

The Possible Restraint Imposed on the Activities of
the International Criminal Court by Article 98
Agreements, Extradition Treaties, and Status of Forces
Agreements (SOFAs): An Analysis of their Consistency
with the Rome Statute and the Related Issues of the
Law of Treaties (III)

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【Research Note】

The Possible Restraint Imposed on the Activities of the International Criminal Court by Article 98 Agreements, Extradition Treaties, and Status of Forces Agreements (SOFAs): An Analysis of their Consistency with the Rome Statute and the Related Issues of the Law of Treaties (Ⅲ)

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Chapter 3 Analysis of Article 98 Agreements' Consistency with the Statute and the Related Issues of the Law of Treaties (Continued)

Section 2 Article 98 Agreements' Consistency with the Statute

1. Interpretation of Article 98, Paragraph 2, of the Statute

(A) Meaning of the Term "surrender"

This subsection aims to discuss the following five key points of the interpretation of Article 98, paragraph 2, of the Statute to analyse the consistency of Article 98 Agreements with the Statute. Firstly, with regard to the meaning of the term "surrender" in Article 98, paragraph 2, of the Statute, the EU Guiding Principles quoted in subsection 2 of section 2 of the previous chapter state that "[s]urrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute". The last paragraph declares the following:

- (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.
- (b) A request by the Court for transit shall be transmitted in accordance with article 87⁸⁰. The request for transit shall contain:

80 Article 87 of the Statute, entitled "Requests for cooperation: general provisions", stipulates the following:

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests

- (i) A description of the person being transported;
 - (ii) A brief statement of the facts of the case and their legal characterization;
and
 - (iii) The warrant for arrest and surrender;
- (c) A person being transported shall be detained in custody during the period of transit;
- (d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;
- (e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

The above-mentioned statement in the EU Guiding Principles seems to suggest that the ICC can make requests for transit to the parties to Article 98 Agreements. On the contrary, if the term "surrender" in Article 98, paragraph 2, of the Statute could be interpreted to include "transit" in Article 89, paragraph 3 thereof, the ICC would be prevented from making such requests to them.

In respect of the interpretation of treaties such as the Statute and Article 98

shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession. Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

- (b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.
2. [...].
 3. [...].
 4. [...].
 5. (a) The Court may 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.
 - (b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.
 6. [...].
 7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

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Agreements, it is well known that the relevant rules are formulated in Articles 31 and 32 of the VCLT. The former article, entitled "General rule of interpretation", declares the following:

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

The latter article, entitled "Supplementary means of interpretation", also declares the following:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Although neither the US nor ICC is a party to the VCLT, in the drafting process of Article 21 of the Statute entitled "Applicable law"⁸¹, it was accepted that the proposed

81 Article 21 of the Statute stipulates the following:

ICC would follow the rules prescribed in the VCLT, including the ones concerning the interpretation of treaties⁸². Moreover, the ICJ has acknowledged the customary law nature of Articles 31 and 32 of the VCLT. For example, in the judgment of December 2002 on the Case Concerning the Sovereignty over Pulau Ligitan and Pulau Sipadan (hereinafter referred to as "the Pulau Ligitan and Pulau Sipadan Case"), it upheld the following:

The Court notes that Indonesia is not a party to the Vienna Convention of 23 May 1969 on the Law of Treaties; the Court would nevertheless recall that, in accordance with customary international law, reflected in Articles 31 and 32 of that Convention:

"a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion." (*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994*, pp. 21-22, para. 41; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1995*, p. 18, para. 33; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection*,

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1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

⁸² Per Saland, who worked as chairperson of the Working Group on General Principles of Criminal Law (hereinafter referred to as "the WG on General Principles") at the Rome Conference (for the establishment of 5 working groups, see note 21 and accompanying text), states that "[o]ne difficult issue was the role of treaties other than the Rome Statute. Since the question of the inclusion of the so-called 'treaty crimes' within the jurisdiction of the Court had not been resolved, it was difficult to decide whether to have a reference only to 'directly applicable' treaties or to refer to 'relevant' treaties. The debate was over whether the Vienna Convention on the Law of Treaties was applicable or only relevant. [...] At the end, the phrase 'applicable treaties and the principles and rules of international law' was used in sub-paragraph (b)". Per Saland, "International Criminal Law Principles," in Lee (ed.), *supra* note 32, p. 215.

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Judgment, I.C.J. Reports 1996 (II), p. 812, para. 23; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18.)

Moreover, with respect to Article 31, paragraph 3, the Court has had occasion to state that this provision also reflects customary law, stipulating that there shall be taken into account, together with the context, the subsequent conduct of the parties to the treaty, i.e., "any subsequent agreement" (subpara. (a)) and "any subsequent practice" (subpara. (b)) (see in particular *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 75, para. 19; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1075, para. 48).

Indonesia does not dispute that these are the applicable rules. Nor is the applicability of the rule contained in Article 31, paragraph 2, contested by the Parties⁸³.

In light of these rules concerning the interpretation of treaties, it is clear that the EU Guiding Principles' interpretation of the term "surrender" in Article 98, paragraph 2, of the Statute is valid, as the provision which defines the ICC's power to make a request for surrender (i.e. Article 89, paragraph 1 thereof⁸⁴) is different from the one which defines its power to make a request for transit (i.e. Article 89, paragraph 3 thereof). Oliver Dörr elucidates the role of context in the interpretation of treaties by stating that "[t]he entire text of the treaty is to be taken into account as 'context', including title, preamble and annexes (cf the chapeau of para 2) and any protocol to it, and the systematic position of the phrase in question within that ensemble. Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure or scheme of the treaty"⁸⁵. Therefore, it can be said that the ICC is able to make requests for transit to the parties to Article 98 Agreements and they shall be complied with in accordance with the Statute, though it should also be noted that the Article 98 Agreement with Uzbekistan quoted in subsection 1 of section 2 of the previous chapter seems to provide for the obligation to prevent such transit, stipulating that "[p]ersons of one Party present in the territory of the other shall not [...] be

83 *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, pp. 645-646, para. 37.

84 For the text of Article 89, paragraph 1, of the Statute, see subsection 1 of section 1 of the previous chapter.

85 Oliver Dörr, "Article 31. General rule of interpretation," in Dörr and Schmalenbach (eds.), *supra* note 71, p. 582.

surrendered or transferred by any means to the International Criminal Court for any purpose [...]".

(B) Meaning of the Term "the requested State"

Secondly, with regard to the meaning of the term "the requested State" in Article 98, paragraph 2, of the Statute, Markus Benzing contends that "[t]he rationale of article 98 is to protect the requested State Party from being faced with conflicting obligations under international law [...]. Consequently, 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 Court⁸⁶, since other states could never find themselves in a situation of conflicting obligations [...]"⁸⁷. To justify this interpretation, he also argues that "[a]rticle 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. [...] 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"⁸⁸.

It should be noted, however, that the ILC pointed out in the commentary on its final draft of the VCLT that "the Court [=the ICJ] has more than once had recourse to *the statement of the object and purpose of the treaty in the preamble* in order to interpret *a particular provision*" [emphases added]⁸⁹. Moreover, Jan Klabbers persuasively argues that "[w]hat also seems clear is that the notion of object and purpose of a treaty is meant to refer to that treaty as a whole. [...] For one thing, individual treaty provisions

86 See Article 87, paragraph 5 (see note 80) and Article 12, paragraph 3, of the Statute. The latter article, entitled "Preconditions to the exercise of jurisdiction", stipulates the following:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

87 Markus Benzing, "U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties," *Max Planck Yearbook of United Nations Law*, Vol. 8 (2004), pp. 198-199.

88 *Ibid.*, p. 216.

89 Yearbook of the International Law Commission, 1966, Vol. II, p. 221, para. 12.

may serve different goals; hence, to individualize the notion of object and purpose would serve to reintroduce a plural idea: the idea that a treaty can simultaneously have various objects and purposes, and therewith undermine the very notion. Moreover, should object and purpose be construed to relate to individual provisions, it would become very difficult, perhaps impossible, to act in accordance with object and purpose, and therewith, in the end, equate the treaty with the objects and purposes of its individual provisions. This would render the very notion of a treaty's object and purpose redundant. Finally, the specific reference to the treaty as a whole in Art. 41 VCLT⁹⁰ makes instrumental sense, as this provision regulates the possibility of modifying a treaty and thus breaking up a treaty's regime into various parts. In such a context, it is well worth reminding the parties that the object and purpose ought to be construed as that of the treaty as a whole, not of its various parts⁹¹. Thus, it is undeniable that the rule prescribed in Article 31 of the VCLT is interpreted to speak of the object and purpose of a treaty as a whole rather than those of an individual provision.

Furthermore, it should be added that the object and purpose of a treaty play a much less significant role in its interpretation according to the rules formulated in the VCLT than its text. For example, Mustafa Kamil Yesseen, who presided as chairperson of the Drafting Committee at the Vienna Conference, explains that "[l]'interprétation à la lumière du but et de l'objet comme le prévoit la Convention de Vienne ne diminue pas la valeur du texte. L'objet et le but ne peuvent pas être la source directe et unique d'une disposition. Ils ne sont qu'un élément entre autres, en fonction duquel le sens susceptible d'être attribué aux termes doit être examiné. Cet examen peut d'ailleurs ne pas aboutir nécessairement à écarter une solution qui ne semble pas être en harmonie avec l'objet et le but du traité s'il paraît évident que cette solution est celle que les parties veulent. L'objet et le but du traité peuvent en effet ne pas être l'objet et le but de toutes les

90 Article 41 of the VCLT is entitled "Agreements to modify multilateral treaties between certain of the parties only", paragraph 1 of which stipulates the following:

Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

- (a) the possibility of such a modification is provided for by the treaty; or
- (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

91 Jan Klabbbers, "Treaties, Object and Purpose," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 9 (Oxford University Press, 2012), p. 1137. See also *id.*, "Some Problems Regarding the Object and Purpose of Treaties," *Finnish Yearbook of International Law*, Vol. 8 (1997), pp. 151-155; Dörr, *supra* note 85, p. 585.

dispositions du traité"⁹². Similarly, in the judgment of February 1994 on the Case Concerning the Territorial Dispute (hereinafter referred to as "the Territorial Dispute Case"), the ICJ held that "in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. *Interpretation must be based above all upon the text of the treaty*" [emphasis added]⁹³.

In light of the VCLT's rules concerning the interpretation of treaties understood in this way, it is clear that, contrary to Benzing's interpretation quoted above, the word "State" in Article 98, paragraph 2, of the Statute means states in general, as terms like "State Party" and "State not party to this Statute" are used in other provisions of the Statute^{94 95}. Moreover, in relation to the word "requested", it can be noted that, in

92 Mustafa Kamil Yesseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités," *Collected Courses of The Hague Academy of International Law*, Vol. 151 (1976), p. 58. Ian Sinclair, who was the deputy-chairperson of the UK delegation to the Vienna Conference (for the membership of the Drafting Committee including the UK, see U.N. Doc. A/CONF. 39/11/Add. 2, p. 107, para. 6), also explains that "[i]t is also worth stressing that reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. The initial search is for the 'ordinary meaning' to be given to the terms of the treaty in their 'context'; it is in the light of the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified". Sinclair, *supra* note 71, p. 130. See also Aust, *supra* note 79, p. 209; Dörr, *supra* note 85, pp. 586-587.

93 *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41. For a succinct summary of the ICJ's findings relating to Article 31, paragraph 1, of the VCLT, see Jean-Marc Sorel and Valérie Boré Eveno, "Article 31, Convention of 1969," in Corten and Klein (eds.), *supra* note 64, pp. 818-819.

94 See e.g., Article 87 of the Statute (see note 80).

95 The ICJ also interprets a word or phrase by comparing it with another in the same treaty. For example, in the judgment of December 2004 on the Case Concerning the Legality of Use of Force (hereinafter referred to as "the Legality of Use of Force Case"), it upheld the following:

Article 35, paragraph 2, refers to "the special provisions contained in treaties in force", in the context of the question of access to the Court. Taking the natural and ordinary meaning of the words "special provisions", the reference must in the view of the Court be to treaties that make "special provision" in relation to the Court, and this can hardly be anything other than provision for the settlement of disputes between the parties to the treaty by reference of the matter to the Court. As for the words "treaties in force", in their natural and ordinary meaning they do not indicate at what date the treaties contemplated are to be in force, and thus they may lend themselves to different interpretations. One can construe those words as referring to treaties which were in force at the time that the Statute itself came into force, as was contended by certain Respondents; or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked. In favour of this latter interpretation, it may be observed that the similar expression "treaties and conventions in force" is found in Article 36, paragraph 1, of the Statute, and the Court has interpreted it in this sense (for example, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 16, para. 19). The expression "treaty or convention in force" in Article 37 of the Statute has also been read as meaning in force at the date proceedings were instituted (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 27). (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 318-319, para. 101)

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accordance with Article 89, paragraph 1, of the Statute, a request for surrender can be transmitted to "any State on the territory of which that person may be found", which includes non-party states⁹⁶. Therefore, it can be said that the ICC is unable to make requests for surrender to any state which is a party to an Article 98 Agreement to the extent that it conforms to Article 98, paragraph 2, of the Statute in other respects.

(C) Meaning of the Phrase "its obligations under international agreements"

Thirdly, with regard to the meaning of the phrase "its obligations under international agreements" in Article 98, paragraph 2, of the Statute, the following two issues have been raised. The first is whose obligations this phrase refers to, i.e. how the word "its" is interpreted. It can be pointed out that US interpretation of this word has been inconsistent. In 2000, the US proposed the following provision in the preparatory work of the Relationship Agreement between the International Criminal Court and the United Nations (hereinafter referred to as "the ICC-UN Relationship Agreement"):

The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a U.N. Member State, and such directing State has so acknowledged, only in the event

- (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or
- (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply⁹⁷.

96 Benzing also admits that "[a]s is clear from the wording of article 89, the Court is not precluded from addressing such a request to non-State Parties". Benzing, *supra* note 87, p. 196.

97 U.S. Proposal to the Fifth Session of the Preparatory Commission for the International Criminal Court; Proposed Text to Supplemental Document to the Rome Treaty (2000), cited in David J. Scheffer, "Staying the Course with the International Criminal Court," *Cornel International Law Journal*, Vol. 35, Iss. 1 (2001-2002), pp. 79. See also *id.*, *supra* note 37, pp. 341-342; Schabas, *supra* note 9 ("The International Criminal Court"), pp. 1350-1351; Claus Kreß, "Article 98," in Kai Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, fourth edition (C. H. Beck, 2022), pp. 2592-2593.

The Preparatory Commission for the International Criminal Court (hereinafter referred to as "the Preparatory Commission") was established and convened according to the final act of the Rome Conference (U.N. Doc. A/CONF. 183/13 (Vol. I), pp. 67-79) to prepare proposals for practical arrangements for the establishment and coming into operation of the ICC, such as the draft text of its Rules of Procedure and Evidence. No verbatim record of the Preparatory Commission was compiled by the UN.

David Scheffer, who was the Ambassador-at-Large for War Crimes Issues from 1997 to 2001 under the Clinton administration, explains this proposal by stating that "[t]he US objective was to ensure that the Relationship Agreement would constitute, assuming the adoption of our proposal in its text, an Article 98 (2) international agreement that the Court would honour. [...] We considered this strategy justifiable within the meaning of the term 'international agreement' found in Article 98 (2)"⁹⁸. Although the provision quoted above was not included in the ICC-UN Relationship Agreement⁹⁹, it can be seen from his explanation that at that time the US understood "its obligations" in Article 98, paragraph 2, of the Statute to mean obligations of the ICC. In contrast, it is clear that, at least since the US started to conclude Article 98 Agreements with other states in 2002, the US has understood the same phrase to mean obligations of a state. Benzing also claims that "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 requested to surrender a person to the Court"¹⁰⁰.

According to the general rule of interpretation prescribed in Article 31 of the VCLT, the word "its" in Article 98, paragraph 2, of the Statute can be interpreted as "of the Court" or "of the requested State" in this context. Moreover, in light of the supplementary means of interpretation prescribed in Article 32 of the VCLT, it is clear that the latter interpretation is correct, as extradition treaties and SOFAs between states were explicitly mentioned in the drafting process described in subsection 2 of section 1 of the previous chapter.

The second issue is how the meaning of the phrase "its obligations under international agreements" in Article 98, paragraph 2, of the Statute is temporally limited, i.e. until when such agreements can be entered into and obligations created. For example, Crawford, Sands and Wilde claim that "[i]t is difficult to escape the conclusion that the ordinary meaning of the words 'obligations under international agreements' in Article 98(2) is not limited to existing international agreements. This provision contrasts with the approach elsewhere in Part 9 of the Statute, which includes the qualifying word 'existing' in Article 90 (6)¹⁰¹ and Article 93 (3)¹⁰²¹⁰³. On the contrary, Benzing contends that

98 Scheffer, *supra* note 37, p. 342. See also *id.*, *supra* note 97, pp. 78-80.

99 For the text of the ICC-UN Relationship Agreement, see e.g. <https://legal.un.org/ola/UNICCCooperation.aspx> (as of 31 May 2023). The ICC-UN Relationship Agreement was approved by the UN General Assembly Resolution 58/318 of 13 September 2004, and entered into force on 4 October 2004.

100 Benzing, *supra* note 87, pp. 208-209. See also Kreß, *supra* note 97, pp. 2665-2666.

101 For the text of Article 90, paragraph 6, of the Statute, see note 31.

102 Article 93 of the Statute is entitled "Other forms of cooperation", paragraph 3 of which stipulates the following:

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"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 cooperate 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"¹⁰⁴. Moreover, Roland Adjovi asserts that the provisions of Article 98 of the Statute "implique clairement, conformément à l'objet et au but de la Convention"¹⁰⁵, qu'il s'agit de ne pas conduire les États à violer leurs engagements antérieurs à Juillet 1998 ! Car si les États pouvaient après l'adoption de la Convention, négocier des accords pour exclure la coopération avec la Cour, ce serait un comportement contraire à l'objet de la Convention"¹⁰⁶. Furthermore, Claus Kreß also interprets the word "agreements" in this paragraph as pre-existing ones by arguing that

Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

103 Crawford, Sands and Wilde, *supra* note 47, p. 18. See also Zappalà, *supra* note 9, pp. 122-123; Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits," *Journal of International Criminal Justice*, Vol. 1, Iss. 3 (2003), p. 645; Dieter Fleck, "Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Force Agreements?," *Journal of International Criminal Justice*, Vol. 1, Iss. 3 (2003), p. 655; Coulée, *supra* note 9, p. 62; Akande, "International Law Immunities and the International Criminal Court," *American Journal of International Law*, Vol. 98, No. 3 (2004), p. 427; Harmen van der Wilt, "Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?," *Leiden Journal of International Law*, Vol. 18, Iss. 1 (2005), pp. 100-101; Scheffer, *supra* note 37, pp. 340-341.

104 Benzing, *supra* note 87, p. 218.

105 For the object and purpose of the Statute, see its Preamble, which stipulates the following:

The States Parties to this Statute,

[...]

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

[...]

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

[...]

Have agreed as follows:

106 Adjovi, *supra* note 9, pp. 209-210.

"[o]ne cornerstone of the so hard-fought final compromise solution contained in Article 12 (2)¹⁰⁷ provides the Court with a limited jurisdiction over nationals of non-party States. The broad interpretation of Article 98 (2) would allow State Parties to renegotiate, on a bilateral basis, this cornerstone of the compromise on jurisdiction [...]. [...] To accept such a reading of the second para. of this provision, is irreconcilable with the overarching guiding principle to interpret the Statute as a coherent whole. This systematic consideration is of a much more substantial character than the undisputable fact that the word 'existing', the insertion of which would have clarified the matter, is absent from para. 2 while contained in Article 90 (6) and Article 93 (3)"¹⁰⁸.

As shown in the previous sub-subsection, the rule prescribed in Article 31 of the VCLT cannot be interpreted to speak of the object and purpose of an individual provision, and the text of a treaty serves a primary role in its interpretation according to the rules formulated in the VCLT with its object and purpose being a secondary one. It can be seen from these observations that Benzing's and Adjovi's arguments quoted above, neither of which is based on the text of the Statute, are not persuasive. Moreover, Kreß's presupposition that the broad interpretation of Article 98, paragraph 2, of the Statute could lead to the renegotiation of the compromise on jurisdiction seems imprecise, as the exercise of jurisdiction by the ICC and surrender to the ICC are distinctly different matters dealt with in different parts of the Statute (i.e. Parts 2 and 9 respectively). On the contrary, there is no doubt that, as pointed out by Crawford, Sands and Wilde, the qualifying word "existing" is not included in this paragraph in contrast to other provisions of the Statute¹⁰⁹. Thus, it is indisputable that "its obligations under international agreements" can be created until the ICC is about to make a request for surrender which would require the requested State to act inconsistently with them.

Therefore, it can be said that the Article 98 Agreements into which the US has entered with approximately 100 countries since 2003¹¹⁰ are able to prevent the ICC from making requests for surrender to the extent that they conform to Article 98, paragraph 2, of the Statute in other respects.

107 For the text of Article 12, paragraph 2, of the Statute, see note 86.

108 Kreß, *supra* note 97, pp. 2668-2670. See also Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, fourth edition (Oxford University Press, 2020), p. 324.

109 It should be noted, however, that how the meanings of the phrases "an existing international obligation" in Article 90, paragraph 6, of the Statute and "an existing fundamental legal principle" in Article 93, paragraph 3 thereof are temporally limited is not self-evident, and that the meaning of the word "existing" in these provisions has to be explored according to the rules formulated in the VCLT.

110 See notes 46 and 48, and accompanying text.