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Although more than half of the States in the world are parties to the Rome Statute of the International Criminal Court, more than eighty have yet to ratify. The article considers the relationship of the Court with these non-party States. It examines the exercise of jurisdiction over their nationals, arguing that international law immunities continue in force despite the terms of the Statute. Declarations of jurisdiction by non-party States are also studied, including the declaration formulated by the Palestinian Authority with respect to Gaza in January 2009. Non-party States may be asked to cooperate with the Court and, where so ordered by the United Nations Security Council, they may be required to do this.

Quoique plus de la moitié des États du monde soient Parties au Statut de Rome de la Cour pénale internationale, plus de quatre-vingt d'entre eux ne l'ont pas encore ratifié. Cet article considère le rapport de la Cour avec ces États qui n'y sont pas Parties. Il examine l'exercice de sa compétence à l'égard de leurs ressortissants, soutenant que les immunités du droit international demeurent en vigueur malgré la teneur du Statut. L'article étudie aussi les déclarations de compétence d'États qui ne sont pas Parties au Statut, y compris la déclaration formulée par l'Autorité palestinienne en rapport à Gaza en janvier 2009. On peut demander aux États qui ne sont pas Parties au Statut de coopérer avec la Cour, et, lorsque cela est ordonné par le Conseil de Sécurité des Nations Unies, il peut être exigé qu'ils le fassent.

I. INTRODUCTION

THE *Rome Statute of the International Criminal Court* was adopted on 17 July 1998, and entered into force for 67 States Parties on 1 July 2002. In the case of States whose ratification or acceptance became effective subsequent to 1 July 2002, it entered into force on the first day of the month after the sixtieth day following the deposit by such State of the appropriate instrument.¹ As of 17 July 2010, there were 111 States Parties to the *Rome Statute*. As a result, there were approximately 85 non-Party States, among them three permanent members of the Security Council (the United States, the Russian Federation and China) and several other very large and influential States (India, Indonesia, Turkey, Egypt,

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1 *Rome Statute of the International Criminal Court*, 2002, 2187 UNTS 90, art. 126(2). [*Rome Statute*]

Pakistan, Iran).

Thirty-seven of the non-party States, including the United States, Iran, Turkey, Egypt, and Israel, have signed but not ratified the *Rome Statute*.² Signature brings with it certain obligations, notably to refrain from acts which would defeat the object and purpose of a treaty, until it shall have made its intention clear not to become a party to the treaty.³ Two signatory States to the *Rome Statute*, the United States and Israel, have made declarations indicating their intent not to ratify the *Statute*.

More generally, however, the situation of non-party States is governed by article 34 of the *Vienna Convention on the Law of Treaties*: "A treaty does not create either obligations or rights for a third State without its consent."⁴ Nevertheless, significant legal issues arise concerning the relationship between non-party States and the *Rome Statute*. These issues, which can be broadly divided into questions of jurisdiction of the Court and cooperation with the Court, are the subject of this article.

A. Jurisdiction of the International Criminal Court

The International Criminal Court may exercise jurisdiction over nationals of States Parties and over the territory of States Parties, providing that there is also subject-matter⁵ and temporal jurisdiction,⁶ and that the alleged offender was at least eighteen years old when the crime was committed.⁷ Three issues arise with respect to jurisdiction of the Court and non-party States. First, there is the objection that the Court may not exercise jurisdiction over nationals of a non-party State. Second, nationals of non-party States who are entitled to immunity under customary international law may not benefit from immunity before the International Criminal Court. Third, a non-party State may make a declaration by which it accepts the jurisdiction of the Court without, however, becoming a State Party.

1. Jurisdiction over nationals of non-party States

Article 12(2) of the *Rome Statute* declares that the Court may exercise jurisdiction on two bases: "The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; The State of which the person accused of the crime is a national." Although not explicitly spelled out in the terms of the provision, it is obvious that the intent of the text is to extend the jurisdiction of the Court beyond pure territorial jurisdiction so as to encompass crimes com-

2 Algeria, Angola, Armenia, Bahamas, Bahrain, Bangladesh, Cameroon, Cape Verde, Côte d'Ivoire, Egypt, Eritrea, Guinea-Bissau, Haiti, Iran, Israel, Jamaica, Kuwait, Kyrgyzstan, Moldova, Monaco, Morocco, Mozambique, Oman, Philippines, Russian Federation, Saint Lucia, Sao Tome and Principe, Seychelles, Solomon Islands, Sudan, Syria, Thailand, Ukraine, United Arab Emirates, United States, Uzbekistan, Yemen, Zimbabwe.

3 *Vienna Convention on the Law of Treaties*, 1980, 1155 UNTS 331, art. 18.

4 *Ibid.*, art. 34.

5 *Rome Statute*, *supra* note 1 art. 5(1).

6 *Ibid.*, art. 11.

7 *Ibid.*, art. 26.

mitted by nationals of States Parties on the territory of non-party States (and on terra nullius and the high seas), and crimes committed by nationals of non-party States on the territory of States Parties.

Prosecution of crimes committed by nationals of States parties on the territory of non-party States does not seem to raise any objection.⁸ Although there is no ruling of the International Court of Justice on the point, active personality jurisdiction is well accepted. By joining the International Criminal Court, States are merely conferring upon an international body the jurisdiction that they already possess over their own nationals. There is no record at the Rome Conference, where the Statute was adopted, or in any other forum, of objection to the Court's exercise of active personality jurisdiction. Although the Court has yet to exercise such jurisdiction, it was certainly contemplated by the Prosecutor when he considered whether or not to lay charges against nationals of States parties for war crimes related to the conflict in Iraq, which was not itself a State Party.⁹

It seems logical that the same reasoning would apply to territorial jurisdiction, that is, if a State may exercise criminal law jurisdiction over foreign nationals for crimes committed on its territory, it can surely transfer such jurisdiction to an international tribunal. The idea that the Court should require the consent of the State of nationality of the suspect had been present since the discussion in the International Law Commission, in the early 1990s.¹⁰ It was one of the options in the final draft adopted by the Preparatory Committee, in April 1998.¹¹ According to Monroe Leigh, "[o]nly very late in the negotiations did the United States introduce this objection [to territorial jurisdiction] as a fundamental obstacle to its acceptance of the treaty."¹² In the final week of the Rome Conference, the United States proposed an amendment by which the Court's jurisdiction would be limited to nationals of States Parties, unless the jurisdiction of the Court were triggered by the Security Council.¹³ The United States challenged other approaches, characterizing them as "universal jurisdiction," and said that if such a principle were adopted, "the United States would have to actively oppose the Court." According to the United States: "The possibility that the Court might prosecute the officials of a State that was not a party to the treaty or had not submitted to the Court's jurisdiction in other ways was a form of extraterritorial jurisdiction that would be quite unorthodox."¹⁴ The very narrow option

8 There are two apparent examples of this position in the drafting history of the *Rome Statute*. Probably, however, the official records only manifest a misunderstanding of the country explaining its position or perhaps the précis writer who recorded it: UN Doc. A/CONF.183/SR.5, para. 5 (Slovakia); UN Doc. A/CONF.183/SR.6, para. 76 (France).

9 "Letter of Prosecutor dated 9 February 2006" (Iraq).

10 "Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)" in *Yearbook of the International Law Commission, 1994*, (UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2)) 15 at 42. ["Forty-sixth session report"]

11 "Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Draft Statute for the International Criminal Court" UN Doc. A/CONF.183/2/Add.1, at 31.

12 Monroe Leigh, "The United States and the Statute of Rome" (2001) 95 A.J.I.L. 124 at 127.

13 "Proposal Submitted by the United States of America" UN Doc. A/CONF.183/C.1/L.70.

14 UN Doc. A/CONF.183/C.1/SR.29 at para. 42.

favoured by the United States was also endorsed by several other States.¹⁵

The text of article 12(2) was comprised in the final proposal from the Bureau, issued early on the last day of the Rome Conference.¹⁶ In the final plenary of the Committee of the Whole, the United States submitted an amendment to make the exercise of jurisdiction conditional on the consent of the State of nationality of the accused person:

With respect to States not party to the Statute the Court shall have jurisdiction over acts committed in the territory of a State not party, or committed by officials or agents of a State not party in the course of official duties and acknowledged by the State as such, only if the State has accepted jurisdiction in accordance with this article.¹⁷

A procedural gambit known as a “no-action” motion was adopted by a generous majority, and the amendment was never put to a vote.¹⁸

In explanation of vote following the adoption of the *Rome Statute*, some States voiced criticism of article 12. According to India, “the inclusion in the Statute of the concept of universal or inherent jurisdiction made a mockery of the distinction between States Parties and States not parties, thus straying sharply from established international law.”¹⁹ The United States said it had voted against the *Rome Statute* because it “did not accept the concept of universal jurisdiction as reflected in the Statute of the International Criminal Court, or the application of the treaty to non-parties, their nationals or officials, or to acts committed on their territories. The only way to bring non-parties within the scope of the regime was through the mandatory powers of the Security Council under the Charter of the United Nations.”²⁰ China said that article 12 “imposed an obligation upon non-parties and constituted interference in the judicial independence of sovereignty of States.”²¹

The issue of exercise of jurisdiction over nationals of non-party States figured in the campaign of the United States against the International Criminal Court. For a while, the United States tried to protect its nationals indirectly, by promoting non-surrender agreements based on a creative interpretation of article 98(2) of the *Statute*.²² It had actually raised the issue of the protection of its troops who were posted abroad under status of forces agreements as early as

15 *Ibid.*, paras. 76-77 (China), 98 (Indonesia), 103 (Gabon), 113 (Russia); UN Doc. A/CONF.183/C.1/SR.30 at paras. 14 (Jamaica), 30 (Nigeria), 51 (Viet Nam), 75 (Algeria), 78 (Indonesia), 87 (Egypt), 92 (Israel); UN Doc. A/CONF.183/C.1/SR.31 at paras. 11 (Sri Lanka), 18 (Pakistan), 27 (Afghanistan), 40 (Iran).

16 UN Doc. A/CONF.183/C.1/L.76/Add.2, at 10.

17 UN Doc. A/CONF.183/C.1/L.70; UN A/CONF.183/C.1/SR.42 at para. 22.

18 UN Doc. A/CONF.183/C.1/SR.42 at para. 31.

19 UN Doc. A/CONF.183/SR.9 at para. 15.

20 *Ibid.*, at para. 28.

21 UN Doc. A/CONF.183/SR.9 at para. 37.

22 See *infra*, “Cooperation and Immunities.”

1995.²³ If nothing else, this shows the insincerity of its subsequent claim that international law prohibited an international tribunal from exercising jurisdiction over a national of a non-party State. If such were the case, no particular protection for soldiers under status of forces agreements would ever be required. In fact, exclusion of United States nationals from the jurisdiction of the Court was not a policy objective of the United States. If other States had been more conciliatory, and the *Rome Statute* had turned out in a form that was more or less satisfactory to the United States, then it would presumably have ratified the *Statute*, with the inevitable consequence that the Court have jurisdiction over American nationals. After all, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Special Tribunal for Lebanon all have jurisdiction over nationals of the United States. In 1999, the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia published a report on its examination of allegations that American military and civilian officials might be responsible for serious violations of international humanitarian law during the Kosovo bombing campaign.²⁴ More recently, the enthusiasm of the United States for the non-surrender agreements has waned, as they have been proven to be counter-productive to national interests.

The argument by which exercise of jurisdiction over the nationals of non-party States by an international criminal tribunal is a violation of article 34 of the *Vienna Convention on the Law of Treaties* cannot be sustained. An international criminal tribunal prosecutes individuals, not States. In the case of the International Criminal Court, it simply exercises the jurisdiction over foreign nationals that the national courts of its States parties exercise virtually every day, without objection from the State of nationality of the suspect. The issue figured

23 "United States Government informal comments on extradition/surrender approach of ILC draft of a statute for an international criminal court", 14 July 1995. Discussed in: David J. Scheffer, "Article 98(2) of the Rome Statute: America's Original Intent" (2005) 3 *Journal of International Criminal Justice* 333 at 339.

24 "Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report to the Prosecutor" The Hague, 13 June 2000, PR/PI.S./510-e. See: Paolo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia" (2001) 12 *E.J.I.L.* 503; Michael Bothe, "The Protection of the Civilian Population and the NATO Bombing in Yugoslavia: Comments on a Report to the Prosecutor of the ICTY" (2001) 12 *E.J.I.L.* 531; Anthony J. Colangelo, "Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor not to Investigate NATO Bombing in the former Yugoslavia" (2003) 97 *Nw. U.L. Rev.* 1393; William J. Fenrick, "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia" (2001) 12 *E.J.I.L.* 489; Andreas Laursen, "NATO, the War Over Kosovo, and the ICTY Investigation" (2002) 17 *Am. U. Int'l L. Rev.* 765; Michael Mandel, "Our Case Against NATO and the Lessons to be Learned from it" (2001) 25 *Fordham Int'l. L.J.* 95; Natalino Ronzitti, "Is the *non liquet* of the Final report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia Acceptable?" (2000) 82 *Int'l Rev. Red Cross* 1017; Tania Voon, "Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict" (2001) 16 *Am. U. Int'l L. Rev.* 1083; Robert Cryer, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime*, (Cambridge: Cambridge University Press, 2005) at 213-220.

regularly in the debates about United States opposition to the Court, but the weakness of the argument shows, if nothing else, that this matter was peripheral to the concerns of Washington and that even it did not really believe in or support the suggestion.

2. Immunity and jurisdiction over nationals of non-party States

There is no doubt that article 27(2) removes any claim to immunity from relevant officials of States Parties to the Rome Statute: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." The more difficult question is the application of this provision with respect to Heads of State of non-party States. They have not abandoned the immunity to which they are entitled under customary international law before foreign courts. Since a celebrated judgment of the International Court of Justice, it has not been a matter of great controversy that the courts of one State cannot prosecute the Head of State of another, even for the most serious international crimes.²⁵ In a sense, the problem is the opposite of that concerning jurisdiction over nationals of non-party States generally, where the International Criminal Court is doing what its member States may do individually. But in the case of Heads of State of non-party States, the claim to be able to prosecute rests upon the proposition that somehow States Parties may do collectively what they are not allowed to do individually.

The issue has already arisen in *ex parte* proceedings held on the application by the Prosecutor for a warrant of arrest directed against President Omar Al-Bashir of Sudan, a non-party State. Pre-Trial Chamber I of the International Criminal Court held that the position of the accused person as Head of State of a non-party State "has no effect on the Court's jurisdiction over the present case."²⁶ It said this conclusion was based upon four considerations.²⁷ The first was a rather gratuitous and unhelpful reference in the preamble to the core goals of the Statute, which are "to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which 'must not go unpunished'."²⁸ The second consisted of an equally gratuitous and unhelpful recital of the terms of article 27.²⁹ The third was more compelling: a reference to article 21 of the Statute, and the observation that unless there is a lacuna in the Statute the Court is not to apply other sources of law.³⁰ The message is that even if general public international law provides for Head of State immunity, this is not formally contemplated by article 27 and therefore cannot

25 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Reports 3 at para. 61.

26 *Prosecutor v. Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (4 March 2009) at para. 41. [*Bashir*]

27 For academic critique of this aspect of the decision, see Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) 7 *Journal of International Criminal Justice* 315, at 323-325.

28 *Bashir*, *supra* note 26 at para. 42.

29 *Ibid.*, at para. 43.

30 *Ibid.*, at para. 44.

be invoked in proceedings before the Court. Finally, the Pre-Trial Chamber said that by referring the Darfur situation to the Court in accordance with article 13(b) of the Statute, the Security Council “accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.”³¹

The reasoning of the Pre-Trial Chamber rests upon an interpretation of article 27(2) by which it applies to Heads of State even of non-party States because the provision does not say the contrary. But a construction by which article 27(2) only applies to States Parties is certainly equally plausible, if not more so. To start with, the Chamber might have considered article 34 of the *Vienna Convention on the Law of Treaties*. Given the fourth argument proposed by the Chamber, is it not logical to presume that the Security Council, in referring the Situation in Darfur to the Court, assumed that not only article 34 of the *Vienna Convention* remained applicable but also that the Court would apply article 27 within the framework of customary international law concerning immunities of Heads of State?

Another argument for the application of article 27(2) to Heads of State of non-party States, but one that the Pre-Trial Chamber did not take, views Security Council referral as an implied removal of immunity. Reliance is placed upon decisions of the ad hoc tribunals in Taylor³² and Milošević,³³ to the extent that they bolster the theory of implied withdrawal of immunity. The reasoning in both decisions of the ad hoc tribunals is quite superficial on this point, weakening their authority. Both the Special Court for Sierra Leone and the International Criminal Tribunal for the former Yugoslavia appear to have considered that the “official capacity” provision in their statutes also addressed the matter of immunity under international law, but this is not the case. In fact, the statutes of the two tribunals each contain an identical provision whose text is equivalent to article 27(1) of the Rome Statute, not article 27(2).³⁴ There is a perhaps subtle but nevertheless significant distinction between the defence of “official capacity,” which may be invoked as a defence by any accused person, and immunity of a head of State before foreign courts, which is a claim that belongs to the State itself. The argument of implied removal of immunity also falters on the fact that, as a general rule, the Security Council cannot alter the provisions of the Rome Statute when it makes a referral. Otherwise, Security Council referral would create a different legal regime than that resulting from State Party referral or proprio motu triggering by the Prosecutor. The Security Council cannot add new crimes, or alter the temporal jurisdiction of the Court, for example. Why, then, should its referral of a situation alter a general rule on immunities set out in paragraph 2 of article 27? It seems highly doubtful that the intent of the members

31 *Ibid.*, at para. 45.

32 *Prosecutor v. Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004.

33 *Prosecutor v. Milošević*, IT-02-54-PT, Decision on Preliminary Motions, 8 November 2001.

34 *Statute of the International Criminal Tribunal for the former Yugoslavia*, UN Doc. S/RES/827 (1993), annex, art. 7(2); *Statute of the Special Court for Sierra Leone*, (2002) 2178 UNTS 138, annex, art. 6(2).

of the Security Council was to strip the Heads of non-party States – including the Heads of State of those non-party States who are permanent members of the Security Council – of their immunity before the International Criminal Court.

The preceding interpretation of article 27(2), by which it does not apply to Heads of State of non-party States, finds confirmation in the negotiations of the Relationship Agreement between the International Criminal Court and the United Nations. The Government of Belgium, which for many years adopted a rather extreme position on immunities, reflected in the dissenting opinion of ad hoc judge Van den Wyngaert in the Arrest Warrant case, proposed the following provision: “Paragraph 1 of this article shall be without prejudice to the relevant norms of international law, particularly article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide and article 27 of the Statute, in respect of the crimes that come under the jurisdiction of the Court.”³⁵ When the text of the Relationship Agreement was being prepared, Belgium was embroiled in litigation before the International Court of Justice, and obviously understood that recognition of immunity for United Nations officials in that text would seem incompatible with its claim that there was no immunity at all for the core crimes of international law. Belgium’s provision was rejected during the drafting, and the final version of the Agreement confirms the immunities to which officials of the United Nations are entitled. According to article 19 of the Relationship Agreement, the United Nations agrees to waive these immunities. But if article 27(2) removed such immunity, there would be no need for any such provision, and this was precisely the point that Belgium unsuccessfully tried to confirm.

Because the immunity of a Head of State exists by virtue of customary international law rather than principles enshrined in national legislation, a matter dealt with in article 27(1), by ratifying or acceding to the *Rome Statute* States in effect renounce their right to immunity before a foreign court, just as they may renounce to this immunity on a case by case basis. But while a State Party to the *Rome Statute* may abandon the immunity that it is entitled to under international law, it would seem that it cannot, by treaty, remove it from non-party States that have not renounced such immunity. For this reason, article 27(2) should not apply to Heads of State of non-party States, who retain their immunity under customary international law. The *Bashir* arrest warrant decision takes the contrary position, of course. It was decided *ex parte*. Moreover, although the decision examines some issues in extraordinary detail, its discussion of article 27(2) is brief and insubstantial.

3. Declaration of jurisdiction by a non-party State

The *Rome Statute* allows a non-party State to declare that it accepts the jurisdiction of the Court “with respect to the crime in question” but without ratifying or acceding to the *Rome Statute*.³⁶ Côte d’Ivoire, Uganda and Palestine have

35 “Proposal submitted by Belgium concerning document PCNICC/2000/WGICC-UN/L.1”, PCNICC/2000/WGICC-UN/DP.18.

36 *Rome Statute*, *supra* note 1 art. 12(3). On article 12(3) of the *Rome Statute*, see: Carsten Stahn, Mohamed El Zeidy and Héctor Olásolo, “The International Criminal Court’s Ad

all made such declarations. Article 12(3) of the *Rome Statute* is the residue of a provision in the 1994 draft statute of the International Law Commission by which State consent was contemplated on a case-by-case basis,³⁷ similar to the way it operates at the International Court of Justice when the respondent State has not previously accepted the jurisdiction of the Court. The provision proposed by the International Law Commission remained essentially unchanged in the draft of the Preparatory Committee, where it appeared in all of the options.³⁸ In the first Bureau discussion paper at the Rome Conference, it was detached from the general provision on preconditions and given its own identity as a distinct article, entitled "Acceptance by non-States Parties."³⁹ In the debate in the Committee of the Whole, it met with no real opposition. The head of the United States delegation described it as "a useful and necessary provision."⁴⁰

But after the *Rome Statute* was adopted, article 12(3) became a frequent target for abuse in the criticism of the Court by the United States. The United States argued that article 12(3) would allow a Saddam Hussein to invoke the jurisdiction of the Court for crimes committed by the United States in Iraq, yet without at the same time authorising the Court to do the same with respect to atrocities committed by the regime against the people of the country.⁴¹ The United States campaigned for,⁴² and obtained, a provision in the Rules of Procedure and Evidence that addressed its concerns:

Rule 44. Declaration provided for in article 12, paragraph 3

1. The Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3.

2. When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and

hoc Jurisdiction Revisited" (2005) 99 A.J.I.L. 421; Steven Freeland, "How Open Should the Door Be? – Declarations by Non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court" (2006) 75 Nordic Journal of International Law 211; Carsten Stahn, "Why Some Doors May be Closed Already: Second Thoughts on a 'Case-by-Case' Treatment of Article 12(3) Declarations" (2006) 75 Nordic Journal of International Law 243.

37 ILC 1994 Final Report, at 43.

38 Preparatory Committee Draft Statute, at 33-34.

39 "Discussion Paper, Bureau" UN Doc. A/CONF.183/C.1/L.53. Also: "Bureau Proposal", UN Doc. A/CONF.183/C.1/L.59.

40 UN Doc. A/CONF.183/C.1/SR.29 at para. 44.

41 David J. Scheffer, "A Negotiator's Perspective on the International Criminal Court" (2001) 167 Mil. L. Rev. 1, at 8.

42 David J. Scheffer, "The United States and the International Criminal Court" (1999) 93 A.J.I.L. 12 at 18-20.

the provisions of Part 9, and any rules there under concerning States Parties, shall apply.

The Rule is intended to make one-sided manipulation of the jurisdiction impossible. Some supporters of the American position have taken the view that reciprocity flows automatically from the logic of a “sensible reading” of article 12(3) in any event, and that there is no need for an explicit norm to clarify things.⁴³ Others claim that even with Rule 44, the problem persists. According to Jack Goldsmith,

[t]his vague provision does not, as many have stated, guarantee that Article 12(3) parties will consent to jurisdiction for all crimes related to the consent. But even if it did, the Iraqs of the world could consent under Article 12(3) and simply not show up. Rule 44(3) improves the anomaly of Article 12(3), but does not fix it.⁴⁴

Côte d’Ivoire signed the *Rome Statute* on 30 November 1998, but it has never ratified the instrument and is not a State Party. In 2005, it lodged a declaration with the Court by which it accepted the Court’s jurisdiction for crimes committed in its territory since 19 September 2002.⁴⁵ In 2006, the Prosecutor said that he would send a mission to Côte d’Ivoire “when security permits.”⁴⁶ In April 2009, the Deputy Prosecutor said that the situation in Côte d’Ivoire⁴⁷ was “under analysis.” In November 2009, the Prosecutor told the Assembly of States Parties that “preliminary examination” was underway with respect to Côte d’Ivoire.⁴⁸

As for Uganda, in support of his application for arrest warrants of leaders of the Lord’s Resistance Army, the Prosecutor included a “Declaration on Temporal Jurisdiction,” dated 27 February 2004, whereby the Republic of Uganda accepted the exercise of the Court’s jurisdiction for crimes committed following the entry into force of the Statute on 1 July 2002.⁴⁹ Because Uganda ratified the *Rome Statute* on 14 June 2002, it only entered into force with respect to Uganda on 1 September 2002, two months after the entry into force of the *Statute* itself.

The Palestinian declaration was formulated by the Minister of Justice of the Palestinian Authority on 21 January 2009, in the aftermath of the Israeli cam-

43 Ruth Wedgwood, “The United States and the International Criminal Court: Achieving a Wider Consensus Through the ‘Ithaca Package’” (1999) 32 Cornell Int’l L.J. 535 at 541.

44 Jack Goldsmith, “The Self-Defeating International Criminal Court” (2003) 70 U Chicago L. Rev. 89, at fn. 11.

45 “Registrar confirms that the Republic of Côte d’Ivoire has accepted the jurisdiction of the Court”, ICC-CPI 20050215-91.

46 “Sixth Diplomatic Briefing of the International Criminal Court, Compilation of Statements”, 23 March 2006.

47 “Overview of situations and cases before the ICC, linked with a discussion of the recent Bashir arrest warrant” 15 April 2009, at 9.

48 “Address to the Assembly of States Parties” The Hague, 18 November 2009, at 5.

49 *Prosecutor v. Kony*, ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, 27 September 2005, at para. 32.

paign directed against Hamas militants in Gaza. It reads as follows:

Declaration recognising the Jurisdiction of the International Criminal Court

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognises the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.

This declaration, made for an indeterminate duration, will enter into force upon its signature.

Material supplementary to and supporting this declaration will be provided shortly in a separate communication.⁵⁰

The Palestinian declaration raises a number of difficult legal issues. Palestine is not a Member State of the United Nations, and its claim to be a State within the meaning of article 12(3) is debatable. Even if it is recognised as a State at some point in time, there is a question as to whether it can retroactively give jurisdiction to the Court over its territory for periods of time when it was not a State. Finally, the actual limits of the territory of Palestine are also a matter of dispute. The Prosecutor has described the situation in Palestine as being under “preliminary examination.”⁵¹ The Commission of Inquiry presided by Richard Goldstone took note of the Palestinian declaration, and said: “The Prosecutor may determine that for the purposes of Article 12, paragraph 3, under customary international law, Palestine qualifies as ‘a state.’”⁵² The Commission said that “accountability for victims and the interests of peace and justice in the region require that the legal determination should be made by the Prosecutor as expeditiously as possible.”⁵³

To date, article 12(3) appears to have been viewed as if it relates only to territorial jurisdiction. Nothing in the *Rome Statute* explicitly limits the provision in this way, however. To the extent that article 12(3) is analogous to a conferral of jurisdiction by ratification or accession, but only with respect to a specific situation, it seems reasonable to consider that the declaration gives jurisdiction to the Court over both the territory of the accepting State and over its nationals with respect to the given situation.

The term “accepting State” is used to describe the author of the declaration

50 Palestinian National Authority, Ministry of Justice, Office of the Minister, “Declaration Recognising the Jurisdiction of the International Criminal Court” 21 January 2009.

51 “Address to the Assembly of States Parties”, The Hague, 18 November 2009 at 5.

52 “Report of the United Nations Fact Finding Mission on the Gaza Conflict” UN Doc. A/HRC/12/48, at para. 1632.

53 *Ibid.*, at para. 1767.

contemplated by article 12(3). The final sentence in article 12(3) says that “[t]he accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.” However, there does not seem to be any consequence should an accepting State fail to cooperate as required. The declaration is filed with the Registrar. The Registrar does not have any discretion to accept or reject a declaration. In accordance with Rule 44, the Registrar must reply to the State and inform it of the conditions set out in the Rule. A State that has made a declaration under article 12(3) is entitled to challenge jurisdiction and admissibility of a case.⁵⁴

There are intriguing possible applications of article 12(3) in the case of occupied territories. For example, Cuba might make a declaration giving the Court jurisdiction over the Guantanamo Bay naval base. Syria, too, could make a declaration giving the Court jurisdiction over the occupied Golan Heights.

B. Cooperation and non-party States

The International Criminal Court depends upon States for the enforcement of arrest warrants, the conduct of investigations on their territory, and the service of sentences by persons who may be convicted. As a result, what is known as “State cooperation” is extremely important to the Court. Elaborate provisions in Part IX of the *Rome Statute* set out the obligations of States parties and, in some circumstances, address the rights of non-party States. It is also possible for non-party States to be required to cooperate with the Court pursuant to a Security Council resolution, as is the case with its referral of the *Situation in Darfur*.⁵⁵ The general principle, however, is that non-party States are under no obligation to cooperate with the Court. This flows naturally from article 34 of the *Vienna Convention on the Law of Treaties*.

Nevertheless, the International Law Commission recognised that “all States as members of the international community have an interest in the prosecution, punishment and deterrence” of international crimes. Thus, even those States which are not parties to the *Statute* are encouraged to cooperate with the Court.⁵⁶ The Court may invite any non-party State to provide assistance, on the basis of an *ad hoc* arrangement, an agreement “or any other appropriate basis.”⁵⁷ A non-party State that has made a declaration under article 12(3) accepting the jurisdiction of the Court is required to “cooperate with the Court without any delay or exception.”⁵⁸

1. Security Council Resolution

Non-party States may be required to cooperate with the Court by virtue of a Security Council resolution, at least when the situation has been referred by the Council pursuant to article 13(b) of the *Rome Statute*. When it referred the

54 *Rome Statute*, *supra* note 1 at art. 19(2)(c).

55 UN Doc. S/RES/1593 (2005) at para. 2.

56 “Forty sixth session report,” *supra* note 10 at 15-73, 65-66. See also: “Report of the Preparatory Committee on the Establishment of an International Criminal Court” Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), UN Doc. A/51/22, at para. 11.

57 Regulations of the Court, Regulation 107.

58 *Rome Statute*, *supra* note 1 at art. 12(3).

Situation in Darfur, the Security Council “[d]ecide[d] that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.”⁵⁹ When the Prosecutor reported non-cooperation by Sudan to the Security Council,⁶⁰ it responded by issuing a Presidential Statement:

The Security Council recalls its decision, under Chapter VII of the United Nations Charter, in resolution 1593 (2005) that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor pursuant to that resolution, while stressing the principle of complementarity of the International Criminal Court.

The Security Council takes note of the efforts made by the Prosecutor of the International Criminal Court to bring to justice the perpetrators of war crimes and crimes against humanity in Darfur and in particular notes the follow up by the International Criminal Court with the Government of Sudan, including the transmittal by the Registry of the International Criminal Court to the Government of Sudan on 16 June 2007 of arrest warrants and the opening by the Prosecutor of other investigations on crimes committed by various parties in Darfur.

In this respect, the Council urges the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the Court, consistent with resolution 1593 (2005), in order to put an end to impunity for the crimes committed in Darfur.⁶¹

However, there has been little if anything in the way of cooperation, either from Sudan itself, which is resisting the proceedings, or from States in the region. In fact, the African Union called upon the Security Council to apply article 16 of the *Rome Statute* and “defer the process initiated by the ICC.”⁶² In his November 2009 report to the Security Council, the Prosecutor condemned

⁵⁹ UN Doc. S/RES/1593 (2005) at para. 2.

⁶⁰ UN Doc. S/PV.5905 at 3.

⁶¹ “Statement by the President of the Security Council”, UN Doc. S/PRST/2008/21.

⁶² African Union Assembly Decision on the Application by the International Criminal Court Prosecutor for the Indictment of the President of the Republic of the Sudan (Dec. 221 (XII)), 3 February 2009 at paras. 2, 3 and Peace and Security Council Decision (PSC/PR/Comm (CLXXV)), 5 March 2009 at paras. 4-6. See: Annalisa Ciampi, “The Proceedings Against President Al Bashir and the Prospects of their Suspension Under Article 16 ICC Statute” (2008) 6 *Journal of International Criminal Justice* 885.

Sudan for its failure to cooperate with the Court.⁶³ He described “cooperation with the African Union, the League of Arab States and other international bodies” as “fruitful.”⁶⁴ He also spoke of “positive developments to report regarding the cooperation of States.” The Prosecutor noted that President al-Bashir would not travel to a number of States Parties, and that as a result he had missed high-level events that he had planned to attend in South Africa, Uganda, Nigeria and Venezuela, as well as the Climate Conference in Copenhagen. He also noted that President al-Bashir had not attended the United Nations General Assembly, nor a recent meeting of the Organization of the Islamic Conference’s Committee for Economic and Commercial Cooperation.⁶⁵ These latter two examples involve non-party States, the implication being that they too were willing to cooperate with the Court. The legal issues associated with the possible arrest of President al-Bashir by the authorities of the United States while attending the United Nations General Assembly in New York are fascinating, but addressing them properly would require a separate article.

2. Competing requests for extradition and other forms of mutual legal assistance

States Parties are under an obligation to surrender a suspect when so requested by the Court. The Statute does not use the term “extradition” to refer to transfer or surrender of suspects to the Court.⁶⁶ The *Rome Statute* contemplates a situation where a State receives competing requests for a suspect, one from the Court and the other from a third State seeking extradition. If the third State is also a State Party to the *Rome Statute*, the requested State is to give priority to the request from the Court after respecting certain formalities.⁶⁷

Where the competing request comes from a non-party State, the requested State finds itself confronted with two competing international obligations, one to the Court pursuant to the *Rome Statute*, the other to the requesting States pursuant to extradition treaties or customary international law. For example, States Parties to the *Convention Against Torture* accept the existence of an obligation of extradite even in the absence of a specialised treaty.⁶⁸

Article 90(4) establishes the principle that the State Party with custody over the suspect must give priority to the Court’s request for surrender unless it is under an international obligation to extradite the suspect to the requesting State. The norm seems deceptively simple, because where there is no obligation to extradite to a third State and there is an obligation to surrender to the Court, there is only one international obligation. Thus, there may be competing “requests” but there are no competing obligations.

To the extent that the International Criminal Court has not determined the case to be admissible, the requested State may, “at its discretion, proceed to deal

63 UN Doc. S/PV. 6230 at 4.

64 *Ibid.*, at 2.

65 *Ibid.*, at 4.

66 *Rome Statute*, *supra* note 1 at art. 102.

67 *Ibid.*, at 90(2).

68 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1987, 1465 UNTS 85, at art. 8.

with the request for extradition from the requesting State.” The wording of article 90(5) contrasts with a similar but slightly different formulation applicable in the case of requests from a State Party, whereby the requested State is prohibited from extraditing the suspect until the Court has ruled on admissibility. When the requesting State is not a State Party, there is no such bar to extradition as long as the Court has not declared the case admissible. The *Statute* seems to envisage a race between the Court, to rule the case admissible, and the requested State, to complete its extradition proceedings to the requesting State.

Where there is an existing international obligation to extradite to the requesting State, the requested State “shall determine” whether to comply with the extradition request or to respond to the Court’s request for surrender. It is to consider several relevant factors set out in the *Statute*, although the list is not held to be exhaustive, and the requested State seems to be free to consider other criteria as well. Article 90(6) enumerates the following: the dates of the requests (the implication being that the earlier request takes priority); the interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and the possibility of subsequent surrender between the Court and the requesting State.

If the application for extradition does not concern the same conduct as that covered by the Court’s request for surrender, the requested State is to decide upon which of the competing requests it is to honour in light not only of the criteria listed in article 90(6) but also “shall give special consideration to the relative nature and gravity of the conduct in question.” There was probably a presumption when this was drafted that the conduct of interest to the Court would always be more serious than other crimes for which extradition might be sought. This may not, however, always be the situation. Although it did not concern competing extradition requests, the case of Thomas Lubanga presented a somewhat analogous situation. He was being prosecuted in the Democratic Republic of Congo for genocide and crimes against humanity when the Court sought and obtained his surrender on charges of recruiting child soldiers.⁶⁹ Had *Lubanga* involved competing requests, it is certainly possible that a requested State would consider a request by a third State to try the suspect for genocide to be of greater gravity than a prosecution involving child soldier offences.

As in the case of arrest and surrender, a State Party may receive competing requests for other forms of legal assistance. Initially, it is to try to respond to both requests, “if necessary by postponing or attaching conditions to one or the other request.” Although the cooperative intention expressed in article 93(9)(a)(i) is laudatory, the text is curious in that it seems to impose an obligation not only to comply with the Court but also to cooperate with the third State responsible for the competing request. If both requests cannot be met satisfactorily, the issue is to be resolved in accordance with the principles set out in article 90 of the *Statute*, which applies to competing requests for arrest and surrender. Thus, the distinction between States Parties and non-party States that is made in article 90 should apply *mutatis mutandis* to other forms of cooperation.

69 *Prosecutor v. Lubanga*, ICC-01/04-01/06-8, 10 February 2006, Decision on the Prosecutor’s Application for a Warrant of Arrest, at para. 33.

3. Cooperation and immunities

The issue of immunities is discussed above, but in the context of the exercise of jurisdiction by the Court. It also arises in the context of cooperation, where an existing obligation of immunity under customary law or treaty law that a State Party may owe to a non-party State may conflict with the requirements of the *Statute*. Article 98 concerns obligations that States Parties assume under the *Statute* with respect to surrender of accused persons and other forms of cooperation. Paragraph 1 grants an exemption from these undertakings to the extent they may conflict with immunities granted under “international law with respect to the State or diplomatic immunity.” Paragraph 2 grants an exemption from surrender obligations where these conflict with “international agreements,” of which so-called “status of forces agreements” governing foreign military personnel are the classic example. Article 98 does not explicitly distinguish between third States that are States Parties and those that are not. Nevertheless, if the conflicting obligation is owed to a third State that is also a State Party, that State will itself be required to cooperate with the Court, and the problem will be quickly resolved.

Article 98 has proven to be one of the most controversial provisions in the *Rome Statute*,⁷⁰ but the difficulties only manifested themselves some years after its adoption. The text was devised at the Rome Conference, no equivalent appearing in the International Law Commission draft or the work of the Preparatory Committee. At the Conference itself, article 98 “did not absorb too much negotiation time” and “was not considered to be of utmost sensitivity by most participants in the negotiations.”⁷¹ After the *Statute* was adopted, creative lawyers in the United States government relied upon article 98 as they developed strat-

70 See: Markus Benzing, “U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties” (2004) 8 Max Planck Yearbook of United Nations Law 181; Yolanda Gamarra Chopo, “La política hostil de Estados Unidos contra la Corte Penal Internacional: los acuerdos del artículo 98 o la búsqueda de la impunidad” (2005) 57 Revista Española de Derecho Internacional 145; Chimène Keitner, “Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)” (2001) 6 UCLA J. Int’l L. & Foreign Aff. 215; Jordan J. Paust, “The Reach of ICC Jurisdiction Over Non-Signatory Nationals” (2000) 33 Vand. J. Transnat’l L. 14; Jörg Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (Munich: Beck, 2002); Scheffer, *supra* note 23; Björn Sendel, “Bilaterale Nichtüberstellungsabkommen der Vereinigten Staaten und Art. 98 Abs. 2 des Römischen Statuts zur Errichtung eines ständigen Internationalen Strafgerichtshofs” (2007) 3 Zeitschrift für Internationale Strafrechtsdogmatik 118; David A. Tallman, “Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict” (2005) 92 Geo. L.J. 1033; Chet J. Tan, “The Proliferation of Bilateral Non-Surrender Agreements among Non-Ratifiers of the Rome Statute of the International Criminal Court” (2004) 19 Am. U. Int’l L. Rev. 1115; Harmen van der Wilt, “Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?” (2005) 18 Leiden Journal of International Law 102; Salvatore Zappalà, “The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements” (2003) 1 Journal of International Criminal Law 114.

71 Claus Kieß and Kimberly Prost, “Article 98” in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, 2nd ed., (Munich: C.H. Beck, Baden-Baden: Nomos, Oxford: Hart, 2008) 1601 at 1604.

egies first to limit the jurisdiction of the Court through provisions in the Rules of Procedure and Evidence and, eventually, to attack the institution through a campaign to negotiate so-called “Bilateral Non-surrender Agreements.”

If it agrees that the situations described in article 98 are applicable, then the Court has the responsibility to apply to the third State for a waiver. In the case of a non-party State, the Court will have to invoke other sources of legal obligation in order to obtain a waiver. Some international treaties impose obligations requiring cooperation in the repression of international crimes, for example, article 7 of the *Convention for the Prevention and Punishment of the Crime of Genocide*.⁷² It is argued that if a State itself fails to investigate or prosecute a suspect over whom it has jurisdiction, then it must cooperate with others in bringing the individual to justice.⁷³ To the extent that this is an obligation under international law, the Court may invoke it in any waiver request.

Article 98(1) deals with diplomatic and analogous immunities. It would apply when, for example, the Court seeks the surrender of the ambassador of a non-party State who is posted to a State Party. In that situation, the requested State would be required to respect the ambassador's immunity, but would also be under a competing duty to comply with the Court's request. Article 98(1) resolves the matter in favour of the ambassador's immunity. The second paragraph of article 98 contemplates international agreements, both bilateral and multilateral. The text of the provision itself offers little additional guidance for the purposes of interpretation and the *travaux préparatoires* are summary and uninformative. Much has been made of the “personal recollection of those who participated,”⁷⁴ but on this too there is controversy. The head of the United States delegation to the Rome Conference has written that “particular agreements – either already in force or that would be negotiated and ratified in the future and which established jurisdictional responsibilities for investigating and prosecuting criminal charges against certain individuals before national courts – could be used to avoid surrender of particular types of suspects to the ICC.”⁷⁵ Others contend that those who drafted the provision believed it was meant to cover existing status of forces agreements, and not to allow agreements negotiated subsequently to provide a loophole that might be exploited by opponents of the Court.

Certainly, the terminology that is employed in article 98(2) is rooted in practice concerning status of forces agreements. The United States had flagged its concerns on this point as early as the *Ad Hoc* Committee, in 1995.

It is also critical that the rights and responsibilities of states parties to applicable Status of Forces Agreements (SOFAs) be fully preserved under the statute of the ICC, and that

72 *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277, art. VII.

73 *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Application, 19 February 2009.

74 Kreß & Prost, *supra* note 71 at 1617

75 Scheffer, *supra* note 23 at 336.

SOFA practice be reflected in the Statute's provision on extradition. SOFAs are international agreements, which provide for a number of reciprocal rights and responsibilities of the signatory states in respect to armed forces stationed or temporarily present in the territories of the respective signatory states. Under such agreements, the state dispatching or posting its forces in the territory of another state is identified as the 'sending state'. The state on whose territory foreign forces are dispatched or posted is identified as the 'receiving state'. Most SOFAs contain provisions governing the exercise of criminal jurisdiction over the armed forces stationed or posted abroad.⁷⁶

The United States returned to the subject during the Preparatory Committee,⁷⁷ although there is no reference to this in the various reports of the Committee or in its final draft. As discussed above with regard to the drafting history, the issue received perfunctory treatment at best during the negotiations. Probably most States understood the concerns of the United States, and accepted without difficulty that status of forces agreements created a kind of immunity analogous to that of diplomats, and was entitled to some recognition in the *Statute*. That article 98(2) was perceived to be quite innocuous can be seen in the initial academic writing on the subject, most of which was informed by the recollections of participants in the Rome Conference.⁷⁸

The first crisis emerged during the Preparatory Commission, when the Rules of Procedure and Evidence regarding article 98 were being drafted. Initially, there was only one paragraph in the draft, and it corresponds to Rule 195(1) in the final version.⁷⁹ The United States proposed a paragraph 2, reading: "The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with international agreements applicable to the surrender of the person."⁸⁰ The provision was part of a package that also contained a declaration, to be incorporated into the relationship agreement with the United Nations, clarifying the intention of the United States, which was to cover "a national who acts within the overall direction of a UN

76 "United States Government informal comments on extradition/surrender approach of ILC draft of a statute for an international criminal court" 14 July 1995.

77 "Cooperation between States and the ICC, Remarks of the US Delegation, April 8, 1996 – afternoon session" at 7.

78 Kimberly Prost and Angelika Schlunck, "Article 98" in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 1131. See also: Kreß & Prost, *supra* note 71 at 1604-1606.

79 "Discussion paper proposed by the Coordinator regarding Part 9 of the Rome Statute, concerning international cooperation and judicial assistance" PCNICC/2000/WGRPE(9)/RT.1, at 6. It had an ominous footnote: "One delegation may propose an addition to the rule related to article 98."

80 "Proposal submitted by the United States of America concerning rules of procedure and evidence relating to Part 9 of the Statute (International Cooperation and Judicial Assistance)" PCNICC/2000/WGRPE(9)/DP4.

Member State.”⁸¹ None of this was well-received, and a rather different text was subsequently negotiated for the Rules of Procedure and Evidence: “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 an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.”⁸² Its adoption by the Preparatory Commission was accompanied by a declaration: “It is generally understood that [Rule 195(2)] should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or any other international organisation or State.”⁸³ When the Rule was adopted, several States made declarations clarifying their interpretation of the provision. Some were concerned that it might modify article 98(2), while others described it as a compromise formulation compatible with the *Statute*.⁸⁴

Beginning in 2002, the United States began negotiating “bilateral non-surrender agreements” with other States who undertook not to surrender American nationals to the Court. The United States took the view that such agreements were compatible with article 98(2). On 26 September 2002, the European Parliament said such agreements were inconsistent with the *Rome Statute*.⁸⁵ The preamble to Security Council Resolution 1593, which triggered the *Situation in Darfur, Sudan*, contains the following paragraph: “*Taking note* of the existence of agreements referred to in Article 98-2 of the *Rome Statute*...” These words were included at the request of the United States which, in addition to other formulations that supporters of the Court found offensive, agreed to abstain when the vote was taken rather than to veto the resolution. The American representative explained:

As is well known, in connection with our concerns about the jurisdiction of the Court and the potential for politicized prosecutions, we have concluded agreements with 99 countries — over half the States Members of this Organization — since the entry into force of the Rome Statute to protect against the possibility of transfer or surrender of United States persons to the Court. We appreciate that the resolution takes

81 David J. Scheffer, “Staying the Course with the International Criminal Court”, (2002) 35 Cornell Int’l L.J. 47, at 78-80.

82 “Discussion paper proposed by the Coordinator concerning rules of procedure and evidence relating to Part 9 of the Statute (International Cooperation and Judicial Assistance)”, PCNICC/2000/WGRPE(9)/RT.2; “Report of the Working Group”, PCNICC/2000/WGRPE/L.14/Add.2.

83 “Proposed understanding in connection with rule 9.19, for incorporation into the Proceedings of the Preparatory Commission” PCNICC/2000/WGRPE(9)/RT.3; “A guide to the report of the Preparatory Commission Prepared by the Secretariat”, PCNICC/2002/3, at para. 9.

84 “Summary of statements made in plenary in connection with the adoption of the report of the Working Group on the Rules of Procedure and Evidence and the report of the Working Group on Elements of Crime” PCNICC/2000/INF/4.

85 European Parliament resolution on the International Criminal Court (ICC), P5_TA(2002)0449, 26 September 2002.

note of the existence of those agreements and will continue to pursue additional such agreements with other countries as we move forward.⁸⁶

Most of the States Parties to the *Rome Statute* who were present during the debate acquiesced, making no comment on the reference to the Article 98(2) agreements. Denmark said it “would like to stress that that reference is purely factual; it is merely referring to the existence of such agreements. Thus, the reference in no way impinges on the integrity of the *Rome Statute*.”⁸⁷ Brazil also objected, but acknowledged that the paragraph had substantive consequences, and was not merely an innocent statement of fact. “My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application has been a highly controversial issue,” said the Brazilian representative. “We understand that it would be a contradiction to mention, in the very text of a referral by the Council to the ICC, measures that limit the jurisdictional activity of the Court.”⁸⁸

American legislation imposed penalties upon States that did not agree to the bilateral surrender agreements, notably the withdrawal of certain forms of military assistance.⁸⁹ Although initially successful with its diplomatic bullying campaign, when some countries called the bluff, the United States discovered that China was poised to replace whatever the United States was denying. American generals soon realised that they had shot themselves in the foot.⁹⁰ Military officials began publicly challenging the campaign to promote bilateral surrender agreements. In late November 2006, President Bush waived the penalties imposed upon countries that refused to reach bilateral surrender agreements, with three exceptions: Ireland, Brazil and Venezuela.

For a time, the issue of bilateral surrender agreements and the disputed interpretation of article 98(2) left many thinking that the United States might have found the Achilles heel of the *Rome Statute*. Several arguments were mustered in attempts to claim the agreements were illegal or invalid, in particular a claim that the drafters of article 98(2) only intended it to shelter status of forces agreements in existence prior to entry into force of the *Rome Statute*.⁹¹ As indicated above,

86 UN Doc. S/PV.5158, at 4.

87 *Ibid.* at 6.

88 *Ibid.* at 11.

89 Sean D. Murphy, “American Servicemembers’ Protection Act” (2002) 96 A.J.I.L. 975; Lilian V. Faulhaber, “American Servicemembers’ Protection Act of 2002” (2003) 40 Harv. J. on Legis. 537.

90 See, e.g., Statements by General Bantz J. Craddock, Head of United States Southern Command, before the House Armed Services Committee, 16 March 2006, and before Senate Armed Services Committee, 19 September 2006; Vice Admiral James G. Stavridis, Nominee for Commander, United States Southern Command, before Senate Armed Services Committee, 19 September 2006.

91 Otto Triffterer, “‘Irrelevance of Official Capacity’ – Article 27 Rome Statute Undermined by Obligations under International Law or by Agreement Edward (Article 98)?”, in Isabel Buffard, James Crawford, Alain Pellet & Stephan Wittich, eds., *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (Leiden: Brill, 2008) 571 at 597-598.

although some negotiators may remember differently, it is difficult to reach such conclusions when the *travaux préparatoires* are taken as the official record of the Rome Conference, and the subsequent work in the Preparatory Commission. In any event, the crisis proved to be ephemeral. The legal consequences of the agreements were much misunderstood. They do not affect the jurisdiction of the Court at all. Their potential impact is in providing States with a reason to deny surrender or other forms of cooperation where such agreements exist and nationals of a non-State Party are concerned.

II. CONCLUSION

As ratification and accession to the *Rome Statute* makes the treaty increasingly universal, the difficulties posed by non-party States become less and less important. Nevertheless, given the reluctance to join the Court of several large and powerful States, including three permanent members of the Security Council, these issues will remain for many years to come. Several problems remain unresolved, as discussed in this article. They are highlighted by recent developments at the Court, in particular the issuance of an arrest warrant against President al-Bashir of Sudan and the declaration of jurisdiction formulated by the Palestinian Authority.