

Human Rights Watch
350 Fifth Avenue, 34th Floor
New York, NY 10118
Phone: 212-290-4700
Fax: 212-736-1300
E-mail: hrwync@hrw.org
Website: <http://www.hrw.org>

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United States Efforts to Undermine the International Criminal Court: *Article 98(2) Agreements*

Introduction

As part of a larger U.S. strategy to undermine the International Criminal Court (ICC), the United States continues its attempts to secure blanket immunity for U.N. peacekeepers from the jurisdiction of the ICC through U.N. Security Council resolutions. Human Rights Watch strongly condemns these efforts. (See <http://hrw.org/campaigns/icc/usproposal.htm>; <http://hrw.org/press/2002/07/icc070102.htm> and <http://hrw.org/press/2002/07/icc070302.htm>.)

Simultaneous with these efforts in the U.N. Security Council, the Bush Administration is also preparing to negotiate bilateral "Article 98(2)" agreements with many countries, nearly all of which have ratified or signed the Rome Statute. The goal of these agreements is to exempt U.S. military and civilian personnel from the jurisdiction of the ICC. The U.S. argues that such agreements are contemplated under article 98(2) of the Rome Statute. Human Rights Watch disagrees. Use of article 98(2) agreements in this manner violates the Rome Statute and should be opposed. States Parties, as well as signatories of the Rome Statute, have a legal obligation *not* to sign such agreements.

Outline of Article 98(2)

Article 98(2) provides that the ICC may not proceed with a request for surrender that would require the requested State to act inconsistently with its obligations under international agreements "pursuant to which the consent of a sending State is required to surrender a person of that State to the Court" unless the sending State first consents.

Usually, a "sending State" will contribute troops for operations in the territory of the "requested State." These troops are often regulated under Status of Forces Agreements (SOFAs). SOFAs typically impose an obligation on a requested State to recognize that a sending State has at least certain jurisdiction over its nationals even though the nationals of the sending State will operate in the territory of the requested State. Article 98(2) provides that in case of a conflict between the Rome Statute's obligations to prosecute or allow the ICC to do so, and a bilateral agreement that purports to first require the sending State's consent, the latter prevails.

I. Legal Analysis

Current US SOFAs Do Not Qualify as Article 98(2) Agreements

As mentioned above, article 98(2) only allows a bilateral agreement to “trump” the Rome Statute where the agreement is one “pursuant to which the consent of a sending State is required to surrender a person of that State to the Court.”

Human Rights Watch understands that the U.S. has 105 existing SOFAs with 101 foreign countries, but that none of these SOFAs stipulates that the “the consent of a sending State is required to surrender a person of that State to the Court.” The SOFAs that we have reviewed do not address the issue of “consent,” and certainly do not provide for surrender to the ICC, since they were negotiated prior to the ICC’s entry into force.

Consequently, Human Rights Watch believes that existing U.S. SOFAs are not the type of agreement that would qualify under Article 98(2), and cannot trump any obligations under the Rome Statute.¹ If a requested State Party has such a SOFA with the United States, it would have to adhere to its legal obligations under the Rome Statute to cooperate with the ICC, including, where required, the surrender of U.S. nationals to the ICC.

Any Country That Has Ratified the Rome Statute May Not Sign an Agreement Providing Immunity from ICC Prosecution with a Country that Has Repudiated or Has Not Signed the Rome Statute; to do so would Violate the Rome Statute.

The Rome Statute establishes a jurisdictional regime based on the nationality of the accused or the state where the crimes occurred.

Article 98, which provides an exception to that regime (and hence must be construed narrowly), must be read to permit a *State Party* to enter into agreements that allow it first chance at prosecuting, for example, any members of its armed forces, stationed on the territory of another state, who commit crimes within the ICC’s jurisdiction. While Human Rights Watch does not favor such agreements, such a jurisdiction-routing mechanism is consistent with the overall goals of the Rome Statute to ensure that crimes covered by the ICC Statute are prosecuted by the ICC or national courts subject to ICC oversight. At all times, and consistent with *States Parties’* obligations under the Rome Statute, such agreements must preserve the oversight role of the ICC.

Article 98 cannot be read to permit a *non-state Party* (and particularly, one that has repudiated or not signed the Rome Statute) to benefit by its provisions and remove crimes from the ICC’s jurisdiction. Any state that has not signed the Rome Statute or has repudiated its signature, is unwilling to commit to prosecuting the crimes covered by the Rome Statute, or to subject its prosecutions to ICC scrutiny to determine whether they are conducted in good faith.

To permit a non-state Party to use Article 98 in this way would undermine the ICC’s capacity to either prosecute these most serious crimes, or ensure that good faith national prosecutions occur. Thereby, such agreements would exclude the ICC from fulfilling its most vital functions: the Court could not step in and exercise jurisdiction even if the government supplying military personnel conducted a bad faith investigation or prosecution.

¹ Because the Rome Statute is a multilateral treaty that lays down a comprehensive jurisdictional regime and Article 98(2) provides an exception to that regime, strict construction of Article 98(2) is warranted according to the general legal principle that exceptions must be construed narrowly.

In other words, article 98(2) must be interpreted consistently with the goals of the Rome Statute, which establishes a strict prosecutorial regime covering certain crimes. Article 98(2) cannot be read to uphold agreements that are designed to provide immunity from that regime.

Accordingly, any new bilateral agreement that a State Party enters with a country that has repudiated or not signed the Rome Statute and which purports to require turning over military personnel suspected of committing crimes within the ICC's jurisdiction to the latter state is not a valid Article 98 agreement. For a State Party to enter into such an agreement would violate its obligations under the Rome Statute to respect the jurisdiction established by that Statute.

Any Country That Has Signed But Not Yet Ratified the Rome Statute May Not Sign an Agreement Providing Immunity from ICC Prosecution with a Country that Has Repudiated or Has Not Signed the Rome Statute; to do so Would Violate the "Object and Purpose" of the Rome Statute.

Any country that has *signed* the Rome Statute is, pursuant to Article 18 of the Vienna Convention on the Law of Treaties, "obliged to refrain from acts which would defeat the object and purpose" of the Rome Statute.

The "purpose" of the Rome Statute, as made clear in the Preamble and Articles 12 and 27, is to establish a system of individual accountability for the most serious international crimes. As mentioned above, the treaty is also predicated on ICC oversight over national prosecutions to remove the possibility of impunity.

Countries that have repudiated or not signed the Rome Statute have expressed an unwillingness to commit to those goals: they have not agreed to prosecute the crimes under the Rome Statute; they have not agreed to the ICC's oversight regarding national prosecutions; and, in effect, they have not taken steps to eradicate impunity.

For states that have signed the Rome Statute to enter into an agreement with such a repudiating or non-signatory state, by which that state purports to maintain exclusive jurisdiction over ICC crimes, violates the signatory states' obligations under the Vienna Convention to refrain from acts which would defeat the object and purpose of the Rome Statute.

II. Policy Assessment

Any Agreements Designed To Undercut the Jurisdiction of the ICC Would Set a Dangerous Precedent

Facilitating widespread U.S. immunity through negotiated bilateral agreements with the United States would provide a dangerous precedent. It may encourage other nations, particularly those opposed to the ICC, to pursue similar immunity for their own citizens. This would fundamentally undermine the Court.

It is also important for States Parties and signatory States to recall that Article 98(2) was essentially inserted into the Rome Statute at the behest of the United States. States agreed to its insertion in order to retain U.S. involvement in the ICC project. Given that the U.S. has now officially repudiated the ICC, the U.S. has reneged on the underlying rationale for article 98; accordingly, states should refuse to enter into such agreements.

III. Conclusion

U.S. efforts to exploit Article 98(2) of the Rome Statute by agreements, such as SOFAs, with States Parties and signatory States must be opposed to ensure compliance with the ICC. At stake is the integrity of a vital instrument for international justice.