

**PUBLIC INTERNATIONAL LAW:**

**VALIDITY OF THE US BILATERAL IMMUNITY**

**AGREEMENTS IN THE CONTEXT OF**

**INTERNATIONAL LAW**

*A dissertation submitted in partial fulfillment of the requirements  
for the degree LLM (Public International Law)*

*by*

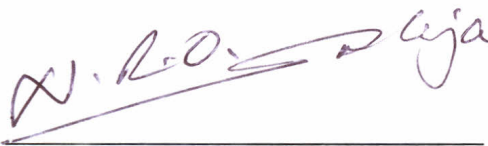
*Nicholas R. O. Ombija*

*Prepared under the supervision of Professor Albert Muma  
at the Faculty of Law, University of Nairobi.*

*30<sup>th</sup> September, 2005*

## DECLARATION

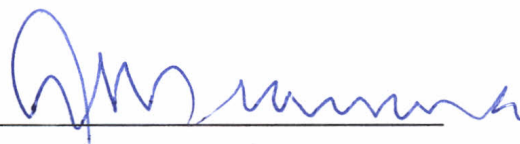
I, Nicholas R. O. Ombija, declare that this dissertation is my own original work and that it has not been submitted for examination for the award of a degree at any other university.

Signed: 

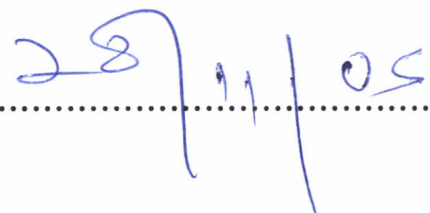
**NICHOLAS R. O. OMBIJA**

**(Student Reg. No. G62/P/7360/04)**

This thesis has been submitted for examination with my approval as University Supervisor.

Signed: 

**PROFESSOR ALBERT MUMA**

DATE:  .....



## DEDICATION

This dissertation is dedicated to all men and women of goodwill  
who cherish the lofty principle of *the rule of law*,  
which is founded on the concept of fairness.

Unfairness and inequality inexorably hobble the search for justice.

And a crippled justice has no virtuous purpose to speak of.

## ACKNOWLEDGMENTS

I am indebted to a number of people without whom this research would not have been possible.

- Professor Albert Muma, my teacher and thesis supervisor, for his incisive comments which shaped this study.
- My family and friends for the moral support.
- Mrs Mary Mbugua for tirelessly and patiently doing the typing several times over.
- God for giving me the courage and good health to undertake the project.

## TABLE OF CONTENTS

Declaration .....	i
-------------------	---

Dedication .....	ii
Acknowledgments .....	iii
Table of contents .....	iv
<b>Chapter 1: Introduction .....</b>	<b>1</b>
1.1 Introduction to the study .....	1
1.2 Background to the Rome Statute of the International Criminal Court .....	3
1.3 The Statement of the problem .....	7
1.4 Hypothesis .....	7
1.5 Theoretical framework .....	7
1.6 Importance of study/justification .....	13
1.7 Methodology adopted in the study .....	14
1.8 Literature review .....	15
1.9 Overview chapter .....	25
<b>Chapter 2: Evolution of International Criminal Law Regime and Jurisdiction:</b>	
<b>A Historical Perspective .....</b>	<b>26</b>
2.1. Introduction .....	26
2.2 Medieval International Criminal Justice Regime .....	27
2.3 Abortive early attempts (1919 – 1945) to establish International Criminal Tribunals .....	29
2.4 The Nuremberg and Tokyo Tribunals (1945 – 1947) .....	33
2.5 The work of the ILC [1950 – 1954] for the elaboration of the Statute of an International Criminal Court .....	42
2.6 Development of ad hoc tribunals 1994 - 94.....	43



2.7	The Establishment of the two ad hoc tribunals for Former Yugoslavia and Rwanda .....	44
2.8	The drafting and adoption of the statute of the ICC [1994 – 1998] .....	47
2.9	The Rome Statute of International Criminal Court: Legal basis, scope and jurisdiction.....	49

**Chapter 3: Analyzing The Validity of United States Bilateral Immunity**

	<b>Agreements [BIAs] or “ Article 98 Agreements” In the Context of Rome Statute and International Law and Public Policy .....</b>	<b>58</b>
3.1	Introduction .....	58
3.2	Tactics of The United States Against The ICC .....	60
3.3	Analysing Immunity Agreements (Bias) or “Article 98 Agreements”.....	63
3.3.1	Treaties and International Obligations .....	79
3.4	The Implication and/or Consequences of Signing the United States Bilateral Immunity Agreements or “Article 98 Agreements” in the Context of the Rome Statute, International Law and/r Public Policy .....	80
3.4.1	The Principle of Jus Cogens .....	83
3.4.2	The Vienna “Injunction” on state parties to a Treaty .....	84
3.4.3	The Principle of Pacta Sunt Servanda and Uberrimae fidei .....	85
3.4.4	Legislative History and the Legislative Intent of Article 98 of the ICC ...	87
3.4.5	The Principle of Persistent Objector .....	89
3.4.6	Pacta Tertiis nec nocent nec prosunt .....	90
3.4.7	Dispositive and Constitutive Treaties .....	92
3.4.8	Universal Jurisdiction.....	93

<b>4.0 Chapter 5: Conclusion .....</b>	<b>95</b>
4.1 Dispositive and Constitutive Treaty Principle .....	97
4.2. Conflict with domestic Law Principle .....	97
4.3 Jus Cogens Principle .....	97
4.4 Obligation not to undermine the fundamental purpose or core object of the treaty – Article 18 of the Vienna Convention .....	98
4.5 Breach of Articles 27, 86,87, 89 and 90 of the Rome Statute ....	98
4.6 Intemporal Law Principle .....	98
4.7 ICC to interpret its own statute and determine its jurisdiction .....	99
4.8 Legislative History and Legislative intent of “Article 98 Agreements ....	99
4.9 Universal Jurisdiction .....	99
4.10 Recommendations .....	100
Abbreviations .....	102
Bibliography .....	103
Primary Sources .....	103
Secondary Sources .....	106
Books .....	107
Statutes .....	108

## CHAPTER 1: INTRODUCTION

### 1.1 INTRODUCTION TO THE STUDY

As a rule, only states parties can be held accountable for violations of human rights guaranteed under international law. Ultimately it is up to states on how to practice responsibility at the national level, i.e., *exclusive state responsibility*.<sup>1</sup>

The principle of *exclusive state responsibility* has proved largely *ineffective* in the context of human rights simply because it has not been an effective deterrent. Powerful people found ways of escaping responsibility by way of comprehensive amnesty laws, immunity or belated pardoning.<sup>2</sup>

Dictators, heads of juntas, police chiefs, soldiers, *ejus dem generis*, for the longest time knew they were protected by the *overriding principle of impunity* even if they had committed the most serious of human rights violations, such as *genocide, war-crimes and crimes against humanity*.<sup>3</sup>

Thus, over the years it has become clear that state responsibility ought to be complemented by *perpetrators' individual responsibility under criminal and civil law*. This not only has a deterrent effect on state functionaries, but might also prove a useful way of preventing *human rights violations* by *non-state actors*, such as transnational corporations, inter-governmental organizations, organized crime, terrorism, guerilla movements or rebels.<sup>4</sup>

---

<sup>1</sup> See Manfred Nowak, Introduction to the International Human Rights Regime, p289 Martinus Nijhoff Publishers Leiden/Boston.

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Ibid



For all the above reasons struggle against *impunity* has to be raised at the international level. One of the tools developed for that purpose is the principle of “*universal jurisdiction*”. The principle of *universal jurisdiction* was originally applied to persons who had committed crimes in territories outside national jurisdiction such as pirates, slave traders at sea and airline hijackers. The first human rights convention to embody, the concept of “*universal jurisdiction*”<sup>5</sup> entitles, and even obligates, state parties to take into custody and bring before a criminal court persons suspected of torture, irrespective of these countries’ traditional competence as derived from the principle of territoriality, as well as the active and passive personality [or *nationality*] principle, provided extradition to another state having jurisdiction is not possible [*principle of “aut dedere aut judicare”*]. The arrest of *General Augusto Pinochet Ugarte*, the former Chilean dictator by British Security forces on 16th October, 1999 following a Spanish warrant of arrest, readily comes to mind.

Nevertheless, most states, including those strongly committed to democracy, human rights and the rule of law, hesitate to apply the principle of *universal jurisdiction*, which is largely due to the fact that assuming a subsidiary competence is generally considered an unfriendly act against other states. Ultimately, of course, there is always the risk that the principle of *universal jurisdiction* may be abused for political interests<sup>6</sup>

Thus, the international community has always had *universal jurisdiction*. The second alternative jurisdiction is an independent International Criminal Court – *The Rome Statute*<sup>7</sup>.

---

5 Ibid

6 Ibid

7 The Rome Statute of the International Criminal Court.[ICC] <http://www.icc>

## **1.2 BACKGROUND TO THE ROME STATUTE OF THE INTERNATIONAL**

### **CRIMINAL COURT**

The “*road to Rome*” was along and contentious one. While efforts to create a global criminal court can be traced back to early 19<sup>th</sup> century, the story began in earnest in 1872 with *Gustan Moynier* – one of the founders of the International committee of Red Cross – who proposed a permanent court in response to crimes of Franco-Prussian War. The next serious call for an internationalized system of justice came from the drafters of the *1919 Treaty of Versailles*, who envisaged an *ad hoc* international court to try the Kaiser and German War Criminals of World War 1.<sup>8</sup>

The idea finally materialized during World War 11. Thus, even before the war had ended, the four Allied Powers decided by the London Treaty of 8<sup>th</sup> August, 1945 to form a military tribunal to prosecute Axis War Criminals. [The German leaders and German organizations for crimes against peace, war crimes and crimes against humanity].

The tribunal, which was then established in *Nuremberg*, after Germany’s unconditional surrender, recognized individuals as international duty *subjects* directly responsible under international law.

A partly similar tribunal was established by the unilateral decision of American General Douglas MacArthur in *Tokyo* in 1946 to try Japanese War criminals after Japan’s surrender in August 1945.

---

<sup>8</sup> Coalition for the International Criminal Court, [www.iccbow.org](http://www.iccbow.org)

This development towards direct individual criminal liability under international law for certain serious international crime was then finally completed by the Security Council's establishment in 1993 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and its subsequent establishment of a similar Tribunal for Rwanda in 1994 (ICTR).<sup>9</sup>

The *ad-hoc* tribunals have jurisdiction, generally speaking, over genocide, crimes against humanity and violations of international humanitarian law committed during armed conflict in Former Yugoslavia, and Rwanda, respectively; and both were established under *Chapter VII* of the UN Charter, which implies that all decisions, orders, warrants and judgments issued by the chambers, as well as preliminary measures requested by the prosecutor of the two tribunals are directly binding on states under international law. Thus uncertainty as to the position of the individual under international law has been finally settled. Individuals can be held criminally responsible directly under international law, before international tribunals, in respect of the most serious international crimes. This major break through was finally crowned by the adoption by 120 states of the Statute of the permanent International Criminal Court in Rome on 17<sup>th</sup> July, 1998. Thus the ICC is a system of Universal Justice Court actively behaving as a check on the functioning of domestic justice.<sup>10</sup>

---

<sup>9</sup> Ibid

<sup>10</sup> Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by Process-verbaux of 10 November 1998, 12 July 1999, 8<sup>th</sup> May 2000, 17 January 2001 and 16 January, 2002. The Statute entered into force on 1 July 2002.



From 1995 through 2000, the United States government supported the establishment of ICC yet one that would be controlled through the Security Council or provided exemption from prosecution of United States officials and nationals. By 31 December, 2000, the agreed deadline, 139 states had signed. The United States under the Clinton administration, was finally also among the signatory states. When the possibility of having their way seemed dim, the United States decided *to plot against the ICC*. In *April 2002*, the Bush administration announced several measures to undermine the ICC and on 6<sup>th</sup> May, 2002, officially “unsigned”/withdrew, the Clinton Administration signature of the Rome Statute, purportedly, the Bush Administration believes that the Court could be used as a stage for political prosecutions, despite ample safeguards included in the Rome Statute to protect such an event.<sup>11</sup>

Through “*Article 98*” of the Rome Statute the United States is derogating from this standing international system of Universal Justice Court. Towards that end, the United States Congress adopted the American Service Members Protection Act 2002 [ASPA] commonly known as the “*Hague Invasion Act*” by putting heavy pressure on other states to enter into bilateral agreements[commonly known as “*Article 98 agreements*”] aimed at exempting US Citizens from being extradited to the Hague, and by even forcing the Security Council to adopt *Resolution 1422 (2002)*, which requests the ICC, for a period of 12 months (*extended for another 12 months by Security Council Resolution 1487 of 12<sup>th</sup> June, 2003*), not to commence any investigations or prosecution against any official of the United States and other non state parties having committed international crimes in the context of any “United Nations

---

<sup>11</sup> See Coalition for the ICC at: [http://www.iccnworg./documents/otherwise issues impunity agreem.html](http://www.iccnworg./documents/otherwise%20issues%20impunity%20agreem.html), The ICC will be governed by the complementary principle which provides each state with the primacy of national jurisdiction to prosecute and judge crimes within the jurisdiction of the court: genocide, crimes against humanity and war crimes. US anxiety is, therefore, unfounded.

established or authorized operation”.<sup>12</sup>

The nations that negotiated the drafting of the Rome Statute did so with extensive reference to international law and with care to address potential conflicts between the Rome Statute and existing international obligations. The drafters recognized that some nations had previously existing agreements, such as Status of Forces Agreements (*SOFAs*), which obliged them to return home the nationals of another country [the “sending state” when a crime had allegedly been committed]. Thus *Article 98 [2]* was designed to address any potential discrepancies that may arise as a result of these existing agreements and to permit co-operation with the ICC. The article also gives the “sending state” priority to pursue an investigation of crimes allegedly committed by its nationals. This provision is consistent with the Statute’s complementary principle, which allows the country of the nationality of the accused the first opportunity to investigate, and if necessary, try an alleged case of genocide, war crimes, or crimes against humanity.

To-date, several versions of these bilateral agreements have been proposed; those that are reciprocal, providing that neither of the two parties to the accord would surrender the other’s “persons” without first gaining consent from the other; those that are non-reciprocal, providing only for the non-surrender to the ICC of United States “persons”, and those that are intended for states that have neither signed nor ratified the Rome Statute, providing that those states not cooperate with efforts of third party states to surrender United States “persons” to the ICC.<sup>13</sup>

---

<sup>12</sup> American NGO Coalition for the ICC, “Peacekeeping and the ICC”, [www.amicc.org.usinfo/administration\\_policy-pkeeping.html](http://www.amicc.org/usinfo/administration_policy-pkeeping.html), See also Bilateral Immunity Agreements, [www.amicc.org/usinfo/administrationpolicy -BIAs.html](http://www.amicc.org/usinfo/administrationpolicy-BIAs.html).

<sup>13</sup> Global Policy Forum, 777 UN Plaza, Suite 3D, New York, N. Y 100017 USA: [globalpolicy@globalpolicy.org](mailto:globalpolicy@globalpolicy.org).

### **1.3 THE STATEMENT OF THE PROBLEM**

The validity of the United States bilateral immunity agreements in the context of International Law and the Rome Statute of the International Criminal Court

The implications and /or ramifications of signing the United States bilateral Immunity agreements to the viability and/or efficacy of the international system of criminal justice put in place by the Rome Statute.

### **1.4 HYPOTHESIS**

With regard to validity, I argue that the United States bilateral immunity agreements or so called "*Article 98 Agreements*" are contrary to the basic tenets of international law and the Rome Statute.

With regard to the implications and/or ramifications of the signatures of these bilateral immunity agreements, I argue that the states that sign these agreements would breach their obligation under the Rome Statute, the Vienna Convention on the Law of Treaties, Customary International Law and possibly their own extradition laws.

### **1.5 THEORITICAL FRAMEWORK**

Under the principle of *universality* any state is empowered to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, or the nationality of the author or of the victim.<sup>14</sup>

The principle was first proclaimed in customary international law in the seventeenth century, with regard to piracy. Any state was authorized to arrest and to bring to justice

---

<sup>14</sup> See Antonio Cassese. International Criminal Law [15.5] p.284-286.



persons suspected of engaging in piracy, whatever their nationality and the place of commission of the crime. The *rationale* behind the exceptional authorization to states to depart from this classic principle of territoriality or nationality was the need to fight jointly against a form of criminality that affected all states. Each state knew that by bringing to justice suspected pirates it was acting to protect at the same time its own interests and those of other states.<sup>15</sup>

Subsequently the same *jurisdictional* ground was included in the *Geneva Conventions* on war victims, the *1984 Convention against Torture* and a string of international treaties on terrorism. The *rationale* for universal jurisdiction in these cases differed, however, from that invoked for piracy. States were not empowered to exercise jurisdiction for purposes of protecting a joint interest. They were authorized to prosecute and punish, on behalf of the whole international community, persons responsible for a special class of war crimes [*grave breaches of 1948 Geneva Conventions*], torture or terrorism, with a view to safeguarding universal values.<sup>16</sup>

For instance, contracting states were authorized by the 1984 Convention to bring to justice persons who had engaged in torture abroad, in particular in their own country against their countrymen. The purpose was to prevent those persons from equally perpetrating torture against nationals of the prosecuting state [in which case one would have been faced with the protection of joint interest]. The purpose was rather that of leaving the crime of torture unpunished, were the territorial state to refrain from putting the alleged torturer in the dock. Contracting states were thus authorized to act as “*universal*” guardians against attacks on

---

<sup>15</sup> Ibid

<sup>16</sup> Ibid

human dignity taking the form of torture.<sup>17</sup>

In short, the crimes over which such jurisdiction may be exercised are of such gravity and magnitude that they warrant their universal prosecution and repression, as the Supreme Court of Israel eloquently held in *Eichmann*.<sup>18</sup> In its concluding remarks the court held as follows:

*“Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundation. The state of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case no importance attaches to the fact that the state of Israel did not exist when the offences were committed.”*

Subsequently the Spanish constitutional court, in a judgment of 10 February 1997<sup>19</sup> and the Spanish national criminal court. [*Audiencia nacional*] in an order of 4 November, 1998<sup>20</sup>

-----  
<sup>17</sup> Ibid

<sup>18</sup> See ILR,36, at 304. It should be noted that Israel was also very influenced by the fact that it was the home of the Jews and the Jews were the victims of the crime. So there was a clear link between the crimes and the state of Israel, i.e. ,sort of passive nationality was an alternative basis for jurisdiction.

<sup>19</sup> See the Judgment of 10<sup>th</sup> February 1997 in the Panamarian ship case, at 6, Legal Ground No. 3 A. The Court held that the Spanish legislator had intended (to attribute universal scope to the Spanish jurisdiction over those specific crimes [mentioned in Article 23 of the 1985 Law on Judicial Power] on account of both of the gravity of these crimes and the need for international protection]

<sup>20</sup> Order (auto) of 4 November, 1998, in don Adolfo Fransisco [Scilingo], at 3, Legal Ground no.2. The court held that it was contrary to the spirit of the Genocide convention to interpret Article 6 of this Convention [which provides that the accused may be tried either by a territorially competent court or by an international court) to that effect such provision would limit the jurisdiction of states. This interpretation would run counter to the fact that genocide is “regarded as a crime to extreme gravity in the whole world and affects directly the international community, in deed all humanity, as is intended by the same convention”.

set out this view. Thus, any state is authorized to substitute itself for the natural judicial forum, namely the territorial or national state, should neither of them bring proceedings against the alleged author of an international crime.

*Universal jurisdiction* has been recognized in the United States for a long time. American courts have endorsed this principle on numerous occasions.<sup>21</sup> The American Restatement of Law reads:

*“ A State has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as universal concern, such as piracy, slave trade, attacks on or hijackings of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction ... is present.”*<sup>22</sup>

In the case of *Yunis*: The defendant was a citizen of Lebanon accused of participating in the hijacking of a Jordanian airliner that resulted in the passengers [including several Americans] being held hostage. He was brought to trial in the US after being arrested at sea by US authorities. Yunis challenged the jurisdiction of the US Courts, arguing that there was no nexus between the hijacking and the US territory [the aircraft did not fly over US airspace or have contact with US territory]. In its judgment of 12<sup>th</sup> February 1988, the District Court of Columbia dismissed the defendants motion and affirmed US jurisdiction. It held:

*“Not only is the United States acting on behalf of the world community to punish alleged offenders of crimes that threatened the very foundations of the world order, but the United States has its own interest in protecting its nationals.”*<sup>23</sup>

---

<sup>21</sup> Johan D. Vanger Vyver, American Exceptionalism, Human Rights, International Criminal Justice, and National Self-Righteousness, 50 Emory L. J. 775[813]

<sup>22</sup> Restatement (Third) of Foreign Relations Law of United States 404 (1987)

<sup>23</sup> See 681 F. Supp. 896 [DDC], at 903



What has been changing, over the years, is the scope of crimes universal jurisdiction applies to, the extent of official immunity and the use of such proceedings in practice. The trend is to include more crimes and to reduce immunity which in turn invites more such proceedings to take place.<sup>24</sup>

Proceeding on the premise that *universal jurisdiction* is the *jus cogens* obligation under international law, I argue that it is a significant factor in determining the harmony between “*Article 98 Agreements*” and the International Law.<sup>25</sup>

*Jus cogens* is defined as “*a peremptory norm of general international law*” accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted<sup>26</sup> and which can be modified only by a subsequent norm of general international law having the same character. They render void other non-peremptory rules which are in conflict with them.

*Genocide, war crimes, and crimes against humanity* are regarded under international law as *delicti jus gentium*. They constitute a *corpus* of crimes that are an affront to humanity and its existence. Keeping these crimes in check is important and fundamental to the international public order. A treaty like the Rome statute which has jurisdiction to deal with them ought to be supported by all nations of goodwill. The Rome Statute is therefore binding on the parties who are interested in the maintenance of that public order whether they are signatories or not. I believe that the United States is interested in the maintenance of the international public order hence the Rome Statute is valid as against it and for this reason

---

<sup>24</sup> op.cit 21

<sup>25</sup> See Vienna Convention, Article 53

<sup>26</sup> Ibid

should accept obligations under the Rome Statute.<sup>27</sup>

United States during the Clinton administration signed the Rome Statute. Under the Bush administration “unsigned”/withdrew its signature. Withdrawal of signatures is generally acceptable in international law if provided for in the treaty. However, there are exceptions: “*dispositive and constitutive*” treaties. These are treaties that set up *permanent arrangements* which would not be extinguished by war. I take the view that the Rome Statute is one such treaty. It establishes a special regime of international criminal law. Hence the “unsigned”/withdrawal of the United States signature is inconsequential in the realm of international law. I equally take the view that the Rome Statute bestows rights *in rem erga omnes* [valid against the whole world]. These are rules which if violated, give rise to a general right of standing – amongst all states subject to those rules to make claims. Treaties creating permanent regimes fall in this category.<sup>28</sup>

I also argue that a state cannot get rid of its obligations under a treaty without the consent of all the parties to the treaty, expressly or by implication unless it is established that the parties intend to admit the possibility of withdrawal or denunciation.<sup>29</sup> In the same vein the United States cannot get rid of its obligations under the Rome Statute without the consent of all the parties to the treaty.

Last but not least, I argue that the obligation of the Rome Statute are in any case customary international law which a state cannot contract out of through “*Article 98*”

---

<sup>27</sup> See M. Sherif Bassiouni, AN APPRAISAL OF THE GROWTH & DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW, 45 REV. INT’L DE DROIT PENAL 405 [1974]

<sup>28</sup> See S. K. Verma, An Introduction to Public International Law, p.274 – 282

<sup>29</sup> Ibid



*Agreements*".<sup>30</sup> Violating customary international law is tantamount to violating fundamental rules of international public policy. This would be detrimental to the international legal system and how that system, and the society it serves defines themselves.

## 1.6 IMPORTANCE OF STUDY/JUSTIFICATION

The study raises several issues in the realm of international law:

1. It investigates whether a state which is not a party to the Rome statute is nevertheless bound by it on the basis of the principle of *universal jurisdiction*.
2. It investigates whether the United States by bilateral immunity agreements or "*Article 98 Agreements*" derogate from "peremptory rules" – *jus cogens*, [Article 64 of the Vienna Convention].
3. It investigates whether the Rome Statute bestows rights *in rem erga omnes* [valid against the whole world].
4. It investigates whether the Rome Statute is *dispositive and constitutive treaty*. i.e. it sets out permanent arrangements which would not be extinguished by war – *special regime of international criminal law*.
5. It focuses on the issue whether a state party who has signed a treaty can *denounce*, "*unsign*" or *withdraw* its signature and thus defeat the *core object of the treaty* [Article 18 of the Vienna Convention].
6. It investigates whether a state party to a treaty can get rid of its obligations under a treaty without the consent of all the parties to a treaty - *pacta sunt servanda*.

---

<sup>30</sup> Ibid

7. It investigates whether “*Article 98 Agreements*” are inconsistent with the Law of Treaties and in violation of fundamental rules of international law and public policy.

### **1.7 METHODOLOGY ADOPTED IN THE STUDY**

The study will rely on both primary and secondary data.

**Primary Sources:** The Vienna Convention on the Law of Treaties, United States Bilateral Immunity Agreements or so-called “*Article 98 Agreements*”, relevant treaties, various Resolutions of the United Nations relevant to the issues at hand. The United Nations Charter, International Law Commission, ICJ advisory opinion on treaty laws, e.t.c. and any other treaties that may shed some light on the issues raised by the study.

**Secondary data:** Scholarly Journals, Thesis and Dissertations conducted on the subject, government documents, papers presented at conferences, books, references quoted in books, International Indices, Abstracts Periodicals, Reference Section of the University library, Grey Literature, Inter-Library Loan, The British Lending Library, Computer Search, Microfilm, The Internet etc.

The study will be both descriptive and prescriptive.

Matters of legality will merely be descriptive. Matters of implications will merely be analytical.

A chapter on conclusion and recommendations or proposal will be prescriptive.

## 1.8: LITERATURE REVIEW

The literature on the relationship of the United States Bilateral Immunity Agreements or so called “*Article 98 Agreements*”, customary international law, international treaty law [Vienna Convention on the Law of Treaties], and the Rome Statute will be obtained from descriptive and analytical text of the Bilateral Immunity Agreements, treaties on customary international law, the Vienna Convention on the Law of Treaties and the legislative history and legislative intent of Article 98 of the Rome Statute.

*Amnesty International* posits that Article 98 (1) was couched to deal with the question of a states obligation under customary international law or conventional law such as the Vienna Convention on Diplomatic Relations vis-à-vis the states obligations under the Rome Statute. With immunities granted to state and diplomatic officers under the Vienna Convention on Diplomatic Relations, a waiver of the Immunity will have to be granted before an officer who is entitled to such state or diplomatic immunity can be prosecuted by the ICC.<sup>1</sup>

That Article 98 (2) prevents the Court from insisting on the surrender of an offender from a state, where such surrender will lead the said state to act inconsistently with its treaty obligations. An obligation of this nature may relate to an agreement, which details out the legal responsibilities of the parties with respect to a crime of offence taking place on their territories. By surrendering an offender to the ICC, the state concerned may be acting inconsistently with

---

<sup>1</sup> Amnesty International, INTERNATIONAL CRIMINAL COURT: US efforts to obtain impunity for genocide, crimes against humanity and war crimes, [A1 Index: 10R 40/025/2002, at 6, available at [http://web.amnesty.org/aidoc\\_\\_\\_pdf.nsf/Index/IOR 400252002 ENGLISH/ \\$File/IOR 4002502. PDF](http://web.amnesty.org/aidoc___pdf.nsf/Index/IOR_400252002_ENGLISH/$File/IOR_4002502.PDF) [last visited August 4, 2003] [Hereinafter “All Impunity article”].



its treaty obligations and thus the ICC will not proceed with such a request unless the necessary consent of the surrender can be obtained from the relevant state.<sup>2</sup>

*Erick Rosenfeld* posits that protection is given only to individuals and top civilian officers that are sent on official duties in foreign countries.<sup>3</sup> SOFA's provide the legal basis, the mission, and the mandate for the deployment of troops and military officers on either peacekeeping or other military engagements.<sup>4</sup> It is an instrument that details the respective rights and responsibilities of the parties to the deployment, and determines the legal requirements and the basis of investigations and prosecution of offenders.<sup>5</sup> If a deployed citizen of a sending state commits a crime in a territory of the receiving state, the SOFA will determine the legal status of offender, the requirements for his prosecution, and which country has the jurisdiction to try the offender.<sup>6</sup> Under the provision of Article 98, therefore, the receiving state cannot extradite the offender to the ICC without the consent of the sending state. To compel such state to extradite the offender may lead to the state to act inconsistently with its treaty obligation. Article 98 is thus, intended to preserve any such agreements existing between states before the coming into force of ICC.

*Hans-Peter Kaul & KerB* posits that it is a way of avoiding possible conflicts between obligations states parties to the ICC may assume vis-à-vis any other obligations they

-----  
<sup>2</sup> See the Rules of Procedure and Evidence of International Criminal Court. UN Doc. PCNICC/2000/1/1. Add.1, 30 June, 2000, Patel 95 (2) stated in full as " The court may not proceed with a request for the surrender of a person without the consent of a sending state if, under article 98, paragraph 2, such a request would be inconsistent with obligations under international agreements pursuant to which the consent of a sending state is required prior to the surrender of a person of that state to the court.

<sup>3</sup> See generally, Erik Rosenfeld, APPLICATION OF U.S. STATUS OF FORCES AGREEMENTS TO ARTICLE 98 OF THE ROME STATUTE, available at [http://law.wusfl.edu/Publications/WUGSLR/Issue % 2. Archive/Volume -2-/Rosenfeld\\_rd\\_book pages .pdf](http://law.wusfl.edu/Publications/WUGSLR/Issue%20Archive/Volume-2-/Rosenfeld_rd_book%20pages.pdf) [last visited August 19, 2003]; see also intra note 76

<sup>4</sup> See David J. Scheffer, "Original Intent at the Global Criminal Court", Wall Street Journal Europe, September 20, 2002.

<sup>5</sup> See Supra note 3

<sup>6</sup> Ibid



may have already assumed under such existing agreements.<sup>7</sup> It should be noted, however, that the Article 98 provision does not prevent the ICC from investigating and indicting an alleged perpetrator.<sup>8</sup> Such agreements cannot give protection to mercenaries or individuals who engage in unofficial acts and commit crimes within the jurisdiction of the ICC.<sup>9</sup> Private individuals or persons sent on covert missions without the legal mandate of the foreign state are also not covered under Article 98.<sup>10</sup> An individual who is not protected under such agreement can be extradited to the ICC for possible prosecution.<sup>11</sup>

Thus the meaning of *Article 98* of the Rome Statute is very clear. It does not lead to any absurdity. It is gathered from the preparatory commission's work that it was intended to preserve the status of the forces between states.<sup>12</sup>

*Antonio Cassese* posits that the principle of *universal jurisdiction* was proclaimed in the seventeenth century with regard to piracy. That it was a departure from the classic principle of territoriality or nationality. That it was necessitated by the need to fight jointly against a form of criminality that affected all states. Subsequently the principle was incorporated in the Geneva Convention and the 1984 Convention against Torture and International Treaties on terrorism.<sup>13</sup> Further, he discusses the jurisdiction of the ICC in great details in addition to the substantive Criminal Law.

*Johan D. Vanges Vyver* posits that universal Jurisdiction has been recognized in the

---

<sup>7</sup> See Han – Peter Kaul & Krieb, Jurisdiction and cooperation in the Statute of International Criminal Court: Principles and compromises, 2 Y. B. Int'L Hum. L. 143, 165 (1999)

<sup>8</sup> See David Scheffer, *supra*, note 5

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> See generally Ibid

<sup>12</sup> Ibid

<sup>13</sup> Antonio Cassese. International Criminal Law [15.5] p.284 – 286.

United States for a long time. As his basis he quotes Restatement (Third) of Foreign Relations Law of United States 404 [1987].<sup>14</sup>

**Michael Byers** posits that universal jurisdiction is the *jus cogens* obligation under international law. That *jus cogens* rules are non-derogable rules of international “*public policy*”. They render void other, non peremptory rules which are in conflict with them. Concomitantly, he posits that *in erge omnes* rules, are rules which, if violated, give rise to a general right of standing – against all states subject to those rules – to make claims.<sup>15</sup>

**M. Sherif Bissouni** posits that crimes of genocide, war crimes and crimes against humanity are regarded under international law as *delicti jus gentium* i.e. against humanity and thus, qualify as international crimes or universal crimes that are an affront to humanity and its existence.<sup>16</sup>

**Julius Stones** posits that there are some treaties that are “*dispositive and constitutive*” in character. They bind or produce effects for third parties without their consent. The permanent arrangements set up by such treaties would not be extinguished by war.<sup>17</sup>

**L. Oppenheim** posits that apart from “*legislative*” or “*constitutive*” treaties, there are treaties which expressly bind the third parties. *Article 2 (6) of the United Nations Charter* states:

-----  
<sup>14</sup> Johan D. Vanger Vyver, American Exceptionalism, Human Rights, International Criminal Justice, and National Self-Righteousness, 50 Emory L. J. 775 [813]

<sup>15</sup> See Michael Byers, Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules, Nordic Journal of International Law 66: 211 – 239, 1997 (c) 1997 Kluwer Law International. Printed in the Netherlands.

<sup>16</sup> See Sherif Bassouni, AN APPRAISAL OF THE GROWTH AND DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW, 45, REV. INT’L DE DROIT PENAL 405 [1974].

<sup>17</sup> See Julius Stone, Legal Controls of International Conflicts [Steven & Sons Ltd, London], 1954, p.448. In the International Status of South-West Africa Case [1950] ICJ Rep. p.128, at p.154, Judge Mc Nair observed that the mandate constituted “more than a purely contractual basis,” territories subjected to it were “impressed with a special legal status”.



*“The organisation shall ensure that states which are not members ... act in accordance “these principles” so far as may be necessary for the maintenance of international peace and security”.*

In pursuance of its duty to maintain international peace and security, Article 33 (2) empowers the Security Council to call upon the parties [to the disputes, not necessarily the members of the UN] to settle their disputes through peaceful means enumerated in paragraph (1) of Article 33. Read along with Articles 37 (2), 40, 41 and 42, of their relations and the right to intervene. This may lead to a situation when conformity with the terms of such treaties will be expected as a matter of right and not as a matter of courtesy from a third state.<sup>18</sup> Certain multilateral conventions with intended universal application or of public law character, may create enforceable obligations against non-parties. For example, single *Convention on Narcotic Drugs*, 1961, which replaced the Geneva Drugs Convention, 1936 empowers the parties to the convention to impose an embargo against the imports of a non-party in the same way as against parties to the convention, if it exceeds its narcotic drug requirements.<sup>19</sup>

*S. K. Verma*, posits that the treaties, declaratory of established customary rule of international law, will apply to non-parties, which will be bound not by the treaty but the customary rule, though treaty might have given the rule a precise formulation. Similarly, a treaty leading to the formulation of customary rule of international law, becomes binding upon a third – state as such [*Article 38*]. The treaty may become evidence of a general international law, the accepted practice of nations.<sup>20</sup>

---

<sup>18</sup> L. Oppenheim, *International Law*, Vol.1, 8<sup>th</sup> ed. [Lanterpatcht (Ed.) Longman, London] 1955, p.407.

<sup>19</sup> The 1961 Convention has been supplemented by the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substance.

<sup>20</sup> See S. K. Verma, *Public International Law: The Nuremberg Tribunal applied the regulations attached to the 1907 Hague Convention on Rules of Land Warfare to determine crimes against the law of war.*

*Malcom Shaw* posits that as a general rule treaties bind only the parties to them: one major exception to this rule is that where the provisions of the treaty in question have entered into customary law.<sup>21</sup> In such a case, all states would be bound, regardless of whether they had been parties to the original treaty or not.<sup>22</sup> This point arises with regard to article 2 (6) of the United Nations Charter which states that:

***“The Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”***<sup>23</sup>

*H. Kelsen* and *Mc Nair*<sup>24</sup> posit that this provision creates binding obligations rather than being merely a statement of attitude with regard to non-members of the United Nations.<sup>25</sup>

*Article 36 of the Vienna Convention* provides:

***“a right arises from a provision of a treaty if the parties to the treaty intend the provisions to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides”.***<sup>26</sup>

---

<sup>21</sup> See Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition, Cambridge University Press.

<sup>22</sup> Article 38, See the North Sea Continental Shelf Cases, ICJ Reports, 1969, p.3; 41 ILR, p.29. See also Year book of the ILC, 1966, Vol.11, p.230

<sup>23</sup> See *Infra*, chapter 19, p.807

<sup>24</sup> See e.g. H. Kelsen, *The Law of the United Nations*, London 1950, pp106 – 110.

<sup>25</sup> See also Lord Mc Nair, *Law of Treaties*, pp 216 – 18

<sup>26</sup> Article 36 of Vienna Convention



In instances, of treaties providing benefits of all nations of the world their *assent is presumed* in the absence of contrary intention. This is because the general tenor of international law has earned in favour of the validity of rights granted to third parties, but against that obligations imposed upon them, in the light of the basic principles relating to state sovereignty, equality and non-intervention.<sup>27</sup>

*Isaac Minta Larbi* posits that the United States has opposed the ICC since its inception. Signing of Bilateral Immunity agreements and seeking and obtaining Security Council Immunity is just part of that process.

*Larbi* juxtaposes *Article 98 Agreements* with some international legal principle; *jus cogens*, Vienna “Injunctions” on states parties to the Convention, the legislative history and legislative intent, Principle of persistent objector under international law. He gives some reasons why the United States should refrain from signing bilateral immunity agreements with other countries.

*Larbi* further posits that the duty to prosecute international crimes have developed into *jus cogens* and *customary international law*, thus obligating states to prosecute perpetrators wherever they may be found. That state parties to the ICC are under a duty to prosecute or extradite perpetrators to the ICC for prosecution. That the Vienna Convention on the Law of Treaties places an “*injunction*” on state parties not to sign “*Article 98 Agreements*”

---

<sup>27</sup> PCIJ, Series A, No1, 1923, p22, ILR, p.99. See also Year Book of the ILC, 1966, Vol.II, pp228 – 9 and J. de Arechaga, International Law in the Past Third of a century, 159 HR, pp1, 54 and de Arechega, “Treaty Stipulations in favour of Third States”, 50 AJIL, 1956, pp 338, 355 – 356

with the United States. That the principle of persistent objector is not available to the United States in any event. Finally, having analysed the United States arguments against the ICC in the context of international law, he concludes on a note that “Article 98 Agreements clearly violate international law.”<sup>28</sup>

*Vanessa Haas* posits that the United States vehemently opposes the ICC. That the ICC does not have primacy over national criminal jurisdiction, but rather the ICC is meant to be complementary to domestic systems. Therefore the ICC not only delivers international justice when a domestic court lacks the capacity to do so, but it forces domestic systems that would not have otherwise acted to bring criminals to justice. Hence, the ICC does not have *universal jurisdiction* because it cannot try any individual from any state. ICC can only exercise its jurisdiction over a crime when “an alleged crime is committed either in the territory, or by a national, of an ICC state party. The only exception being a UN Security Council referral for an investigation. The ICC aims to end impunity for crimes committed during war between states as well as political atrocities within states.

At the end of it all, Haas takes the view that the United States use of Article 98 of the Rome Statute to justify the conclusion of bilateral immunity agreements is in contravention of the statute. The drafters of the Rome Statute recognized that some nations had previously existing agreements, such as Status of Forces Agreements (SOFAS) which obliged them to

---

<sup>28</sup> See Isaac Minta Larbi, International Treaty obligations VS. International War Crimes, Analyzing United States Article 98 Agreements of the International Criminal Court in the context of international legal principles, EYES ON THE ICC, volume 1 Number 1, 2004, pp.177 – 190.

return home the nationals of another country [the sending-state] when a crime had already been committed. Thus Article 98 (2) was designed to address any potential discrepancies that may arise as a result of these existing agreements and to permit cooperation with ICC.<sup>29</sup>

*Marti Flacks* posits that there would be no violation of United States Constitution if it become a party to the ICC. That the crimes listed in the Rome Statute would not be “*void for vagueness*” under the United States Constitution. Flacks concludes that while a small number of the individual acts listed in the ICC Statute may fall into this category, the vast majority of the acts prohibited by the Rome Statute are detailed with sufficient clarity as to meet the constitutional standards.<sup>30</sup>

*John Burroughs* posits that when the United States notified the United Nations that it did not intend to ratify the ICC Statute, the Bush Administration sought to terminate the United States obligation under the customary international law not to engage in acts contrary to the statute’s “*object and purpose*”. That the original plan for the ICC had been of a permanent institution handling matters referred by the Security Council [*in which United States is a member*] and, subject to the significant restrictions on one court’s jurisdiction, by states. The eventual acceptance of a relatively broad scope for the court’s jurisdiction diluted the importance of the Security Council in the ICC structure. Moreover, the inclusion, as the negotiations matured, of a power of the prosecutor to initiate cases on his or her own power gave added weight to the ICC as an institution independent of both the Security Council and

---

<sup>29</sup> See Vanessa Haas, Power and Justice the United States and the International Criminal Court, EYES ON THE ICC, vol. 1, Number 1, 2004, pp 161 – 176.

<sup>30</sup> See Marti, Flacks, The International Court and the US Constitution: Does the Rome Statute violate “Void for Vagueness?”, EYES ON THE ICC, Vol.1 Number 1, 2004, pp 152 – 160



the states. This lends credence to the assertion that initially the United States supported the establishment of the ICC yet one that would be controlled through the Security Council or provided exemption from prosecution of the United States officials and nationals. When its objective failed it become hostile and began signing "*Article 98 Agreements*" with as many countries as possible to defeat the object and purpose of the Rome Statute.<sup>31</sup>

The next chapter highlights the historical evolution of international criminal law regime:

A historical perspective.

---

<sup>31</sup> See John Burroughs, US Opposition to the International Criminal Court, EYES ON ICC, Vol. 1, Number 1, 2004, pp.147 – 151.



## **1.9 OVERVIEW CHAPTERS**

**Chapter 1** deals with the background to the Rome Statute of International Criminal Court.

**Chapter 2** deals with the Evolution of International Criminal Law Regime and Jurisprudence: A historical perspective.

**Chapter 3** deals with the a Validity of the United States Bilateral Immunity Agreements or “Article 98 Agreements” and the implications and consequences of signing the said agreements, in the context of Rome Statute, International Law and Public Policy.

**Chapter 4** deals with conclusion and recommendations.

# **CHAPTER 2: EVOLUTION OF INTERNATIONAL CRIMINAL LAW**

## **REGIME AND JURISDICTION: A HISTORICAL PERSPECTIVE**

### **2.1 INTRODUCTION**

International Criminal Law regime has been in existence since the time of the ancient Greeks and probably well before that. *Piracy* and *war crimes* have always been prosecuted.<sup>1</sup>

This Chapter analyses the historical evolution of international criminal law regime. I argue that the evolution has undergone various faces.

*Part 1* is the introduction.

*Part 2* discusses international criminal justice regime in the ancient times – medieval times.

*Part 3* discusses the abortive early attempts [1919 – 1945] to establish international criminal tribunal.

*Part 4* discusses the Nuremberg and Tokyo Tribunals [1945 – 1947].

*Part 5* discusses the work of the *ILC* [1945 –1950]

*Part 6* discusses the development of *ad hoc* Tribunals.

*Part 7* discusses the Establishment of the Two *ad-hoc* tribunals for Former Yugoslavia and Rwanda.

*Part 8* discusses the drafting and adoption of the Rome Statute of ICC [1994 – 1998].

---

<sup>1</sup> See Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April, 1863.

**Part 9** discusses the Rome Statute of International Court: Legal Basis, Scope and Jurisdiction.

## **2.2 MEDIEVAL INTERNATIONAL CRIMINAL JUSTICE REGIME**

Individuals, traditionally, have been subject to the exclusive [judicial and executive] jurisdiction of states on whose territory they live. Violations of international rules were prosecuted and punished by the competent authorities of the states where these acts had been performed. This was under the doctrine of *territorial jurisdiction*. It was the responsibility of the state to bring to trial and punish the offender. The individuals who had materially breached international rules could not be called to account by the foreign state, unless they were their nationals.

A few exceptions existed, one of them was *piracy*,<sup>2</sup> a practice that was widespread in the seventeenth and eighteenth centuries. All states of the world were empowered to search for and prosecute pirates, regardless of the nationality of the victims and of whether the proceeding states had been directly damaged by piracy. The pirates were regarded as enemies of humanity [*hostes humani generis*] in that they hampered freedom of the high seas and infringed private property.

-----  
<sup>2</sup> Article 101 of 1982 Convention on the Law of the Sea [authoritative definition of piracy defines piracy]

'Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship, or a private aircraft, and directed.
  - (i) on the high seas, against any other ship or aircraft, or against persons or property on board such ship or aircraft
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
- (b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a private ship or aircraft;
- (c) any act of inciting or intentionally facilitating an act described in subparagraphs (a) and (b)'



Another exception was constituted by *war crimes*.<sup>3</sup> This category of international crimes gradually emerged in the second half of the nineteenth century. Together with piracy, it constituted the first exception to the concept of *collective responsibility* prevailing in the international community.

I share the view that two factors gave great impulse and a significant contribution to this class of crimes. First, was the codification of customary law of warfare, at both private and semi-private level. At the private level, there emerged the famous *Lieber Code*, in 1863<sup>4</sup> which was applied during the American Civil War, 1861 – 5. Equally notable was the adoption of the *Institut de Droit International of the Oxford Manual* in 1880.<sup>5</sup> At the state level, a remarkable impulse was given by the *Hague Codification* [1889 – 1907] which represent the first significant codification of war in an international treaty. The *Preamble* to the conventions recognizes that they were incomplete but promises that until a complete code of laws of war is issued,

*“the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience”*<sup>6</sup>

---

<sup>3</sup> Text in Friedman, I, 158 – 86

<sup>4</sup> Ibid

<sup>5</sup> See *Les Lois de La Guerre sarr Terre*, Manuel pubic par l’Institut de Droit International (Brussels and Leipzig: C Muquarat, 1880.

<sup>6</sup> See Report of International Commission of Enquiry into the Causes and Conduct of the Balkans Wars, Washington, Carnegie Endowment for International Peace 1914. This provision is known as the Marten’s clause after the Russian draftsman who drafted it.

Secondly, there were some important trials held at the end of the American Civil War, notably *Henry Wirz* – a case dealing with serious ill-treatment of prisoners of war heard by a US Military Commission [1865].<sup>7</sup>

Traditionally such crimes were defined as violations of the laws of warfare committed by combatants in international armed conflicts. However, exceptional character of war warranted this deviation from traditional law. For many years it was primarily the adversary that before the end of hostilities as well as thereafter carried out the prosecution and punishment of those guilty of war crimes, on the basis of the principle of '*passive nationality*' [the victims of the breaches were nationals of the state conducting the trial].<sup>8</sup>

### ***2.3 ABORTIVE EARLY ATTEMPTS (1919 – 1945) TO ESTABLISH INTERNATIONAL CRIMINAL TRIBUNALS***

As World War one wound to a close public pressure mounted for criminal prosecutions of those generally considered to be responsible for war. To this end, attempts were made to establish international criminal institutions all of which ended in a fiasco.

In 1919 the "*Commission on the Responsibility of the Authors of war and enforcement penalties*" proposed the establishment of a "*high tribunal composed of*

---

<sup>7</sup> See the numerous cases cited in W. Winthrop, *Military Law and Precedents*, 2<sup>nd</sup> Edn [Buffalo, NY: William S. Helm & Co, 1920], 839 – 62.

<sup>8</sup> See Antonio Cassese, *International Criminal Law*, [2.5], pp 37 – 38.

*judges drawn from many nations*".<sup>9</sup> In the same year the victors had agreed upon a few provisions of the peace treaty with Germany, signed at Versailles. Among other things, the Versailles treaty provided for the punishment of leading figures responsible for war crimes. Consequently a "*special tribunal*" was created to try *Emperor Wilhelm of Hohenzollern* for the supreme offence against international morality and sanctity of treaties.

It is significant to note that at the *Paris Peace Conference*, when the Allies debated the wisdom of such trials, the United States was generally hostile to the idea, arguing that it would be *ex post facto* justice. That responsibility for breach of international conventions, and above all for crimes against the "*laws of humanity*" a reference to civilian atrocities within a state's own borders – was a question of morality, not law. But this was a minority position. The resulting compromise dropped the concept of '*laws of humanity*' but promised the prosecution of *Kaiser Wilhelm II*,

*'for a supreme offence against international morality and sanctity of treaties'*

The *Versailles treaty*<sup>10</sup> recognized the rights of Allies to set up military tribunals to try German soldiers accused of war crimes. Germany never accepted the provisions, and subsequently a compromise was reached whereby the Allies would prepare lists of suspects but the trials would be held before the German Courts. Known as the "*Leipzig Trials*" the trials looked rather like disciplinary proceedings of the German Army than any international reckoning. The Allies selected only 45 cases for prosecution. Ultimately 12 minor indictees

---

<sup>9</sup> See the Report of the Commission, in 14 AJIL [1920], at 116. As for the objection of the US delegates, see Ibid, 129, 139 ff

<sup>10</sup> See The Treaty of Peace between the Allied and Associated Powers and Germany [Treaty of Versailles], [1919] T S 4, Article 227.



were brought to trial in 1921, and before a German Court, the “Imperial Court of Justice”

[Reichsgericht, sitting at Leipzig]. Six of the 12 indictees were acquitted.

I posit that the attempts to establish some sort of international criminal justice ended in a failure. But I hasten to add that two of its judgments (because of high legal quality) involving the sinking of the hospital ship *Dover Castle* and the *Wandover Castle*, and the murder of the survivors mainly Canadians wounded and medical personnel, are listed to this day as precedents on the scope of the defence of superior orders.<sup>11</sup>

The treaty of *Serves* of 1920, which governed the peace with Turkey, also provided for war criminals.<sup>12</sup> However, the treaty was never ratified by Turkey. Attempts to bring to justice the “Young Turks” responsible for Armenian genocide of 1915 were generally failures, courts in Istanbul brought some accused to trial. See in particular *Kemal* and *Tevfik [at 1-7]* and *Bahaeddin Sakiz [at 1 -8]*. The treaty of Serves was replaced by the treaty of *Lausanne* 1923 which contained a “*declaration of amnesty*” for all offences committed between 1 August, 1914 and 20 November 1922.<sup>13</sup>

In the light of the foregoing I posit that these initial efforts to create an international criminal court were unsuccessful. Nevertheless, they stimulated many international lawyers to think over the concept in the years that followed. *Baron Descamps* of Belgium, a member of the Advisory of the Committee of Jurists appointed by the council of the League of Nations

-----  
<sup>11</sup> German War Trials, Reports of Proceedings before the Supreme court in Leipzig, London. His Majesty’s Stationary office, 1921. See also James F. Willis, Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War, Westport, CT Greenwood Press, 1982.

<sup>12</sup> 1920 UKTSIL: (1929) 99 (3<sup>rd</sup> Series), De Martens, Recueil general des traits, No.12, PTZO [French Version].

<sup>13</sup> See Supra, Notell, Kemal and Tevfik [at 1 – 7] and Bahaeddin Sakiz [at 1 – 8]

urged the establishment of a “*High Court of International Justice*”. *Decamps* recommended that the jurisdiction of the court include offences “*recognized by the civilized nations but also the demands of public conscience [and] the dictates of the legal conscience of civilized nations*”. His ideas were however declared premature. Efforts by bodies such as International Law Association and the International Association of Penal Law, culminated in 1937, in the adoption of a treaty by the League of Nations that contemplated the establishment of an international criminal court.<sup>14</sup> But it never entered into force.

I posit that all these efforts came to nought because the period placed an exceptionally high premium upon considerations of national sovereignty which was the bedrock of the international community. The practical import of this was that no feasible mechanism could be brought into being enabling a state official – let alone a Head of State – accused of war crimes or other outrages to be tried. It is no coincidence that the first provision criminalizing international action was *Article 227 of the Versailles Treaty*, which provided for the criminal liability of the most important and representative among state officials, as a Head of State, and that provision remained a dead letter and indeed caused an uproar in the international community.<sup>15</sup>

---

<sup>14</sup> Convention on the creation of International Criminal Court to try terrorists offences, League of Nations OJ Spec. Supp No.156 [1936] I. N. Doc. (547) (1) M. 384 (1) 1937. V [1938].

<sup>15</sup> See Article 227 of the Versailles Treaty

## 2.4 THE NUREMBERG AND TOKYO TRIBUNALS (1945 -1947)

I submit that the existence of a community dominated by state sovereignty led to the successful establishment of the Nuremberg and Tokyo Tribunals in the immediate post – World War two era. I equally submit that the tribunals were a response to the horrors of Nazi Genocide in Europe and crimes perpetrated by the Japanese during their occupation of vast parts of South East Asia nations. The international community was jolted out of its complacency.

The Allied forces campaigned for the arrest and prosecution of those primarily responsible for war crimes. The British suggested trial by specially created tribunals<sup>16</sup> United States and Italy objected. In the end the wish of the British prevailed, and the International Military Tribunal was set up in Nuremberg to try the “**great Nazi Criminals**” while lesser Allied Tribunals in the four occupied zones of Germany were to deal with minor criminals.

The *Charter of International Military Tribunal* [IMT] was formally adopted on 8<sup>th</sup> August, 1945, and was promptly signed by the representatives of the “Big Four”: United Kingdom, France, the United States, and the Soviet Union. The IMT met from 14 November to 1 October 1946. In addition, in occupied Germany, the four major Allies, pursuant to Control Council Law No.10, prosecuted through their own courts sitting in Germany, in their respective zones of occupation, the same crimes committed by lower-ranking defendants.<sup>17</sup>

---

<sup>16</sup> See F. Smith (ed), *The American Road to Nuremberg. The Documentary Record, 1944 – 1945* (Stanford, Cal: Hoover Institution Press, 31 – 3, 155 -7

<sup>17</sup> See for instance C. C. Hyde, ‘Punishment of War Criminals’ proceedings of the American Society of International Law, Thirty – seventh Annual meeting, 1943 (1943), 43 –3.



On 26 July 1945, two weeks after the conclusion of the London Conference the “Big Four” issued the Postdam Declaration to prosecute leading Japanese Officials for the same crimes. Subsequently on 19 January 1946, General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, approved, in the form of an executive order, the Tokyo Charter; *International Tribunal for the Far East [IMTFE]*. Like the Nuremberg Charter, the Tokyo Charter, which was issued on 26 April, 1946, included the newly articulated crimes against peace and humanity.<sup>18</sup>

Arguably the creation of the two tribunals marked a crucial turning point in the evolution of international criminal justice regime.<sup>19</sup> *First*, two new categories of crime were envisaged; crimes against peace and crimes against humanity in addition to war crimes. *Secondly*, until 1945 [with the exception of the treaty of Versailles relating to the German Emperor, which however remained a dead letter] senior state officials had never been held personally responsible for their wrongdoings, until that time states alone could be called to account by other states, plus servicemen, normally low ranking people, accused of misconduct during international wars. Those men were no longer protected by state sovereignty; they could be brought to trial before organs – representative if not of the international community at least of the large group of the allied victors – and punished by foreign states.<sup>20</sup>

---

<sup>18</sup> The Charter had been drafted by the American only, essentially by Joseph B. Keenow, Chief Prosecutor at the Tokyo Trial, and the other allies were only consulted after it was issued: B.V.A. Roling and A. Cassese, *The Tokyo Trial and Beyond* [Cambridge: Polity Press, 1993], 2.

<sup>19</sup> C. C. Hyde [Punishment for ‘War Criminals’ proceedings of the ASIL [1943], at 43 – 44. See also H. Kelsen *peace through law*, at 111 – 116 and *Supra* note 17.

<sup>20</sup> See H. Kelsen, *Supra*, note 19 at 222 – 18.

As International Military Tribunal forcefully stated [at 223],

*“the very essence of the Charter (instituting the IMT) is that individuals have international duties which transcend the national obligation of obedience imposed by individual state”.*<sup>21</sup>

At Nuremberg the Nazi war criminals were charged with what prosecutors called “*genocide*” but the term did not appear in the substantive provisions of the statute and the Tribunal convicted them of ‘*crimes against humanity*’ for the atrocities committed against the Jewish people of Europe. In December 1946, a resolution was adopted declaring genocide a crime against international law and calling for a preparation of a Convention for Prevention and Punishment of the Crime of Genocide.<sup>22</sup> It is significant that the definition of genocide as set in *Article 11 of the 1948 Geneva Conventions* is incorporated unchanged in the statute of International Criminal Court, as *Article 6*. The said article provides that the trial for genocide was to take place before,

*‘a competent tribunal of the state of the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.’*

Arguably the 1948 Geneva Conventions marked a great advance as regards the extension both of substantive law [new categories of war crimes were added; they were termed

---

<sup>21</sup> See Antonio Cassese, *International Criminal Law*, p.41

<sup>22</sup> Convention on the Prevention and Punishment of the Crime of Genocide [1951] 78 UNTS

‘grave breaches of the Geneva Conventions’] and of procedural law [they set up a very advanced system for repressing violations by states]. The relevant provisions represented a momentous departure from customary law, for the Conventions laid down the principle of “*universality of jurisdiction*”.

The universality principle has been upheld in two different versions, both predicated on the notion that the judge asserting universal jurisdiction so acts to substitute for the defaulting territorial or national state: the narrow notion [*conditional jurisdiction*] and broad notion [*absolute universal jurisdiction*].

According to narrow notion of universality<sup>23</sup>, only the state where the accused is in custody may prosecute him or her [the so-called *forum deprehensionis*; or jurisdiction of the place where the accused is apprehended]. Thus, the presence of the accused on the territory is a condition for existence of jurisdiction.

I submit that this class of jurisdiction is accepted, at the level of customary international law with regard to *piracy*. At the level of treaty law, with regard to *grave breaches* of the 1949 Geneva Conventions and the First Additional Protocol of 1977, *torture* [under Article 7 of the 1948 Torture Convention], as well as terrorism.

These treaties, however, do not confine themselves to granting the power to prosecute and try the accused. They also oblige states to do so, or alternatively to extradite the defendant to a state concerned [the principle of *aut prosequi aut dedere*]. This version of universality principle is also applied in national legislation of some states, such as Austria, Germany and Switzerland.

---

<sup>23</sup> See Antonio Cassese, *Supra*, note 21, 15.5.1, pp 285 - 286.



According to a *broad notion of universality*,<sup>24</sup> a state may prosecute persons accused of international crimes regardless of their *nationality*, the place of the commission of the crime, the nationality of the victim and even of *whether or not the accused is in custody or at any rate present in the forum state*. Such exercise of jurisdiction is premised on the failure of the territorial or national state to take proceedings, and should therefore not be activated whenever one of those states initiates proceedings. A case in point is that of Pinochet.<sup>25</sup> In its decision of 5 November, 1998 the Spanish *Audencia nacional* held that,

*“Universal Jurisdiction may have to yield to territorial jurisdiction whenever this is imposed by an international treaty. It is stated that because of the prevalence in Spanish law of treaties over national legislation, Article 16 of the Genocide Convention of 1948 [whereby persons accused of genocide must be tried by courts of the territorial states or by an “international penal tribunal” ] entails that in Spain the exercise of other grounds of jurisdiction [including universality] is ‘subsidiary in nature’, so that courts of a state should refrain from exercising jurisdiction over acts of genocide that are being tried by courts of the state where they occurred, or by an international criminal court” [at 3, second legal ground; emphasis added]”*

---

<sup>24</sup> Ibid

<sup>25</sup> 11 September, 1973: bloody military coup and overthrow of democratically elected Chilean president *Salvador Allende*. In 1981 Pinochet declared himself president of Chile. His regime was marred by human rights violations. In 1990 Pinochet handed over presidency to a civilian, Aylwin. He was arrested on 16 October 1998 during a visit to the UK, based on a Spanish provisional arrest warrant [issued by Judge *Balthasar Garçon*] because of the alledged responsibility for the murder of Spanish citizens in Chile during his reign ... Also the Swiss and French Government filed extradition requests. Criminal proceedings against him also began in Belgium, Italy, Luxembourg, Norway, Sweden and United States.

The Pinochet case is significant for international law and the principle of universal jurisdiction mainly because for the first time ever, the British House of Lords decided that former heads of state accused of torture did not enjoy immunity.

The principle is laid down in such national legislations as that of *Spain* and *Belgium*.<sup>26</sup> It is notable that Regulation No. 2000/15 of United Nations Transitional Administration in East Timor [UNTAET] also applies this principle in *Articles 2.1* and *2.2* with regard to such crimes as genocide, war crimes, crimes against torture and humanity.

*Article 7.5* of the Italian Criminal Code may also be construed to the effect that alleged authors of international crimes may be prosecuted even if they do not find themselves on Italian

---

<sup>26</sup> In Spain, Article 23 of the 1985 Law on Judicial Power provides that Spanish courts have jurisdiction over crimes committed outside Spain when such crimes constitute genocide, terrorism or other crimes which Spain is obliged to prosecute under international treaties. However, in Spain trials by default or in absentia are not allowed.

In Belgium, under the Law of 16 June 1993, Belgium courts have jurisdiction over grave breaches of the 1949 Geneva Conventions and 1977 Protocols, no matter where such offences are committed, by whom or against whom they were committed, and whether or not the offender is on Belgian territory. A law of 3 February, 1999 added genocide and crimes against humanity to the International crimes over which Belgian court possess Universal Jurisdiction. See the order of Brussels Investigating Judge in Pinochet [at 281 –8], as well as Rwanda case [where however the accused was already in custody in Belgium), at 2 – 3.

It should be noted that in a decision of 6 March, 2002 in Sharon and others the Chambre des mises an accusation of the Brussels Court of Appeal held that Belgian Legislation must be construed to the effect that it provides only for conditional universal jurisdiction [at 7 – 20]





territory provided that:

- (i) the crimes are envisaged in international treaties ratified by Italy and
- (ii) under these treaties Italian courts may exercise jurisdiction.<sup>27</sup>

Under the German Penal Code propounded by the German Supreme Court [*Bundesgerichtshof*] in a judgment of 21 February, 2001 in *Sokolovic* it was held that the same principle should apply in Germany, at least whenever the obligation to prosecute is provided for in an international treaty binding upon Germany.<sup>28</sup> It is also worthy of mention that in the course of drafting the Statute of International Criminal Court, Germany forcefully expressed the view that international customary law at present authorizes universal jurisdiction

-----  
<sup>27</sup> Recently some national judges attempted to place a broad interpretation on the notion of Universal Jurisdiction laid down in the Geneva Conventions and the First Additional Protocol of 1977. A French investigating judge unsuccessfully made this attempt on 9 May 1994 [Order of the Judge d'instruction, in Javor and others]. (He intended to institute proceedings against Bosnia Serbs who were alleged to have committed grave breaches of the Geneva Conventions and who found themselves on the territory of Bosnia and Herzegovina). See the cases discussed in R. Maison, 'Les premiers cas d'application des dispositions penales des conventions de Geneva Par les juridictions internes', 6 EJIL [1995], 260 ff.

<sup>28</sup> The court noted that in its decision of 29 November 1999, the Court of Appeal [oberlandsgericht Dusseldorf], following the traditional German case law, had held that a factual link was required by law [legitimierender /Anknüpfungspunkt] for a German court to exercise Jurisdiction over crimes committed abroad by foreigners. [In the case at issue the offender was a Bosnian serb accused of complicity in genocide perpetrated in Bosnia]. The Court of Appeal had found this link in the fact that the accused had lived and worked in Germany from 1969 to 1989 and had thereafter regularly returned to Germany to collect his pension and also to seek work. After recalling these findings by the Court of Appeal, the Supreme Court added: 'The court however inclines, in any case under Article 6 para 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of Jurisdiction .... Indeed, when, by virtue of an obligation laid down in international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non intervention. [Judgment of 21 February 2001, 3 STR 372/00, still unreported, at 19 – 20 of the typescript.



over major international crimes.<sup>29</sup>

The Geneva Convention were followed by two *Additional Protocols* in 1977,<sup>30</sup> the *Conventions against Torture* in 1984<sup>31</sup> [which significantly contributed to the emergence of torture as a distinct crime], and a string of treaties against terrorism since the 1970's [which

-----

<sup>29</sup> In a document submitted in 1998 to the preparatory committee drafting the statute, Germany stated the following. 'Under current international law, all states may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national jurisdiction, regardless of whether the custodial state, territorial states or any other state has consented to the exercise of such jurisdiction before hand. This is confirmed by extensive practice "[UN DOC.A/AC 249/1998/D.P2, 23 March 1998.

<sup>30</sup> See the 2 Additional Protocols to the Geneva Convention.

<sup>31</sup> See Flavia Lattanzi and William Schabas, *Essays of the International Criminal Court*, vol.1, page 31 note 12. Thus the Convention Against Torture provides for a system of mandatory Universal Jurisdiction, even if conditioned by the presence of the alleged offenders on the territory of the state [so called "territorial" Universal Jurisdiction. Such "territorial" Universal Jurisdiction is accompanied by the principle of *aut judicare aut derere*. According to Article 7 (I) of the Convention, the state party in the territory under whose jurisdiction a person alleged to have committed any offence of torture is found shall, in the cases contemplated by Article 5, if it does not extradite him submit the case to its competent authorities for purposes of prosecution.

contributed to the evolution of the International Crime of Terrorism].<sup>32</sup> If there was any doubt left it was put to rest by the Appeals Chamber in *Tadic*<sup>33</sup> [*Interlocutory Appeal*] where it was held that the crimes against humanity need not be linked to armed conflicts. It follows that crimes against humanity can be committed in peace time. Thus the notion of war crimes was gradually extended to serious violations of international humanitarian rules governing internal armed conflicts.

I submit that the *IMTS* were important in several respects. *First*, it broke the 'monopoly' over criminal jurisdiction concerning such international crimes as war crimes, until that moment firmly held by states. For the first time non-national, or multi-national, institutions were established for the purpose of prosecuting and punishing crimes having international dimension and scope. *Secondly*, new offences were envisaged in the London Agreement and made punishable crimes against humanity and crimes against peace. *Thirdly*, the statutes and the case law of the *IMT* and the *IMTFE* and the various tribunals set up by the Allies in the aftermath of the second world war contributed to the development of a new legal norms and standards of responsibility which advanced the international rule of law, for example the elimination of the defence of '*obedience to superior orders*', and the accountability of Heads of State. Finally a symbolic significance emerged from these experiences in terms of

---

<sup>32</sup> In 1991 a treaty was agreed upon in the UN General Assembly, in addition to prohibiting specific acts of terrorism, also added a definition of this phenomenon. This is the International Convention for the suppression of the Financing of Terrorism [G. A. Resolutions 54/109 of 9 December 1999].

<sup>33</sup> See prosecutor –V- Dusko Tadic [Case No. IT-94-1-1] Judgment on 15 July 1999, The Prosecutor V Dusko Tadic [Decision of the Appeal Chamber, 2 October 1995] ILR 919, 453 [70].

their moral legacy, which was drawn on by those seeking a permanent international criminal justice.<sup>34</sup>

## **2.5 THE WORK OF THE ILC [1950 – 1954] FOR THE ELABORATION OF THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT**

In an effort to build on the *IMT* and *IMTFE*, the United Nation system in the 1940's and 1950's tried to establish more permanent and impartial institutions for dispensing international criminal justice.

There were efforts to codify international crimes and to elaborate on the draft statute for the establishment of an international court.

On 21 November, 1947 the General Assembly [*res.177/II*] requested the International Law Commission [*ILC*] to commence the formulation of the principles recognized in the Charter of Nuremberg Tribunal, to prepare a draft code of offences against peace and security of mankind. Concomitantly, the task of formulating a draft statute for the establishment of an international court was assigned to another *special rapporteur*, who submitted his first report to the *ILC* in 1959.<sup>35</sup>

The *ILC* special committee charged with preparing a draft statute for an international criminal court produced a text in 1951 which was revised in 1953.<sup>36</sup> The 1953 Draft Statute of the court was shelved because the definition of aggression, what had been entrusted to another

---

<sup>34</sup> M. Lippman, Nuremberg: Forty-Five years later, 7 Conn. J. Int.L[1991], 1

<sup>35</sup> See report of International Law Commission on the Question of International Criminal Jurisdiction UNGAOR, 7<sup>th</sup> Sess., UN Doc A/CN.4/15[1950]

<sup>36</sup> See Report of the Committee on International Criminal Jurisdiction, UNGAOR, 7<sup>th</sup> Sess. SUPP NO.12 at 21, UN Doc.A/26645 (1954)



body, was not completed. This was not surprising. It was the result of a political will to delay the establishment of an international criminal court due to the cold war. Member states were subsumed in two antagonistic political blocks.

## **2.6 DEVELOPMENT OF AD HOC TRIBUNALS [1993 – 1994]**

I submit that several factors led to the establishment of international criminal tribunals in the 1990s.

The cold war had ended with the collapse of USSR power block. The animosity that had dominated international relations for close to fifty years thawed down. In its wake several factors emerged. *First*, there was reduction in distrust between the Western and Eastern Block. *Secondly*, the successor states to the USSR [the Russian Federation and the other members of the Confederation of Independent States] came to accept and respect some basic principles of international law. *Thirdly*, there emerged unprecedented agreement in the UN Security Council with the consequence that this august institution became able to fulfill its mandate effectively.<sup>37</sup>

I equally submit that during the cold war the two power blocks had managed to guarantee modicum of international order, in that each of the super-powers had acted as a sort of policeman. The collapse of this power relations entailed fragmentation of international community and intense disorder which, coupled with rising nationalism and fundamentalism resulted in a spiraling of mostly internal armed conflicts. The ensuing implosion of previously

---

<sup>37</sup> See Antonio Cassese, *International Criminal Law*, pp 334 – 335

multi-ethnic societies led to gross violations of international humanitarian law on unprecedented scale.<sup>38</sup>

Last but not least, I submit that increasing importance of human rights doctrine, which soon became a sort of ‘secular religion’ contributed immensely to the establishment of international criminal justice system.

Two events characterized this period. The first is comprised of the establishment by the Security Council of two *ad hoc* tribunals for Former Yugoslavia and Rwanda. The second, by the eventual adoption through multilateral treaty making process of the statute for a Permanent International Court.<sup>39</sup>

## **2.7 THE ESTABLISHMENT OF THE TWO AD HOC TRIBUNALS FOR FORMER YUGOSLAVIA AND RWANDA**

The UN Security Council set up ad hoc Tribunals for the Former Yugoslavia [ICTY] in 1993, and in 1994 for Rwanda [ICTR]. This was in response to the internal armed conflicts that erupted in these countries.<sup>40</sup>

The *ICTY* was empowered to exercise jurisdiction over grave breaches of the Geneva Conventions, violations of the laws and custom of war, genocide, and crimes against humanity allegedly perpetrated in the Former Yugoslavia since *1 January 1991*.

-----  
<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> See for example the letters to A. Cassese of Lawrence Eagleburger of 8<sup>th</sup> May 1996 [‘the United States could no longer remain silent on the issue of war crimes...[A]cts against humanity could not and would not be ignored’] and Elie Wiesel of 28<sup>th</sup> June 1996 [‘not to prosecute the criminals would amount to condoning their crimes. In extreme situations, speaking out is a moral obligation’] reported in *The Path to the Hague: Selected Documents on the origins of the ICTY* [UN: ICTY, 1996], at 89 and 91 respectively.

The *ICTR* was mandated to adjudicate genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of the Second Additional Protocol, allegedly perpetrated in Rwanda [or ‘in the territory of neighboring states in respect of serious violations of international humanitarian law committed by Rwanda Citizens’] between *1 January and 31 December, 1994*.

The Security Council established the *ICTY* in its *Resolution 827* of 25 May 1993 and *ICTR* in its *Resolution 955* of 8<sup>th</sup> November, 1994. The *ad hoc* tribunals were set up in the belief that an international tribunal would contribute in ensuring that mass killings, massive organized and systematic detention and rape of women and ...the practice of “ethnic” cleansing that constituted a threat to international peace and security under chapter VII of the UN Charter<sup>41</sup> would be halted and effectively redressed.<sup>42</sup> The creation of the two tribunals elicited various criticism.<sup>43</sup> The *first* was that the Charter was ultra-vires. The *second*, that the tribunal was meant to make up for impotence of diplomacy and politics.

-----

<sup>41</sup> In operative paragraph 2 of Resolution 827 of 25 May 1993, the Security Council decided ‘to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above – mentioned. [Secretary – General’s] report. The Security Council amended the ICTY statute by resolution 1166 [1998] on 13 May 1998 to add a third Trial Chamber and three new judges. Likewise the statute of ICTR was amended by the Security Council in its Resolutions 1165 of 30 April, 1998 to provide for a third Trial Chamber.

<sup>42</sup> See in this regard UNSC Resolution 827 of 25 May 1993

<sup>43</sup> See in particular G. Robertson, *Crimes against Humanity – The Struggle for Global Justice* (London: Penguin, 2000), 300 ft.



The *third* that the Security Council had opted for ‘*selective justice*’; and last but not least that there was no complete separation at the Tribunal of the prosecutorial function from the Judicial end.

Be that as it may, I submit that as long as an international criminal court endowed with *universal jurisdiction* was lacking the establishment of the *ad hoc* Tribunals proved salutary.

After the decision to create the Rwanda Tribunal, which took much time and effort to establish and function, the Security Council “arguably” reached a point of “*tribunal fatigue*”.<sup>44</sup> After 1994, at least for sometimes, the Security Council simply did not see fit to take the same approach with regard to situations that were meanwhile arising in the world. Subsequently, the Council did consider the situations in, inter-alia, Sierra Leone, Cambodia, and East Timor as being suitable for establishment of *ad hoc* international courts. In the case of Sierra Leone, it actively dealt with the matter and eventually, in October 2000 at its request the Secretary General drafted the Statute of a Special Tribunal,<sup>45</sup> in the case of Cambodia the Secretary General discussed at length the establishment, by the Cambodian Parliament, of a Cambodian Special Tribunal<sup>46</sup> dealing with crimes committed in the past by Khmer Rouge, and

---

<sup>44</sup> A term coined by David Scheffer, then Senior Counsel and Advisor to the US Permanent Representative to the UN: cited in M. C. Bassiouni, *The Statute of International Criminal Court: A Documentary History*, cit, 10 n.50.

<sup>45</sup> See UN DOC.5/2000/915. See also SC Res.1315 (2000). For an overview, See. M. Frulli, “The Special Court for Sierra Leone: Some Preliminary Comments” ‘EJIL (2000), 857 – 69. On 16 th January 2001, the UN and Sierra Leone signed an agreement establishing a mixed court, accompanied by a statute.

<sup>46</sup> On 2 January, 2001 Cambodias Parliament (the National Assembly) passed a law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea.

composed partly by Cambodian judges and partly by international judges. In case of East Timor the setting out of mixed panels.<sup>47</sup>

I take the view that although the two *ad hoc* Tribunals were limited both temporally and geographically, their overall success provided a final spur to the emergence of International Criminal Court.

## **2.8 THE DRAFTING AND ADOPTION OF THE STATUTE OF THE ICC [1994 – 1998]**

The question of an international court came back to the United Nations' agenda in 1989 after a hiatus 36 years, following suggestion in the General Assembly by *Trinidad and Tobago* that a specialized international criminal court be established to deal with the problem of drug trafficking. In response to the General Assembly's mandate, arising out of the 1989 special sessions on drugs, the ILC in 1990 completed a report which was submitted to the 45<sup>th</sup> session of the General Assembly. Though the report was not limited to the drug trafficking question it was, nonetheless, favorably received by the General Assembly which encouraged the ILC to continue its work. The ILC produced a comprehensive text in 1993, which was modified in 1994.<sup>48</sup>

---

<sup>47</sup> In East Timor the UN provisional administration [UN Transitional Administration in East Timor, or UNTAET] adopted Regulation 2000/11 in 2000 setting up mixed panels within the District Court of Dili and Regulation 2000/15 established panels with exclusive jurisdiction over 'Serious Criminal Offences'.

<sup>48</sup> See Report of the International Law Commission, 46 Session, 2 May 22 July 1994, UNGAOR, 49<sup>th</sup> See. Supp No.10, UN Doc A/49/10[1994]

The General Assembly established in 1996<sup>49</sup> a Preparatory committee on the establishment of an International Criminal Court [*PrepCom*]. This committee held various meetings, and submitted to the Diplomatic Conference at Rome [15 June – 17 July 1998] a Draft Statute and Draft Final Act consisting of 116 articles contained in 173 pages of text with some 1,300 words in square brackets, representing multiple options either to entire provisions or to some words in certain provisions.

The ICC is a treaty.<sup>50</sup> The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.<sup>51</sup> The Statute was opened for signature by all states in Rome at the Headquarters of the Food and Agriculture Organisation of the United Nations on 17<sup>th</sup> July 1998. Thereafter it was opened for signature in New York, at United Nations Headquarters.<sup>52</sup>

It is subject to ratification, acceptance or approval by signatory states. Instruments of ratification acceptance or approval are deposited with the Secretary-General of the United Nations.<sup>53</sup>

---

<sup>49</sup> The 1994 ILC report on the Draft Statute for an International Criminal Court was submitted to the 49<sup>th</sup> Session of the General Assembly, which resolved to consider it at its 50<sup>th</sup> Session, but first it set up an ad hoc committee to discuss the proposal. This committee, referred to as the 1995 Ad Hoc Committee for the Establishment of an International Criminal Court, met inter-sessionally for two sessions of two weeks each from April to August 1995 [Ibid]

<sup>50</sup> See Article 2 of the Vienna Convention on the Law of Treaties

<sup>51</sup> See C. Bassouni, *The Statute of the International Criminal Court: A Documentary History*, [1998]

<sup>52</sup> See Article 125 of ICC Statute

<sup>53</sup> Ibid



## ***2.9 THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: LEGAL BASIS, SCOPE AND JURISDICTION***

The International Criminal Court established under the Rome Statute [hereinafter referred to as the *ICC*] is a permanent international tribunal that tries individuals responsible for the most serious crimes defined in the court's treaty.<sup>54</sup>

The court has a chequered history. The United States initially - 1995 – 2000 – supported its establishment so long as it was under the control of the Security Council. Subsequently it has persistently objected to its jurisdiction. The United States believes, inter-alia, that the ICC is an affront to its Constitution and that it will limit its sovereignty as regards rights to exercise its jurisdiction<sup>55</sup> over its nationals particularly the ones involved in peacekeeping. The concept of allowing a civilian court to evaluate what essentially may be a professional military judgment runs contrary to the core of the United States military system.<sup>56</sup> That is their official position.

However, I contend that the main fears of the United States are twofold. *First*, the United States disapproves the treaty's inclusion of the crime of "*aggression*" even though the *ICC* does not have jurisdiction over the same until it compiles the precise definition of the term. This is on account of the fact that the United States is the biggest aggressor in the world

---

<sup>54</sup> See the Preamble, See also Articles 5, 6, 7 and 8 of the Rome Statute.

<sup>55</sup> See John R. Bolton, The United States and the International Criminal Court, Remarks to the Federalist Society, Washington DC, November 14, 2002 See also [cicc@www.iccnw.org](mailto:cicc@www.iccnw.org) .

<sup>56</sup> Sewall and Kaysen, 156

currently. *Two*, the United States does not want to be part of an organisation that it cannot dominate. Being a member of the Security Council the United States would be comfortable if the Council acts as a check on the ICC.<sup>57</sup> Yet, if the ICC is to operate as a credible institution it must operate as an independent entity.<sup>58</sup>

By reason of such fears the United States have all along used its Constitution to defeat the ICC Statute. The Constitution of the United States<sup>59</sup> enjoins the President to propose ratification of a treaty to the Senate and to obtain its advise and consent. The Clinton's administration signed the ICC treaty on 31<sup>st</sup> December, 2000 but failed to ratify its claiming that it was "*significantly flawed*."<sup>60</sup> Upon assuming office President Bush "*unsigned*" the treaty and made it clear that he would not ratify the treaty.<sup>61</sup> It is arguable whether the "*un-signing*" of the treaty has any legal efficacy given that there is no mechanism for "*unsigning*" the ICC treaty. With a hardened intent the United States threatened to veto United States peacekeeping operations around the world and embarked on negotiating Bilateral Immunity Agreements

-----  
<sup>57</sup> Sewall and Kaysen 72, See also Vanessa Haas, Power and Justice the United States and the ICC, EYES ON ICC Vol.1.No.1.2004.p171.

<sup>58</sup> According to James Crawford, Whewell Professor of International Law at Cambridge University, and the Chairman of the International Law Commission that produced the first draft statute for the court "that the US make a formal announcement that it was not going to become a party, See. Also ANTHONY DOWRKINS, The United States and the International Criminal Court; A briefing, May 15, 2002.

<sup>59</sup> See US Const. article 11 & 12, See also International Economic Law. Documents (ASIL Database), I.E.L. TREATY, BASIC TREATY RESEARCH, 3 (1989)

<sup>60</sup> See Clinton Statement on signature of International Criminal Court Treaty, U.S. NEWSWIRE, Jan 1, 2001. Clinton upon signing the statute stated that signing the treaty will enable the U.S. influence the court rather than to refuse to sign which would make it impossible for the U.S. to influence the court.

<sup>61</sup> See Press Statement, Richard Boucher, Spokesmen, International Criminal Court: Letter to the UN Secretary General Kofi Annan Washington, DC, May 6, 2002; available at <http://www.state.gov/v/pa/prs/ps/2002/9968.html> (last visited August 30, 2003).

[BIA'S], dubbed "**Article 98 Agreement**" to protect the United States interest.<sup>62</sup> The United States also passed the American Service Members Protection Act<sup>63</sup> [ASPA] dubbed the "**Hague Invasion Act**" which authorizes the United States President to use "all means necessary to release the United States Servicemen and Peacekeepers from detention centres in any part of the world including the seat of the ICC, the Hague. It has also threatened to restrict military aid to countries that do not enter into such agreements.

Be that as it may, the ICC is arguably the most significant international organisation to be created since the United Nations. The goal of the Court is to defeat the **culture of impunity** for the "most serious crimes of concern to the International Community as a whole".<sup>64</sup>

The main object and purpose of the ICC is to **end impunity** for the worst possible crimes in the world in accordance with the principle of complementarity, which places the primary responsibility of investigating and prosecuting these crimes on states, but ensure that the Court will be able to exercise jurisdiction when states fail to fulfill those responsibilities. The other objects are to deter future war and human rights criminals, to help end conflicts and to compensate for the short-comings of **ad hoc** tribunals [ICTY, ICTR etc].<sup>65</sup>

---

<sup>62</sup> See U.S. seeks Court Immunity for E. Timor Peacekeepers, The Washington Post, Thursday, May 16, 2002 page A 22.

<sup>63</sup> See US "Hague Invasion Act" Becomes Law, White House, "Stops at Nothing" in Campaign Against War Crimes Court, 3 August 2002, available at [[http://ww.hrw.org/press/soo2/aspa\\_080302.html](http://ww.hrw.org/press/soo2/aspa_080302.html)].

<sup>64</sup> See Rome Statute, note 54.

<sup>65</sup> Ibid



The Court works on the principle of complementarity which is laid down in paragraph 10 of the Preamble as well as Article 1 of the Statute whereby<sup>66</sup> the ICC “shall be complementary to national criminal jurisdiction” as spelled out in Article 15, 17, 18 and 19.<sup>67</sup> In sum, the court is barred from exercising its jurisdiction over a crime whenever a national court asserts its jurisdiction over the same crime and,

*i) under its national law the state as jurisdiction;*

*ii) the case is being duly investigated or prosecuted by its authorities if these authorities have decided, in a proper manner, not to prosecute the person concerned; and;*

*iii) the case if not of sufficient gravity to justify action by the court [ex Article 17]*

In addition the Court may,

*iv) not prosecute and try a person who has already been convicted of or acquitted for the same crimes, if the trial was fair and proper [Articles 17 and 20].<sup>68</sup>*

The Court is instead authorized to exercise its jurisdiction over a crime even if a case concerning the crime is pending before national authorities, and thus override national criminal jurisdiction, whenever;

-----  
<sup>66</sup> See Paragraph 10 of the Preamble and Article 1 of the Statute.

<sup>67</sup> See Articles 15, 17 18 and 19 of the Rome Statute.

<sup>68</sup> Articles 17 and 20.

- i) the state is unable or unwilling genuinely to carry out the investigations or prosecutions, or its decision not to prosecute the person concerned has resulted from its unwillingness or inability to genuinely prosecute that person; and*
- ii) the case is of sufficient gravity to justify the exercise of the court's jurisdiction.*

The question of course arises of what is meant by '*unwillingness*' or '*inability*' of a state to prosecute or try a person accused or suspected of international crimes. These two notions are spelt out in Article 17 (2) and (3).<sup>69</sup> A state may be considered as "*unwilling*" when:

- i) in fact the national authorities have undertaken proceedings for the purpose of shielding the person concerned from criminal responsibility; or*
- ii) there has been 'unjustified delay' in the proceedings, showing that in fact the authorities do not intend to bring the person concerned to justice; or*
- iii) the proceedings are not being conducted independently or impartially or in any case in a manner showing the intent to bring the person to justice.*

-----  
<sup>69</sup> See Articles 17 (2) and 3 of the Rome Statute, see also Antonio Cassese International Criminal Law, pp 352 – 353.

A State is '*unable*' when, chiefly on account of a total or partial collapse of its judicial system, it is not in a position:

- i) to detain the accused or to have him surrendered by the authorities or bodies that hold him in custody, or
- ii) to collect the necessary evidence, or
- iii) to carry out criminal proceedings. One should also add cases where the national court is unable to try a person not because of collapse or malfunctioning of the judicial system, but on account of legislative impediments, such as amnesty laws, or a statute of limitations, making it impossible for the national judge to commence proceedings against the suspect or the accused.

Complementarity applies not only to state parties to the ICC Statute but also with respect to states not parties.<sup>70</sup> Thus, for instance, if the national of a state not party (A) has committed an international crime on the territory of a state party (B) and then escapes to another state not party (C), and this state asserts its jurisdiction on the ground that the crime is provided for in an international treaty and the suspect is present on its territory [the *forum deprehensionis* principle] or on the ground of universality, the ICC may not exercise its

---

<sup>70</sup> See Article 18 (i) of the Rome Statute



jurisdiction if it is proved that state C is willing and able to conduct a proper and fair trial.

Complementarity applies whatever the *trigger mechanism* of the court's proceedings, that is, both when the case

- (i) has been brought to the court by a states party [Articles 13 (a) and 14, or
- (ii) has been initiated by the prosecutor *motu proprio* and the prosecutor has been authorized by the Pre-Trial Chamber to commence a criminal investigation (Articles 13 (c) and 15), and when
- (iii) it is the UN Security Council that has referred to the court a 'situation in which one or more of ... the crimes [falling under the court's jurisdiction] appears to have been committed [Articles 13 (b) and 52 (c)].<sup>71</sup>

The ICC system of complementarity globally considered shows that the court must generally defer to national courts, except when these courts are not longer in a position to do justice in a proper and fair way, and in addition the case is of sufficient gravity to warrant the Court's stepping in. Although one should of course wait until the system begins to operate in practice, at present the appraisal of complementarity is largely positive.

Its chief merit lie both in its substantial respect of national courts, and in the indirect but powerful incentive to their becoming more operational and effective, inherent in the power of the ICC to substitute for national judges, whenever they are not in a position to dispense justice or they deliberately fail to do so.

I submit that ICC is different from the *International Court of Justice* [World Court]

---

<sup>71</sup> Article 13 (b) and 52 (c) of the Rome Statute

and other existing international tribunals. While the International Court of Justice [ICJ or World Court] is a civil tribunal that hears disputes between countries, the ICC is a criminal tribunal that prosecutes individuals. The two *ad hoc* war crimes tribunals for Former Yugoslavia and Rwanda are similar to the ICC but have limited geographical scope, while the ICC will be global in its reach. The ICC as a permanent court, will also avoid the delay and start-up costs of creating country specific tribunals from scratch each time the need arises.

I further submit that ICC will ultimately break the *taboo of impunity* often enjoyed by those responsible for the most serious international human rights crimes. It will provide incentives and guidance for countries that want to prosecute such criminals in their own courts, and will offer permanent back up in cases where countries are unwilling or unable to try these criminals themselves, because of violence, intimidation, or lack of resources or political will. As noted below, the ICC is not intended to replace national courts. Domestic judicial systems remain the first line of accountability in prosecuting these crimes. The ICC ensures that those who commit the most serious human rights crimes are punished even if national courts are unable or unwilling to do so. Indeed, the possibility of an ICC proceeding may encourage national prosecutions in states that would otherwise avoid bringing war criminals to trial.

All countries of the world can ratify the ICC treaty. Kenya signed the Rome Statute on 11 August, 1999, and ratified on 15 March, 2005, becoming the 98<sup>th</sup> State Party. The number of countries that have subscribed to it is a living testimony of the systems viability which should satisfy all states.

Among other things the next chapter highlights:

First, is the Introduction.

Secondly, Tactics of the United States against the ICC.

**CHAPTER 3: ANALYZING THE VALIDITY OF UNITED STATES  
BILATERAL IMMUNITY AGREEMENTS [BIAs] OR  
“ARTICLE 98 AGREEMENTS” IN THE CONTEXT OF  
ROME STATUTE, INTERNATIONAL LAW AND PUBLIC  
POLICY.**

**3.1 INTRODUCTION**

The International Criminal Court [hereinafter referred to as *ICC*] was established with the sole object of investigating, prosecuting, enforcing and deterring the commission of international crimes.<sup>1</sup> The United States has opposed the ICC since its inception but when its formation became imminent it reluctantly accepted. By 31 December, 2000, the agreed deadline, the United States under the Clinton administration's, was finally among the states that had signed but failed to ratify it claiming it is significantly flawed. On 6 May, 2002, the Bush administration announced several measures to undermine the ICC and officially repudiated/"unsigned"/nullified/withdrew the Clinton Administration signature to the Rome Statute. Ultimately, the United States, has been signing Bilateral Immunity Agreements [hereinafter referred to as *BIA's*] with as many countries as possible, with the sole aim of obtaining the country's obligation not to extradite its personnel to the ICC. Dubbed '*Article 98 Agreements*', it is designed to grant immunity to the United States peacekeepers who commit serious international crimes that threaten the very foundation of world order.

-----  
<sup>1</sup> See Articles 1 and 5 of the Rome Statute, see the Rome Statute of the International Criminal Court, U. N. Doc. A/CONF./183/9/[1998] [United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court July 17, 1998 [hereinafter the Rome Statute].



This Chapter analyses Bilateral Immunity Agreements in the context of the Rome Statute and Public Policy.

*Part 1* is the introduction.

*Part 2* discusses the tactics employed by the United States in an attempt to defeat the noble cause of the ICC. It highlights the repudiation of the United States signature to the treaty, the threat to international peacekeeping, and the seeking and obtaining of the United Nations Security Council Immunity.

*Part 3* analyses the validity of the United States Bilateral Immunity Agreements or “*Article 98 Agreement*” in the context of the Rome Statute, international law and public policy.

*Part 4* analyses the implications and consequences of signing the United States Bilateral Immunity Agreements or “*Article 98 Agreements*” in the context of the Rome Statute, international law and public policy.

The principles I have in mind are: *Jus cogens*, *The Vienna “Injunction” on states parties to a treaty*, *the principle of Pacta Sunt Servanda and Uberrimae fidei*, *legislative history and the legislative intent of “Article 98 of the ICC”*, *the principle of Persistent Objector*, *Pacta Tertiis nec nocent nec prosunt*, *Dispositive and Constitutive Treaties and universal jurisdiction*.

I posit that the duty to prosecute international crimes have developed into *jus cogens* thereby obligating states to prosecute or extradite perpetrators wherever they may be found.<sup>2</sup>

---

<sup>2</sup> See Jonathan I. Charney, Universal International Law, 87 Am. J. Int’l L.529, 541 [stating that “[international laws that prohibit genocide, slavery, war crimes and crimes against humanity are binding on all states regardless of their timely objections].

Indeed the United States law recognizes this legal principle under international law and does not overlook its significance.<sup>3</sup> The Vienna Convention on Law of Treaties states that “ states are obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty subject to ratification, acceptance or approval until it shall have made its intention clear not to become a party to the treaty”.<sup>4</sup> Thus state parties to the ICC are under obligation not to sign such agreements with the United States. I further contend that United States objection to the ICC is only restricted to imminent trial of its personnel by the court. It does not deal with the development of a legal principle under international law as required in the case of a persistent objector. Thus, this principle is not applicable. In my opinion the ICC can prosecute United States personnel where necessary.

### ***3.2 TACTICS OF THE UNITED STATES AGAINST THE ICC***

That United States is currently the only super power in the world is not in dispute. That it acts as the international police by way of international peacekeeping cannot be gainsaid. It’s case is that in shouldering so much of the international responsibilities, its peacekeeping

-----

<sup>3</sup> See RESTATEMENT [THIRD]OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102, cmt. J & Reporters note 4[1981] [hereinafter is “Restatement”] dealing with conflict between international agreements and customary law, stating in pertinent part “an agreement will not supersede a prior rule of customary law that is peremptory norm of international law, and an agreement will not supersede customary law if the agreement is invalid because it violates such a peremptory norm. See also Restatement, id, cmt. k.

<sup>4</sup> See Vienna Convention, Article 18

officer's and servicemen should be exempted from the jurisdiction of the ICC. Its main fear is that many states can possibly file malicious cases against its personnel<sup>5</sup> while in the service of the international community. United States also believes, albeit wrongly, that ICC is an affront to its Constitution and that only its judicial system can exercise jurisdiction over its nationals.<sup>6</sup> It also harbours the wrong view that the ICC will be a limitation on its sovereignty.<sup>7</sup> The United States has thus withdrawn its signature to the ICC treaty and is busy negotiating "**Article 98 Agreements**" with as many states as possible worldwide.

A letter stating the United States intention towards the ICC was submitted to the United Nations Security General.<sup>8</sup>

Gripped with unfounded fears the United States threatened to veto UN peacekeeping operations around the world unless immunity was granted. After intense negotiations, the United States reached a compromise with other Security Council members and a one year exemption was granted to its peacekeepers subject to a renewal on a yearly basis.<sup>9</sup>

-----  
<sup>5</sup> See John R. Bolton, *The United States and the International Criminal Court*, the Remarks of the Federalist Society, Washington DC, November 14, 2002, available at <http://www.state.gov/t/us/rm/15158.html> [last visited 4 Dec. 2002].

<sup>6</sup> See *Id.*, see also the Washington working Group on the International Criminal Court Factsheet; *The International Criminal Court and the U. S. National Security*, available at <http://www.w.f.a.org/issues/wicc/factsheets/nationasecurity.html> [last visited 4 Dec. 2002]

<sup>7</sup> See *US ADMINISTRATION ARGUMENTS AGAINST THE ICC* by the American non-Governmental Organisations for the International Criminal Court [hereinafter "AMICC"], available at <http://amicc.org/unisfo/administration.html/arguments> (last visited December 27, 2002).

<sup>8</sup> See website of International Criminal Courts, at [www.un.org/law/icc](http://www.un.org/law/icc), [last visited Dec.1, 2002].

<sup>9</sup> See UN Security Council Resolution 1422 of 12 July 2002 available at [www.un.org/documenrnts](http://www.un.org/documenrnts), [last visited 4 December, 2002]; See also, Human Rights Watch – United States efforts to undermine the International Criminal Court, 2 August, 2002, available at [www.hrw.org](http://www.hrw.org). [last visited Dec. 4, 2002]



Immediately following the granting by the UN Security Council of the one year immunity, the United States plunged into negotiating Bilateral Immunity Agreements<sup>10</sup> [hereinafter referred to as *BIA's* or '*Article 98 Agreements*']. The United States also passed the American Service Members Protection Act [*ASPA*] dubbed the "*Hague Invasion Act*",<sup>11</sup> which authorizes the United States President to use "*all means necessary*" to release United States Servicemen and Peacekeepers from detention centers in any part of the world including the seat of the ICC, the Hague. United States is also "*blackmailing*" foreign diplomats and their governments to sign "*Article 98 Agreements*" on pain of restricting military aid to countries that do not comply.<sup>12</sup> To make good their threat United States have come out with a list of countries that have been denied military aid by reason of their stand.<sup>13</sup>

-----

<sup>10</sup> See NEWS: US to seek bilateral deals on ICC, posting of Shantha Rav, cicc 4 @ ICC now org, to ICC info @yahoogroups.com [July 16, 2002], available at <http://www.groups.yahoo.com/group/icc-info/message/2294> [last visited August 19, 2003] (stating that after failing to secure a blanket immunity for its personnel, the United States, has turned its attention to the worlds capital to negotiate bilateral agreement.

<sup>11</sup> See US: "Hague Invasion Act" Becomes law, White House 'Stops at nothing' in Campaign Against War Crimes Court, 3 August 2002, available at [[http://www.hrw.org/press/2002/08/aspa\\_080302.htm](http://www.hrw.org/press/2002/08/aspa_080302.htm)] (last visited 4 Dec, 2002); (Press Release: U.S. Congress Passes Anti-ICC "Hague Invasion Act"// 26 July, 2002, available at <http://www.iccnow.org/documents/otherissues/aspa.html> [last visited Dec, 1 2002].

<sup>12</sup> See Press Release – Experts Available: U.S. Threatening to withhold Military Aid, available at <http://www.ICCnow.org/documents/otherissues/aspa.html> [last visited Dec, 1, 2002].

<sup>13</sup> See THE- WHITE HOUSE – office of the Press Secretary, MEMORANDUM FOR THE SECRETARY OF STATE, Presidential Determination No.2003 – 27, July 1, 2003, available at <http://www.US.embassy-australia.state.usembassy.org.UK/forpo564.html> .

### **3.3 ANALYZING THE UNITED STATE BILATERAL IMMUNITY AGREEMENTS (BIA'S) OR "ARTICLE 98 AGREEMENTS" IN THE CONTEXT OF THE ROME STATUTE, INTERNATIONAL LAW AND PUBLIC POLICY**

The jurisdiction of the ICC is to investigate, prosecute and punish any person accused of genocide, crimes against humanity or war crimes anywhere in the world. The main object of the court is to end the culture of impunity in accordance with the *principle of complementarity*, which places the primary responsibility of investigating and prosecuting these crimes on states, but ensure that the court [*read ICC*] will be able to exercise jurisdiction when states fail to fulfill these responsibilities.<sup>1</sup>

The United States is currently involved in a worldwide campaign to persuade states to enter into impunity agreements [hereinafter referred to as *BIA's or Article 98 Agreements*].<sup>2</sup> These impunity agreements *do not require* the United States or the other state concerned to *investigate* and if there is sufficient admissible evidence, *to prosecute* the United States national accused by the International Criminal Court of such serious crimes. *There lies the legal problems.* The overall object and purpose of the Rome Statute is to ensure that those responsible for the worst possible crimes are brought to justice in all cases, *primarily by states*, but, under the underlying principle of complementarity, if they prove unable or unwilling to do

<sup>1</sup> Paragraph 10 of the Preamble, Article 1 and 5 of Rome Statute.

<sup>2</sup> Christopher Marquis, U.S. seeking pacts in a bid to shield its peacekeepers, New York Times, 6 August 2002. Status of BIAs as at 15<sup>th</sup> June, 2004:

U.S. Success In Getting Impunity Agreements	
Signatures of BIAs to-date	- 79
States Parties to have signed	- 36
States to receive permanent waivers	- 27
Ratifications of BIAs	- 14
U.S. Unsuccessful In Getting Impunity Agreements Countries that have publicly refused signing	- 45
States Parties that have not signed	- 58 of 94
State Parties that have not signed despite loss of US aid	- 23

so, by the International Criminal Court as a last resort.<sup>3</sup>

I posit that any agreement not expressly provided for in the Rome Statute that precludes the International Criminal Court from exercising its complementarity of acting when states are unable or unwilling to do so, defeats the object and purpose of the statute.<sup>4</sup>

A key component of the object and purpose of the statute is incorporation in *Article 12* of the fundamental principle that *no one is immune* for crimes under international law such as genocide, crimes against humanity or war crimes.<sup>5</sup> That jurisdiction, apart from a referral of a situation pursuant to *chapter VII* of the United Nations Charter, extends under Article 12 of the Rome Statute to crimes committed by any person over the age of 18, regardless of nationality, in the territory of a state party or state making a special declaration and to crimes committed by a national of one of these states.<sup>6</sup>

---

<sup>3</sup> The object and purpose of the Rome Statute is set forth in the Preamble, in particular in the following paragraphs.

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

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

...

Emphasizing that the International Criminal Court established under this statute shall be complementary to national jurisdictions,

Resolved to guarantee lasting respect for the enforcement of international justice]”

<sup>4</sup> Ibid

<sup>5</sup> See Article 27 of the Rome Statute

<sup>6</sup> See Article 12 of the Rome Statute (preconditions to the exercise of Jurisdiction).



The centrality of this component of the object and purpose of the Rome Statute is demonstrated by the fact that there are only three (3) narrow exceptions – or apparent exceptions –limiting the court’s exercise of such jurisdiction.

- i) Certain exceptional cases provided for in Article 90 (6)
- ii) The special, limited temporary, diplomatic immunities and state immunities under Article 98 (1) and [(2)]
- iii) Existing Status of Forces Agreements [*SOFAS*] envisaged <sup>7</sup> in Article 98 (2).

In terms of the provisions of *Article 9* as read together with *Article 119* of the Rome Statute, it is the Court to interpret its own Statute. Hence the Court will determine what effect under the Rome Statute to give to the United States impunity agreements. <sup>8</sup>

The intention of *Article 98* of the Rome Statute is to secure and preserve *existing* and, possibly, any *future* international obligations that states may assume under international law. Such obligations may be as a result of existing international law or may have arisen by reason of an international agreement existing between the states concerned. It is submitted that, in the context of Article 98, this provision appears to create limitation on the Court’s ability to prosecute offender by the operation of international law or international treaties entered into by states. According to Article 98 (1),

---

<sup>7</sup> See Article 90 (6) of the Rome Statute

<sup>8</sup> See Article 9, see also Article 119 of the Rome Statute.

*“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 co-operation of that third state for the waiver of the immunity”.<sup>9</sup>*

It is submitted that this paragraph was intended to deal with the question of a state’s obligations under customary international law or international treaty law, for example, the Vienna Convention on Diplomatic Relations vis-à-vis the states obligations under the Rome Statute.<sup>10</sup> With immunities granted to state and diplomatic officers under the Vienna Convention on Diplomatic Relations, a waiver of the immunity will have to be granted before an offender who is entitled to such state or diplomatic immunity can be prosecuted by the ICC.

Article 98 (2), which is intended to deal specifically with existing international treaties provides that:

*“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*

---

<sup>9</sup> See Article 98 (1) of the Rome Statute.

<sup>10</sup> See Amnesty International, INTERNATIONAL CRIMINAL COURT: US efforts to obtain impunity for genocide, crimes against humanity and war crimes, [A1 Index: IOR 40/025/2002], at 6, available at [http://web.amnesty.org/aidoe\\_pdf.nsf/index/IQR4002522002\\_ENGLISH/\\$File/OR40025202.PDF](http://web.amnesty.org/aidoe_pdf.nsf/index/IQR4002522002_ENGLISH/$File/OR40025202.PDF) [last visited August 4, 2003 [hereinafter “All Impunity Article”].

*a person of that state to the Court, unless the Court can first obtain the cooperation of the sending state for the giving of consent for the surrender”.*<sup>11</sup>

It is submitted that this provision prevents the Court from insisting on the surrender of an offender, from a state, where such surrender will lead the said state to act inconsistently, with its treaty obligations. An obligation of this nature may relate to an agreement which sets out the legal responsibilities of the parties with respect to a crime or offence taking place on their territories. By surrendering an offender to the ICC, the state concerned may be acting inconsistently with its treaty obligations and thus, the ICC will not proceed with such a request unless the necessary consent for the surrender can be obtained from the relevant state.<sup>12</sup> Thus, the provision of Article 98 incorporates *Status of Forces Agreements (SOFA)*,<sup>13</sup> which gives protection to individuals and top civilians officers that are sent on official duties in foreign countries.<sup>14</sup> *SOFA*'s provide the legal basis, the mission, the mandate for the deployment of

---

<sup>11</sup> See the Rome Statute, supra, note 1, Article 98 (2).

<sup>12</sup> See the Rules of Procedure and evidence of the International Criminal Court U.N. Doc.PCNICC/200/11Add.1. 30 June 2000, Rule 195 (2) stated in full as: “The Court will not proceed with a request for the surrender of a person without the consent of a sending state, if, under article 98, paragraph 2 such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of sending state is required prior to the surrender of a person of that state to the court.

<sup>13</sup> See generally Erick Ronsenfold, APPLICATION OF U.S STATUS OF FORCES AGREEMENT TO ARTICLE 98 OF THE ROME STATUTE, available at [http://law.wustl.edu/publications/NUGSLR/Issue%20/Archive/Vol. 2 /Rosenfed\\_rd](http://law.wustl.edu/publications/NUGSLR/Issue%20/Archive/Vol. 2 /Rosenfed_rd), book pages. Pdf [last visited August, 19 2003].

<sup>14</sup> See David J. Scheffer, “Original intent at the Global Criminal Court”, Wall Street Journal Europe, September 20, 2002.



troops and military officers on either peacekeeping or other military engagement.<sup>15</sup> It is an instrument which embodies the respective rights and duties of the parties to the deployment, and determines the legal requirement and the basis of investigation and prosecution of offenders.<sup>16</sup> If a deployed citizen of a sending state commits a crime in the territory of the receiving state, the SOFA will determine the legal status of the offender, the requirements for his prosecution, and which country has the jurisdiction to try the offender. Therefore, under the provision of Article 98, the receiving state cannot extradite the offender to the ICC without the consent of the sending state. It is submitted that to compel such state to extradite the offender may lead the state to act inconsistently with its treaty obligation. Thus, Article 98 is intended to preserve any such agreements existing between states before the coming into force of the ICC. It is a way of avoiding possible conflicts between obligations states parties to the ICC may assume vis-a-vis any other obligations they may have already assumed under such existing agreements.<sup>17</sup> It is, however, noteworthy that the Article 98 provision does not prevent the ICC from investigating and indicting an alleged perpetrator.<sup>18</sup> It is submitted that such agreements cannot also give protection to mercenaries or individuals who engage in unofficial acts and commit crimes within the jurisdiction of the ICC.<sup>19</sup> Private individuals or persons sent

---

<sup>15</sup> See, *Infra*, note 18.

<sup>16</sup> *Ibid*

<sup>17</sup> See Hans – Peter Kaul & KreB, *Jurisdiction and Cooperation in the statute of the International Criminal Court: Principles and compromises*, 2 *Y. B Int’L HumL* 143m 165 [1999]

<sup>18</sup> See David Scheffer, *Supra*, note 14.

<sup>19</sup> *Ibid*

on covert missions without the legal mandate of the foreign state are also not covered under Article 98.<sup>20</sup> An individual who is not protected under such agreement can be extradited to the ICC for possible prosecution.

*Hans Peter Kaul* and *Claus Kress*, both members of the German delegation who attended the Rome Diplomatic Conference, explained the design of Article 98 (2) thus:

*“The idea behind the provision [Article 98 (2)] 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”*<sup>21</sup>

*Kimberly Prost*, a member of the Canadian delegation, and *Angelika Schlunck*, a member of the German delegation, have noted that states were concerned about *existing* international obligations when drafting Article 98.<sup>22</sup>

The United States commentary has implicitly recognized that Article 98 (2) does not apply to agreements entered into *after* a state has signed the Rome Statute. This interpretation is to be seen in the light of its underlying premise – the United States nationals suspected of genocide, crimes against humanity or war crimes should never be subject to the jurisdiction of the International Criminal Court.<sup>23</sup>

---

<sup>20</sup> Ibid

<sup>21</sup> See, Supra, note 17

<sup>22</sup> Ibid

<sup>23</sup> See Ruth Wedgwood, the International Criminal Court: An American View, 10 Euro.J.Int'l L.93, 103 (1999)

Article 98 (2) was designed, consistently with the overall scheme of the Rome Statute to end impunity through complementarity and the law of treaties, to take into account the allocation of priority among sending and receiving states under existing *SOFAS*. Under classical international law principles of interpretation of a statute, *the subsequent* Rome Statute could not of itself *override pre-existing* obligations of state parties to non state parties under other treaties.<sup>24</sup> To the extent that existing *SOFAS* perform this function of allocating priority between a sending state and receiving state, they are not necessarily inconsistent with the Rome Statute or other international law.

Thus even *SOFAS* must be consistent with international law. If the ICC were to interpret Article 98 (2) as applying to renewals of existing *SOFAS* or future *SOFAS*, they would also have to be consistent with the Rome Statute. If such international agreements were likely to lead to impunity, then they would not be valid under international law.<sup>25</sup>

It is possible that even the existing United States *SOFAS* may not satisfy the requirement of Article 98 (2). In fact, it has been argued that none of the existing 105 *SOFAS*

---

<sup>24</sup> See Vienna Convention Law of Treaties, Article 30 (4). See also Restatement (Third), of the Foreign Relations of the United States, 325 para 1 (American Law Institute 1987)

<sup>25</sup> See Gennady, M. Danilenko, "ICC Statute and third States" , in Antonio Cassese, Paola Gaeta & John R. W, O. Jones, eds,1 The Rome Statue of the International Criminal Court: A commentary 1887 – 1888 (Oxford: Oxford University Press 2002). See also Bert Swart & Groaw Sluiter, the ICC and International Criminal Co-operation in Herman AM. Von Heber, Johaw G. Lainmers & Jolian Schukking, eds, Reflections on the International Criminal Court: Essays in Honour of Adriann Bos 121 [The Hague: T. M.C. Asser Press 1999] (suggesting in the context of Article 98 (1) that international law may permit a state requested by the International Criminal Court to surrender a national of state that refuses to waive immunity to comply with the Court's request).



between the United States and 101 other states fall within Article 98 (2) by reason of the fact that they do not expressly state that the consent of a sending state is required to surrender a person of that state to the Court.<sup>26</sup> A leading expert on the United States military law agrees with this interpretation and notes that if such SOFAS were to lead to impunity they would be inconsistent with international law.<sup>27</sup>

In May 2002, the United States repudiated its signature of the Rome Statute and embarked on its campaign in relation to BIA's or "Article 98 Agreements". It took a two pronged approach: obtain Security Council resolution 1422<sup>28</sup> and threat to cut off military aid to any state party to the Rome Statute that does not enter into an impunity agreement with the United States.<sup>29</sup>

The impunity agreements came in three forms:

- i) The *standard form*, apparently signed by only one state, *Israel*, a signatory of the Rome Statute, provides that both parties agree not to surrender a broad range of

---

<sup>26</sup> See Human Rights Watch, United States Efforts to Undermine the International Criminal Court: Article 98 (2) Agreements, 9 July 2002, 2. Human Rights Watch stated that it believed "that existing U.S. SOFAs are no the type of agreement that would qualify under Article 98 (2), and cannot trump any obligations under the Rome Statute".

<sup>27</sup> That expert explained in 2000 that with respect to international agreements within the meaning of Article 98 (2) "No such agreement is known to exists. For example NATO SOFA does not preclude every sort of rendering of an accused US national to another state or to an international tribunal.

<sup>28</sup> See S. C. Res.1422, 12 July, 2002, in particular see the first 3 paragraphs of the Resolution.

<sup>29</sup> See Section 2007 (prohibition of United States Military Assistance to Parties to the International Criminal Court) of that act prohibits US military assistance to states that ratify the Rome Statute, but that prohibition does not apply to NATO members and certain Allies ...

each others nationals [and certain other associated nationals], not just persons serving in a UN peace-keeping operation, to the International Criminal Court without the consent of the other party.<sup>30</sup>

---

<sup>30</sup> The text of the standard impunity agreement as obtained by the CICC and Amnesty International reads as follows (with numbering and lettering added by the CICC for the convenience of the reader).

- “A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes.
- B. 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.
- C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,
- D. Bearing in mind Article 98 of the Rome Statute,
- E. Hereby agree as follows:
  - 1. For purposes of this agreement, ‘persons’ are current or former Government officials employees (including contractors), or military personnel or nationals of one Party).
  - 2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
    - (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or.
    - (b) be surrendered or transferred by any means to any other entity or third country, 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 other Party 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 X.
  - 4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
  - 5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to being 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.”

- ii) The *second form*; signed by *Romania* and *Tajkistan*, both state parties to the Rome Statute, reportedly is identical, except that does not prohibit the United States from surrendering nationals [and certain other associated nationals] of the second state to the International Criminal Court.<sup>31</sup>
- iii) The *third form*, which is intended for states that have neither signed nor ratified the Rome Statute, and signed only by *East Timor*, who is not yet a UN member state includes a paragraph requiring those states not to cooperate with efforts of third states to surrender persons to the International Criminal Court.<sup>32</sup>

Each impunity agreement is designed to remove the other states sovereign right to determine which courts – its own or those of an international criminal court to which it has delegated its authority under a multilateral treaty – will investigate and prosecute crimes committed in its territory or by persons found in its territory. Each also will require states to renegotiate re-extradition provisions in all current extradition agreements. However, none of these agreements have been ratified by national Parliaments.

There are a number of notable features about the United States impunity agreements.

I take the liberty to summarise them as follows:

**a. *Inability of the United States to investigate and prosecute all of the crimes in the Rome Statute committed abroad.***

-----  
<sup>31</sup> Ibid

<sup>32</sup> The additional paragraph, as obtained by the CICC, reads:

“Each Party agrees, subject to its international legal obligations, not to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal Court.”



*First*, the agreement declares that “the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals”. However, the United States cannot investigate or prosecute all such persons for all crimes within the jurisdiction of the Rome Statute. United States law permits the United State to investigate and prosecute United States soldiers and enemy nationals in general courts-martial for war crimes under customary international law committed abroad and enemy nationals in military commissions [executive bodies – not competent, independent and impartial courts] for war crimes. However, the USA does not have clear jurisdiction over all such crimes committed by United States civilians or over genocide committed abroad by members of the United States armed forces that are not United States nationals or by foreign civilians. For example, not all war crimes in the Rome Statute are expressly defined as crimes under Federal law when committed abroad. Crimes against humanity, apart from torture, committed abroad are not crimes under Federal Law. The United States courts may balk at trying persons for crimes under customary international law that are not expressly defined as crimes under the United States law. Federal courts have jurisdiction over genocide committed abroad only if committed by United States nationals, but not members of the United States armed forces or person committed by the United States impunity agreement who were not the United States nationals.<sup>33</sup>

-----

<sup>33</sup> 18 U.S.C. 1091 (d) (2). For the complex question of the scope of extraterritorial jurisdiction over war crimes, crimes against humanity, genocide, torture in US Courts, See Amnesty International, Universal jurisdiction. The duties of states to enact and implement legislation, A1 Index 10R 53/002-018/2001, September 2001 [Chapters 4, 6, 8 and 10] obtainable from [http:// www.amnesty.org](http://www.amnesty.org) or as CD-ROM from [ijp@amnesty.org](mailto:ijp@amnesty.org).

**b. Only investigations and prosecutions if “appropriate”.**

*Second*, even with regard to the crimes under international law committed abroad over which the United States courts have jurisdiction, the United States expresses its intention to investigate and prosecute only “where appropriate”, thus, indicating that the decision to investigate or prosecute is a matter solely within the discretion of the United States and not a matter of law. The United States sought in June 2002, but failed, to include similarly restrictive language concerning the duty of states to investigate and prosecute genocide, crimes against humanity and war crimes in what became *Security Council Resolution 1422*.<sup>34</sup>

**c. Purpose of US impunity agreement exact opposite of that of SOFAs.**

The *third* notable point about the United States impunity agreement is that, despite the reference in the fourth preambular paragraph to Article 98 of the Rome Statute, the purpose of the agreement is the exact opposite of the purpose of the existing SOFAs which are the subject of the second paragraph of that article. Existing SOFAs are designed to allocate responsibility for investigating and prosecuting crimes committed by armed forces of a sending state present on the territory of a receiving state pursuant to the agreement, not to provide impunity for the sending state’s forces for crimes committed in the territory of the receiving state. Despite the expressed intention in the third preambular paragraph by the United States to investigate and

-----  
<sup>34</sup> The language describing the US restrictive view of the duty under International Law to investigate and prosecute crimes under international law reads as follows: “Emphasizes that member states contributing personnel to UNMIBH or SFOR have the primary responsibility to investigate and prosecute in their national systems as appropriate crimes over which they have jurisdiction alleged to have been committed by their nationals in connection with UNMIBH or SFOR.”

prosecute persons (but only “where appropriate”) for crimes within the jurisdiction of the International Criminal Court and the reaffirmation in the first preambular paragraph of “the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes”, the agreement does not provide for primary jurisdiction in the United States – or even any jurisdiction in the United States – but simply provides that the second state may not surrender or otherwise transfer persons to the International Criminal Court. Indeed, the entire agreement must be seen against the background of the United States denunciation of its signature of the Rome Statute on 6 May, 2002.

*d. No obligations for second state to investigate or prosecute.*

*Fourth*, there is no requirement that the second state investigate and, if there is sufficient admissible evidence, prosecute. The second preambular paragraph of the United States impunity agreement simply recalls the principle of *vertical* complementarity under which the International Criminal Court will exercise its jurisdiction when states are unable or unwilling genuinely to investigate or prosecute. However, the agreement does not replace it with *horizontal* complementarity by the second state. There is no provision in the operative paragraphs requiring the United States to investigate and, if there is sufficient admissible evidence, to prosecute in good faith with due diligence any person extradited or otherwise transferred by the second state to the United States or to return any such person to the second state if this does not happen. Moreover, that state is likely to be under intense bilateral United States political pressure not to investigate or prosecute a person covered by the impunity agreement. Thus, it is, truly, *an impunity agreement*, not an agreement allocating responsibilities for investigating and prosecuting persons suspected of crimes.



*e. Need for state to renegotiate all existing extradition agreements.*

If a state signs a United States impunity agreement, it will have to re-negotiate all or almost all current extradition agreements with other states since most bilateral extradition agreements have re-extradition clauses. Such clauses provide that the state extraditing a person to another state normally retains the right to agree to the re-extradition of that person to another state or international court. Such clauses apply even if the state is extraditing a person of another nationality to a state not of that person's nationality. Under the United States impunity agreement, the second state gives up this right to the United States. Therefore, if a state agreed to the United States impunity agreement, it would have to renegotiate all or almost all current extradition agreements that have a re-extradition clause and to insert a new clause that provided that the second state retained this right to agree to re-extradition except when the person was a United States national or fell within one of the other categories or persons covered by that agreement.

*f. Broader range of persons covered than in SOFAs.*

*Fifth*, a broader range of persons are covered than in *SOFAs*. Persons covered by the standard United States impunity agreements are “*current or former Government officials, employees (including contractors), or military personnel or nationals of one party*”. In marked contrast to *SOFAs* and the language of Article 98 (2) of the Rome Statute, the persons covered by the United States impunity agreement are not limited to the current members of armed forces and related civilians of a sending state stationed in the receiving state pursuant to that agreement. They include former members of the armed forces and related civilians. They include a broad range of persons not included in *SOFAs*. For example, they even include

former members of the armed forces and related civilians. They include persons traveling through, conducting personal business or vacationing in the United States or the second state. It is important to note that the persons covered by the United States impunity agreement can include nationals of other states than those of the two parties to the agreement [including nationals of states parties to the Rome Statute). In addition, any of the categories of persons covered on the United States side, such as members of United States armed forces (which include nationals or any other countries) could include even nationals of the other party to the agreement (which might be a state party to the Rome Statute).

***g. Transfer of US witnesses to crimes under international law prohibited.***

***Sixth***, the United States impunity agreement is designed to prevent the United States nationals and associated persons, as well as nationals and associated persons of the second state, from appearing as witnesses, including as expert witnesses, before the International Criminal Court. The agreement provides that persons of either party present in the territory of the other party ***“shall not, absent the expressed consent of the [other] Party, (a) be surrendered or transferred by any means to the International Criminal court for any purpose[”***<sup>35</sup> Since witnesses before the International Criminal Court ordinarily appear only if they themselves consent, under the United States impunity agreement, they could be prevented from attending, even if they are willing to assist the Court in the search for truth and a fair

-----

<sup>35</sup> It is possible that the agreement is seeking to prevent even compelled testimony in the second state by video link before the Court. Even assuming that the person gave testimony to the Court by means of a video-link, the Court would have to rely upon the state concerned, which might not be a state party to the Rome Statute or have adequate legislation, to punish offences before the Court as perjury.

determination of guilt and innocence based on all the relevant evidence, including exculpatory and mitigating evidence. Their right to testify in the cause of international justice would be taken away by their own government. Thus, the *agreement could obstruct* international justice for genocide, crimes against humanity and war crimes, even when a United States national (or associated person) was not being prosecuted, by preventing crucial testimony that could determine guilt or innocence of persons accused of the worst crimes in the world.

*h. Broader range of persons covered than in Security Council Resolution 1422*

*Seventh*, the persons covered by the United States impunity agreements are not limited to “current or former officials from a contributing State not a Party to the Rome Statute over acts and omissions relating to a United Nations established or authorized operation”, as in Security Council Resolution 1422, but they also include employees, including civilian contractors (presumably, any person acting as an agent of the party to the United States impunity agreement in some contractual relationship with the United States, such as intelligence sources), regardless of nationality and regardless whether the person was a national of a state party or a state signatory to the Rome Statute. In addition, the persons covered by the United States impunity agreement are not limited to the persons with some connection to a United Nations established or authorized operation, as in Security Council Resolution 1422.

**3.3.1 Treaties and International Obligations**

States assume international obligations by signing international agreements known as treaties. A treaty is defined under the Vienna Conventions on the Laws of Treaties <sup>36</sup>.

-----  
<sup>36</sup> Vienna Convention on the Law of Treaties Article 2 (1)



Although states are sovereign, the principle of *pacta sunt servanda* and *uberrimae fidei* enjoins states to keep good faith with their international obligations. It is also not in consonance with the conduct of civilized nations to, on the one hand, ratify a treaty with a view to becoming a party and, on the other hand, enter into another treaty to undermine it. Thus, states that enter into “*Article 98 Agreements*” with the United States would have assumed international obligations to the effect that without the express authorization by United States, those states cannot extradite its offenders to the ICC for prosecution. Accordingly, this discourse sets the stage for a critical analysis of implications and consequences of *BIA*’s or “*Article 98 Agreements*” in the context of international law.

### ***3.4 THE IMPLICATION AND CONSEQUENCES OF SIGNING THE UNITED STATES BILATERAL IMMUNITY AGREEMENTS OR “ARTICLE 98 AGREEMENTS” IN THE CONTEXT OF THE ROME STATUTE, INTERNATIONAL LAW AND/OR PUBLIC POLICY.***

I posit that the United States impunity agreements are contrary to Article 98 (2) of the Rome Statute and international law.

They are for the purpose of giving the United States nationals and others covered by the agreements *impunity*. Their purpose is the exact opposite of *SOFA*’s, the agreements that Article 98 (2) was intended to address. Instead of allocating responsibility for investigating and prosecuting crimes committed by members of a sending state’s armed forces stationed in a receiving state and requiring each party to provide the other with assistance in such investigations and prosecutions, as in a *SOFA*, the sole purpose of these agreements is to

prevent the ICC from exercising its jurisdiction.

The United States will exercise its discretion and only investigate and prosecute persons covered by the agreement and will be under intense bilateral United States political pressure not to do so. These agreements, equally go so far as to prevent the United States nationals and others covered by the agreements from voluntarily appearing as witnesses in cases of crimes covered under Article 5 of the Court's jurisdiction. **Complementarity, is thus, negated** – neither the ICC nor the court[s] of the second state can step in as court[s] of last resort if the United States is unable or unwilling genuinely to investigate or prosecute these crimes.<sup>37</sup>

I further posit that the implications of signing or entering into “Article 98 Agreements” with the United State vary from party to party:

-----

<sup>37</sup> Wirth has explained that if a SOFA has been entered into by a state after it had signed the Rome Statute, “it must be interpreted taking into account the ‘relevant rules of international law’ [citing Article 31 (3) (c) of the Vienna Convention on the Law of Treaties]. Amongst such rules is the **Rome Statute** itself. The State Party to the SOFA but not the Rome Statute must be deemed to have known of the other State's obligations under the **Statute**. Moreover, the State party to the SOFA but not the Statute cannot assume that the State Party to both treaties wanted to violate its obligation under the **Statute** (and possibly also to Geneva law and the **Genocide Convention**), not to establish new bars to the Court [s]s jurisdiction based on official capacity. Thus, unless there is an express provision to the contrary, such SOFAs must be interpreted bona fide and in a way that respects any obligations under the **Rome Statute**. Accordingly, the State party must be required to surrender alleged perpetrators of core crimes to the Court.”

- i). *State Parties*<sup>38</sup> would violate their obligations under *the principle of complementarity*, as reflected in the Preamble, Article 1 and Article 17, and their obligations to co-operate with the Court as embodied in Articles 86, 87, 89 and 90, in addition to Article 27.
- ii) *Signatories of the Rome Statute*<sup>39</sup> would be acting in a manner that would defeat the object and purpose of the Rome Statute and, thus, in violation of their obligations under international law governing treaties.
- iii) *States that have not signed the Rome Statute or yet ratified* it should not sign or enter into impunity agreements with the United States or refuse to arrest and surrender persons accused by the ICC because doing so may violate their obligations under international law to bring to justice persons who commit crimes covered under Article 5 of the Rome Statute, particularly if they do not investigate and, if there is sufficient admissible evidence, to prosecute such persons or extradite such persons to a state that will fulfill its international responsibilities.<sup>40</sup>
- iv) *SOFAs* entered into *before* and *after* a state has signed<sup>41</sup> the Rome Statute must be read in the light of the object and purpose of the Rome Statute, customary international law and general principles of international law.

---

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> Article 31 (3) (c) of the Vienna Convention on the Law of Treaties.

<sup>41</sup> See Article 5 of the Rome Statute. See also Article 18 of the Vienna Convention on the Law of Treaties.



### 3.4.1 *The Principle of Jus Cogens*

Crimes of genocide, war crimes, and crimes against humanity<sup>42</sup> are regarded as *delicti jus gentium* i.e. against humanity. States are, therefore, obligated to exercise jurisdiction over perpetrators without due regard to the nationality of the offender or the frontiers or territorial borders.<sup>43</sup> This obligation is the *jus cogens* obligation under international law. *Jus cogens* is defined as “*a peremptory norm of general international law, accepted and recognized by the international community of states*” and as “*a norm from which no derogation is permitted*”. It can only be modified by a subsequent norm of international law having same character.<sup>44</sup> Indeed United State law recognizes this legal principle.<sup>45</sup> The Rome Statute makes it obligatory for states to exercise jurisdiction over international crime. To do otherwise would offend *Article 7* of the Vienna Convention on the Law of Treaties and thereby become invalid. Customary international law equally imposes obligations upon States to pass domesticating or implementing legislation in their various territories to facilitate the exercise of jurisdiction. With the duty to prosecute for international crimes accorded the status of *jus cogens* I posit two

---

<sup>42</sup> See Article 5 of the Rome Statute

<sup>43</sup> See Henry King Jr, Universal Jurisdiction Myths, Realities Prospects, War Crimes and Crimes against humanity. The Nuremberg Precedent, 35 New Eng. L. Rev.281, 285 (2001) citing *Demjankuk V Petroks*, 776 F. 2 d 571, 582 – 83 [6<sup>th</sup> Gr.1985]

<sup>44</sup> See the Vienna Convention, Article 53

<sup>45</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102, CMT. J & Reporters note 4 (1987) [hereinafter “Restatement”] [dealing with the conflict between international agreement and customary law, stating in pertinent part that “an agreement will not supersede a prior rule of customary law that is peremptory norm of international law, and in agreement will not supersede customary law if the agreement is invalid because it violates such peremptory norm”]. See also Restatement, id, cmt.k.

arguments. *One*, that “*Article 98 Agreements*” signatories that are state parties to the Rome Statute continue to have and to implement all prior obligations related to the ICC, except with regard to specific terms of the Agreements. *Two*, that “*Article 98 Agreements*” signatories that are *not yet* state parties to the Rome Statute may, and should be encouraged to, accede to the Rome Statute whose jurisdiction is with respect to crimes against humanity to avoid invalidity and its consequences.

### 3.4.2 *The Vienna “Injunction” on state parties to a Treaty*

The Vienna Convention on the Law of Treaties, places an “*injunction*” on states not to do anything to defeat the object and purposes of a treaty.<sup>46</sup> Thus, state parties to the ICC are obligated not to undermine the Rome Statute. Hence no state party shall enter into such BIA’s or “*Article 98 Agreements*” with the United States. I submit that a state party that enters into such agreements is in breach of its obligation under international law.<sup>47</sup>

-----  
<sup>46</sup> The Vienna Convention, Article 18 [stating that a state is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty. Subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party.

<sup>47</sup> See COUNCIL OF THE EUROPEAN UNION: COUNCIL CONCLUSIONS AND EU EVIDING PRINCIPLES CONCERNING ARRANGEMENTS BETWEEN A STATE PARTY TO THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT AND THE UNITED STATE REGARDING THE CONDITIONS TO SURRENDER OF PERSONS TO THE COURT, 42 I.L.M 240. It is in recognition of a possible legal blunder by its members that the EU came out with guidelines for signing of any Article 98 Agreements with the US. The principles provide, inter-alia, that “[e]ntering into US agreements – as presently drafted – would be inconsistent with the ICC states parties obligation with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC state parties are parties”.

*Article 32* of the Vienna Convention on the Law of Treaties obligates nations not to take any action that might undermine treaties to which they are signatories even if the treaties are not ratified. Ironically, the United States signed but has never ratified the Vienna Convention although it has adhered to the provisions of its *Article 18*.

A reading of “*Article 18*” of the Vienna Convention, however suggest that a state can undermine a treaty when it has declared its intention not to become a party or bound by it. The United States has “*unsigned*” the Rome Statute. I submit that this may be the reason why the United States is undermining the ICC. I share the view that to undo the Vienna Convention on top of “*unsigned*” the Rome Statute would constitute a second serious blow to the whole international system of the rule of law, and a personal and national accountability for actions that the United States have championed for decades. Such action would further isolate the United States and depict it as becoming not just a dropout or refusenile but a “*rogue*” nation. That probably may be the reason why a move against the Vienna Convention, if really contemplated was postponed.<sup>48</sup>

### 3.4.3 *The Principle of Pacta Sunt Servanda ond Uberrimae fiddei*

The principle of *pacta sunt servanda and uberrimae fiddei* enjoins states to act in good faith and to refrain from acts which would defeat the object and purpose of the treaty. Upon

-----

<sup>48</sup> See COLONEL DANIEL SOUTH, USA [Ref], Dropping Out-American style, CDI. Weekly Defence Monitor, Vol. 6, Issue #14, May 16 2002. See also Article 18 of the Vienna Convention [stating that “a state is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty subject to ratification acceptance or approval, until it shall have made its intention clear not to become a party to the treaty”]



becoming a party to the treaty, they are similarly obliged to refrain from such acts, pending the entry into force of the treaty, provided the entry has not been unduly delayed.<sup>49</sup>

The United States signed the Rome Statute. It is arguable whether the said statute was intended to be binding upon ratification. I take the position that it was and argue that in that event, mere signature would not constitute a legal relationship between the parties as signature is merely a preliminary step. Ratification being the final step. Seen in that light the United States never approved the Rome Statute. That may be the reason why it chose to recall its signature and then proceed to sign “Article 98 Agreements” with full knowledge that it had no obligation under the Rome Statute.

I argue that a treaty will only require ratification if it is clearly contemplated by the parties or when the negotiating states so intends or the representation of a state has signed the treaty subject to ratifications or the provision to this effect was contained in the full powers of its representatives. The Rome Statute clearly provides for ratification at Article 125. Since the *United States* did not ratify it, is not bound by it under this principle. However, if the treaty was silent on ratification the better view would have been that it was binding upon signature in which event the United States would be bound upon signature. Be that as it may, I posit that states parties to the Rome Statute that sign “Article 98 Agreements” are in breach of Articles 27, 86, 87, 89 and 90 of the Statute. They would also violate Article 18 of the Vienna Convention on Laws of Treaties. Many States will likely violate their own extradition laws in signing those agreements.

-----

<sup>49</sup> See S. K. Verma, *An Introduction to Public International Law*, pp 268 – 269

#### 3.4.4 *Legislative History and the Legislative Intent of Article 98 of the ICC*

It is axiomatic that treaties are to be read in accordance with the conditions and circumstances prevailing at the time they are drafted.<sup>50</sup>

Proceeding on that premise I posit that the meaning of Article 98 (2) is very clear, as it does not lead to any absurdity. It is gathered from the Preparatory Commission's [*prepcom*] work that it was intended to preserve *Status of Forces Agreements* [hereinafter referred to as SOFA] and extradition treaties in force between states.

*Ambassador David J. Scheffer* argues that this provision was successfully negotiated by the United States, with its "*own intent*, the United States could sign such "*Article 98 Agreements*" with many states to limit the possibility of its personnel becoming amenable to the jurisdiction of the ICC. Thus the United States having such agreements with many states would facilitate regulations of its officers in peace-keeping missions.<sup>51</sup>

On the premises, I advance two arguments. *One*, that "*Article 98 Agreements*" are contrary to the intention of the Rome Statute drafters. Delegates involved in the negotiations of "*Article 98 Agreements*" indicate that it was not intended to allow the conclusion of new agreements based on Article 98, but rather to prevent legal conflicts which might arise because of the existing agreements or new agreements based on existing precedent, such as new *SOFAs*. Article 98 was not intended to allow agreements that would preclude the possibility of a trial by the ICC where the sending state did not exercise jurisdiction over its own nationals.

-----  
<sup>50</sup> See *ROCCA V Thompson*, 223 U.S. 317, 331 [1912]

<sup>51</sup> See Ambassador David J. Scheffer, *A Negotiators Perspective on the International Criminal Court*, 167 M;I.L Revil, at 17 [stating that "when the U.S. delegation successfully negotiated the inclusion of Article 98 (2) in the Rome Treaty, we had in mind our own SOFAS and their applicability].

Indeed, “*Article 27*” of the Rome Statute provides that no one is immune from the crimes under its jurisdiction. *Two*, that “*Article 98 Agreements*” are contrary to the language of Article 98 itself. The proposed agreements seek to amend the terms of the treaty by effectively deleting the concept of the sending state from Article 98, this term indicates that the language of Article 98 is intended to cover only SOFAS, Status of Mission Agreements [hereinafter referred to as *SOMAS*] and other similar agreements. *SOFAS* and *SOMAS* reflect a division of responsibility for a limited class of persons deliberately sent from one country to another and carefully addresses how any crimes they may commit can be addressed.

*By contrast*, the United States proposed bilateral immunity agreements seek immunity for a wide ranging class of persons, without any reference to the traditional sending state – receiving state relationship of *SOFA* and *SOMA* agreements. This wide range class of persons would include anyone found on the territory of the state concluding the agreement with the United States who works or has worked for the United States government . Government legal experts have stated that this could easily include citizens for the state in which they are found effectively preventing that state from taking responsibility for its own citizens.

Last but not least, I posit that the United States interpretation of “Article 98 Agreements” is contrary to the overall purpose of the ICC. These agreements have been constituted solely for the purpose of providing individuals or groups of individuals with immunity from the ICC. Furthermore, the agreements do not ensure that the United States will investigate and, if necessary prosecute alleged crimes. Therefore, the intent of these United States bilateral immunity agreements is contrary to the overall purpose of the ICC, which is to



ensure that genocide crime, against humanity and war crimes be addressed either at the national level or on international judicial body.

### 3.4.5 *The Principle of Persistent Objector*

This is a norm under international law that a nation that clearly rejects a rule or a principle of international law during its formation stages will not be bound by it.<sup>52</sup> For this principle to be applicable, the state must satisfy two conditions to avoid being subjected to the new rule. **First**, the objection should be raised during the<sup>53</sup> formative stages of the rule and the state must persist in its objection throughout. Also there must be a clear manifestation of its objection, which must prevail throughout the formation of the new rule without the presumption of accepting it.<sup>54</sup> **Secondly**, the state must be consistent in its objection.<sup>55</sup> The objecting state may not approve the rule at one time and reprobate at another time. The satisfaction of these two conditions makes the state a persistent objector; ***hence the new rule, when fully developed, is inapplicable to it.*** Despite the general acknowledgement of this

---

<sup>52</sup> See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 10[4<sup>th</sup> Ed.1990] [Hereinafter "BROWNLIE"], See also the Anglo-Norwegian Fisheries case, ICJ Reports [1951], 131: Ted Stein, The \ Approach of the Different Drummer, The Principle of Persistent objector in International Law, 26 Harr. Int'L,L 457 [1985] (discussing the increasingly important role of Persistent objectors in international controversies); see also Restatement [Third] of the Foreign Relations Law of the United States §102 cmt. D[1987] [Stating that a state that indicates its dissent from a practice while the law is still in the process of development is not bound by the rule even after it matures"].

<sup>53</sup> See MARK 1 VILLAGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 16, [1985] [Hereinafter "VILLAGER"]

<sup>54</sup> See BROWNLIE, Supra, note 51- 57.

<sup>55</sup> See VILLAGER, supra note 52, at 16

principle, some scholars dispute the existence of this persistent objector principle under international law,<sup>56</sup> and it is also considered that the full development of the new rule under international law can become binding on non-state parties when it crystallizes into a customary rule of international law or *jus cogens*.<sup>57</sup>

The United States has persisted in objecting to the jurisdiction of the Court and has manifestly demonstrated its intention not to accept its jurisdiction. Indeed, nothing could be clearer than the signing and “*unsigned*” of its signature. But one must not be confused or be led into thinking that the persistent objection of the United States is with respect to the subject matter jurisdiction of the Court, or to the development of any rule under international law. The objection is solely related to *the exercise of jurisdiction over its nationals* and is in no way related to the subject matter jurisdiction of the ICC such as genocide, war crimes, and crimes against humanity. Thus, in conclusion, the role of persistent objector cannot be applicable under these circumstances. The United States cannot, therefore use this principle, whether as a mere political reference in its public statements and declarations or as a rule of defence in the event of a prosecution of its personnel by the ICC.

#### 3.4.6 *Pacta Tertiis nec nocent nec prosunt*

As a general rule a treaty primarily binds the parties to it and may not confer rights or impose obligations on third parties without their consent. This general rule, known as *pacta*

---

<sup>56</sup> See PATRICK KELLY, *The Twilight of Customary International Law*, 40 *Va.J. Int’L* 449, 508-516 (2000) (arguing that this principle was developed by western states as a counter-measure to the newly independent states who used majority democracy at the UN General Assembly to overcome the Western’s control over the development of customary international law and the International Legal Process.

<sup>57</sup> See generally, Restatement [Third] of Foreign Relations Law of the United States [1987].

*tertiis nec nocent nec prosunt*<sup>58</sup> reflect the customary international law, which is supported by state and judicial practice and is incorporated in the Vienna Convention.<sup>59</sup>

It is akin to the private law of contract providing corresponding rule against imposing obligations in creating rights in favour of non-party.

It is arguable whether this principle would avail the United States in this debate. Article 34 of the Vienna Convention states that a “treaty does not create either obligations or rights for a third state without its consent.”<sup>60</sup> However an obligation arises from a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third party expressly accepts that obligations in writing.<sup>61</sup> This is to give expression to the fundamental principle of international law that a state cannot be bound by a treaty provision without its consent. Similarly the obligation accepted by a state in writing can be revoked or modified only with the consent of the parties to the treaties and of the third state, unless it is established that they have agreed otherwise.<sup>62</sup>

In conclusion, I argue that United States is not bound under this principle as treaties do not impose legally binding rules upon dissenting state or non-party.<sup>63</sup>

-----  
<sup>58</sup> See S. K. Verma An Introduction to Public International Law pp.264, 265,

<sup>59</sup> See Vienna Convention Articles 34 – 38

<sup>60</sup> See, Vienna Convention Article 34

<sup>61</sup> See, Vienna Convention Article 35

<sup>62</sup> See, Vienna Convention Article 37 (1)

<sup>63</sup> See the North Sea Continental Shelf cases, (1969) ICJ Rep. p3 at p.95 L” For a treaty which is only to become binding upon ratification, mere signature would not constitute any legal relationship between the parties ... as Judge Nervo pointed out, its signature had only been a “preliminary step”, it “did not ratify the Convention, is not a party to it and therefore cannot be contractually bound by its provision.”



### 3.4.7 *Dispositive and Constitutive Treaties*

Even in cases of “*legislative*” treaties with a large number of parties, there is no process to bind third parties without their consent. That is the rule. However to every rule there are exceptions, for example, *dispositive or constitutive treaties*. These treaties create rights in other (non-parties) of a permanent nature in pursuance of the treaty. These treaties bestow rights *in rem erga omnes* in that they:

- a. *bind or produce effects for third parties without their consent;*
- b. *establish special regimes;*
- c. *relate to international settlement or arrangements, e.g. treaties of cessation, boundary treaties, treaty guaranteeing neutrality of Switzerland, treaty guaranteeing passage through the Suez Canal.*<sup>64</sup>

I posit that such treaties endow international institutions with legal personality and hence valid *in erga omnes* and cannot be ignored by third parties. I submit the Rome Statute is one such treaty. It creates a permanent international criminal law regime jurisdiction. The United States is thus bound by it. It cannot ignore it. The creation of the ICC is arguably the second most important event after the establishment of United Nations. It has international personality. Article 2(6) of the United Nations Charter states “The organisation shall ensure that states which are not members ... act in accordance with the Principle of the Charter” so far

-----

<sup>64</sup> In the Reparation cases [1949] ICJ Rep.124 at p.185, the objective status of international organisation with a large membership, has been recognised under international law, which is binding on non-parties. The opinion has established the binding character of the UN Charter in relation to non-members, and in that sense it is a legislative character. See also Article 1 Vienna Treaty, Article 380 of Versailles Treaty, Treaty establishing the Suez and Panama Canals.

as may be necessary for the maintenance of peace. In the same vein the Rome Statute [Article 1 and 4] has jurisdiction over most serious crimes of international concern. Like the Charter of the United Nations it is a special treaty of constitutional nature. The relationship of the Court with United Nations (Article 2) is approved by Assembly of States Parties to the Rome Statute.

In addition, at the level of the *state* responsibility, it is now widely recognized that customary rules on genocide impose *in erga omnes* obligations, that is, lay down obligations towards all member states of the international community, and at the same time confer on any state the right to require acts of genocide to be discontinued. Those rules now form part of *jus cogens* and may not be derogated from international agreement [nor a *fortiori* by national legislation].<sup>65</sup> Hence the United States is bound by the customary rules on genocide which is one of the most serious crimes within the jurisdiction of the Court. By extension the United States is bound by the jurisdiction of the Court under this principle.

### 3.4.8 Universal Jurisdiction

Sovereignty, although still a strong principle under international law is a diminishing concept.<sup>66</sup> This is especially so when it comes to international crimes such as war crimes, genocide, crimes against humanity and torture.<sup>67</sup> The Nuremberg trials, the trial of *Agustino*

-----  
<sup>65</sup> See Antonio Cassese, International Criminal Law, p.107

<sup>66</sup> See Charles Pierson, Pinochet and the End of Immunity: Englands House of Lords Holds that a Former Head of State is not immune for Torture, 14 Temp. Int’L & Comp. L.J.263, [explaining that the Pinochet decision is a reflection of the diminishing rate of sovereign immunity under international law].

<sup>67</sup> See James D. Fry, Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction, 7 ULAJ.Int’I.L & Foreign Aff.169, at 183 – 190 [discussing crimes against humanity and genocide]

*Pinochet* and *Slobodan Milosovic* underscore this point.<sup>68</sup> The world is moving towards a stage where sovereignty is giving way to the principle of universal jurisdiction. That is going to be the end result of globalization if it is anything to go by.<sup>69</sup> Rome Statute provides for equal application of the Statute to all persons irrespective of their status in society.<sup>70</sup> A distinction based on official capacity is untenable under the Statute. The Court will hold each and every person criminally responsible for his/her acts.<sup>71</sup> The very bold attempt by the Rome Statute to exclude immunities, diplomatic or otherwise, and to hold persons criminally responsible for their acts is an indication that matters of human rights have come to stay and it is just a matter of time for it to invalidate all immunity agreements under international law.<sup>72</sup> Thus states that have signed “*Article 98 Agreements*” with the United States will not be obligated under international law to comply with the terms. Accordingly, therefore, such states can either prosecute the United States offenders or hand them over to the ICC without consent or approval of the United States.

The next Chapter deals with conclusion and recommendations.

---

<sup>68</sup> See generally, Kerrie Creque & O’Neill, A New Customary Law of Heads of State Immunity? Hirohito and Pinochet, 38 Stan .J. Int’l L,289, at 295 [discussing the post world 11 developments of customary international law duty to prosecute for international crimes]

<sup>69</sup> See Vienna Convention, Article 53, 64 and 71.

<sup>70</sup> See Rome Statute, Article 25

<sup>71</sup> See Article 25 and 27 of Rome Statute

<sup>72</sup> See the Vienna Convention, Articles 53, 64 and 71



## **CHAPTER 4: CONCLUSION AND RECOMMENDATION**

International law, from which the Rome Statute derives, is grounded on positivists thinking in the sense that it represents the will of many nations, from which it receives its force of law, which is based on a concept that fundamental rights and freedoms are inherent and inalienable.

Indeed the United States Bill of Rights embodies the fundamental rights of the individual. The same is inscribed in its Constitution in the golden letters thus:

*“ We hold these truths to be self-evident, that **all men** are created **equal**, that **they are endowed by their Creator** with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.”*

The American Restatement of law reads:

*“A state has jurisdiction to define and prescribe punishment for certain offences, recognized by the community of nations as a universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps, certain acts of terrorisms even where none of the bases of jurisdiction ... is present”.*

*Princeton Principle of Universal jurisdiction*, a scholarly statement that is just one view of the current international legal development in this area, add crimes against humanity (other than terrorist attacks) and torture to the list accepted by the United States Restatement and lifts even all immunities, even from sitting Heads of State.

The United States, among other countries, has helped to propagate the concept of human rights throughout the world. Viewed in that light the United States should have been the first state to embrace the International Criminal Court's jurisdiction in furtherance of its ideals.

In signing "*Article 98 Agreements*" the United States is rapidly eroding its credibility among the community of nations. Opposition to an institution of International Justice is indeed a risky game for the United States which relies on the power of its democratic ideals for among other things its foreign policy.

The Bush administration missed the point. The United States could have enhanced its image as the foremost democracy by signing, ratifying and acceding to the Rome Statute to enable it influence the direction of the ICC in furtherance of its global interests. It could have used its leverage in the Security Council to influence the ICC which is comprised of the most progressive and influential democracies in the world. As matters stand now the United States is getting further and further isolated from its hitherto allies in the European Union and is becoming not just a refusenile but a "*rogue*" nation.

The European Union has concluded that entering into the United States "*Article 98 Agreements*" – as presently drafted – would be inconsistent with the ICC States Parties obligation with regard to the Rome Statute and may be inconsistent with other international agreements. I agree.

Indeed, the United States "*Articles 98 Agreements*" not only flies in the face of basic tenets of international law but also the Rome Statute. I have reached this conclusion based on an informed position regard being had to the following outstanding international law principles and public policy.

#### **4.1 Dispositive and constitutive Treaty**

As a rule treaties do not impose obligation upon dissenting parties or non-parties. However, to every rule there are exceptions – dispositive and constitutive treaties. I opine, that the Rome Statute is dispositive or “*real*” in nature. It creates rights on other [non parties] of a permanent nature in pursuance of the treaty. It bestows rights *in rem erga omnes* [valid against the whole world]. According to international law institutions endowing such a treaty with legal personality valid *in rem erga omnes* cannot be ignored by third parties. The United States and other countries who are not signatories to the Rome Statute are thus bound. Indeed the Rome Statute, like the Charter of the United Nations, is a special treaty of a constitutional nature.

#### **4.2 Conflict with domestic law principles**

The United States argues that ICC is an affront to its Constitution in that ICC jurisdiction conflicts with its judicial system and that in any event it will limit its sovereignty. As a rule of international law a state cannot invoke the fact that its consent to be bound was expressed in violation of the states domestic law. Treaty obligations imposed on states parties are binding in good faith. The good faith performance is required irrespective of any conflicting domestic law.

#### **4.3 Jus – cogens Principle**

Rome Statutes jurisdiction is with respect to genocide, war crimes, crimes against humanity. The court will exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Article 121 and 123 defining the crime and setting out conditions under which the court shall exercise jurisdiction with respect to the crime.



The duty to punish these crimes is the *jus - cogens* obligations under international law. The United States cannot derogate from it. Other states that are not signatories to the Rome Statute cannot equally derogate from it.

#### ***4.4 Obligation not to undermine the fundamental purpose or core object of the treaty – Article 18 of the Vienna Convention.***

States parties to a treaty are under an obligation to act in good faith and to refrain from acts which would defeat the object and purpose of the treaty. Thus signatories and States parties to the Rome Statute who have signed “Article 98 Agreements” with the United States are in breach of their obligations under the Rome Statute.

#### ***4.5 Breach of Articles 27, 86, 87, 89 and 90 of the Rome Statute***

State parties to the Rome Statute that sign “Article 98 Agreements” with the United States are in breach of Articles 27, 86, 87, 89 and 90 of the Rome Statute. Concomitantly, they are in breach of Article 18 of the Vienna Convention on the Laws of Treaties. Many such states will likely violate their extradition laws.

#### ***4.6 Intertemporal Law Principle***

The validity of a state’s action is determined by the accepted rule of international law at the time the action was taken. This principle dictates that practices regarded as lawful in the past will continue to be respected in the future. That the United States having participated in the preparatory commissions to the Rome Statute and having signed the same, the subsequent act of “*unsigning*” the statute has no legal efficacy”.

#### ***4.7 ICC to interpret its own statute and determine its jurisdiction***

In terms of Article 9 and 119 of the Rome Statute the interpretation rests with the court. Accordingly it is upon the ICC to determine whether it has jurisdiction over the American citizens or any other person who violate Article 5 of the Rome Statute. Equally it is the ICC to determine the legality or otherwise of “Article 98 Agreements”.

#### ***4.8 Legislative History and Legislative intent of “Article 98 Agreements”***

It is axiomatic that in interpreting rules and statutes, the legislative history and the legislative intents are very significant. The United States is looking beyond the treaty text for the meaning of a treaty and in the process ignore the plain meaning of the words.

Legislative history of “Article 98 Agreements” is a clear testimony that these agreements offend the spirit and letter of the Rome Statute. Article 98 was not intended to allow conclusion of *new* agreements but rather to prevent legal conflicts that might arise because of *existing* agreements. Equally, Article 98 was not intended to allow agreements that would preclude trials by the ICC. Indeed Article 27 of the Rome Statute provides that no one is immune from the crimes under its jurisdiction.

#### ***4.9 Universal Jurisdiction***

Sovereignty, although a strong principle under international law, is giving way to the principle of universal jurisdiction. The principle of universal jurisdiction is the bedrock of the Rome Statute. By reason of Article 27 no one is immune from crimes under Article 5 of the Rome Statute. Thus States that have signed “Article 98 Agreements” with the United States will not be obligated under international law to comply with the terms.

## RECOMMENDATIONS

By way of recommendation I propose the following:

1. No Parliament should domesticate any United States “Article 98 Agreement”.
2. States that have not signed or yet ratified the Rome Statute should enter into agreements with International Criminal Court pursuant the provisions of Article 87 (5) to provide assistance to the Court to arrest and surrender United States nationals (or associated nationals) pending a determination by the International Criminal Court.
3. No state party to the Rome Statute, state signatory to the Rome Statute or any other state should enter into “Article 98 Agreements” with the United States unless the United States provides the following guarantees:
  - That the United States of America has legislation that defines each crime in the Rome Statute at least as broadly as in the Rome Statute and defines principles of criminal responsibility and defences in a manner fully consistent with international law and provides for jurisdiction over such crimes in its civilian courts.
  - That the United States of America will investigate all crimes under the Rome Statute allegedly committed by United States nationals or others within its jurisdiction promptly, thoroughly, independently and impartially and that, if there is sufficient admissible evidence, it will prosecute these crimes in a similar manner.
  - That if the United States of America proves unable or unwilling to investigate or prosecute any United States national or other person within its jurisdiction returned by a state to the United States, it will return that person to the other state or surrender that person to the International Criminal court.



- 3 The Prosecutor should seek a definitive ruling by the pre-Trial Chamber or other Chamber on any claim by a state that “ an agreement prevents the surrender of an accused to the ICC and that Chamber should declare any such agreements that would lead to impunity contrary to the Rome Statute and without any legal effect on the duty of the requested state to surrender an accused to the Court.
- 4 The Security Council should slowly but surely convince the United States that the ICC is a living and breathing institution. In opposing the Court it is eroding its credibility and diplomacy as a super-power. That even after the establishment of the ICC it will not have monopoly of power. There are still a whole range of mechanisms responding to such changes including national courts, truth and reconciliation commissions, historical commissions and other means of transnational justice.
- 5 The refusal of the US, Russia and China – all members of Security Council to ratify the Rome Statute however present a significant challenge in this regard. These countries should be slowly convinced at the Security Council level to support the ICC system.
- 6 Theories of penology such as deterrence or rehabilitative theories on punishment are inapplicable with respect to international tribunals. The question arises of how one can rehabilitate a person convicted of genocide. Perhaps there is need to develop new theories to meet the needs of international justice system.
- 7 The ICC would have to develop a clear criteria to determine when it would intervene because national courts are unable or unwilling to effectively prosecute. This is necessary to uphold the principle of complementarity and to avoid the perception that ICC is encroaching on the competence of national courts.

## **ABBREVIATIONS**

<b><i>ASPA</i></b>	- American Service Members Protection Act
<b><i>BIAs</i></b>	- Bilateral Immunity Agreements
<b><i>CICC</i></b>	- Coalition for International Criminal Court
<b><i>ICC</i></b>	- International Criminal Court
<b><i>ICJ</i></b>	- International Court of Justice
<b><i>ICTR</i></b>	- International Criminal Tribunal for Rwanda
<b><i>ICTY</i></b>	- International Criminal Tribunal of Former Yugoslavia
<b><i>ILC</i></b>	- International Law Commission
<b><i>IMT</i></b>	- International Military Tribunal
<b><i>IMTFE</i></b>	- International Military Tribunal for the Far East
<b><i>SOFAs</i></b>	- Status of Forces Agreements
<b><i>SOMAs</i></b>	- Status of Mission Agreements
<b><i>UN</i></b>	- United Nations
<b><i>UNTAET</i></b>	- United Nations Transitional Administration in East Timor
<b><i>US</i></b>	- United States
<b><i>USA</i></b>	- United States of America
<b><i>USSR</i></b>	- United Soviet Socialist Republic

## BIBLIOGRAPHY

### PRIMARY SOURCES

1. Amnesty International, International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes, August 2002 – [www.amnestyusa.org](http://www.amnestyusa.org)
2. C . Bassouni, The Statute of the International Criminal Court: A documentary History [1998].
3. Charles Pierson, Pinochet and the End of Immunity, 14, Temp.Int’L & Comp. L.J.263
4. Convention on the Prevention of the Crime of Genocide [1951] 78 UNTS – [www.umn.edu/humanrts/instreet/x1cpcpg.htm](http://www.umn.edu/humanrts/instreet/x1cpcpg.htm)
5. David J. Scheffer, Ambassador, A Negotiators Perspective on the International Criminal Court 167 N; I.L. Revil
6. David J. Scheffer, Ambassador, “Original Intent at the Global Criminal Court” Wall Street Journal 1, September 20, 2002.
7. Ellis S. Mark, The International Criminal Court and its implications for domestic law and national capacity building “Florida Journal of International Law 215 [2002]: 3
8. Erick Rosenfeld, Application Of U.S. Status Of Forces Agreement To Article 98 Of The Rome Statute, available at <http://law.wust/educ.publications/WUGSLR/issue%2>.
9. F. Smith (ed) the American Road to Nuremberg, The Documentary Record, 1944-1945 (Stanford, Cal: However Institution Press, 31-3. 157-7
10. Frulli “The Special Court of Sierra Leone, some preliminary comments” EJIL (2000)



11. Isaac Minta Larbi, International Treaty Obligations Vs International War Crimes, Analyzing United States Article 98 Agreements in the International Criminal court in the context of International Legal Principle, Eyes on The ICC, Vol I, No. 1, 2004.
12. John Burroughs, US Opposition to the International Criminal Court, Eyes On ICC, volume I number 1 2004.
13. John D. Vanger Vyrer: American Exceptionalism Human Rights, International Criminal Justice Court: Principles and Compromises, 2 Y.B. Int’L Hum. L. 143, 65 (1999).
14. Jonathan, I. Charney Universal International Law, 87 Am. J. Int’l L.529
15. Marti Flacks, The International Court and the US Constitution: Does Rome Statute violate “void for vagueness?” EYES OF THE ICC, vol. 1 No.1, 2004.
16. Michael Byers, Conceptualizing the Relationship between *Jus Cogens* and *Erga Omnes* Rules, Nordic Journal of International Law 66.211 – 239, 1997 © 1997 Kluwer Law International Printed in Netherlands.
17. Kerrie Creque & O’Neill, A new Customary Law of Heads of States “Immunity: Hirohito and Pinochet, 38 Stan J. Int’l L,289.
18. Rome Statute of the International Criminal Court. <http://www.un.org/law/icc>
19. Ruth Wegward, the ICC: An American View, 10 Euro. J. Int’l L93, 103 (1999)
20. The Vienna Convention on the Law of Treaties – [www.un.org/law/ilc/text/treaties](http://www.un.org/law/ilc/text/treaties)
21. The White House – Office of the Press Secretary, Memorandum for the Secretary, Presidential Determination No.2003 – 27, July 1, 2003, available at <http://USEmbassy.australiastate> USEmbassy.org.uk/furpo564.html.
22. United States Bilateral Immunity Agreements Comments (Article 98 Agreements) – [www.amicc.org](http://www.amicc.org)

23. US Administration Arguments against the ICC by American non-Governmental organisation for the ICC, available at <http://amicc.org./unisofa/administration.html/arguments>.
24. Venessa Haas, Power and Justice and the United States and the International Criminal Court, EYES ON ICC, vol.1, No.1, 2004.
25. W. Winthrop, Military Law and Precedents, 2<sup>nd</sup> Edition [Buffalo, NY. William S. Helm & Co. (1920).

## SECONDARY SOURCES

1. American NGO for the ICC, "Peacekeeping and the ICC" [www.amicc.org](http://www.amicc.org)
2. Bilateral Immunity Agreements, [www.amicc.org/usinfo/administration\\_policy - BIAs.html](http://www.amicc.org/usinfo/administration_policy_BIAs.html).
3. Christopher Marquis, U.S. Seeking Pacts in a bid to shield its peacekeepers, New York Times, 6 August 2002.
4. Coalition for the International Criminal Court, [www.ICC bow.org](http://www.ICCbow.org).
5. Convention on the Creation of International Criminal Court to Terrorist Offences, League of Federalists Society, Washington DC, Nov.14, 2002.
6. Global Policy Forum: [globalpolicy@globalpolicy.org](mailto:globalpolicy@globalpolicy.org).
7. John R. Bolton, The United States and the International Criminal Court, Remarks of the Nations OJ Spec. Supp No.156 [1936] I.N. Doc [547] (1) M 384 (1) 1937. V [1938].
8. Rules of Procedure and Evidence of International Criminal Court.  
UNDoc.PCNICC/2000/1/1. Add.1, 30 June 2000. – [www.un.org](http://www.un.org)
9. Text on the Rome Statute – <http://www.un.org/law/icc>
10. The United Nations Charter – [http://www.un.org/aboutun/charter/chapter 7.htm](http://www.un.org/aboutun/charter/chapter_7.htm)  
[usinfo//administration policy\\_pkeeping.html](http://www.un.org/usinfo/administration_policy_pkeeping.html).
11. Year Book of the ILC, 1966, Vol.11, pp.228 -



## **BOOKS**

1. Antonio Cassese *International Criminal Law*, Oxford University Press.
2. C. Bassiouni, *The Statute of International Criminal Court: A documentary History* [1987]
3. G . Robertson , *Crimes and Humanity – The Struggle for Global Justice* [London; Penguin]
4. Malcolm N. Shaw, *International Law*, 4<sup>th</sup> Edition Cambridge University Press
5. Ian Brownlie, *Principles of Public International Law* 10 [4<sup>th</sup> Edition 1990].
6. Julius Stone, *Legal Controls of the International Conflicts* [Stevens & Sons Ltd, London],  
1954
7. L. Oppenheim *International Law*, Vol.1, 8<sup>th</sup> Edition [Laterpatcht [Ed] Longman,  
London]
8. Lord Mc Nair and Kelsenlt, *Law of Treaties*, Clanderon Press, Oxford.
9. Lord Mc Nair, *The Law of Treaties*, Clarendon Press, Oxford.  
Ltd, New Delhi – II0 001
10. Manfred Nowak, *Introduction to the International Human Rights Regime*, Martinus  
Nijhoff Publishers, Leiden/Boston.
11. Restatement [Third] of Foreign Relations Law of the United States 404 [1987]
12. S. K. Verma, *An Introduction to Public International Law*, Prentice Hall of India Private
13. Villager, Mark I, *Customary International Law and Treaties* 16, [1985]
14. William Schabbas, “*An Introduction to the International Criminal Court*”.

## **STATUTES**

Convention of Genocide 1948 - <http://www.hrw.org>

Vienna Conventions 1969 - [www.un.org/law/ilc/text/treaties](http://www.un.org/law/ilc/text/treaties)

Convention on Narcotic Drugs 1961 - <http://www.hrw.org>

Convention Against Torture 1984 - <http://www.unhcr.ch/html/intlist.htm>

Geneva Conventions 1949 - [www.icrc.org](http://www.icrc.org)

Second Additional Protocol 1977 - [www.icrc.org](http://www.icrc.org)

**Words - 29,826**