

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 (IV)

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Journal of International Relations and Comparative Culture

Vol. 22, No. 2 (March 2024)

【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 (IV)

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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 (Continued)

1. Interpretation of Article 98, Paragraph 2, of the Statute (Continued)

(D) Meaning of the Phrase "a person of 'the sending State'"

Fourthly, with regard to the meaning of the phrase "a person of that State [=the sending State]" in Article 98, paragraph 2, of the Statute, the following three issues have been raised. The first is whether this phrase covers only a national of the sending State. For example, Salvatore Zappalà contends that "Article 98 (2) must be interpreted to the effect that it allows States Parties to make the transfer of a third State's national to the ICC contingent upon the consent of that third State, provided, however, that the third State actually investigates and prosecutes"¹¹¹. On the contrary, Benzing claims that this phrase "cannot be interpreted as requiring that the person concerned be a national of the sending state"¹¹².

In light of the VCLT's rules concerning the interpretation of treaties explained above, it is clear that the word "person" means persons in general, as the word "national" is used in other provisions of the Statute¹¹³. Although most of the people who are covered by Article 98, paragraph 2, of the Statute might be nationals of the sending state, it should be noted that the scope of application of this paragraph also includes those who

¹¹¹ Zappalà, *supra* note 9, p. 129.

¹¹² Benzing, *supra* note 87, p. 213. See also O'Keefe, *supra* note 9, p. 576; Kreß, *supra* note 97, p. 2668.

¹¹³ See e.g., Article 12, paragraph 2, of the Statute (see note 86).

have not obtained nationality from such a state.

The second issue is which state is able to benefit from Article 98 Agreements, i.e. which state can be qualified as "the sending State" the consent for surrender of which is required under Article 98, paragraph 2, of the Statute. For example, the Human Rights Watch, which is a well-known international non-governmental organisation, claims that "[o]nly state parties can benefit from an agreement that allows them first chance at prosecuting their own nationals for ICC crimes committed on the territory of another state. While Human Rights Watch does not favor such agreements, such a jurisdiction-routing mechanism is consistent with the overall goals of the Rome Statute to ensure that crimes covered by the ICC Statute are prosecuted by national courts subject to ICC scrutiny or by the ICC itself. Such agreements would still respect this guarantee against impunity, which is fundamental to the Rome Statute"¹¹⁴. In contrast, Dapo Akande cleverly argues that "[a]t least three reasons demonstrate the importance of construing Article 98 (2)—like Article 98 (1)¹¹⁵—as benefiting only nonparties. Firstly, the reasons described above for so construing Article 98 (1)¹¹⁶ also apply to agreements covered by Article 98 (2), which confer immunity based on official capacity (e.g., SOFAs). Secondly, the significant degree of overlap in the two provisions suggests that they must be given similar interpretations. The overlap arises because treaties conferring state or diplomatic immunities clearly fall within the language of Article 98 (2). Whatever the intent of the drafters of the ICC Statute, it cannot be doubted that the Vienna Convention on Diplomatic Relations of 1961 and the UN Convention on Special Mission of 1969 are 'international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court'. Thus, if Article 98 (2) is not limited to nonparties, the limitation of Article 98 (1) to nonparties would easily be avoided by relying on Article 98 (2) instead. Thirdly, interpreting Article 98 (2) as extending to ICC parties while Article 98 (1) does not would lead to the manifestly absurd result that troops of parties and extradited persons may not be surrendered to the ICC (because of the SOFAs and extradition agreements covered by Article 98 (2)) but that a serving head of state, head of government, or foreign minister who goes to visit those troops in the same country (or the head of the diplomatic mission) has no immunity and may be surrendered to the ICC. Thus, an interpretation of Article 98 (2)

114 Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements (September 2002), at <https://www.hrw.org/legacy/campaigns/icc/docs/art98analysis.htm> (as of 31 December 2023).

115 For the text of Article 98, paragraph 1, of the Statute, see note 17.

116 See Akande, *supra* note 103 ("International Law Immunities"), pp. 421-426.

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in context, that is, in the light of the interpretation given to 98 (1), must lead to the conclusion that only agreements for the benefit of nonparties to the ICC Statute come within the scope of Article 98 (2)"¹¹⁷.

However, neither of these restrictive interpretations can be accepted. As mentioned in sub-subsection (B) of this subsection, it is clear that the word "State" in Article 98, paragraph 2, of the Statute means states in general regardless of whether it is used in the term "the requested State" or in the term "the sending State". Akande also admits that "it is more difficult to interpret the wording of Article 98 (2) as applying only to agreements concluded by nonparties. Since that provision prevents requests for surrender that 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', it does not explicitly exclude agreements concluded by parties. In addition, while obligations under the Statute (such as those in Article 27¹¹⁸) are part of the 'obligations under international law' of state parties and can therefore be taken into account under Article 98 (1), it may be argued that Article 98 (2) only requires consideration of the obligations under other international agreements and not under the Statute"¹¹⁹.

The third issue is how the word "sending" in Article 98, paragraph 2, of the Statute is interpreted, in particular whether or not it covers extradition. For example, Akande contends that "Article 98 (2) uses the term 'sending state' and envisages a situation in which it is a state that has sent or transferred a person to another state on an official mission or for some other purpose. This is evident not only from the ordinary meaning of the term but from the fact that the term was derived from Status of Forces Agreements (SOFAs), which define the legal position of troops and related personnel of one state which are placed in another state. Thus, the term 'sending state' cannot be intended to cover any person on the territory of another state on private business. Therefore, the US agreements as currently worded are not consistent with Article 98 (2). [...] Even though the drafters of Article 98 (2) ICCSt. were primarily concerned with

117 *Ibid.*, pp. 428-429. See also Kreß, *supra* note 97, p. 2666.

118 Article 27 of the Statute, entitled "Irrelevance of official capacity", stipulates the following:

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.
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.

119 Akande, *supra* note 103 ("International Law Immunities"), p. 428.

SOFAs, the wording of that provision is such that it cannot be confined to those types of agreements. It should be noted that there is no restriction in that provision of the purposes for which a person may be sent by one state to another. Therefore, that provision must also be interpreted as extending to extradition agreements which provide that a person who has been extradited from one state to another may not be reextradited to a third state without the consent of the first state"¹²⁰. However, Crawford, Sands and Wilde doubt if this word covers extradition, asserting that "the reference to the term 'sending State' in Article 98 (2) suggests that the first class of agreements identified in the Triffterer commentary"¹²¹ [=extradition treaties] may not have been intended to have been covered"¹²².

According to the general rule of interpretation prescribed in Article 31 of the VCLT, the word "sending" in Article 98, paragraph 2, of the Statute is interpreted so as to cover extradition, as the meaning of the word "send" includes not only "[t]o commission, order, or request (a person) to go to or into a place or to a person" but also "[t]o cause (a person) to be carried or conducted to a destination"¹²³. Moreover, in light of the supplementary means of interpretation prescribed in Article 32 of the VCLT, this relatively wide interpretation can be confirmed by the fact that, as mentioned in the previous sub-subsection, extradition treaties were explicitly referred to in the drafting process.

Therefore, it can be said that, as the EU Guiding Principles quoted in subsection 2 of section 2 of the previous chapter assert that "[a]ny solution should cover only persons present on the territory of a requested State because they have been sent by a sending State", the ICC is able to make requests for surrender of some nationals of the parties to Article 98 Agreements, such as businesspeople and tourists¹²⁴, to the extent that these agreements conform to Article 98, paragraph 2, of the Statute in other respects. It can also be added that the word "sending" in this paragraph covers extradition, though the EU Guiding Principles' assertion that "any solution should only cover persons who are

120 Akande, *supra* note 103 ("The Jurisdiction"), pp. 643-645. See also Zappalà, *supra* note 9, pp. 124, 129-130; Akande, *supra* note 103 ("International Law Immunities"), pp. 426-427; David A. Tallman, "Catch 98 (2): Article 98 Agreements and the Dilemma of Treaty Conflict," *Georgetown Law Journal*, Vol. 92, Iss. 5 (2004), pp. 1046-1048; Scheffer, *supra* note 37, pp. 345-350; Kreß, *supra* note 97, pp. 2666-2668.

121 See note 34 and accompanying text.

122 Crawford, Sands and Wilde, *supra* note 47, pp. 19-21, esp. p. 19. See also Coulée, *supra* note 9, pp. 62-63; Benzing, *supra* note 87, pp. 210-213; van der Wilt, *supra* note 103, pp. 104-105; O'Keefe, *supra* note 9, pp. 576-577.

123 John. A. Simpson and Edmund S. C. Weiner (prepared by), *The Oxford English Dictionary*, second edition, Vol. 14 (Clarendon Press, 1989), p. 966.

124 For the personal scope of application of Article 98 Agreements, see Article 1 of the Article 98 Agreement with Uzbekistan quoted in subsection 1 of section 2 of the previous chapter.

not nationals of an ICC State Party" cannot be justified by the interpretation of the phrase "a person of that State [=the sending State]".

(E) Necessity for the Obligation to Investigate and Prosecute?

Lastly, without referring to any particular word or phrase in Article 98, paragraph 2, of the Statute, some scholars argue that Article 98 Agreements are inconsistent with the Statute because they do not provide for the obligation to investigate and prosecute. For example, Zappalà claims that "[a]s the main objective of the ICC Statute is 'to put an end to impunity'¹²⁵, the only interpretation that makes Article 98 Agreements consistent with the object and purpose of the ICC Statute is that they must ensure that alleged perpetrators be brought to justice" and that "the mere 'intention' expressed by the US to investigate and to prosecute international crimes 'where appropriate'¹²⁶ is not sufficient"¹²⁷. The EU Guiding Principles quoted in subsection 2 of section 2 of the previous chapter also state that "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". On the contrary, Crawford, Sands and Wilde contend that "[i]n our view no such requirement [=a requirement to investigate or prosecute] can be read into Article 98 (2)"¹²⁸.

The above-mentioned argument based solely on the object and purpose of the Statute cannot be accepted because, as explained in sub-subsection (B) of this subsection, 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. Therefore, it can be said that, although they do not provide for the obligation to investigate and prosecute, Article 98 Agreements 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.

(F) Summary of Subsection 1, and the Interpretation of Pre-existing SOFAs and Extradition Treaties

125 For the text of the Preamble of the Statute, see note 105.

126 See the Preamble of the Article 98 Agreement with Uzbekistan quoted in subsection 1 of section 2 of the previous chapter.

127 Zappalà, *supra* note 9, pp. 123-125, 129-131, esp. pp. 124, 131. See also Jayaraj, *supra* note 47, p. 505; van der Wilt, *supra* note 103, p. 107.

128 Crawford, Sands and Wilde, *supra* note 47, p. 21.

This subsection has discussed the five key points of the interpretation of Article 98, paragraph 2, of the Statute to analyse the consistency of Article 98 Agreements with Statute. It can be seen from these discussions that, if the Statute and Article 98 Agreements are applicable at the same time, the ICC can make requests for surrender of any national of the parties to Article 98 Agreements except those who they have sent for some purpose including extradition. In the next subsection, the matter of applicability of the Statute and Article 98 Agreements will be fully discussed.

While Article 98 Agreements and other treaties¹²⁹ have been concluded bearing in mind Article 98, paragraph 2, of the Statute since the Rome Conference, there is a scholarly dispute as to whether this provision covers pre-existing SOFAs. For example, Dieter Fleck claims that "[t]he relevant provision of NATO SOFA, Article VII on Jurisdiction and Military Police¹³⁰, which is widely used as a model even beyond the NAA [=the

129 For example, Article 4 of the Arrangements Regarding the Status of the International Security Assistance Force (hereinafter referred to as "the ISAF SOFA"), which is annexed to the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ("Interim Administration"), stipulates the following:

The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, *an international tribunal* or any other entity or State without the express consent of the contributing nation. (International Security Assistance Force (ISAF)-Interim Administration of Afghanistan ("Interim Administration"): Military Technical Agreement (4 January 2002), *International Legal Materials*, Vol. 41, Iss. 5 (2002), pp. 1035-1036, with emphasis added)

For the information on the ISAF's mission, see https://www.nato.int/cps/en/natohq/topics_69366.htm (as of 31 December 2023).

130 Article 7, paragraphs 2, 3 and 5 of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (hereinafter referred to as "the NATO SOFA") stipulate the following:

2. a. The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
- b. The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending state.
- c. [...]
3. In case where the right to exercise jurisdiction is concurrent the following rules shall apply:
 - a. The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
 - i. offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
 - ii. offences arising out of any act or omission done in the performance of official duty.
 - b. In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.
 - c. If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the

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North Atlantic Alliance], is limited to issues of national rather than international jurisdiction and it neither restricts nor excludes a surrender to the ICC"¹³¹. On the contrary, Akande contends that "there are provisions within the NATO SOFA which may be viewed as implicitly precluding surrender of personnel stationed abroad to an international court where the sending state has exclusive or primary concurrent jurisdiction over a crime"¹³². These include provisions (such as Article VII (5) NATO SOFA¹³³) which require the receiving state to assist in arrest and surrender to the sending state where the latter has exclusive or primary concurrent jurisdiction. Likewise, Article VII (3) (c)¹³⁴ implies that even in cases where the sending state has primary concurrent jurisdiction and has chosen not to exercise it, the receiving state requires the consent of the sending state in order to take action against a member of the sending state's personnel. Article 98 (2) will therefore apply to these circumstances. However, where the receiving state has exclusive jurisdiction¹³⁵, it is free to prosecute or to transfer to the ICC"¹³⁶. Moreover, in respect of extradition treaties, Akande asserts that the European Convention on Extradition (hereinafter referred to as "the ECE")¹³⁷, which was concluded

primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other state considers such waiver to be of particular importance.

4. [...].

5. a. The authorities of the receiving and sending states shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

b. [...].

c. [...].

131 Fleck, *supra* note 103, pp. 657-658. See also Jordan J. Paust, "The Reach of ICC Jurisdiction over Non-Signatory Nationals," *Vanderbilt Journal of Transnational Law*, Vol. 33, No. 1 (2000), p. 14; van der Wilt, *supra* note 103, p. 102.

132 The sending state's exclusive jurisdiction is granted under Article 7, paragraph 2 (a), of the NATO SOFA while its primary concurrent jurisdiction under Article 7, paragraph 3 (a) (see note 130).

133 See note 130.

134 See note 130.

135 The receiving state's exclusive jurisdiction is granted under Article 7, paragraph 2 (b), of the NATO SOFA (see note 130).

136 Akande, *supra* note 103 ("The Jurisdiction"), p. 644. See also *id.*, *supra* note 103 ("International Law Immunities"), pp. 426-427; Scheffer, *supra* note 37, p. 340.

137 Article 15 of the ECE, entitled "Re-extradition to a third state", stipulates the following:

Except as provided for in Article 14, paragraph 1.b, the requesting Party shall not, without the consent of the requested Party, surrender to another Party or to a third State a person surrendered to the requesting Party and sought by the said other Party or third State in respect of offences committed before his surrender. The requested Party may request the production of the documents mentioned in Article 12, paragraph 2.

For the information on the signatures and ratifications of the ECE, see

<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=024>

(as of 31 December 2023).

in 1957, is covered by Article 98, paragraph 2, of the Statute¹³⁸.

In light of the VCLT's rules concerning the interpretation of treaties, it can be said that Akande's interpretation of Article 7 of the NATO SOFA is valid, as the phrase "the consent of a sending State is required [...]" in Article 98, paragraph 2, of the Statute is interpreted to include the cases where the wrongfulness of surrender to the ICC can be precluded by the consent of the sending state. Article 31 of the VCLT quoted in full in sub-subsection (A) of this subsection declares that "[t]here shall be taken into account, together with the context: [...] (c) any relevant rules of international law applicable in the relations between the parties", which include a customary rule of the international law of state responsibility such as that concerning the circumstances precluding wrongfulness^{139 140}. However, it seems impossible to accept his assertion about extradition treaties, as Article 15 of the ECE explicitly mentions "to another Party or to a third State" and cannot be interpreted to prohibit surrender to the ICC¹⁴¹.

Furthermore, it should be added that there are some scholars who address the matter of the ICC's power to solve the disputes over the interpretation of Article 98, paragraph 2, of the Statute, though they agree that it has such power in relation to actual and potential requests for surrender. For example, Crawford, Sands and Wilde claim that "[f]or present purposes, a 'dispute' within the meaning of Article 119 (1)¹⁴² would relate

138 Akande, *supra* note 103 ("The Jurisdiction"), p. 645. See also *id.*, *supra* note 103 ("International Law Immunities"), pp. 426-427.

139 Article 20 of the articles on "Responsibility of States for internationally wrongful acts" (hereinafter referred to as "the ARSIWA", which is annexed to the UN General Assembly Resolution 56/83, stipulates the following:

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

For the customary law nature of Article 20 of the ARSIWA, see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), pp. 163-165; Affef Ben Mansour, "Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent," in James Crawford, Alain Pellet, and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), pp. 439-447.

140 To avoid misapprehension, it should, however, be added that there does not seem to be any scholar who has discussed whether SOMAs are covered by Article 98, paragraph 2, of the Statute. For an explanation of the relationship between the term "SOFAs" and "SOMAs", see note 33.

141 For the text of Article 15 of the ECE, see note 137.

142 Article 119 of the Statute, entitled "Settlement of disputes", declares the following:

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

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to the question of whether or not a potential request by the ICC would be precluded by a bilateral non-surrender agreement: the 'judicial function' of the ICC in issue would be the making of a request. As indicated above, the effect of the Article is that any dispute concerning the exercise of this function-whether arising at the time a request is being contemplated by the Court, or after such request has been made-is to be settled by the Court itself"^{143 144}.

In light of the supplementary means of interpretation prescribed in Article 32 of the VCLT, it is clear that those scholars' arguments are compelling, as Tuiloma Slade and Roger Clark, who actively participated in the drafting process of Article 119 of the Statute, state that "[o]ur understanding from participating in the drafting process is that, at the least, anything that could be said to have some relationship, however tenuous, to *prosecution of an individual or a group of individuals on the basis of a concrete complaint of a breach of the Statute* would be included in the notion of 'judicial functions'" [emphasis added]¹⁴⁵.

143 Crawford, Sands and Wilde, *supra* note 47, pp. 26-27. See also Coulée, *supra* note 9, p. 69; Benzing, *supra* note 87, pp. 199-200; Scheffer, *supra* note 37, p. 352.

144 Moreover, Crawford, Sands and Wilde contend that "Article 119 (2) refers to disputes relating to the interpretation or application of the Statute, other than those concerning the judicial functions of the Court, between two or more States Parties. For present purposes, such a dispute would relate not to whether or not the Court was obliged to respect the agreements, but the distinct question of whether or not the conclusion (or possibly the maintenance) of such an agreement by a State Party was contrary to the ICC Statute". Crawford, Sands and Wilde, *supra* note 47, p. 27. See also Coulée, *supra* note 9, p. 69. For the text of Article 119, paragraph 2, of the Statute, see note 142.

145 Tuiloma Neroni Slade and Roger S. Clark, "Preamble and Final Clauses," in Lee (ed.), *supra* note 32, p. 430. Tuiloma Slade was the head of the Samoa delegation to the Rome Conference and Coordinator for the Preamble and Final Clauses of the Preparatory Committee's Draft Statute, and Roger Clark was Advisor to the same delegation. The list of Coordinators for the various sections of the Preparatory Committee's Draft Statute was announced at the CoW's 6th meeting (on 18 June 1998). U.N. Doc. A/CONF. 183/13 (Vol. II), p. 170, para. 1 (Kirsch, the Chairman).