

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 (I)

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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 (I)¹

Yoshiaki KITANO

Chapter 1 Introduction

1 July 2022 marks the 20th anniversary of the establishment of the International Criminal Court (hereinafter referred to as "the ICC"), i.e. the entry into force of the Rome Statute of the International Criminal Court (hereinafter referred to as "the Statute")². The Statute was adopted in July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter referred to as "the Rome Conference"), and no less than 123 countries are currently parties to it³.

In contrast, as is well known, the US voted against the Statute at the final plenary meeting of the Rome Conference. After the adoption of the Statute by a non-recorded vote, the US stated the following:

1 This paper is a revised version of the author's previous article written in Japanese. Yoshiaki Kitano, "Kokusai keiji saibansho to iwayuru 98 jou kyoutei [The International Criminal Court and So-Called 'Article 98 Agreements'] (I) (II) (III)," *Hogakuronso [Kyoto Law Review]*, Vol. 168, No. 1 (2010), pp. 1-22, Vol. 168, No. 3 (2010), pp. 1-25, Vol. 168, No. 5 (2010), pp. 27-42.

2 See Article 126 of the Statute, which is entitled "Entry into force" and stipulates the following:

1 This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2 For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

3 See <https://asp.icc-cpi.int/states-parties> (as of 15th June 2022).

[H]e [=the speaker] did not accept the concept of universal jurisdiction as reflected in the Statute of the International Criminal Court, or the application of the treaty to non-parties, their nationals or officials, or to acts committed on their territories. The only way to bring non-parties within the scope of the regime was through the mandatory powers of the Security Council under the Charter of the United Nations. For those reasons, he [=the speaker] had voted against the Statute⁴.

It can be seen from this statement that the US had serious doubts about the legality of the ICC's exercise of jurisdiction over the cases involving states non-party to the Statute (hereinafter referred to as "non-party states"), which has been discussed by a large number of scholars in international law⁵.

Moreover, since the closure of the Rome Conference, the US has not only refused to become a party to the Statute, but has also taken three kinds of measures to restrict the ICC's activities involving non-party states. Firstly, the UN Security Council Resolution 1422 (2002)⁶ was adopted on 12 July 2002 as a result of US pressure including the exercise of veto over the proposed extension of the mandate of the United Nations Mission in Bosnia and Herzegovina (UNMIBH)⁷. The relevant part of it reads as follows:

The Security Council,

[...]

1. Requests, consistent with the provisions of Article 16 of the Rome Statute⁸, 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;

4 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 123, para. 28 (United States of America).

5 See Yoshiaki Kitano, "The Legal Basis for the Exercise of Jurisdiction by the International Criminal Court and the Preparatory Work of the Rome Statute (II) (III)," *Journal of International Relations and Comparative Culture*, Vol. 17, No. 1 (2018), pp. 37-48, Vol. 17, No. 2 (2019), pp. 55-64, and the references cited therein.

6 Note that this paper does not refer to the document symbols of UN General Assembly resolutions and UN Security Council resolutions.

7 UN. Doc. S/PV. 4563, p. 3.

8 Article 16 of the Statute, entitled "Deferral of investigation or prosecution", stipulates the following:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

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The UN Security Council also adopted Resolution 1487 (2003) on 12 June 2003, the wording of which was exactly the same as Resolution 1422 (2002) except that the twelve-month period of deferral started "1 July 2003". Several international lawyers have raised questions about the consistency of these resolutions with Article 16 of the Statute and the UN Charter⁹, but in any case no similar resolution has been adopted since 2004¹⁰.

9 See Zsuzsanna Deen-Racsmany, "The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?," *Netherlands International Law Review*, Vol. 49, Iss. 3 (2002), pp. 353-388; Robert Cryer and Nigel D. White, "The Security Council and the International Criminal Court: Who's Feeling Threatened?," *International Peacekeeping: The Yearbook of International Peace Operations*, Vol. 8 (2003), pp. 143-170; Carsten Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)," *European Journal of International Law*, Vol. 14, No. 1 (2003), pp. 85-104; Salvatore 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*, Vol. 1, Iss. 1 (2003), pp. 117-121; Olufemi Elias and Anneliese Quast, "The Relationship between the Security Council and the International Criminal Court in the Light of Resolution 1422 (2002)," *Non-State Actors and International Law*, Vol. 3, Iss. 2 (2003), pp. 165-185; Markus Wagner, "The ICC and its Jurisdiction - Myths, Misperceptions and Realities," *Max Planck Yearbook of United Nations Law*, Vol. 7 (2003), pp. 497-504; Frédérique Coulée, "Sur un État tiers bien peu discret : les États-Unis confrontés au statut de la Cour pénale internationale," *Annuaire français de droit international*, Vol. 49 (2003), pp. 51-57; Claudia Fritsche, "Security Council Resolution 1422: Peacekeeping and the International Criminal Court," in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum (eds.), *Verhandeln für den Frieden - Negotiating for Peace: Liber Amicorum Tono Eitel* (Springer, 2003), pp. 107-120; Andreas Zimmermann, "'Acting under Chapter VII (...) - Resolution 1422 and Possible Limits of the Powers of the Security Council,'" in Frowein, Scharioth, Winkelmann and Wolfrum (eds.), *supra* note 9, pp. 253-278; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003), p. 180; Neha Jain, "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court," *European Journal of International Law*, Vol. 16, No. 2 (2005), pp. 240-254; Roland Adjovi, "Le Conseil de sécurité des Nations unies et la Cour pénale internationale," *African Yearbook of International Law*, Vol. 13 (2005), pp. 202-209; Ioannis Prezas, "La justice pénale internationale à l'épreuve du maintien de la paix : A propos de la relation entre la Cour pénale internationale et le Conseil de sécurité," *Revue belge de droit international*, No. 2006/1 (2006) pp. 88-91; Anne Peters, "Article 24," in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary*, third edition (Oxford University Press, 2012), p. 785; Nico Krisch, "Article 41," in Simma, Khan, Nolte and Paulus (eds.), *supra* note 9, p. 1321; Juliet Okoth, "Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals," in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court* (T.M.C. Asser Press, 2014), pp. 200-202; Deborah Ruiz Verduzco, "The Relationship between the ICC and the United Nations Security Council," in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), p. 57; Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015), pp. 549-550; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, second edition (Oxford University Press, 2016), pp. 437-441; Nigel D. White, *The Law of International Organisations*, third edition (Manchester University Press, 2017) pp. 39, 152, 253-254; Yassin M. Brunger, "Article 16," in Mark Klamburg (ed.), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher, 2017), pp. 201-203; Dame Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran and James Sloan, *Oppenheim's International Law: United Nations* (Oxford University Press, 2017), pp. 1331-1332; Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, fourth edition (Cambridge University Press, 2019), pp. 153-154, 166, 555; William A. Schabas, *An Introduction to the International Criminal Court*, sixth edition (Cambridge University Press, 2020), pp. 28-29, 177-179.

10 In 2004, the US put forward a proposal for deferral once more, but withdrew it because the majority necessary to approve it could not be obtained as the abuses committed by US officials in Abu Ghraib prison (in Iraq) provoked severe criticism. Warren Hoge, "The Reach of War: War Crimes; U.S. Drops Plan

Secondly, the UN Security Council Resolution 1497 (2003), which was adopted on 1 August 2003 based on the US proposal¹¹, was intended to restrict the ICC's exercise of jurisdiction without invoking Article 16 of the Statute. The relevant part of it reads as follows:

The Security Council,

[...]

1. Authorizes Member States to establish a Multinational Force in Liberia to support the implementation of the 17 June 2003 ceasefire agreement [...], and to prepare for the introduction of a longer-term United Nations stabilization force to relieve the Multinational Force;

[...]

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;

There has been considerable debate among scholars about the legal effect of operative paragraph 7 of this resolution on the ICC¹². Both the multinational force and UN stabilization force in Liberia have already completed their mandates¹³, while paragraphs similar to the above-mentioned operative paragraph 7 have been inserted into the UN

to Exempt G.I.'s from U.N. Court," *The New York Times*, 24th June 2004, at <https://www.nytimes.com/2004/06/24/world/the-reach-of-war-war-crimes-us-drops-plan-to-exempt-gi-s-from-un-court.html> (as of 18 June 2022). See also, Frederic L. Kirgis, "U.S. Drops Plan to Exempt G.I.'s from U.N. Court," *ASIL Insights*, Vol. 8, Iss. 15 (2004), at <https://www.asil.org/insights/volume/8/issue/15/us-drops-plan-exempt-gis-un-court> (as of 18 June 2022).

11 U.N. Doc. S/2003/784.

12 See Salvatore Zappalà, "Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC," *Journal of International Criminal Justice*, Vol. 1, Iss. 3 (2003), pp. 671-678; Coulée, *supra* note 9, pp. 57-58; Jain, *supra* note 9, pp. 240-254; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), pp. 110-111; Krisch, *supra* note 9, p. 1321; Okoth, *supra* note 9, p. 201; Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, third edition (Cambridge University Press, 2014), pp. 174-175; O'Keefe, *supra* note 9, pp. 550-551; Higgins, Webb, Akande, Sivakumaran and Sloan, *supra* note 9, pp. 1331-1332; Schabas, *supra* note 9 ("An Introduction"), pp. 71-72.

13 The stabilization force mentioned here was established by the UN Security Council Resolution 1509 (2003) under the name of "the United Nations Mission in Liberia (UNMIL)", and operated until March 2018. See <https://unmil.unmissions.org/> (as of 22 June 2002).

Security Council Resolutions 1593 (2005) and 1970 (2011), by which the Council decided to refer situations in Darfur (in Sudan) and Libya to the Prosecutor of the ICC respectively¹⁴.

Lastly, the US has also been trying to prevent the ICC's exercise of jurisdiction over its officials and nationals by concluding bilateral treaties which are drawn up bearing in mind Article 98, paragraph 2, of the Statute¹⁵, and collectively called "Article 98 Agreements"¹⁶. Although they have been signed by a substantial number of countries, quite a few international lawyers have discussed their consistency with the Statute and the issues of the law of treaties relating to them.

This paper aims to explore if and when Article 98 Agreements restrain the ICC's activities by fully analysing their consistency with the Statute and the related issues of the law of treaties. Moreover, the findings of this analysis can apply, *mutatis mutandis*, to extradition treaties and status of forces agreements (hereinafter referred to as "SOFAs"), which, as will be shown in the next chapter, were explicitly mentioned in the drafting process of Article 98, paragraph 2, of the Statute. In light of the fact that extradition treaties and SOFAs are quite common, it can be said that this paragraph could have a significant impact on the ICC's future activities.

Chapter 2 General Description of Article 98, paragraph 2, of the Statute and Article 98 Agreements

Section 1 Article 98, paragraph 2, of the Statute

1. Provision

14 For example, in operative paragraph 6 of the former resolution, the Council decided that "nationals, current or former officials or personnel from a contributing State outside Sudan 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 operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State". After the adoption of this resolution, the US stated that "[w]e decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties. [...] In the Darfur case, the Council included, at our request, a provision that exempts persons of non-party States in the Sudan from ICC prosecution". U.N. Doc. S/PV. 5158, pp. 3-4 (United States of America).

15 The Office of the Legal Adviser of the US Department of State has revealed that "[d]uring the debate over Resolution 1422, several U.S. allies had suggested to the United States privately that its concerns for its peacekeepers could be resolved via article 98(2) of the Rome Statute". Sally J. Cummins and David P. Stewart (eds.), the Office of the Legal Adviser of the United States Department of State, *Digest of United States Practice in International Law 2002* (International Law Institute, 2003), p. 165.

16 See <https://2001-2009.state.gov/t/pm/art98/index.htm> (as of 23 June 2022).

Article 98 of the Statute is entitled "Cooperation with respect to waiver of immunity and consent to surrender", paragraph 2 of which declares the following:

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 surrender¹⁷.

With regard to "a request for surrender" mentioned in Article 98, paragraph 2, of the Statute, Article 89 of the Statute is entitled "Surrender of persons to the Court", paragraph 1 of which declares the following:

The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

Thus, although state parties to the Statute (hereinafter referred to as "state parties") are obliged to comply with the ICC's requests for arrest and surrender, it cannot make such requests to the states which have concluded Article 98 Agreements with the US to the extent that they conform to Article 98, paragraph 2, of the Statute.

2. Drafting Process

At the beginning of the Rome Conference held in 1998, its plenary, after settling organisational matters like the adoption of the draft organization of work¹⁸, heard general statements on substantive matters from states, international organisations and non-

17 On the other hand, Article 98, paragraph 1, of the Statute, which has no relevance to Article 98 Agreements, stipulates the following:

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.

18 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 64, paras. 5-6.

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governmental organisations from its 2nd meeting (on 15 June) to 8th meeting (on 19 June). However, none of these statements seem to have been relevant to Article 98, paragraph 2, of the Statute¹⁹.

On the other hand, the Committee of the Whole (hereinafter referred to as "the CoW"), which "should concentrate on the substantive work" according to the draft organization of work²⁰, decided to establish 5 working groups at its 2nd meeting (on 16 June)²¹ in addition to public debate from its 1st meeting (on 16 June) to 42nd meeting (on July 17). One of them, which was named "the Working Group on International Cooperation and Judicial Assistance" (hereinafter referred to as "the WG on Cooperation"), introduced, at the CoW's 22nd meeting (on 2 July), its report where the same provision as Article 98, paragraph 2, of the Statute was proposed²². However, the report offered no explanation about this proposal²³, nor does any statement made during the CoW's meetings seem to have been relevant to Article 98, paragraph 2, of the Statute²⁴.

Finally, at the 9th plenary meeting (on 17 and 18 July) where the Statute was adopted, no state, international organisation or non-governmental organisation mentioned Article 98, paragraph 2, of the Statute²⁵. Therefore, it can be said that official records of the Rome Conference do not reveal what was discussed concerning this paragraph.

Next, when thoroughly examining official records of the Statute's preparatory work prior to the Rome Conference²⁶, discussions of relevance to Article 98, paragraph 2, of the Statute can be found only in the reports of the Ad Hoc Committee on the Establishment of an International Criminal Court (hereinafter referred to "the Ad Hoc Committee") in 1995 and the Preparatory Committee on the Establishment of an International Criminal Court (hereinafter referred to as "the Preparatory Committee") between 1996 and 1998. The relevant part of the summary of the Ad Hoc Committee's discussions reads as follows:

203. The issue of competing treaty obligations was recognized as a particularly

19 *Ibid.*, pp. 64-121.

20 U.N. Doc. A/CONF. 183/13 (Vol. III), p. 92.

21 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 138, paras. 1-2.

22 U.N. Doc. A/CONF. 183/13 (Vol. III), p. 332.

23 For the whole text of the report, see *ibid.*, pp. 325-333.

24 U.N. Doc. A/CONF. 183/13 (Vol. II), pp. 131-362.

25 *Ibid.*, pp. 121-129.

26 For the outline of the Statute's preparatory work prior to the Rome Conference, see Yoshiaki Kitano, "The Legal Basis for the Exercise of Jurisdiction by the International Criminal Court and the Preparatory Work of the Rome Statute (IV)," *Journal of International Relations and Comparative Culture*, Vol. 18, No. 1 (2019), pp. 59-60.

difficult one. It was pointed out that the issue would not only relate to States' obligations under existing extradition treaties but also to the obligations under the status-of-forces agreements. [...]²⁷

218. Concerning other surrender issues, the importance of the question of competing treaty obligations was again emphasized. [...]²⁸

The relevant part of the summary of the Preparatory Committee's discussions in 1996 also reads as follows:

325. [...] It was further noted that the question of competing international obligations would arise in respect of apprehension or surrender where a person whom the requested State had secured from another State for offences unconnected with the Court was transferred to the Court without the consent of that State. [...]²⁹

It can be seen from these discussions that, in the preparatory work of the Statute, it was fully recognised that the obligation under the proposed Statute³⁰ to surrender a person to the proposed ICC should not compete with obligations under extradition treaties or SOFAs. However, as is well known, extradition treaties impose on states not only the above-mentioned obligation not to transfer an extradited person to the ICC, but also the obligation to extradite a person to the requesting state, which is dealt with by Article 90 of the Statute³¹. Therefore, it can be said that Article 98, paragraph 2, of the

27 U.N. Doc. A/50/22, p. 38, para. 203. No verbatim record of the Ad Hoc Committee was compiled by the UN.

28 *Ibid.*, p. 41, para. 218.

29 U.N. Doc. A/51/22 (Vol. I), p. 68, para. 325. No verbatim record of the Preparatory Committee was compiled by the UN. Moreover, the summary of the Committee's discussions was produced in 1996 while no official record of any kind in 1997 or 1998.

30 In this paper, when dealing with the preparatory work of the Statute, the court whose establishment was proposed therein is referred to as "the proposed ICC" and its statute also "the proposed Statute".

31 Article 90 of the Statute, entitled "Competing requests", stipulates the following:

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.
2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:
 - (a) [...]; or
 - (b) [...].
3. [...].
4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

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Statute was drawn up to prevent the obligation to surrender a person to the ICC from competing with obligations under extradition treaties and SOFAs other than the obligation dealt with by Article 90 thereof⁶².

Furthermore, the explanations about Article 98, paragraph 2, of the Statute written by some participants in the Rome Conference (which they state are their own personal views) can be divided into three categories depending on what types of treaties they refer to. Firstly, Hans-Peter Kaul and Claus Kreß, both of whom were members of the German delegation, allude to only SOFAs, arguing the following:

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5. [...].
6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:
- (a) [...];
 - (b) [...]; and
 - (c) [...].
7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:
- (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
 - (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.
8. [...].
- 32 The Preparatory Committee adopted in April 1998 the Draft Statute for the International Criminal Court (hereinafter referred to as "the Preparatory Committee's Draft Statute", which was considered in the Rome Conference. With regard to "the question of competing international obligations" mentioned in the reports of the Ad Hoc Committee and Preparatory Committee, "Option 2" for Article 87, paragraph 3, of the Preparatory Committee's Draft Statute stipulated the following:
- State Party may deny a request for [surrender] [transfer] [extradition] only if:
- [...]
- (e) Compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State.
- (U.N. Doc. A/CONF. 183/13 (Vol. III), p. 68)

However, Phakiso Mochochoko, who was not only a member of the delegation of Lesotho to the Preparatory Committee and Rome Conference but also worked as chairperson of the WG on Cooperation in the Rome Conference, claims that "[t]he remaining two grounds contained in sub-paragraphs (d) and (e) of Article 87 (3) were incorporated into the provisions now contained in Articles 91 and 90 of the Rome Statute", without referring to Article 98, paragraph 2, of the Statute. Phakiso Mochochoko, "International Cooperation and Judicial Assistance," in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, 1999), p. 312. It seems from this explanation that, when drawing up the Preparatory Committee's Draft Statute, the Preparatory Committee did not bear clearly in mind the obligations under extradition treaties and SOFAs other than the obligation to extradite a person to the requesting state.

Article 98 (2) technically operates in the same way as paragraph 1. And again, a reasonable interpretation is called for. The idea behind the provision was to solve legal conflicts which might arise because of Status of Forces Agreements which are already in place. On the contrary, Article 98 (2) was not designed to create an incentive for (future) States Parties to conclude Status of Forces Agreements which amount to an obstacle to the execution of requests for cooperation issued by the Court. It is unfortunate that, due to a lack of time this point [...] is not spelled out with sufficient clarity³³.

Secondly, Kimberly Prost of the Canadian delegation, Angelika Schlunck of the German delegation, Frederik Harhoff of the Danish delegation, and Phakiso Mochochoko of the Lesotho delegation mention extradition treaties as well as SOFAs, claiming the following:

All States participating in the negotiations in Rome had concerns about conflicts with existing international obligations. Thus, there are several provisions within Part 9, including those in articles 90, 93 para. 9 and 98 which address that concern. [...]

The provision [=Article 98, paragraph 2, of the Statute] pertains to those cases where, for instance, a person in custody of the requested State, was extradited, surrendered or transferred to that State from a third State under the condition to be returned upon the termination of the investigation or prosecution or the execution of a sentence. This may arise because generally such a protection against re-extradition is provided for in most bilateral extradition treaties. The provision was also crafted in recognition of the provisions of Status of Forces agreements, where members of

33 Hans-Peter Kaul and Claus Kreß, "Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises," *Yearbook of International Humanitarian Law*, Vol. 2 (1999), p. 165. Similarly, during a General Assembly's meeting held in October 2002, Liechtenstein stated that "[a]ttempts had also been made to apply article 98 in a manner not provided for in the Statute. The negotiations had been based on the assumption that article 98 would apply solely to status-of-mission and status-of-forces agreements, and was not intended to create a loophole of impunity for nationals of States which were not parties to the Statute. The proposed non-surrender agreements would undermine not only the integrity of the Court but also the very principle of territorial jurisdiction of States, of which the International Criminal Court was an extension, and also the jurisdiction of States over their own nationals, a fundamental principle which should not be undermined by any agreement concluded with States parties". U.N. Doc. A/C. 6/57/SR. 13, p. 6, para. 36 (Liechtenstein). It can be noted that in this statement status-of-mission agreements (hereinafter referred to as "SOMAs") were distinguished from SOFAs, while the term "SOFAs" is sometimes applied to SOMAs such as the Draft Model Status-of-Forces Agreement between the United Nations and Host Countries (hereinafter referred to as "the UN Draft Model SOFA". U.N. Doc. A/45/594, pp. 2-15.

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the armed forces of a third State may be present on the territory of the requested State³⁴.

What article 98 requires in paragraph 1 is that the Court may not ask a State to violate its international obligations in respect of immunity by requesting that State to surrender a person to the Court. Paragraph 2 of article 98 then goes on to extend the same principle to also cover respect for international legal obligations in extradition treaties or similar arrangements, such as Status of Forces Agreements (SOFAs), where the consent of the sending State is required for the transfer of the person to another State for prosecution or for other purposes. [...]³⁵

Lastly, David Sheffer, who was the head of the US delegation, refers not only to extradition treaties and SOFAs but also to a new type of treaty concluded allegedly in conformity with Article 98, paragraph 2, of the Statute, arguing the following:

[...] The use of the term 'sending State' derives from the original American effort, very early in the ICC negotiations, to preserve the rights accorded to its official personnel covered by status of forces agreements (SOFAs) between the United States and scores of foreign governments and status of mission agreements (SOMAs) that typically are negotiated in connection with United Nations or multinational military operations³⁶. [...]

[...]

34 Kimberly Prost and Angelika Schlunck, "Article 98," in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, 1999), pp. 1131, 1133.

35 Frederik Harhoff and Phakiso Mochochoko, "International Cooperation and Judicial Assistance," in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 665.

36 It can be noted in this regard that, during a General Assembly's meeting held in October 1994, the US stated that "States which had signed extradition treaties or status of forces agreements with the custodial State should have the right to reject the jurisdiction of the international court". U.N. Doc. A/C. 6/49/SR. 17, p. 13, para. 66 (United States of America). The reason why in this statement extradition treaties and SOFAs were directly related to the jurisdiction of the proposed ICC is that the UN International Law Commission (hereinafter referred to as "the ILC") adopted in July 1994 the Draft Statute for an International Criminal Court (hereinafter referred to as "the ILC's final Draft Statute"), Article 21 of which, entitled "Preconditions to the exercise of jurisdiction", stipulated the following:

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:

(a) In a case of genocide, a complaint is brought under article 25, paragraph 1;

(b) In any other case, a complaint is brought under article 25, paragraph 2, and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(i) By the State which has custody of the suspect with respect to the crime ("the custodial State");

(ii) By the State on the territory of which the act or omission in question occurred.

By the time of the Rome Conference, the language for Article 98 (2) had developed into a more generic text that covered 'persons' of a 'sending State', which clearly would cover persons sent officially by a state into a foreign jurisdiction under the authority of the sending State. The US delegation was very comfortable with that progression of text, as it strengthened the safeguard beyond where we had started the discussion in 1995 to incorporate, for example, the US diplomatic corps, Peace Corps workers, officials of the US Agency for International Development, and US civilian and military leaders who travel officially abroad. We recognized, however, that a SOFA or SOMA is limited in its coverage to the US military force and related civilian component covered by the particular agreement. So coverage of other personnel of the US government might require negotiation and conclusion of an Article 98 (2) international agreement that would cover the additional officials and personnel, and we anticipated doing so either with governments in jurisdictions where we believed the practical need was greatest for such protection or with the ICC directly if that proved possible³⁷.

[...] These experts also correctly conclude that Article 98 (2) is not limited to two categories of agreements (bilateral extradition treaties and SOFAs), but they also question whether bilateral extradition treaties necessarily conform to the 'sending State' terminology of Article 98(2). [...] The US delegation never denied this possibility (which would protect individuals the United States is willing to extradite to a foreign jurisdiction for prosecution) and, under heavy pressure from the US Senate, the Clinton Administration negotiated bilateral extradition treaties that prohibit surrender to the ICC of extradited individuals without prior US consent. But the US delegation focused its attention on SOFAs and future negotiated agreements pertaining to the deployment of military and official personnel on mission for the US Government³⁸.

These explanations will be examined in more detail when the consistency of Article 98 Agreements with the Statute is analysed in the next chapter.

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

(Yearbook of the International Law Commission, 1994, Vol. II (Part Two), p. 41)

37 David Scheffer, "Article 98(2) of the Rome Statute: America's Original Intent," *Journal of International Criminal Justice*, Vol. 3, Iss. 2 (2005), pp. 338-339.

38 *Ibid.*, pp. 340-341, note 13.