

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 (II)

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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 (II)

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Chapter 2 General Description of Article 98, Paragraph 2, of the Statute and Article 98 Agreements (Continued)

Section 2 Article 98 Agreements

1. Provisions and Parties

At first, the US was unwilling to disclose the information on Article 98 Agreements under the George W. Bush administration. In June 2003, the US stated that "[a] total of 38 countries have publicly announced that they have concluded Article 98 or Non-Surrender Agreements with the United States. The countries are Uganda, [...], and Thailand. Several other countries have signed agreements but have asked us not to identify them as signers. We are respecting their wishes"³⁹. In May 2005, it also announced that "[t]he United States welcomes the signing of the 100th Article 98 Agreement. On May 2, 2005, Angola became the 100th country to conclude such an agreement with the United States"⁴⁰, but did not list the names of those 100 countries which had concluded Article 98 Agreements. Moreover, the *Treaties and Other International Acts Series* (hereinafter referred to as "the TIAS"), through which the US Department of State compiles and publishes the texts of treaties and international agreements to which the US is a party⁴¹, did not include any text of Article 98

39 The US Department of State, *Countries Who Have Signed Article 98 Agreements with the United States* (Question Taken at 12 June 2003 Press Briefing), at <https://2001-2009.state.gov/r/pa/prs/ps/2003/21539.htm> (as of 31 December 2022).

40 The US Department of State, *U.S. Signs 100th Article 98 Agreement* (3 May 2005), at <https://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm> (as of 31 December 2022).

41 See <https://www.state.gov/texts-of-agreements/> (as of 31 December 2022).

Agreements⁴².

On the contrary, under the Obama administration, the US significantly changed its policy on the ICC⁴³, and decided to include Article 98 Agreements in the TIAS⁴⁴. For example, the Agreement between the Government of the United States of America and the Government of the Republic of Uzbekistan⁴⁵ Regarding the Surrender of Persons to the International Criminal Court (hereinafter referred to as "the Article 98 Agreement with Uzbekistan"), which on 7 January 2003 became the first Article 98 Agreement to enter into force⁴⁶, reads as follows:

The Government of the United States of America and the Government of the Republic of Uzbekistan, hereinafter "the Parties,"

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

Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

Considering that the Parties have each expressed their intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by their officials, employees, military personnel or other nationals, and

Bearing in mind Article 98 of the Rome Statute,

Hereby agree as follows:

42 See the US Department of State, *Treaties in Force 2007: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2007* (on file with author). At that time only a few texts of Article 98 Agreements were made public unofficially. See e.g., United States (U.S.)-Uzbekistan: Agreement between the Government of the United States of America and the Government of the Republic of Uzbekistan Regarding the Surrender of Persons to the International Criminal Court, *International Legal Materials*, Vol. 42, Iss. 1 (2003), pp. 39-40; Cummins and Stewart (eds.), *supra* note 15, pp. 167-168.

43 See e.g., Elizabeth White, *The Changing Dynamics of the US-ICC Relationship* (15 February 2018), at <https://kenan.ethics.duke.edu/the-changing-dynamics-of-the-us-icc-relationship/> (as of 31 December 2022).

44 See the US Department of State, *Treaties in Force 2016: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2016*, at <https://2009-2017.state.gov/s/l/treaty/tif/index.htm> (as of 31 December 2022).

45 Uzbekistan signed the Statute on 29 December 2000, but has not ratified it. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en (as of 31 December 2022).

46 The Office of the Legal Advisor of the US Department of State has revealed that "the Republic of Uzbekistan became the first country to notify the United States that it had completed its domestic procedures to allow an Article 98 agreement to enter into force". Cummins and Stewart (eds.), *supra* note 15, pp. 166-167. In contrast, the US regards all Article 98 Agreements as executive agreements not requiring Senate approval for treaty status under US law. Scheffer, *supra* note 37, p. 344.

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1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
 - a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
 - b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
3. When the United States extradites, surrenders, or otherwise transfers a person of the Republic of Uzbekistan to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of the Republic of Uzbekistan.
4. When the Government of the Republic of Uzbekistan extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of the Republic of Uzbekistan will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

Done at Washington, in duplicate, this 18th day of September 2002 in the English and Russian languages. In case of differences in interpretation, the English language text shall prevail⁴⁷.

47 TIAS 03-107, at <https://www.state.gov/03-107> (as of 31 December 2022). With regard to the difference in text among Article 98 Agreements, for example, James Crawford, Philippe Sands and Ralph Wilde observe that "[n]on-signatories to the ICC Statute are also obliged, subject to their international legal obligations, not knowingly to co-operate in the transfer of any such individuals by any entity to the ICC without the consent of the United States" and that "[s]ome of these agreements apply only to United States personnel; others are reciprocal". James Crawford, Philippe Sands and Ralph Wilde, Joint Opinion: In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98 (2) of the Statute (5 June 2003), at <https://www.legal-tools.org/doc/7f2edf/pdf/> (as of 31 December 2022), p. 4. See also Chinnasamy Jayaraj, "The International Criminal Court and the United States: Recent Legal and Policy Issues," *Indian Journal of International Law*, Vol. 42, No. 4 (2002), p. 505; Coulée, *supra* note 9, p. 59.

At present, there are at least 95 Article 98 Agreements in force, and all of them, except the one concluded with Chad, are included in the TIAS^{48,49}. In addition, between July 2013 and March 2014, the Obama administration registered 80 of them with the UN Secretariat in accordance with Article 102 of the UN Charter^{50,51}. Accordingly, based on the information on UN members⁵², parties to the Statute⁵³, and parties to Article 98 Agreements, it can be said that 194 countries in the world, excluding the US, can be divided into the following five categories: (A) 54 countries are UN members which are parties to both the Statute and Article 98 Agreements⁵⁴; (B) 41 countries are UN members which are parties to Article 98 Agreements, but not the Statute⁵⁵; (C) 67

48 See the US Department of State, *Treaties in Force 2020: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2020* (hereinafter referred to as "the TIF 2020"), and the *2021-2022 Supplement to Treaties in Force 2020: Supplemental List of Treaties and Other International Agreements* (hereinafter referred to as the "the 2021-2022 Supplement"), at <https://www.state.gov/treaties-in-force/> (as of 31 December 2022).

49 It should be noted that, in the TIF 2020 and 2021-2022 Supplement, certain types of agreements are not listed, such as classified agreements and certain agency-level agreements. See <https://www.state.gov/treaties-in-force/> (as of 31 December 2022).

50 Article 102 of the UN Charter stipulates the following:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

51 The states whose Article 98 Agreements have not been registered with the UN Secretariat are Benin, Bosnia and Herzegovina, Botswana, Burkina Faso, Cabo Verde, Cambodia, Chad, Congo, Israel, Jordan, Kazakhstan, Oman, Seychelles, Sri Lanka, and Tajikistan. See https://treaties.un.org/pages/AdvanceSearch.aspx?tab=UNTS&clang=_en (as of 31 December 2022).

52 For the names of 193 UN members and their division into five regional groups (i.e. African States, Asia-Pacific States, Eastern European States, Latin American and Caribbean States, and Western European and other States), see <https://www.un.org/dgacm/en/content/regional-groups> (as of 31 December 2022).

53 See note 3 and accompanying text.

54 The category (A) countries are as follows (for the grouping of UN members, see note 52):

African States: Benin, Botswana, Burkina Faso, Cabo Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Lesotho, Liberia, Madagascar, Malawi, Mauritius, Nigeria, Senegal, Seychelles, Sierra Leone, Tunisia, Uganda, and Zambia

Asia-Pacific States: Afghanistan, Bangladesh, Cambodia, Fiji, Jordan, Kiribati, Maldives, Marshall Islands, Mongolia, Nauru, Tajikistan, and Timor-Leste

Eastern European States: Albania, Bosnia and Herzegovina, Georgia, Montenegro, and North Macedonia

Latin American and Caribbean States: Antigua and Barbuda, Belize, Colombia, Dominica, Dominican Republic, Grenada, Guyana, Honduras, Panama, and Saint Kitts and Nevis

Western European and other States: (None)

55 The category (B) countries are as follows (for the grouping of UN members, see note 52):

African States: Algeria, Angola, Burundi, Cameroon, Equatorial Guinea, Eritrea, Eswatini, Guinea-Bissau,

countries are UN members which are parties to the Statute, but seemingly not Article 98 Agreements⁵⁶; (D) 30 countries are UN members which are not parties to the Statute, and seemingly not Article 98 Agreements either⁵⁷; (E) 2 countries are non-members of the UN which are parties to the Statute, but seemingly not Article 98 Agreements⁵⁸. Furthermore, from the number of countries belonging to each category, it can be seen that the total number of parties to Article 98 Agreements (i.e. 95 countries excluding the US) is almost equal to that of non-parties to them (i.e. 99 countries).

2. EU Guiding Principles

As is evident from the previous subsection, approximately 200 states in the world have been split down the middle over Article 98 Agreements. In contrast, it can be pointed out that all 27 members of the European Union (hereinafter referred to as "the EU")⁵⁹

Mauritania, Morocco, Mozambique, Rwanda, Sao Tome and Principe, and Togo

Asia-Pacific States: Bhutan, Brunei Darussalam, India, Kazakhstan, Lao People's Democratic Republic, Micronesia, Nepal, Oman, Pakistan, Palau, Papua New Guinea, Philippines, Singapore, Solomon Islands, Sri Lanka, Thailand, Tonga, Turkmenistan, Tuvalu, United Arab Emirates, Uzbekistan, and Yemen

Eastern European States: Armenia, and Azerbaijan

Latin American and Caribbean States: Haiti, and Nicaragua

Western European and other States: Israel

56 The category (C) countries are as follows (for the grouping of UN members, see note 52):

African States: Kenya, Mali, Namibia, Niger, South Africa, and United Republic of Tanzania

Asia-Pacific States: Cyprus, Japan, Republic of Korea, Samoa, and Vanuatu

Eastern European States: Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Republic of Moldova, Romania, Serbia, Slovakia, and Slovenia

Latin American and Caribbean States: Argentina, Barbados, Bolivia, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela

Western European and other States: Andorra, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, and United Kingdom of Great Britain and Northern Ireland

57 The category (D) countries are as follows (for the grouping of UN members, see note 52):

African States: Egypt, Ethiopia, Libya, Somalia, South Sudan, Sudan, and Zimbabwe

Asia-Pacific States: Bahrain, China, Democratic People's Republic of Korea, Indonesia, Iran, Iraq, Kuwait, Kyrgyzstan, Lebanon, Malaysia, Myanmar, Qatar, Saudi Arabia, Syrian Arab Republic, and Viet Nam

Eastern European States: Belarus, Russian Federation, and Ukraine

Latin American and Caribbean States: Bahamas, Cuba, and Jamaica

Western European and other States: Monaco, and Türkiye

58 The category (E) countries are Cook Islands, and State of Palestine.

59 The EU members are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. See https://european-union.europa.eu/principles-countries-history/country-profiles_en (as of 31 December 2022).

belong to category (C) mentioned above⁶⁰, which means that none of them has become a party to an Article 98 Agreement. This concurrence does not seem to be a coincidence, as the Council of the EU⁶¹ adopted in September 2002 the EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court (hereinafter referred to as "the EU Guiding Principles"), which reads as follows:

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

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

The US proposed agreements: Entering into US agreements as presently drafted would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties;

No impunity: any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and where there is sufficient evidence - prosecution by national jurisdictions

⁶⁰ See note 56.

⁶¹ For the composition the Council of the EU, see Article 16, paragraph 2, of the Treaty on European Union, which stipulates the following:

The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

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concerning persons requested by the ICC;

Nationality of persons not to be surrendered: any solution should only cover persons who are not nationals of an ICC State Party;

Scope of persons:

- Any solution should take into account that some persons enjoy State or diplomatic immunity under international law, cf. Article 98, paragraph 1 of the Rome Statute.
- Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute.
- Surrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute.

Sunset clause: The arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force.

Ratification: The approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state⁶².

It is notable that the EU Guiding Principles clearly state that "[e]ntering into US agreements as presently drafted would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute". These obligations mean "the obligations of States Parties under the Statute, *including the obligation of States Parties under Part 9 of the Rome Statute to cooperate fully with the International Criminal Court in its investigation and prosecution of crimes falling within the jurisdiction of the Court*" [emphasis added]. Moreover, it can be noted that the EU Guiding Principles repeatedly use the phrase "any solution should" to suggest how to fix the flaws in Article 98 Agreements in order to "ensure respect for" the above-mentioned obligations. These suggestions will be considered in the next chapter along with scholarly arguments concerning Article 98 Agreements.

⁶² The Council Conclusions on the International Criminal Court (ICC) (30 September 2002), 12134/02 (Presse 279), at https://ec.europa.eu/commission/presscorner/detail/en/PRES_02_279 (as of 31 December 2022). For a brief summary of the relevant documents issued by the EU as well as the Council of Europe, see O'Keefe, *supra* note 9, pp. 577-578.

Section 3 Two Types of Possible Restraints

This chapter has presented, as accurately as possible, the provisions of Article 98, paragraph 2, of the Statute and Article 98 Agreements, as well as the relevant facts. From this general description, it can be said that further examination is needed to ascertain whether Article 98 Agreements can impose either one or both of the following two types of restraints on the ICC's activities.

The first can result from Article 98 Agreements' consistency with Article 98, paragraph 2, of the Statute. As mentioned in subsection 1 of section 1, the ICC cannot make requests for arrest and surrender to the parties to Article 98 Agreements to the extent that they conform to Article 98, paragraph 2, of the Statute. This type might be termed "an internal restraint", as it can be produced by a provision of the Statute, which is the constituent treaty of the ICC.

The second type can result from Article 98 Agreements without the intervention of the Statute. Considering the fact that Article 2 of the Article 98 Agreement with Uzbekistan quoted in subsection 1 of the previous section does not explicitly state to whom obligation therein is owed, it could be argued that this provision might provide for the obligations of the ICC as well as the parties to it (i.e. Uzbekistan and the US) to avoid getting involved in surrender or transfer to the ICC. It can be noted in this regard that Article 34 of the Vienna Convention on the Law of Treaties (hereinafter referred to as "the VCLT"), entitled "General rule regarding third States"⁶³, declares that "[a] treaty⁶⁴ does not create either obligations or rights for a third State without its consent", but is silent on if and when treaties between states can create obligations for entities other than states, such as the ICC, without their consent. This type of possible restraint might be termed "external restraint" in contrast to the first type.

Hence, in the next chapter, after devoting section 1 to preliminary considerations,

63 Article 2, paragraph 1 (h), of the VCLT defines "third State" as "a State not a party to the treaty". In this paper, the states which are not parties to a treaty are called "non-parties" or "non-party states", except in the case of direct quotation.

64 Article 2, paragraph 1 (a), of the VCLT defines "treaty" as "an international agreement concluded *between States* in written form and governed by international law" [emphasis added]. For further study of this provision, see e.g., Philippe Gautier, "Article 2, Convention of 1969," in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions of the Law of Treaties: A Commentary* (Oxford University Press, 2011), pp. 34-45. Moreover, for the characterisation of the Statute as an international agreement between states, see Article 125, paragraph 3, of the Statute, which stipulates that "[t]his Statute shall be open to accession *by all States*. Instruments of accession shall be deposited with the Secretary-General of the United Nations" [emphasis added].

On the other hand, for a definition of "treaty" in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as "the VCLTIO"), see Article 2, paragraph 1 (a), of the VCLTIO, which stipulates that "treaty' means an

section 2 will be dedicated to the first type of possible restraint while section 3 to the second.

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

Section 1 Validity of Article 98 Agreements

As the US sought to conclude Article 98 Agreements by using a strategy reminiscent of the rules concerning the invalidity of treaties, it seems necessary to consider the validity of Article 98 Agreements before examining the two types of possible restraints on the ICC's activities mentioned in section 3 of the previous chapter.

That strategy was to threaten to stop or actually stop providing military and/or economic assistance to the states which refused to enter into Article 98 Agreements. In August 2002, the American Servicemembers' Protection Act (hereinafter referred to as "the ASPA"), which contained provisions for such limitations on assistance, was passed as part of the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States. Section 2007 of the ASPA, entitled "Prohibition of United States military assistance to parties to the International Criminal Court", declares the following:

- (a) Prohibition of Military Assistance. -- Subject to subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.
- (b) National Interest Waiver. -- The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.
- (c) Article 98 Waiver. -- The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such

international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation".

country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel present in such country.

- (d) Exemption. -- The prohibition of subsection (a) shall not apply to the government of -
- (1) a NATO member country;
 - (2) a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or
 - (3) Taiwan⁶⁵.

Moreover, in December 2004, the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005, which provided for additional limitations on assistance, was passed as part of the Consolidated Appropriations Act, 2005. Section 574 of the former act, entitled "Limitation on economic support fund assistance for certain foreign governments that are parties to the International Criminal Court" and often called "the Nethercutt Amendment" after its chief sponsor, declares the following:

- (a) None of the funds made available in this Act in title II under the heading "Economic Support Fund" may be used to provide assistance to the government of a country that is a party to the International Criminal Court and has not entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel present in such country.
- (b) The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a North Atlantic Treaty Organization ("NATO") member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan if he determines and reports to the appropriate congressional committees that it is important to the national security interests of the United States to waive such prohibition.

⁶⁵ H. R. 4775, 107th Cong. (2002), at <https://www.congress.gov/bill/107th-congress/house-bill/4775/text> (as of 31 December 2022). The ASPA has also been called "the Hague Invasion Act", as its Section 2008 stipulates that "(a) Authority. -- The President is authorized to use *all means necessary and appropriate* to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court [...]" [emphasis added]. *Ibid.* See also Human Rights Watch, U.S.: 'Hague Invasion Act' Becomes Law (3 August 2002), at <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> (as of 31 December 2022).

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- (c) The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel present in such country.
- (d) The prohibition of this section shall not apply to countries otherwise eligible for assistance under the Millennium Challenge Act of 2003, notwithstanding section 606(a)(2)(B) of such Act⁶⁶.

Although Section 2007 of the ASPA was repealed in January 2008⁶⁷ and the Nethercutt Amendment has not been renewed since 2009⁶⁸, it can be inferred that there are a certain number of states which took account of possible or actual limitations on assistance from the US when deciding to enter into Article 98 Agreements⁶⁹.

With regard to the above-mentioned limitations threatened and imposed by the US, Frédérique Coulée considers that "[l]a pratique américaine nous renvoie pourtant aux débats qui avaient eu lieu lors de la conférence de Vienne au cours de laquelle les États nouveaux avaient tenté d'imposer parmi les vices du consentement la contrainte politique ou économique"⁷⁰. The debate which she mentions here has resulted in Article 52 of the VCLT⁷¹, which is entitled "Coercion of a State by the threat or use of force" and declares that "[a] treaty is void if its conclusion has been procured by the threat or use

66 H. R. 4818, 108th Cong. (2004), at <https://www.congress.gov/bill/108th-congress/house-bill/4818/text> (as of 31 December 2022).

67 H. R. 4986, 110th Cong. (2008), at <https://www.congress.gov/bill/110th-congress/house-bill/4986/text> (as of 31 December 2022). In contrast Section 2008 of the ASPA (see note 65) remains in force, though a bill which will repeal the ASPA in its entirety has been introduced into the US Congress. H. R. 7523, 117th Cong. (2022), at <https://www.congress.gov/bill/117th-congress/house-bill/7523/text> (as of 31 December 2022).

68 See White, *supra* note 43.

69 The 100th Article 98 Agreement was signed on 2 May 2005, when both the ASPA and Nethercutt Amendment still remained in force. See <https://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm> (as of 31 December 2022). For the detailed information on the related losses of US aid, see the Coalition for the International Criminal Court (hereinafter referred to as "the CICC"), Summary of Information on Bilateral Immunity Agreements (BIAs) or so-Called "Article 98" Agreements as of July 8, 2006 (on file with author).

70 Coulée, *supra* note 9, p. 59.

71 For the drafting process of Article 52 of the VCLT, see Ian Sinclair, *The Vienna Convention on the Law of Treaties*, second edition (Manchester University Press, 1984), pp. 177-181, 200; Paul Reuter (translated by José Mico and Peter Haggemacher), *Introduction to the Law of Treaties* (Routledge, 2015), pp. 181-184; Olivier Corten, "Article 52, Convention of 1969," in Corten and Klein (eds.), *supra* note 64, pp. 1201-1216; Meinhard Schröder, "Treaties, Validity," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 10 (Oxford University Press, 2012), p. 54; Kirsten Schmalenbach, "Article 52. Coercion of a State by the threat or use of force," in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, second edition (Springer, 2018), pp. 942-944.

of force in violation of the principles of international law embodied in the Charter of the United Nations", but does not precisely define the term "coercion"⁷².

Although the US has not become a party to the VCLT⁷³, the ILC stated in the commentary on its final draft of the VCLT that "the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of to-day"⁷⁴. Moreover, in the judgment of February 1973 on the Case Concerning the Fisheries Jurisdiction (hereinafter referred to as "the Fisheries Jurisdiction Case"), the International Court of Justice (hereinafter referred to as "the ICJ") held that "[t]here can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void"⁷⁵. It seems that the customary law nature of Article 52 of the VCLT has been generally accepted⁷⁶.

Furthermore, with regard to the types of coercion covered by the rule prescribed in Article 52 of the VCLT, the ILC stated in the same commentary that "[s]ome members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms

72 In this regard, it is well known that the Final Act of the United Nations Conference on the Law of Treaties (hereinafter referred to as "the Vienna Conference") includes the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties (hereinafter referred to as "the Declaration on Coercion"), which reads as follows:

The United Nations Conference on the Law of Treaties,
Upholding the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith,
Reaffirming the principle of the sovereign equality of States,
Convinced that States must have complete freedom in performing any act relating to the conclusion of a treaty,
Deploing the fact that in the past States have sometimes been forced to conclude treaties under pressure exerted in various forms by other States,
Desiring to ensure that in the future no such pressure will be exerted in any form by any State in connexion with the conclusion of a treaty,
1. Solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty, in violation of the principles of the sovereign equality of States and freedom of consent,
2. Decides that the present Declaration shall form part of the Final Act of the Conference on the Law of Treaties.
(U.N. Doc. A/CONF. 39/11/Add. 2, p. 285)

73 See https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (as of 31 December 2022).

74 Yearbook of the International Law Commission, 1966, Vol. II, p. 246, para. 1.

75 *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 14, para. 24.

76 See Corten, *supra* note 71, pp. 1202-1205; Schmalenbach, *supra* note 71, p. 959.

of a 'threat or use of force in violation of the principles of the Charter', and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter"⁷⁷. In this regard, Albrecht Randelzhofer and Oliver Dörr claim that the term "force" in Article 2, paragraph 4, of the UN Charter⁷⁸ "does not cover any possible kind of force, but is, according to the correct and prevailing view, limited to armed forces"⁷⁹. Therefore, it can be said that the validity of Article 98 Agreements is unquestionable.

Additionally, Article 98 Agreements can be regarded as state practice demonstrating the current status of general (or customary) international law concerning the invalidity of treaties due to coercion. It can be noted in this regard that, in contrast to the above-mentioned fierce debate conducted in the preparatory work of the VCLT, there does not seem to be any state which has maintained that Article 98 Agreements concluded under US pressure are invalid. Today, states seem to share the belief that political or economic coercion in the conclusion of treaties does not (usually) invalidate them.

⁷⁷ Yearbook of the International Law Commission, 1966, Vol. II, p. 246, para. 3.

⁷⁸ Article 2, paragraph 4, of the UN Charter stipulates the following:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

⁷⁹ Albrecht Randelzhofer and Oliver Dörr, "Article 2(4)," in Simma, Khan, Nolte and Paulus (eds.), *supra* note 9, p. 208. See also Anthony Aust, *Modern Treaty Law and Practice*, third edition (Cambridge University Press, 2013), p. 277; Schmalenbach, *supra* note 71, pp. 949-951. Olivier Corten contends that "it is perfectly valid to say that in situations of exceptional gravity, nothing precludes consideration that economic coercion may result in the invalidation of a treaty", but admits that "to this day there is no precedent on invalidation due to economic pressure". Corten, *supra* note 71, pp. 1207, 1211.