Statute share this integral character. However, given that the co-operation obligations of States Parties with the Court as contained in Part 9 are essential to the functioning of the organisation and the achievement of its aims, those obligations cannot be deemed to be of a merely "formal-procedural" character in the above sense, but are better characterised as integral in nature. Exceptions to these obligations, such as article 98, necessarily partake in this nature.

For this *erga omnes partes* type of obligations, the VCLT does not contain any conflict rule, or even a rule that would declare both obligations conflicting with one another valid, a question left open by the ILC.¹⁶⁷ Given that the Convention thus does not regulate the present issue it is necessary to turn to customary international law.

¹⁶³ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 15 et seq. (23).

¹⁶⁴ Ibid.

¹⁶⁵ See also Young, see note 130, 347: "The relationship [between the ICC and a State Party] is not intended to be reciprocal as the ICC is an instrument of the States Parties designed to serve their interests in complementary effective prosecution".

¹⁶⁶ Simma, see note 155, 337.

¹⁶⁷ Rosenne, see note 157, 89.

b. Conflicts between Treaties under Customary International Law

In theory, different solutions are imaginable to filling the *lacuna* left by the VCLT. These range from invalidity of the later conflicting treaty or treaty provision,¹⁶⁸ over its inapplicability,¹⁶⁹ to validity and applicability of both.¹⁷⁰ These options will be discussed in turn:

(1.) *Invalidity of the later treaty, or at least the conflicting norms of the later treaty*: in the work of the ILC leading up to the adoption of the VCLT, Sir Hersch Lauterpacht proposed that a treaty be void if its performance involved breach of a treaty obligation previously undertaken by one or more of the contracting parties, subject to the condition that the departure from the terms of the prior treaty was such as to interfere seriously with the interests of the other parties, or seriously impair the original purpose of the treaty.¹⁷¹ A similar, though more differentiated solution was later adopted in the report prepared by Sir G. Fitzmaurice, limiting the consequence of invalidity of the later treaty to situations where the earlier treaty was a multilateral agreement of an “interdependent” or “integral” type, and where the later treaty conflicted “directly in a material particular with the earlier treaty”.¹⁷² Invalidity of conflicting later treaties or individual provisions thereof, except

¹⁶⁸ This is in line with the classical doctrine before the VCLT, compare E. de Vattel, *Le droit des gens ou principes de la loi naturelle*, Vol. I, 1785, 448, § 315; J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, 1868, 236 (Article 414); Ch. Rousseau, “De la compatibilité des normes juridiques contradictoires dans l’ordre international”, *RGDIP* 39 (1932), 133 et seq. (139); G. Scelle, “Règles générales du droit de la paix”, *RdC* 46 (1933), 331 et seq. (472); H. Lauterpacht, “Règles générales du droit de la paix”, *RdC* 62 (1937), 100 et seq. (308). The opinion is principally based on the lack of legal capacity to enter into the conflicting second agreement, see Central American Court of Justice, *Costa Rica v. Nicaragua*, *AJIL* 11 (1917), 181 et seq. and P.M. Brown, “Costa Rica v. Nicaragua”, *ibid.*, 156 et seq. (156). For a differing view see Lord McNair, *The Law of Treaties*, 1961, 220 et seq.

¹⁶⁹ Dahm/Delbrück/ Wolfrum, see note 41, 694.

¹⁷⁰ Wilting, see note 152, 99; W. Czapliński/ G. Danilenko, “Conflicts of Norms in International Law”, *NYIL* 21 (1990), 3 et seq. (27).

¹⁷¹ First Report by Mr. H. Lauterpacht on the Law of Treaties, Doc. A/CN.4/63, reprinted in: *ILCYB* 1953 (II), 90 et seq. (156 et seq.); Second Report by H. Lauterpacht on the Law of Treaties, Doc. A/CN.4/87, reprinted in: *ILCYB* 1954 (II), 123 et seq. (133 et seq.).

¹⁷² Third Report by G.G. Fitzmaurice, see note 157, 28 (article 19).

from collisions with *jus cogens* norms, were later on abandoned by *Sir H. Waldock*. The rule was deliberately not included in the VCLT¹⁷³ and, considering its drastic consequence of nullity and its tension with the principle of *pacta sunt servanda*, cannot be regarded as part of international law as it stands today.

(2.) *Validity, but inapplicability of the later treaty*: Another option is to avoid the consequence of invalidity of the later treaty, and generally regard the later, conflicting treaty or norm as illegal and inapplicable,¹⁷⁴ or, in other words, to give the obligation of the earlier treaty precedence over the one assumed in the later agreement.¹⁷⁵ Some scholars contend that with the development of international law, in particular its constitutionalisation, treaties creating integral obligations have acquired a higher status in the hierarchy of norms and that, consequently, the later conflicting treaty should be, if not void, then at least inapplicable.¹⁷⁶

(3.) *Validity and applicability of both treaties*: The majority view applies the principle of *political decision* or *political choice*¹⁷⁷ to the situation at hand. The state having concluded two conflicting treaties is bound by both obligations and has to decide which obligation to abide by in case of conflict. Ultimately, this view points to the law of state responsibility for a reconciliation of interests.¹⁷⁸ This view is supported by the fact that the VCLT, recognised in large parts to be indicative of customary international law, does not recognise one treaty claiming primacy over another, but only clauses in one treaty conferring primacy upon another treaty.¹⁷⁹ It has likewise been convincingly argued that it

¹⁷³ See ILC Final Draft, Commentary to article 26, para. 13, reprinted in: R.G. Wetzels/ D. Rauschnig, *The Vienna Convention on the Law of Treaties – Travaux Préparatoires*, 1978, 231 et seq. (235).

¹⁷⁴ P. Daillier/ A. Pellet, *Droit international public*, 6th edition, 1999, 271.

¹⁷⁵ Harvard Draft Convention on the Law of Treaties, *AJIL* 29 (1935), Supplement, 1024.

¹⁷⁶ Dahm/ Delbrück/ Wolfrum, see note 41, 694; Jennings/ Watts, see note 130, 1215, § 591.

¹⁷⁷ Pauwelyn, see note 123, 427; Klein, see note 158, 284; J. Combacau/ S. Sur, *Droit international public*, 5th edition, 2001, 160; G. Schwarzenberger/ E.D. Brown, *Manual of International Law*, 6th edition, 1976, 131.

¹⁷⁸ Wilting, see note 152, 110.

¹⁷⁹ With the exception of Article 103 UN Charter. Compare E. Suy, “Constituent Treaties of International Organizations and the Hierarchy of Norms”, in: U. Beyerlin/ M. Bothe/ R. Hofmann/ E.U. Petersmann (eds), *Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt*, 1995, 267 et seq. (277).

respects the fundamental principles of *pacta tertiis*¹⁸⁰ and *pacta sunt servanda*.¹⁸¹ These principles speak against invalidity or inapplicability of the later treaty. Furthermore, it would seem that the principle of political decision is an appropriate rule for a legal order that is still characterised by a multitude of sovereign and equal law-makers.¹⁸²

There is, however, incontestably a tendency in international law, in particular in doctrine, towards the emergence of an “international public legal order” shared by the international community as a whole. This process is sometimes described as “constitutionalisation”,¹⁸³ a term capturing a plethora of phenomena on the international plane, such as the increased role of civil society for international law,¹⁸⁴ the status of individuals, in particular with respect to human rights law,¹⁸⁵ the establishment of more and more international institutions which co-ordinate and increasingly regulate the behaviour of states,¹⁸⁶ and in particular the

¹⁸⁰ J.B. Mus, “Conflicts Between Treaties in International Law”, *NILR* 45 (1998), 208 et seq. (226); H. Kelsen, *The Law of the United Nations*, 1950, 114.

¹⁸¹ F. Poirat, *Le traité, acte juridique international – Recherches sur le traité international comme mode de production et comme produit*, 2004, 117; I. Seidl-Hohenveldern, “Hierarchy of Treaties”, in: J. Klabbers/ R. Lefeber, *Essays on the Law of Treaties – A Collection of Essays in Honour of Bert Vierdag*, 1998, 7 et seq. (18).

¹⁸² Zuleeg, see note 151, 267. This does not mean that international law as a legal order is necessarily imperfect: “If a legal system leaves a party to conflicting transactions to extricate itself as well as it can from its embarrassing situation and does not perform this task for it, this is not necessarily a deficiency of the legal system in question”; G. Schwarzenberger, *International Law*, Vol. I (*International Law as Applied by International Courts and Tribunals I*), 3rd edition, 1957, 482.

¹⁸³ See J.A. Frowein, “Konstitutionalisierung des Völkerrechts”, in: K. Dicke/ W. Hummer/ D. Girsberger et al. (eds), *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System*, *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (2000), 427 et seq.

¹⁸⁴ *Congo v. Belgium*, see note 63, Dissenting Opinion of Judge Van den Wyngaert, 622 et seq. (629, para. 27): “(...) [T]he opinion of *civil society* (...) cannot be completely discounted in the formation of international law today”. For a critical comment on this statement see Ch. Maierhöfer, “Weltrechtsprinzip und Immunität: das Völkerstrafrecht vor den Haager Richtern”, *EuGRZ* 30 (2003) 549 et seq.

¹⁸⁵ See A. Fischer-Lescano, “Die Emergenz der Globalverfassung”, *ZaöRV* 63 (2003), 717 et seq. (750).

¹⁸⁶ Compare Klabbers, see note 58, 102.

proliferation of international courts adjudicating state disputes, but also determining the legal situation of individuals, in a binding manner.

According to some proponents of constitutionalisation, some principles, and consequently the instruments in which those principles are enunciated, have acquired, or are at least in the process of acquiring, a status higher than other norms of international law. This emergence is already reflected in the recognition of *jus cogens* by the VCLT¹⁸⁷, the ICTY,¹⁸⁸ and in principle also the ICJ,¹⁸⁹ as much as the special status of obligations flowing from the UN Charter (Article 103). However, a higher rank is also claimed for other norms. For instance, it is argued that the conclusion of multilateral treaties covering broad subject-matters by a substantial number of states has assumed the role of an international legislature inasmuch as these concern the protection of common interests which are of fundamental importance to the international community as a whole,¹⁹⁰ leading to an elevated status of such norms.

It is nevertheless questionable whether these developments reach as far as rendering inapplicable (or even void) a later treaty that conflicts with norms of an earlier treaty which are not of a *jus cogens* character. As a matter of *lex lata*, the hierarchical structure of the international legal system is at best “rudimentary”.¹⁹¹ Our discussion thus leads to the

¹⁸⁷ Articles 53 and 64. For a discussion of the concept of *jus cogens* as a constitutional principle of international law see M. Byers, “Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules”, *Nord. J. Int’l L.* 66 (1997), 211.

¹⁸⁸ *Prosecutor v. Furundžija*, Trial Chamber, Case No. IT-95-17/1-T, reprinted in: *ILM* 38 (1999), 317 et seq. (349, para. 155).

¹⁸⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, ICJ Reports 1969, 3 et seq. (42, para. 72); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14 et seq. (100, paras 190 et seq.). Compare also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, ICJ Reports 1993, 325 et seq., Separate Opinion of Judge Lauterpacht, 407 et seq. (439, para. 100).

¹⁹⁰ Dahm/Delbrück/Wolfrum, see note 41, 694.

¹⁹¹ Th. Cottier/ M. Hertig, “The Prospects of 21st Century Constitutionalism”, *Max Planck UNYB* 7 (2003), 261 et seq. (271); C. Walter, “Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law”, *GYIL* 44 (2001), 170 et seq. (201).

conclusion that a State Party having entered into a bilateral non-surrender agreement with the United States will be obliged to both the United States and the ICC in case of a request for surrender by the Court, in a conflicting manner: on the one hand, it must surrender the person concerned to the Court, on the other hand, it is prohibited from doing so by the bilateral agreement.

2. Questions of State Responsibility

As noted, a State Party which has concluded a bilateral non-surrender agreement inconsistent with article 98 (2) will nevertheless be validly bound by both treaties. Both obligations being mutually exclusive, this may give rise to state responsibility of this State Party. It is questionable if this responsibility arises only once a request by the Court has been issued and the State Party refuses to surrender the person in reliance on the non-surrender agreement, or whether the mere conclusion of the agreement entails such accountability.

It is incontestable that, if a State Party decides not to surrender a person contrary to a valid request by the ICC in pursuit of its obligations to the United States under a non-surrender agreement, this party will be in breach of the ICC Statute and incur state responsibility both towards the international organisation ICC and all other States Parties.¹⁹² Accordingly, the Court could make a finding to that respect and refer the matter to the Assembly of States Parties or the Security Council, as specified in article 87 (7).

A further question is whether the *conclusion* of an agreement that goes beyond the scope accepted by article 98 (2) in itself amounts to a breach of a State Party's obligations under the ICC Statute. As has been indicated, article 98 (2) does not impose any direct obligations on states; it rather obligates the Court not to request surrender if states have conflicting duties towards other states. It has also been rightly observed that it does not *explicitly* prohibit States Parties the conclusion of agreements that may cause a conflict of obligations with the co-operation regime of the Court.¹⁹³

¹⁹² Unless the person the arrest or transfer of which is requested falls under a category protected by article 98 (1) ICC Statute, see at III. 2.

¹⁹³ Crawford/ Sands/ Wilde, see note 7, para. 21.

In contrast, other treaties do include specific provisions regulating the question of Member States concluding agreements that could potentially conflict with those treaties (e.g. article 311 (3) of the 1982 United Nations Convention on the Law of the Sea¹⁹⁴, and article 8 of the 1949 North Atlantic Treaty¹⁹⁵). Consequently, *Crawford, Sands* and *Wilde* argue 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 not constitute a breach of the relevant cooperation obligations of the ICC Statute, given that, at this stage in time, it is not clear for which of the two contradictory obligations the State Party will opt when a request for surrender by the Court is made.¹⁹⁶ At first glance, this view seems to be consistent with the principle of political decision as known in the law of treaties which applies to the situation at hand.

However, the silence of article 98, and Part 9, of the ICC Statute to that effect does not necessarily portend that obligations under the Statute may not be breached already by the mere conclusion of non-surrender agreements in their present form, but only once a State Party “invokes” an incompatible obligation arising from a bilateral non-surrender agreement in order to oppose the request for surrender by the Court. The fact that the conclusion of a treaty may breach another, earlier, agreement, is well accepted in doctrine¹⁹⁷ and case law of inter-

¹⁹⁴ “Article 311: *Relation to other conventions and international agreements* [...] (3) Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention. [...]”

¹⁹⁵ “Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty”.

¹⁹⁶ *Crawford/ Sands/ Wilde*, see note 7, para. 23, fn. 4. This analysis is supported by *Kelsen*, see note 180, 114: “According to general international law, it is not the act of concluding a treaty inconsistent with a previous treaty, but the nonfulfilment of this or the other treaty which is illegal”.

¹⁹⁷ Reuter, see note 154, 99; Rosenne, see note 157, 85 et seq.; Combacau/ Sur, see note 177, 160; Vierdag, see note 150 argues that the earliest possible

national courts.¹⁹⁸ As demonstrated, this may also be explicitly provided for in the text of treaties. Equally, article 30 (5) VCLT provides that para. 4 of that provision “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 obligation under another treaty”.¹⁹⁹ The definition makes clear that a distinction must be made between the conclusion and the application of the treaty, i.e. the acting upon the obligations incurred under the instrument.²⁰⁰

It is thus a matter of construction of the instrument in question whether the conclusion of a treaty entails international responsibility, or whether some subsequent action in pursuance of the treaty is required.²⁰¹ In this context, for the purposes of dealing with conflicts of norms, *Pauwelyn* differentiates between an “inherent normative conflict”, i.e. one norm, in and of itself, breaches the other, as opposed to a “conflict in the applicable law”. According to him, the first case is given, *inter alia*, where a multilateral treaty explicitly prohibits the conclusion of certain *inter se* agreements or where it breaches a norm of *jus cogens*.²⁰² On the other hand, a conflict in the applicable law occurs if compliance with, or the exercise of rights under, one of the two norms constitutes a breach under the other norm.²⁰³ Analysed in accordance with these two categories, the conflict between bilateral non-surrender agreements and article 98 (2) ICC Statute would have to be classified as a conflict in the applicable law, as the State Party faced with competing

point in time for international responsibility to arise is the entering into force of the second treaty (p. 106).

¹⁹⁸ PCIJ Advisory Opinion, *Customs Regime Between Germany and Austria*, Series A/B, No. 41, 5 September 1931; Judgment of the Central American Court of Justice, *Costa Rica v. Nicaragua*, reprinted: in *AJIL* 11 (1917), 181-229. Compare also: ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 15 et seq. (21): “It is [...] a generally recognised principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently non of the contracting parties is entitled to frustrate or impair, by means on unilateral decisions or *particular agreements*, the purpose and *raison d’être* of the convention”. (emphasis added).

¹⁹⁹ See also article 73 VCLT.

²⁰⁰ Compare Vierdag, see note 150, 106.

²⁰¹ Jennings/ Watts, see note 130, 1214, § 591.

²⁰² *Pauwelyn*, see note 123, 176.

²⁰³ *Pauwelyn*, see note 123, 275.

obligations would still have to decide which obligation it wants to comply with. As observed, a norm that would expressly proscribe the conclusion of agreements inconsistent with Part 9 is not contained in the ICC Statute. As a result, the conclusion of a bilateral non-surrender agreement would not automatically entail a breach of the ICC Statute.

However, one could consider a possible breach of a different obligation: the obligation to perform treaties in good faith. Pursuant to article 86, States Parties owe full co-operation with the Court (a.) to the Court, and (b.) to all States Parties, in all forms specified in Part 9, except where the Statute itself recognises an exemption from that duty. Independently from the duty to comply with a request for surrender by the Court under article 89 (1) which arises only when the Court in fact makes a request, a State Party has the obligation to fulfil its treaty obligations in good faith pursuant to article 26 VCLT. This obligation comprises the rule not to defeat the object and purpose of a treaty (see article 18 VCLT as an obligation preceding the obligation in article 26, yet contained therein),²⁰⁴ in particular not to conclude a later treaty that is inconsistent with an earlier one.²⁰⁵ It is also recognised that the breach of the obligation to fulfil a treaty in good faith may lead to state responsibility.

In the present circumstances, it may well be argued that it is an essential aspect of complying *bona fide* with the ICC Statute not to bring oneself in a position where the also future compliance with a duty under a treaty is put in danger or even made impossible.²⁰⁶ This is even more so where the entering of that situation is made in full knowledge of the possible conflicts with the ICC Statute, and even with the express intent to make such compliance impossible.²⁰⁷ The conclusion of bilateral non-surrender agreements does indeed endanger the future compliance with potential requests for surrender by the Court. As a conse-

²⁰⁴ See also article 60 (3)(b) VCLT.

²⁰⁵ Dahm/ Delbrück/ Wolfrum, see note 41, 602.

²⁰⁶ Meißner, see note 47, 133; Kreß, see note 56, MN 250, who says that it is impermissible “to consciously put oneself in a position which establishes obstacles for an unqualified implementation of requests for surrender”. In this context, one should also take into consideration that “abstract treaty rules are intended to become in due time sources of concrete rights and obligations of States” (compare Vierdag, see note 150, 97).

²⁰⁷ One could argue that the State Party concluding the agreement will regularly think that it moves within the boundaries of the Rome Statute. However, intent or blameworthiness is not a prerequisite for international responsibility, compare Brownlie, see note 59, 425-427.

quence, it is reasonable to say that their very conclusion may constitute a breach of the obligation to perform treaties in good faith,²⁰⁸ entailing, as a secondary obligation the cessation of the breach, that is the suspension or termination of the later treaty.²⁰⁹

V. Concluding Remarks

The above discussion has shown that bilateral non-surrender agreements raise numerous questions regarding their compatibility with article 98 of the ICC Statute, as well as the law of treaties and state responsibility. In particular with regard to questions of treaty interpretation and conflicts between treaties, it is evident that scholarly consensus on those fundamental areas of international law appears to be relatively limited and merits further examination.

In terms of article 98 (1), it may be concluded that some of the intended beneficiaries of bilateral non-surrender agreements already fall under the scope of this norm, subject, however, to future developments in the law of state immunity.

Whether one agrees with the statement that bilateral non-surrender agreements attempt to “pervert” article 98 (2) or not,²¹⁰ the analysis has shown that they are not consistent with the provision, and that, as a consequence, the Court may essentially disregard them and is not hindered from requesting the surrender of a person purportedly “protected” by such an agreement. States Parties having concluded such agreements remain under the duty to surrender the person requested to the Court. Given that a request for surrender of a United States national by the ICC is highly unlikely, it is uncertain whether the issues discussed are ever going to be the subject of judicial scrutiny by the Court; much speaks for the assumption that this will at least not be the case in the foreseeable future, as the Court still has to find its place within the international system and may not reasonably be expected, as a matter of policy, to confront the only remaining superpower in one of its early cases.

²⁰⁸ See International Law Association, Berlin Conference (2004), Committee on the International Criminal Court, First Report, prepared by W.A. Schabas, available at <www.ila-hq.org> (last visited 3 August 2004), 18.

²⁰⁹ Combacau/ Sur, see note 177, 160.

²¹⁰ W. Schabas, *An Introduction to the International Criminal Court*, 2nd edition, 2004, 81.

It is equally doubtful, in the light of the recent developments in the UN Security Council regarding the opposition to utilise article 16 of the ICC Statute as a general exemption clause,²¹¹ whether the United States will reconsider its policy on the negotiation of non-surrender agreements. In the short term perspective at least, a further push in diplomatic activity aimed at the conclusion of as many agreements as possible is to be expected.

It is to be hoped that, through a prudent and well-balanced approach in its first prosecutorial and judicial activities, the Court will be able to convince its opponents that the concerns and fears apparently raised by it are largely exaggerated and unfounded. In the meantime, the best way to proceed would seem to be to “learn to deal with rejection”.²¹²

²¹¹ See above under II. 2. a.

²¹² Reisman, see note 5.