

# TOWARDS PERMANENTLY DELEGITIMIZING ARTICLE 98 AGREEMENTS: EXERCISING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER AMERICAN CITIZENS

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*This Note discusses one method to permanently delegitimize Article 98 agreements: exercising International Criminal Court (ICC) jurisdiction over Americans to prosecute them for alleged crimes committed in Afghanistan (“the Situation in Afghanistan”). Since their inception, Article 98 agreements have threatened the ICC’s mission by limiting states parties’ ability to assist the ICC in exercising jurisdiction over Americans. This Note considers potential proceedings against an American in the Situation in Afghanistan as a case study to demonstrate how, in practice, Article 98 agreements undermine the ICC’s anti-impunity mission. First, this Note describes the principles and procedures followed by the ICC. Second, this Note discusses the United States’ legal justifications for Article 98 agreements and responds to these justifications with the most prevalent critiques of Article 98 agreements. Although the legal bases for the agreements under Article 98(2) of the Rome Statute are controversial, this Note assumes that the agreements are legally valid as originally intended by the parties. However, this Note also assumes that Article 98 agreements are never binding on the ICC and thus cannot prevent the ICC from exercising its territorial jurisdiction. Finally, this Note explores the allegations against Americans in the Situation in Afghanistan and considers how Article 98 agreements are likely to hamper the ICC’s proceedings. This Note concludes that the Situation in Afghanistan is an opportunity to demonstrate the need to permanently delegitimize Article 98 agreements, and that it can serve as a catalyst for change, even if Americans are not prosecuted.*

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## INTRODUCTION

The mission of the International Criminal Court (ICC) is to bring an end to impunity for the perpetrators of the “gravest crimes.”<sup>1</sup> Over the past decade, the ICC’s Office of the Prosecutor (OTP) has been conducting a preliminary examination into crimes committed in Afghanistan and the territories of other states parties (“the Situation

<sup>1</sup> *About*, INT’L CRIM. COURT, <https://www.icc-cpi.int/about> (last visited Aug. 21, 2018).

in Afghanistan”).<sup>2</sup> In November 2017, the OTP concluded its preliminary examination after determining that there is a reasonable basis to believe that Afghan forces, the Taliban, American military personnel, and members of the Central Intelligence Agency (CIA) committed grave crimes in the Situation in Afghanistan.<sup>3</sup>

Fatou Bensouda, chief prosecutor of the ICC, announced that she would seek authorization to formally investigate the alleged crimes.<sup>4</sup> Victims of the alleged crimes committed in the Situation in Afghanistan had the opportunity to submit “representations”—views, concerns, and expectations—to the ICC.<sup>5</sup> In response, Afghan victims and their representatives submitted 1.17 million statements alleging that they are victims of war crimes and crimes against humanity committed in the Situation in Afghanistan.<sup>6</sup>

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<sup>2</sup> See *Preliminary Examination: Afghanistan*, INT’L CRIM. COURT, <https://www.icc-cpi.int/Afghanistan> (last visited Aug. 21, 2018) (discussing the OTP’s investigation on Afghanistan and the legal framework for ICC investigations); see also James McAuley & Pamela Constable, *ICC Seeks Investigation into War Crimes in Afghanistan Since 2003*, WASH. POST (Nov. 3, 2017), [https://www.washingtonpost.com/world/icc-seeks-investigation-into-war-crimes-in-afghanistan-since-2003/2017/11/03/90c388da-c09e-11e7-9294-705f80164f6e\\_story.html](https://www.washingtonpost.com/world/icc-seeks-investigation-into-war-crimes-in-afghanistan-since-2003/2017/11/03/90c388da-c09e-11e7-9294-705f80164f6e_story.html) (reporting on the background of the OTP’s decade-long investigation into war crimes in Afghanistan). A “situation” consists of information regarding alleged crimes within the ICC’s jurisdiction *ratione materiae*. A situation is not a “case.” Situations arise out of a broader set of information alleging crimes. Once the Prosecutor has fully investigated a situation, she will decide whether it is appropriate to file specific cases arising from her investigation. See *infra* Section I.B. The phrase “Situation in Afghanistan” is used throughout this Note to refer to both ICC official proceedings and the conflict in Afghanistan itself.

<sup>3</sup> *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT’L CRIM. COURT (Nov. 20, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh> [hereinafter *Prosecutor Requests Judicial Authorisation*].

<sup>4</sup> McAuley & Constable, *supra* note 2.

<sup>5</sup> International Criminal Court, *Public Notice of the ICC Prosecutor 1* (Nov. 20, 2017), [https://www.icc-cpi.int/itemsDocuments/Afghanistan/171120-afgh-art\\_15-notice\\_ENG.PDF](https://www.icc-cpi.int/itemsDocuments/Afghanistan/171120-afgh-art_15-notice_ENG.PDF).

<sup>6</sup> See, e.g., *Afghan Vice-President Dostum Accused of Sex Assault*, BBC (Dec. 14, 2016) <https://www.bbc.com/news/world-asia-38311174> (describing the allegations of Ahmad Eshchi, who accused Afghan Vice President Dostum of kidnapping him and sexually assaulting him); Kathy Gannon, *Afghans Submit 1.17 Million War Crimes Claims to International Court*, INDEPENDENT (Feb. 17, 2018, 1:07 AM), <http://www.independent.co.uk/news/world/middle-east/afghanistan-war-crimes-claims-victims-millions-submitted-court-isis-taliban-a8214301.html> (noting the large number of claims received by the ICC and discussing allegations by a family member of an alleged victim of targeted killings and the continued fear Afghan victims and family members experience as a result of the human rights abuses by US and Afghan-backed warlords); Andrea Germanos, *ICC Weighing More Than a Million Statements by Afghans Alleging War Crimes Violations*, COMMON DREAMS (Feb. 16, 2018), <https://www.commondreams.org/news/2018/02/16/icc-weighing-more-million-statements-afghans-alleging-war-crimes-violations> (noting that because “one statement might include multiple victims and one organization might represent thousands

The OTP's preliminary examination into the Situation in Afghanistan was not isolated to the physical territory of the Islamic Republic of Afghanistan.<sup>7</sup> It also directly linked allegations against members of the CIA for crimes committed in European states to the Situation in Afghanistan.<sup>8</sup> The gravity and geographical scope of the allegations in the Situation in Afghanistan offer the ICC an unprecedented opportunity to fulfill its mission; however, allegations against Americans complicate its work.

Many experts have assumed that the ICC could not prosecute Americans since the Rome Statute of the International Criminal Court (Rome Statute) came into force.<sup>9</sup> First, the United States is not a state party to the Rome Statute, so it has argued that it would be inappropriate for the court to exercise jurisdiction over Americans.<sup>10</sup> Second, the United States attempted to immunize Americans from ICC jurisdiction by creating "Article 98 agreements."<sup>11</sup> Article 98 agreements are highly controversial bilateral agreements, signed by

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of victim statements, the number of Afghans seeking justice from the ICC could be several million").

<sup>7</sup> OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2017, ¶¶ 233–35 (Dec. 4, 2017), [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf) [hereinafter PRELIMINARY EXAMINATION REPORT (2017)].

<sup>8</sup> *Id.* ¶¶ 253–54.

<sup>9</sup> See Rome Statute of the International Criminal Court, art. 125(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; see also Caitlin Lambert, *The Evolving US Policy Towards the ICC*, INT'L JUST. PROJECT (Mar. 6, 2014), <http://www.internationaljusticeproject.com/the-evolving-us-policy-towards-the-icc/> (discussing U.S. policy towards Afghanistan and stating that Article 98 agreements (also known as "Bilateral Immunity Agreements") "guarantee immunity from ICC prosecution for all American citizens in the country with which the agreement is concluded"); Thomas Siepelmeier, *Can the ICC Prosecute Tony Blair and Others Who Can Still Evade Prosecution Today?*, ALTERNATIVE INFO. & DEV. CTR., <http://www.aicd.org.za/can-icc-prosecute-tony-blair-others-can-still-evade-prosecution-today/> (critiquing U.S. and British policy toward the ICC and arguing that the ICC's failure to prosecute "Western" citizens for war crimes undermines the legitimacy of the court).

<sup>10</sup> See Rome Statute, *supra* note 9, at 157 (dictating that state party status is "subject to ratification, acceptance or approval by signatory States"). However, the signature has significance under international law because the United States was "obliged to refrain from acts which would defeat the object and purpose" of the statute "until . . . ma[king] its intention clear not to become a party to the treaty." Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>11</sup> Article 98 agreements are also known as "bilateral immunity agreements (BIAs), impunity agreements, and bilateral non-surrender agreements." *International Criminal Court - Article 98 Agreements Research Guide*, GEO. L. LIBR., [http://guides.ll.georgetown.edu/article\\_98](http://guides.ll.georgetown.edu/article_98) (last visited Aug. 22, 2018). As of 2016, only ninety-five of these agreements were still in force. See U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2016 (2016), <https://www.state.gov/documents/organization/267489.pdf> [hereinafter A LIST OF TREATIES IN FORCE].

the Bush administration and states parties,<sup>12</sup> that purport to provide Americans with immunity at the ICC.<sup>13</sup> Despite questions about their legality under international law, the international community has long believed that the agreements immunized Americans from ICC jurisdiction.<sup>14</sup>

Critics of this widely held view argue that Americans are not immune from ICC jurisdiction because Article 98 agreements are only valid between the United States and states parties, and they cannot bind the ICC.<sup>15</sup> The ICC's allegations against Americans support this view and demonstrate that Article 98 agreements do not offer the blanket immunity from international prosecution that the international community believed they did. Nevertheless, all Article 98 agreements continue to threaten justice for victims of the gravest human rights violations<sup>16</sup> because they limit dozens of states parties' ability to assist the ICC in the investigation, prosecution, or extradition of Americans. Permanently delegitimizing Article 98 agreements is crit-

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<sup>12</sup> Throughout this Note, states parties refers to countries that were signatories to the Rome Statute of the International Criminal Court, as opposed to signatories that have not ratified the statute and non-signatories. See *infra* note 21 (listing the 123 countries that are states parties to the Rome Statute of the International Criminal Court).

<sup>13</sup> In 2002, the Bush administration began an active campaign to immunize Americans from ICC jurisdiction by entering into so-called "Article 98 agreements" with states parties. See *infra* Part II; see also HUMAN RIGHTS WATCH, *BILATERAL IMMUNITY AGREEMENTS 7–14* (June 20, 2003), <https://www.hrw.org/legacy/campaigns/icc/docs/bilateralagreements.pdf> [hereinafter HRW, *BILATERAL IMMUNITY AGREEMENTS*] (cataloguing states that signed Article 98 agreements with the United States and noting specific threats and incentives made by the United States that counterparties relied on when signing).

<sup>14</sup> See Eric M. Meyer, Comment, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act*, 58 OKLA. L. REV. 97, 99–100 (2005) (arguing that U.S. policy towards the ICC, specifically in the form of Article 98 agreements, undermines the ICC's mission and would prevent states parties from extraditing Americans to the ICC); *Pulling Back the Blanket*, *ECONOMIST* (July 10, 2008), <https://www.economist.com/node/11707994> (stating that the ICC has jurisdiction over crimes involving at least one country that signed up to the court, which America has not); see also HRW, *BILATERAL IMMUNITY AGREEMENTS*, *supra* note 13, at 1 (discussing the perceived effects of Article 98 agreements).

<sup>15</sup> See 1 *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* 134 & n.13 (M. Cherif Bassiouni & William A. Schabas eds., 2d. rev. ed. 2016) [hereinafter *LEGISLATIVE HISTORY OF THE ICC*] (arguing that the text of the Rome Statute "answers in the positive the question of whether a State Party can surrender to the ICC a national of a non-party State who is on its territory"); *US Bilateral Immunity Agreements or So-called "Article 98" Agreements*, *COAL. FOR THE INT'L CRIMINAL COURT*, [http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs\\_QA\\_current.pdf](http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs_QA_current.pdf) (last visited Aug. 21, 2018) [hereinafter *So-called "Article 98" Agreements*] ("It will be up to the ICC to decide whether or not the so-called Article 98 Agreements proposed by the United States are valid and therefore truly create a conflict of obligations for States Parties.").

<sup>16</sup> See *infra* Section III.A.2.

ical to reaffirming the ICC's fight against impunity and its ability to secure states parties' compliance with the Rome Statute. By making allegations against Americans, the ICC took the first step towards delegitimizing Article 98 agreements by undermining the belief that these agreements immunize Americans from its jurisdiction.

This Note argues that the Situation in Afghanistan is a unique opportunity to permanently delegitimize Article 98 agreements and examines potential proceedings in the Situation in Afghanistan in order to expose how—in practice—the agreements are incompatible with the ICC's anti-impunity mission, particularly in the case of ICC extradition requests. This Note further argues that Article 98 agreements lose all legitimacy when the United States is unwilling to act in the case of an American alleged to have committed crimes within the ICC's jurisdiction. The Situation in Afghanistan presents this circumstance because the United States has demonstrated that it is unwilling to prosecute Americans for their alleged crimes. Furthermore, Article 98 agreements prevent the majority of states parties from extraditing Americans to the ICC. Therefore, states parties should withdraw from—or refuse to comply with—Article 98 agreements because enforcing them would directly lead to impunity.

This Note proceeds in four parts. Part I describes the creation of the International Criminal Court, explains its procedures, and discusses the principle of complementarity and its central role to the ICC as an institution. Part II explains the legal bases for Article 98 agreements and offers major criticisms that question the agreements' legitimacy. Part III examines the Situation in Afghanistan and argues that, in addition to other challenges, Article 98 agreements would stifle the ICC's ability to act, and further, that the Situation in Afghanistan demonstrates the need to permanently delegitimize Article 98 agreements because of the conflicting obligations they create for states parties. Part IV argues that the Situation in Afghanistan should serve as a catalyst for permanently delegitimizing Article 98 agreements, proposes two possible approaches for delegitimizing the agreements, and considers the potential ramifications associated with withdrawal.

## I

### THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT

Part I proceeds by introducing the International Criminal Court (ICC)—its history, its guiding goals and principles, and its jurisdiction. Section I.A examines the history, goals, and jurisdiction of the ICC. Section I.B explains the principle of complementarity and its central

role in the ICC. This Section will conclude by discussing how allegations come before the court and the procedures that lead to prosecution, in order to provide context for potential prosecutions in the Situation in Afghanistan.

### A. *Background and Jurisdiction*

In 1998, the Rome Statute of the International Criminal Court was adopted following extensive negotiations from 1995 to 1998.<sup>17</sup> One hundred thirty-nine states signed the Rome Statute establishing the Permanent International Criminal Court—the ICC, the first permanent court of its kind.<sup>18</sup> The ICC was created to bring an end to the impunity “that protects the perpetrators of . . . the most serious crimes of concern to the international community within the jurisdiction of the ICC.”<sup>19</sup> In 2002, the Rome Statute entered into force after it was ratified by sixty signatory states.<sup>20</sup> Since 2002, 123 countries—referred to as “states parties”—have signed and ratified the Rome Statute.<sup>21</sup> By signing and ratifying the Rome Statute, states parties consent to the ICC’s jurisdiction over the gravest crimes committed after the statute went into force on July 1, 2002.<sup>22</sup> The ICC has jurisdiction *ratione materiae*<sup>23</sup> (subject-matter jurisdiction) over crimes that fall within “either the definition of war crimes, crimes against humanity

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<sup>17</sup> See Rome Statute, *supra* note 9, at 157. For a detailed account of the negotiations of the Rome Statute, see M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443 (1999).

<sup>18</sup> *About*, INT’L CRIM. COURT, *supra* note 1 (“[T]he ICC is the world’s first permanent international criminal court.”); see also United Nations Treaty Collection, Status of Rome Statute of the International Criminal Court, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> (last visited Aug. 25, 2018) (listing signatories to the Rome Statute).

<sup>19</sup> Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT’L L. REV. 1115, 1130 (2004).

<sup>20</sup> Rome Statute, *supra* note 9, at 3–5; *About*, INT’L CRIM. COURT, *supra* note 1 (giving the history of creation of the ICC).

<sup>21</sup> *The States Parties to the Rome Statute*, INT’L CRIM. COURT, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Aug. 25, 2018).

<sup>22</sup> Rome Statute, *supra* note 9, at 91. The International Criminal Court does not have jurisdiction over crimes committed before July 1, 2002 or crimes committed after July 1, 2002 on a state party’s territory before the date on which the statute came into effect for the state party. See Rome Statute, *supra* note 9, at 3, 99.

<sup>23</sup> See, e.g., Manuel Ventura, *Proprio Motu Investigation by the ICC Prosecutor*, PEACE & JUST. INITIATIVE, <http://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor> (last visited Aug. 25, 2018) (characterizing the types of crimes within the jurisdiction of the court under Article 5 as “jurisdiction *ratione materiae*”).

and/or genocide” as defined by the Rome Statute,<sup>24</sup> and as of July 17, 2018, over crimes of aggression.<sup>25</sup> States parties consent to the ICC’s jurisdiction to investigate and prosecute crimes *ratione materiae* that have allegedly been committed by a state party national (jurisdiction *ratione personae* or personal jurisdiction) or on the territory of a state party (jurisdiction *ratione loci* or territorial jurisdiction).<sup>26</sup> The ICC maintains jurisdiction *ratione personae* regardless of where an alleged crime was committed.<sup>27</sup> Similarly, it has jurisdiction *ratione loci* over any individual—regardless of citizenship—who commits crimes on the territory of a state party.<sup>28</sup>

### B. Principles and Procedures

The ICC’s jurisdiction is *complementary* to the jurisdiction of domestic courts, not a substitute for it.<sup>29</sup> This Section details the prin-

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<sup>24</sup> *Id.*; see Rome Statute, *supra* note 9, at 92 (“The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.”); Amendments to the Rome Statute of the International Criminal Court, art. 15 *bis*, June 11, 2010, C.N.651.2010 TREATIES-8 (Depository Notification) [hereinafter Kampala Amendments] (authorizing the “[e]xercise of jurisdiction over the crime of aggression”); see also INT’L COMM. OF THE RED CROSS, WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND THEIR SOURCE IN INTERNATIONAL HUMANITARIAN LAW COMPARATIVE TABLE (2008), [https://www.icrc.org/eng/assets/files/other/en\\_war\\_crimes\\_comparative\\_table.pdf](https://www.icrc.org/eng/assets/files/other/en_war_crimes_comparative_table.pdf) (listing actions that qualify as crimes against humanity under the Rome Statute and demonstrating that they closely track violations of the Geneva Convention and Optional Protocols).

<sup>25</sup> See Int’l Crim. Court [ICC], Assembly of States Parties, Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression, No. ICC-ASP/16/Res.5, (Dec. 14, 2017) (resolving to activate the court’s jurisdiction over the crime of aggression as early as possible); Dapo Akande, *The International Criminal Court Gets Jurisdiction Over the Crime of Aggression*, EJIL: TALK! (Dec. 15, 2017), <https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/> (reporting that the Assembly of States Parties to the Statute of the International Criminal Court has adopted a resolution which activates the jurisdiction of the court over the crime of aggression).

<sup>26</sup> Rome Statute, *supra* note 9, at 99; see also Ventura, *supra* note 23 (labeling the jurisdictional limits captured in Article 12(2) as “jurisdiction *ratione personae*” and “jurisdiction *ratione loci*”).

<sup>27</sup> See Rome Statute, *supra* note 9, at 99. The ICC may also exercise jurisdiction where a non-party state—a country that has not signed and ratified the Rome Statute—formulates a declaration granting the ICC jurisdiction to act in a specific situation. *Id.*

<sup>28</sup> Such territory includes “on board a vessel or aircraft, the State of registration of that vessel or aircraft.” *Id.* (imposing no citizenship requirements on crimes committed in a state party’s territory for jurisdictional purposes).

<sup>29</sup> PAUL SEILS, INT’L CTR. FOR TRANSITIONAL JUST., HANDBOOK ON COMPLEMENTARITY: AN INTRODUCTION TO THE ROLE OF NATIONAL COURTS AND THE ICC IN PROSECUTING INTERNATIONAL CRIMES 3 (2016) [hereinafter HANDBOOK ON COMPLEMENTARITY], [https://www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf).



principle of complementarity and explores how the principle operates in the context of the ICC's procedures and its decision of when to act.

### 1. *Complementarity*

Complementarity is the principle that the ICC is the court of last resort for prosecuting the gravest crimes.<sup>30</sup> The Rome Statute mandates that in the first instance, states make good faith efforts to initiate domestic proceedings<sup>31</sup>—investigation and prosecution—where alleged crimes are within both domestic and ICC jurisdiction.<sup>32</sup> In its discretion, the ICC initiates proceedings *only* when it concludes that a state is “unwilling or unable” to act.<sup>33</sup> Formal analysis of a state's willingness and ability to act is not required until the ICC prosecutor formally opens an individual case. However, the legitimacy of ICC proceedings is directly linked to its ability to justify positive comple-

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<sup>30</sup> See Rome Statute, *supra* note 9, at 100–01; HANDBOOK ON COMPLEMENTARITY, *supra* note 29, at 2 (discussing purpose of the ICC). *But see* Traoré Drissa, *Understanding the Principle of Complementarity in Côte d'Ivoire*, INT'L CTR. FOR TRANSITIONAL JUST. (Aug. 18, 2016), <https://www.ictj.org/news/-complementarity-cote-divoire-ICC> (discussing example where the ICC made complementarity findings that it had jurisdiction even though domestic ad hoc tribunals were already underway).

<sup>31</sup> See Mark A. Drumbl, *Policy Through Complementarity*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 197, 205 (2011) (noting that lack of good faith will be clear in “sham proceedings designed to shield an accused” but discussing the overall difficulty in determining whether proceedings are genuine or conducted in good faith and arguing that transitional justice initiatives such as reconciliation commissions complicate complementarity determinations). Thus far, the ICC has only assessed states parties' good-faith efforts to initiate criminal investigations and judicial proceedings, including criminal tribunals; however, there are other types of proceedings that might qualify. See, e.g., U.N. DEV. PROGRAMME, DISCUSSION PAPER: COMPLEMENTARITY AND TRANSITIONAL JUSTICE 2, [http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Discussion%20Paper%20%E2%80%93%20Complementarity%20and%20Transitional%20Justice%20%E2%80%93%202012%20\\_%20EN.pdf](http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Discussion%20Paper%20%E2%80%93%20Complementarity%20and%20Transitional%20Justice%20%E2%80%93%202012%20_%20EN.pdf) (advocating for an integrated approach to assessing complementarity in the context of transitional justice that is not solely concerned with judicial solutions).

<sup>32</sup> Complementarity is a distinctive feature of the ICC as an institution. See Benson Kinyua Ngure, *The Rome Statute: Its Implementation in Kenya* 4 (June 29, 2011) (unpublished manuscript), <https://ssrn.com/abstract=2353383> (discussing the unique concept of complementarity under the ICC); cf. Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8 SANTA CLARA J. INT'L L. 165, 167–70 (2010) (explaining how dual sovereignty and complementarity are comparable). *But see id.* at 171–74 (noting the differences between American dual sovereignty and complementarity).

<sup>33</sup> Rome Statute, *supra* note 9, at 100–01; see also HANDBOOK ON COMPLEMENTARITY, *supra* note 29, at 38–46 (explaining the concept of complementarity and analyzing the court's interpretation of “willingness or ability” in prior cases and hypothetical circumstances); OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 2 (2003), <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> (writing “on complementarity in practice for the benefit of the future Chief Prosecutor” and her staff).

mentarity;<sup>34</sup> thus, in practice, the ICC considers complementarity well before a situation becomes a case.<sup>35</sup>

Complementarity determinations are simple when a state is clearly unwilling or unable to act for reasons that may include ongoing armed conflict, inadequate economic resources, or political concerns.<sup>36</sup> But complementarity determinations are not usually straightforward. Ultimately, the ICC determines a state's willingness and ability to act by analyzing the gravity of the allegations and factors unique to a situation or case.<sup>37</sup> The ICC has also broadly interpreted the phrase "unwilling or unable" to act,<sup>38</sup> and the vagueness of this operative language can result in apparently contradictory complementarity determinations even for individuals implicated in the same situation.<sup>39</sup>

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<sup>34</sup> See Rome Statute, *supra* note 9, at 101 (outlining requirements for finding complementarity in a given case).

<sup>35</sup> States parties and individual defendants can challenge the ICC's complementarity determination—i.e., admissibility—in the investigation of a situation or specific case. See *id.* at 101–02 (codifying state right to challenge admissibility in order to defer an investigation into a situation once an investigation has been opened by the Prosecutor); *id.* at 102–03 (codifying state and individual rights to challenge admissibility of a case based on complementarity before the start of trial). For an in-depth examination of complementarity determinations and challenges to complementarity, see Linda M. Keller, *The Practice of the International Criminal Court: Comments on "The Complementarity Conundrum,"* 8 SANTA CLARA J. INT'L L. 199 (2010). See also HANDBOOK ON COMPLEMENTARITY, *supra* note 29, at 70–76 (discussing the possibility of challenging admissibility under Article 19 and noting that the accused as well as states have challenged admissibility).

<sup>36</sup> See Rome Statute, *supra* note 9, at 100–01 (outlining factors that, when met, result in an ICC determination of a case's unequivocal admissibility).

<sup>37</sup> The OTP assesses gravity by considering the "scale, nature, manner of commission . . . , and the impact" of the violations. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016 ¶ 7 (Nov. 14, 2016), [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf) [hereinafter PRELIMINARY EXAMINATION REPORT (2016)].

<sup>38</sup> See HANDBOOK ON COMPLEMENTARITY, *supra* note 29, at 42–43 (giving an example of the broad interpretation of the phrase).

<sup>39</sup> For a recent example of inconsistent complementarity determinations, compare *Prosecutor v. Ruto*, ICC-01/09-01/11 OA, Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal Against the Pre-Trial Chamber's Decision on Admissibility," ¶¶ 3, 9–10 (July 28, 2011), [https://www.icc-cpi.int/CourtRecords/CR2011\\_11126.PDF](https://www.icc-cpi.int/CourtRecords/CR2011_11126.PDF) (rejecting the admission of evidence from related proceedings against Ruto's alleged cohorts due to it not being from the same time period), with *Prosecutor v. Gaddafi*, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶¶ 115–16, 219 (May 31, 2013), [https://www.icc-cpi.int/CourtRecords/CR2013\\_04031.PDF](https://www.icc-cpi.int/CourtRecords/CR2013_04031.PDF) (rejecting similar evidence from proceedings against Gaddafi's alleged cohorts, despite it being from the same time period), and *Prosecutor v. Gaddafi*, ICC-01/11-01/11 OA 4, Judgment on Appeal, ¶¶ 39–43 (May 21, 2014), [https://www.icc-cpi.int/CourtRecords/CR2014\\_04273.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_04273.PDF) (upholding the aforementioned determination, and rejecting Libya's appeal for a new determination of inadmissibility). See also, Jean Paul Pierini, *The ICC Rulings in the Libyan Cases and Related Due Process*

## 2. *Pathways to Proceedings: United Nations Security Council, States Parties, and the Prosecutor*

There are three ways in which the ICC can initiate proceedings—typically a preliminary examination or formal investigation—into a “situation.”<sup>40</sup> Referral by the United Nations Security Council (Security Council) or referral by states parties are the two most common ways that preliminary examinations and investigations begin. First, the Security Council can refer a situation relating to alleged crimes in any country to the ICC.<sup>41</sup> A Security Council referral constitutes a sufficient legal basis for the ICC to formally investigate a situation with or without the consent of the involved state(s).<sup>42</sup> States parties can also refer a situation to the ICC when the alleged crimes are within the ICC’s jurisdiction *ratione loci* or *ratione personae*.<sup>43</sup>

An investigation may also originate with the Prosecutor, who has the authority to initiate an investigation *proprio motu* (independently).<sup>44</sup> Without a referral by the Security Council or states parties,

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*Implications of the Complementarity Relationship with Domestic Prosecutions* 6–8, EUROPEANRIGHTS.EU (Jan. 31, 2015), <http://www.europeanrights.eu/public/commenti/Pierini.pdf> (discussing due process concerns raised by complementarity determinations in light of the *Gaddafi* case).

<sup>40</sup> Once the Prosecutor has fully investigated a situation, she will decide whether it is appropriate to file specific cases arising from her investigation. The Prosecutor is not required to name specific individuals until actual cases are filed. *See* Rome Statute, *supra* note 9, at 122–23 (outlining the Prosecutor’s responsibilities in filing an application of a case with the Pre-Trial Chamber after an investigation has taken place, which is the first time specific names must be provided); INT’L CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 17, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> (last visited Aug. 21, 2018) (discussing processes behind ICC referrals, analyses, and investigations).

<sup>41</sup> Rome Statute, *supra* note 9, at 99; *see, e.g.*, Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), <https://www.un.org/press/en/2005/sc8351.doc.htm> (adopting a resolution by a vote of eleven in favor and four abstentions referring the Situation in Darfur, Sudan, to the Prosecutor of the International Criminal Court).

<sup>42</sup> Rome Statute, *supra* note 9, at 99; *see* Kampala Amendments, *supra* note 24, art. 15 *ter* (authorizing ICC jurisdiction over crimes of aggression); *see also* *The ICC and the UN Security Council*, GLOB. CAMPAIGN FOR RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION, <https://crimeofaggression.info/role-of-the-icc/the-icc-and-the-un-security-council/> (last visited Aug. 23, 2018) (describing the Security Council’s referral authority).

<sup>43</sup> *See* Rome Statute, *supra* note 9, at 99 (granting states parties the right to refer a situation “in which one or more crimes within the jurisdiction of the Court appear to have been committed”); *see, e.g.*, Letter from the Union of the Comoros to Mrs. Fatou Bensouda, Prosecutor, Int’l Criminal Court (May 14, 2013), <https://how-the-icc-works.aba-icc.org/uploads/Referral-from-Comoros.pdf> (referring alleged crimes committed by, and as a result of, Israeli Defense Forces blocking aid from reaching Gaza in May 2010).

<sup>44</sup> *See* Rome Statute, *supra* note 9, at 100 (describing steps to be taken after Prosecutor initiates investigation *proprio motu*); LEGISLATIVE HISTORY OF THE ICC, *supra* note 15, at

the Prosecutor acting *proprio motu* is required to conduct a preliminary examination.<sup>45</sup> If the Prosecutor concludes that there is a “reasonable basis” to commence a formal investigation after completing her preliminary examination, she must seek authorization from the Pre-Trial Chamber to open a formal investigation.<sup>46</sup>

*Proprio motu* investigations are an opportunity for the Prosecutor to exercise her discretion and pursue allegations that are not as politically advantageous as situations referred by the Security Council or states parties.<sup>47</sup> However, it is for this reason that *proprio motu* investigations are susceptible to claims of bias and politically motivated prosecution.<sup>48</sup> Additionally, the Pre-Trial Chamber can reject the Prosecutor’s request to initiate an investigation *proprio motu*, so preliminary examinations require deeper factual and legal analysis before the Prosecutor seeks authorization.<sup>49</sup> The years-long preliminary examination into the Situation in Afghanistan reflects this political reality.<sup>50</sup> In 2017, Prosecutor Bensouda sought authorization

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138 (describing the jurisdictional triggering mechanisms of the ICC). Although some of the drafters of the Rome Statute feared that granting the Prosecutor *proprio motu* powers would lead to prosecutorial abuse, the ICC Prosecutor did not request to use its *proprio motu* authority until 2009. Thomas Obel Hansen, *The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and Their Implications for the Future of International Justice*, 18 AUSTRALIAN J. HUM. RTS., 187, 190–91 (2012).

<sup>45</sup> See LEGISLATIVE HISTORY OF THE ICC, *supra* note 15, at 138 (describing the *proprio motu* exception to complementarity). This varies from referral in that referrals may immediately proceed to the investigation stage without preliminary examination. Compare Rome Statute, *supra* note 9, at 99 (explaining the referral of a situation by a state party to the prosecutor in Article 14), with Rome Statute, *supra* note 9, at 100 (describing circumstance where prosecutor can initiate investigation *proprio motu* in Article 15). However, where a state party refers another state party to the Prosecutor, or the Pre-Trial Chamber authorizes the Prosecutor to act *proprio motu*, the UN Security Council retains authority to suspend an investigation for a period of one year. See *id.* at 100.

<sup>46</sup> Rome Statute, *supra* note 9, at 100 (explaining the procedure by which the Prosecutor can initiate investigations *proprio motu*); see also Ventura, *supra* note 23 (same). See, e.g., Situation in the Republic of Kenya, No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 17–69 (Mar. 31, 2010) (explaining and analyzing the criteria for the authorization of an investigation pursuant to Article 15).

<sup>47</sup> See, e.g., Mark Kersten, *The ICC and Ivory Coast: Proprio Motu Is the Way to Go*, JUST. CONFLICT (Apr. 11, 2011), <https://justiceinconflict.org/2011/04/11/the-icc-and-ivory-coast-proprio-motu-is-the-way-to-go/> (arguing that the benefits of *proprio motu* investigations well outweigh the drawbacks).

<sup>48</sup> See, e.g., *id.* (discussing critiques of *proprio motu* investigations).

<sup>49</sup> See Rome Statute, *supra* note 9, at 100 (explaining the process by which the Prosecutor can initiate a *proprio motu* investigation).

<sup>50</sup> See Office of the Prosecutor, Int’l Crim. Court, Report on Preliminary Examination Activities ¶ 20 (Dec. 13, 2011), <https://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf> [hereinafter PRELIMINARY EXAMINATION REPORT (2011)] (noting that by 2011, the OTP

to open an investigation into the Situation in Afghanistan following her preliminary examination report.<sup>51</sup>

### 3. *Preliminary Examination, Investigation, and Surrender*

The structure of the preliminary examination report tracks the language of the Rome Statute by focusing on criteria that go towards the admissibility of future cases.<sup>52</sup> At the preliminary examination stage, admissibility is determined by assessing complementarity and the gravity of the crime(s).<sup>53</sup> Even though the Prosecutor also addressed complementarity and jurisdictional admissibility concerns, the 2017 preliminary examination report gave legitimacy to further proceedings in the Situation in Afghanistan by focusing on the gravity of the allegations when discussing all aspects of admissibility.<sup>54</sup>

Once the Prosecutor is satisfied that the admissibility requirements are met, the Prosecutor also determines whether a formal investigation would be in the “interests of justice” before seeking to open a formal investigation.<sup>55</sup> Although the Prosecutor determines whether a formal investigation would be in the interests of justice, the Rome Statute first provides the opportunity for victims of the alleged crimes to be heard by the ICC.<sup>56</sup> In November 2017, the OTP’s

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had already received fifty-six communications about the Situation in Afghanistan in the course of its lengthy investigation).

<sup>51</sup> *Statement of ICC Prosecutor, Fatou Bensouda, Regarding Her Decision to Request Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, OFFICE OF THE PROSECUTOR, INT’L CRIM. COURT (Nov. 3, 2017), [https://www.icc-cpi.int/pages/item.aspx?name=171103\\_otp\\_statement](https://www.icc-cpi.int/pages/item.aspx?name=171103_otp_statement).

<sup>52</sup> PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶¶ 5–8 (outlining the statutory factors to be considered by the Prosecutor before opening an investigation); *accord* Rome Statute, *supra* note 9, at 102–03 (explaining the process for challenging the admissibility of a case).

<sup>53</sup> PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 5; *see also id.* ¶¶ 6–7 (explaining that complementarity involves examining the “existence of relevant national proceedings” and assessing the “genuineness” of relevant domestic investigations or prosecutions, and that gravity “includes an assessment of the scale, nature, manner of commission of the crimes, and their impact”).

<sup>54</sup> *Id.* ¶¶ 240–74.

<sup>55</sup> *Id.* ¶ 8 (describing the “interests of justice” as a “countervailing consideration” that accounts for whether “there are . . . substantial reasons to believe that an investigation would not serve the interests of justice” (emphasis omitted)).

<sup>56</sup> *See* Rome Statute, *supra* note 9, at 100 (“Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.”); Assembly of States Parties to the Rome Statute of the International Criminal Court, *Rules of Procedure and Evidence*, R. 50, ICC-ASP/1/3 (Sept. 2002) (detailing procedures for requesting authorization by the Pre-Trial Chamber). For a critical analysis of victims’ rights at the ICC, see Miriam Cohen, *Victims’ Participation Rights Within the International Criminal Court: A Critical Overview*, 37 DENVER J. INT’L L. & POL’Y 351 (2009) (examining victims’ participatory rights at different stages of ICC proceedings). The Prosecutor could move forward without the support of victims; however, to do so, the

Victims Participation and Reparations Section solicited victim “representations” or statements in the Situation in Afghanistan.<sup>57</sup>

After the window closed for accepting representations, victims and their representatives “overwhelmingly support[ed]” a formal investigation in line with the Prosecutor’s interests of justice determination.<sup>58</sup> Those representations were submitted via the Victims Participation and Reparations Section to the Pre-Trial Chamber to consider in deciding whether to authorize a formal investigation in the Situation in Afghanistan.<sup>59</sup> When the Pre-Trial Chamber authorizes a formal investigation *proprio motu*, it has determined that “potential case[s]” likely to arise out of a formal investigation are admissible and in the interests of justice.<sup>60</sup>

During the formal investigation, the Prosecutor gathers evidence and identifies individual suspects.<sup>61</sup> Once the investigation is complete, the Prosecutor identifies suspects and opens individual cases.<sup>62</sup> The Prosecutor then requests that ICC judges issue arrest warrants for

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Prosecutor would need to demonstrate that the gravity of the allegations is such that a formal investigation would still be in the interests of justice. *See Prosecutor Requests Judicial Authorisation*, *supra* note 3 (announcing the Prosecutor’s intent to seek judicial authorization to commence an investigation into the Situation in Afghanistan and stating that “the Office has determined that there are no substantial reasons to believe that the opening of an investigation would not serve the interests of justice, taking into account the gravity of the crimes and the interests of victims”).

<sup>57</sup> *See* International Criminal Court, *supra* note 5, at 1 (informing “victims of alleged crimes committed on the territory of Afghanistan” since May 2003 “as well as victims of other alleged crimes that have a nexus to the armed conflict” since July 2002 that the Prosecutor has “requested authorization . . . to open an investigation” and explaining that victims are entitled to “send their comments” as to whether an investigation should be opened); *Preliminary Examination: Afghanistan*, INT’L CRIM. COURT, *supra* note 2 (noting that “victims of alleged Rome Statute crimes committed in the Situation in Afghanistan have the right to submit ‘representations,’ i.e. to provide their views, concerns and expectations”).

<sup>58</sup> Situation in the Islamic Republic of Afghanistan, ICC-02/17, Final Consolidated Registry Report on Victims’ Representations, Annex I ¶ 47, (Feb. 20, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_01449.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_01449.PDF); *see also* Gannon, *supra* note 6 (noting the large amount of victim statements collected during the investigation).

<sup>59</sup> *See Preliminary Examination: Afghanistan*, INT’L CRIM. COURT, *supra* note 2 (noting that the Victims Participation and Reparations Section transmitted 699 victims’ representations and a final report on these representations to the Pre-Trial Chamber).

<sup>60</sup> *See, e.g.*, Situation in the Republic of Kenya, No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 50 (Mar. 31, 2010) (defining a “potential case” at the situation phase with criteria including “(i) the groups of persons involved . . . likely to be the focus of an investigation” and “(ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents . . . likely to be the focus of an investigation for the purpose of shaping the future case(s)”).

<sup>61</sup> *How the Court Works*, INT’L CRIM. COURT, <https://www.icc-cpi.int/about/how-the-court-works> (last visited Aug. 18, 2018).

<sup>62</sup> *Id.*

the suspects or summons to appear before the Court.<sup>63</sup> The ICC does not try individuals in absentia, so a trial will not commence until an individual voluntarily appears before the ICC or is surrendered—extradited—to the ICC by a state.<sup>64</sup> States parties must assist in the surrender of an individual wanted by the ICC.<sup>65</sup> Should the ICC open individual cases against Americans in the Situation in Afghanistan, Article 98 agreements would conflict with this duty because they explicitly prohibit states from surrendering or assisting in surrendering an American to the ICC.<sup>66</sup>

## II

### ARTICLE 98 AGREEMENTS ARE INCONSISTENT WITH THE ROME STATUTE'S OBJECT AND PURPOSE

The United States participated in the negotiation of the Rome Statute by helping shape provisions perceived to be most inconsistent with America's interests, including Article 98.<sup>67</sup> Despite the contention that the ICC was incompatible with American democracy, President Clinton signed the Rome Statute in 2000.<sup>68</sup> President George W. Bush reversed course after the statute came into force by suspending the United States' signature.<sup>69</sup> Building on the previous

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<sup>63</sup> *Id.*

<sup>64</sup> *See, e.g.,* Rome Statute, *supra* note 9, at 126 (“The accused shall be present during the trial.”).

<sup>65</sup> *See id.* at 141 (“State Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”); Göran Sluiter, *The Surrender of War Criminals to the International Criminal Court*, 25 *LOY. L.A. INT'L & COMP. L. REV.* 605, 626 (2003).

<sup>66</sup> *See infra* Section III.C.3 (discussing surrender and extradition).

<sup>67</sup> *See* Sarah B. Sewall, Carl Kaysen & Michael P. Scharf, *The United States and the International Criminal Court: An Overview*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 1, 2–3 (Sarah B. Sewall & Carl Kaysen eds., 2000) (describing the United States' “stance with respect to the ICC” as a “manifestation of the tension between enhancing an international normative framework” and “preventing encroachment on a nation's unfettered right to use force”). The position of the United States was seen by other states as a “unilateral demand for exemption from international rules.” *Id.* at 19; *see also id.* at 14 (describing the U.S. delegation's focus on the Court's jurisdiction over Americans).

<sup>68</sup> *See* Lee A. Casey, *The Case Against the International Criminal Court*, 25 *FORDHAM INT'L L.J.* 840, 843–48 (2002) (stating that the ICC deprives the American people of the ability to elect and hold accountable officials who may wield power over them); Lambert, *supra* note 9 (discussing the ratification of the Rome Statute by President Clinton in 2000).

<sup>69</sup> *See* Press Release, John R. Bolton, U.S. Under Sec'y of State for Arms Control & Int'l Sec., U.S. Dep't of State, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> (asserting that signing the Rome Statute did not create any legal obligations). The effect of “unsigning” a treaty is not clear under international law, and the Bush administration's decision to suspend the United States' signature to the Rome Statute was considered unprecedented. *See* Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International*

administration's concerns—as well as fears that U.S. officials could be susceptible to ICC prosecution—the Bush administration unilaterally interpreted Article 98 and pressured allies into signing Article 98 agreements.<sup>70</sup>

This Part further defines Article 98 of the Rome Statute and delves into the purported legal bases for Article 98 agreements. It then discusses critiques of the Bush administration's legal interpretation and offers other major critiques of Article 98 agreements as well.

### A. Article 98 Agreements Defined

Article 98 agreements—also known as “bilateral immunity agreements”—are controversial agreements between the United States and states parties purporting to immunize Americans from the ICC.<sup>71</sup> Article 98 agreements prohibit parties from aiding the ICC or other states in surrendering an American to the ICC.<sup>72</sup> However, the agreements have also been broadly interpreted as prohibiting cooperation with the ICC at *any* phase of investigation or prosecution of an American.<sup>73</sup> Following the passage of the American Servicemembers' Protection Act of 2002 (ASPA)—which prohibited giving aid to states parties that refused to sign Article 98 agreements (until it was

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*Criminal Court Treaty*, 7 AM. SOC'Y INT'L L. INSIGHTS (May 11, 2002), <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty> (discussing potential consequences of the Bush administration's decision to suspend the United States's signature under customary international law); Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 239 (2009) (“Under international law, the concept of unsigned a treaty does not exist, but states can announce that they have no plans to ratify a treaty that they have signed.”); *The Bush Administration: Suspension of the Rome Statute Signature: The US Disengages*, AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT'L CRIMINAL COURT [hereinafter AMICC], <https://www.amicc.org/bush-administration-1> (last visited Aug. 15, 2018) (“Under the Vienna Convention on the Law of Treaties, this notification had the effect of deactivating but not erasing the signatures.”). For a discussion of whether the U.S. Constitution permits a President to unsign a treaty, see Luke A. McLaurin, *Can the President “Unsign” a Treaty? A Constitutional Inquiry*, 84 WASH. U. L. REV. 1941, 1953–74 (2006).

<sup>70</sup> See Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 683, 688 (2003) (characterizing the Bush administration's objectives related to the ICC as “aggressive unilateralism” based in part on its unilateral campaign to “seek[] bilateral agreements with nations to ensure that they would not extradite U.S. citizens to the ICC”); Elizabeth Becker, *On World Court, U.S. Focus Shifts to Shielding Officials*, N.Y. TIMES (Sept. 7, 2002), <https://www.nytimes.com/2002/09/07/world/on-world-court-us-focus-shifts-to-shielding-officials.html> (discussing critiques by international human rights advocates and states parties of the Bush administration's efforts “to sign accords to exempt Americans from” ICC jurisdiction).

<sup>71</sup> See HRW, BILATERAL IMMUNITY AGREEMENTS, *supra* note 13, at 1–3 (advocating against the further expansion of Article 98 agreements).

<sup>72</sup> *Id.* at 1 (noting that the agreements “remove the ICC's oversight function”).

<sup>73</sup> See *infra* Section III.C.3.



repealed in 2008)<sup>74</sup>—the Bush administration successfully negotiated approximately one hundred agreements.<sup>75</sup>

### *B. Legal Bases for Article 98 Agreements*

Article 98 includes two provisions—Article 98(1) and 98(2)<sup>76</sup>—that address circumstances where states parties’ duties and obligations to the ICC potentially conflict with their agreements with another state.<sup>77</sup> Article 98 agreements are so-named because they rely on a broad reinterpretation of the second conflict provision, Article 98(2): States parties have the right to enter into subsequent agreements after signing the Rome Statute, even where subsequent agreements explicitly limit the ICC’s jurisdiction.<sup>78</sup> Article 98(2) ambiguously refers to conflicts between an ICC request for surrender and “international agreements.”<sup>79</sup> Article 98(2) states:

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<sup>74</sup> See American Servicemembers’ Protection Act of 2002, § 2007, Pub. L. No. 107–206, 116 Stat. 899, 905 (codified at 22 U.S.C. § 7426), *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1212, 122 Stat. 371, 371 (codifying that “no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court”).

<sup>75</sup> See CLARE M. RIBANDO, CONG. RESEARCH SERV., RL33337, ARTICLE 98 AGREEMENTS AND SANCTIONS ON U.S. FOREIGN AID TO LATIN AMERICA 2 (2006), <https://www.hsdl.org/?view&did=461709> (“As of March 15, 2006, the United States has concluded 100 such agreements.”); see also HRW, BILATERAL IMMUNITY AGREEMENTS, *supra* note 13, at 7–13 (cataloguing states that signed Article 98 agreements with the United States). The United States is the only country to create Article 98 agreements, and the Bush administration has been the only U.S. administration to enter into Article 98 agreements. See Beth Van Schaack, *State Cooperation & the International Criminal Court: A Role for the United States?* 6 (Santa Clara Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 5-11, 2011), <http://ssrn.com/abstract=1773681> (stating that the United States does not appear to have signed an Article 98 agreement since 2007).

<sup>76</sup> Rome Statute, *supra* note 9, at 148 (“Cooperation with respect to waiver of immunity and consent to surrender.”). The language in Article 98(1) clearly states that the ICC cannot request surrender of any individual from a state party where such a request would conflict with a “diplomatic immunity” agreement. *Id.* Article 98(1) is only relevant to Article 98 agreements to the extent that the Bush administration compared 98(1)’s precise language (“diplomatic immunity” agreements) to 98(2)’s ambiguous language (“international agreements”) in arguing for the interpretation of Article 98(2) on which they created Article 98 agreements. *Id.* (“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 . . . .”). For a discussion of the legal basis of, types of, and implications of diplomatic immunity, see OFFICE OF FOREIGN MISSIONS, U.S. DEP’T OF STATE, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES 2–15 (2015), <https://www.state.gov/documents/organization/150546.pdf>.

<sup>77</sup> See *So-called “Article 98” Agreements*, *supra* note 15, at 1–2 (“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 the ICC.”).

<sup>78</sup> *Id.*

<sup>79</sup> Rome Statute, *supra* note 9, at 148.

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under *international agreements* pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>80</sup>

In other words, if a state has entered into an international agreement stating that it will *not* extradite individuals to the ICC, then Article 98(2) prohibits the ICC from requesting that the state do so. The Bush administration capitalized on the ambiguity of the term “international agreements” and interpreted it to mean *any* international agreement.<sup>81</sup> Specifically, it argued that international agreements included an entire category of un contemplated agreements: Article 98 agreements.<sup>82</sup>

Article 98 is also silent as to whether it applies only retrospectively to agreements already in force when states ratified the Rome Statute, or if the conflict provisions apply prospectively as well.<sup>83</sup> The Bush administration interpreted Article 98’s silence as to whether it referred to preexisting or future agreements to mean that Article 98(2) applied to *any* preexisting *and* future international agreements.<sup>84</sup> In relying on this interpretation, the administration argued that—as international agreements per se—Article 98 agreements were “international agreements” within the legal scope of Article 98(2).<sup>85</sup>

### C. Critiques of Article 98 Agreements

There are three primary critiques of Article 98 agreements. First, the Bush administration’s interpretation of Article 98(2) has been widely criticized as outside the scope of the drafting—and ratifying—

<sup>80</sup> *Id.* (emphasis added).

<sup>81</sup> See, e.g., HRW, *BILATERAL IMMUNITY AGREEMENTS*, *supra* note 13, at 3 (explaining how Article 98 was meant to apply specifically to SOFAs as opposed to any international agreement).

<sup>82</sup> *Id.* at 5.

<sup>83</sup> Article 98 does not state a time frame for entering into agreements. See Rome Statute, *supra* note 9, at 148.

<sup>84</sup> See *So-called “Article 98” Agreements*, *supra* note 15, at 1–2 (noting that Article 98 was intended to apply to agreements that were in force at the time of the ratification of the Rome Statute).

<sup>85</sup> See Erik Rosenfeld, Recent Development, *Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute*, 2 WASH. U. GLOBAL STUD. L. REV. 273, 277 (2003) (arguing that Article 98 intentionally created a mechanism by which states can “create international obligations that compete or conflict with the Court’s request for surrender”).

parties' intent.<sup>86</sup> Second, Article 98 agreements violate international treaty norms,<sup>87</sup> namely because, when enforced, they are inconsistent with the object and purpose of the Rome Statute.<sup>88</sup> Lastly, the negotiation tactics employed by the Bush administration—primarily with underdeveloped and developing countries—further undermine the legitimacy of Article 98 agreements.<sup>89</sup> This Section considers each critique in turn and concludes that they each raise valid concerns about the legality of Article 98 agreements.

### 1. *Outside the Intended Scope of Article 98*

The legal bases for Article 98 agreements depend on an interpretation of Article 98(2) that is outside its intended scope.<sup>90</sup> Article 98 agreements rely in part on an argument that Article 98 applies to preexisting and future agreements; however, the legislative history of the Rome Statute reflects that Article 98's intended scope is limited to

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<sup>86</sup> See, e.g., *So-called "Article 98" Agreements*, *supra* note 15, at 1 (stating that Article 98 "agreements are contrary to the intention of the . . . drafters" who have indicated that "Article 98 was not intended to allow agreements that would preclude the possibility of a trial" and noting other reasons why Article 98 agreements are improper).

<sup>87</sup> See James Crawford, Philippe Sands & Ralph Wilde, *Joint Opinion: In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute*, COALITION FOR THE INT'L CRIM. COURT ¶ 23 & n.4 (June 5, 2003), <http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf> (discussing the object and purpose of the Rome Statute and arguing that Article 98 agreements create potentially conflicting obligations). *But see* Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371, 387–90 (2016) (arguing that the ICC, rather than Article 98 agreements, threatens treaty norms).

<sup>88</sup> See LEGISLATIVE HISTORY OF THE ICC, *supra* note 15, at 162 (arguing that the "purpose of the ICC" is to "enhance accountability"); European Council Press Release 12134/02 (Presse 279), General Affairs and External Relations, 2450th Council Sess., 9–10 (Sept. 30, 2002), [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/72321.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/72321.pdf) [hereinafter EU Response] (concluding that Article 98 agreements conflict with the Rome Statute and offering the Council of the European Union's countervailing principles).

<sup>89</sup> The Bush administration secured agreements by threatening to withdraw military and development aid from states parties who resisted entering into Article 98 agreements. See Galbraith, *supra* note 70, at 699 (arguing that U.S. "willingness to threaten the withdrawal of military aid from certain countries that fail to reach . . . Article 98 agreements . . . illustrate[s] the forceful nature of" its approach); Kenneth Roth, *Letter to US Secretary of State Colin Powell on US Bully Tactics Against the International Criminal Court*, HUM. RTS. WATCH (June 30, 2003, 8:00 PM), <https://www.hrw.org/news/2003/06/30/letter-us-secretary-state-colin-powell-us-bully-tactics-against-international> (describing the "tactics" used by the United States "in pursuing . . . bilateral agreements" as "unconscionable").

<sup>90</sup> See, e.g., *So-called "Article 98" Agreements*, *supra* note 15, at 1 (arguing that Article 98 agreements are clearly "beyond the scope of Article 98 of the Rome Statute"); Rosenfeld, *supra* note 85, at 277 (noting that Article 98 was intended to apply to SOFAs).

*preexisting*—not future—diplomatic immunity<sup>91</sup> and international agreements.<sup>92</sup> The drafters of the Rome Statute understood that states had preexisting agreements with—and duties to—other states when they ratified the Rome Statute.<sup>93</sup> Article 98 reflects this understanding by conditionally excusing states parties' obligations to surrender an individual to the ICC in the event that specific preexisting agreements conflict.<sup>94</sup> Unfortunately, the Rome Statute does not explicitly codify the drafters' intentions to limit the temporal application of Article 98 to preexisting agreements, so the ambiguity offers a potentially legitimate loophole for new agreements.<sup>95</sup> Furthermore, it seems unlikely that the drafters would have wanted to preclude states parties from entering into any future diplomatic immunity or other international agreements such as Status of Forces Agreements (SOFAs) even if they could potentially conflict with the ICC's authority to compel surrender.<sup>96</sup>

The other legal base for Article 98 agreements—that Article 98(2) applies to *any* international agreement—is also inconsis-

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<sup>91</sup> See Rome Statute, *supra* note 9, at 148; LEGISLATIVE HISTORY OF THE ICC, *supra* note 15, at 162 (reporting that the drafting of Article 98(2) was “predicated on the assumption that States Parties may have prior international obligations requiring them to recognize . . . other jurisdictional priorities over their obligation to the ICC”).

<sup>92</sup> See Rome Statute, *supra* note 9, at 148; *So-called “Article 98” Agreements*, *supra* note 15, at 1 (arguing that Article 98 agreements were “intended to address conflicts with *existing* international agreements and w[ere] not intended to place any one country's citizens . . . above the reach of international law”); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Drafting Committee: Draft Statute for the International Criminal Court*, at 177–78, U.N. Doc. A/CONF.183/13 (Vol. 3) (Aug. 2002), [http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v3\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf).

<sup>93</sup> LEGISLATIVE HISTORY OF THE ICC, *supra* note 15, at 162; Newton, *supra* note 87, at 396 (noting potential conflicts between preexisting international agreements and the Rome Statute).

<sup>94</sup> See Rome Statute, *supra* note 9, at 148.

<sup>95</sup> See Newton, *supra* note 87, at 392 (noting that the text of Article 98(2) does not “provide any express or implied limitation on the timing of such an agreement when measured against the accession of any state into the” ICC Assembly of State Parties).

<sup>96</sup> See Crawford et al., *supra* note 87, ¶ 23 n.4 (noting that states are often “subject to potentially conflicting obligations, particularly as they arise under different treaties” but that “it is questionable whether an intention to breach [the Rome Statute] can be inferred from the mere existence of a subsequent Agreement that contains potentially conflicting obligations”). SOFAs are common agreements arising from armed conflict. Paul J. Conderman, *Status of Armed Forces on Foreign Territory Agreements (SOFA)*, in MAX PLANCK ENCYC. OF PUB. INT'L LAW ¶ 1 (2013), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e410>. Diplomatic immunity agreements are common agreements arising from new diplomatic ties. See generally CONG. RESEARCH SERV., RS21672, DIPLOMATIC IMMUNITY: HISTORY AND OVERVIEW (2003) (describing the history behind the principle of diplomatic immunity, as well as international and domestic law concerning its scope).

tent with the intended scope of Article 98(2).<sup>97</sup> Legislative history indicates that Article 98(2) was specifically included in the Rome Statute to address widely adopted international agreements, such as SOFAs—not Article 98 agreements.<sup>98</sup> SOFAs define the legal rights and responsibilities of foreign military forces operating in the territory of a friendly state.<sup>99</sup> For example, the United States, as a member of NATO, entered into a SOFA with Afghanistan that included an agreement that U.S. military forces would conduct operations against terrorist organizations such as the Taliban.<sup>100</sup>

States primarily enter into SOFAs to ensure that foreign military personnel “respect the law of the receiving State.”<sup>101</sup> SOFAs fit the intended definition of “international agreements” under Article 98(2) because they include provisions explicitly establishing criminal jurisdiction and granting the right to exercise criminal jurisdiction over foreign military personnel to one state.<sup>102</sup> Article 98 agreements are different from SOFAs because they do not establish any criminal jurisdiction, which makes impunity much more likely.<sup>103</sup> Additionally,

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<sup>97</sup> See *So-called “Article 98” Agreements*, *supra* note 15, at 1–2 (arguing that legal experts “have concluded that” Article 98 agreements violate international law and are outside the scope of Article 98 as intended by the drafting parties).

<sup>98</sup> LEGISLATIVE HISTORY OF THE ICC, *supra* note 15, at 162; see also Rosenfeld, *supra* note 85, at 280, 286 (describing the history of SOFAs and their significance to the drafting of Article 98); *So-called “Article 98” Agreements*, *supra* note 15, at 1–2 (explaining how SOFAs are distinguishable from Article 98 agreements).

<sup>99</sup> SOFAs only apply to guest military forces in the territory of a friendly state. For example, they do not apply to military occupation. See generally Conderman, *supra* note 96, ¶ 23 (noting that SOFAs include provisions to support the visiting state’s military mission).

<sup>100</sup> N. Atl. Treaty Org. [NATO], Agreement Between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan (Sept. 30, 2014), [https://www.nato.int/cps/en/natohq/official\\_texts\\_116072.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/official_texts_116072.htm?selectedLocale=en); see also J.E.D. Voetelink, *The Status of Foreign Forces in Afghanistan Post 2014*, 108 MILITAIR RECHTELJK TIJDSCHRIFT, no. 1, 2015, at 1, 1 (discussing how the 2014 Bilateral Security Agreement between Afghanistan and the United States, and the post-2014 SOFA between Afghanistan and NATO, reflect a shift in “the character of the new military mission and the changing relations between Afghanistan and the international community”).

<sup>101</sup> Conderman, *supra* note 96, ¶ 9. SOFAs may expand the definition of “military personnel” to include other categories of persons to whom the agreement applies. See *id.* ¶¶ 8–9.

<sup>102</sup> See, e.g., *id.* ¶¶ 11–13 (describing different types of jurisdictional arrangements affecting SOFAs, including exclusive, conditional, and concurrent agreements).

<sup>103</sup> See Amnesty Int’l, *International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes*, AI Index IOR 40/025/2002, at 19–22 (Aug. 2002), <https://www.amnesty.org/download/Documents/120000/ior400252002en.pdf> (distinguishing Article 98 agreements from SOFAs). Article 98 agreements presume that the United States will make good-faith efforts to initiate proceedings against alleged perpetrators of crimes that fall within the ICC’s jurisdiction *ratione materiae*. *Id.* at 22

SOFAs, like diplomatic immunity agreements, are compatible with Article 98 because they apply to a *narrow* class of individuals, whereas Article 98 agreements apply to all American citizens.<sup>104</sup> Therefore, Article 98 agreements are necessarily inconsistent with the intended scope of Article 98 because, if the agreements were within its scope, states parties could forgo their obligation to surrender individuals of any nationality simply by entering into “Article 98-like” agreements with any willing state.

## 2. *Violation of Treaty Norms*

In addition to being outside the intended scope of Article 98, critics argue that Article 98 agreements violate international treaty norms. Under well-established international treaty norms, parties to a treaty have an unyielding duty to act in accordance with a treaty’s “object and purpose.”<sup>105</sup> Although largely a term of art, the “object and purpose” of a treaty is best defined as a “treaty’s essential goals.”<sup>106</sup> The object and purpose of the Rome Statute is to bring an end to the “impunity that protects the perpetrators of . . . the most serious crimes of concern to the international community within the jurisdiction of the ICC.”<sup>107</sup> Therefore, states parties must act in accordance with the Rome Statute’s goal of eradicating impunity.<sup>108</sup> States parties’ obligations include refraining from taking actions that under-

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(discussing why Article 98 agreements do not provide a sufficient legal basis under international law for good-faith efforts by the United States to prosecute or investigate crimes).

<sup>104</sup> See *So-called “Article 98” Agreements*, *supra* note 15, at 1 (explaining that Article 98 “was not intended to place any one country’s citizens, military or employees above the reach of international law”).

<sup>105</sup> See Vienna Convention, *supra* note 10, at 336. The Vienna Convention is the definitive source on treaty interpretation under customary international law. See generally David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565 (2010) (discussing uses of the term “object and purpose” in the Vienna Convention and offering a method for applying them to treaty interpretation); Karl Zemanek, *Introductory Note to Vienna Convention on the Law of Treaties, 1969*, U.N. AUDIOVISUAL LIBR. INT’L L. (2009), <http://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf> (exploring the history and influence of the Vienna Convention on the Law of Treaties).

<sup>106</sup> Jonas & Saunders, *supra* note 105, at 567; *id.* at 571 (defining a treaty’s “object and purpose” as the treaty’s “goals”); see also Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EUR. L. 311, 343 (1998) (describing the difficulties States face in determining which treaty provisions “are essential for achieving the purpose of the treaty”).

<sup>107</sup> Tan, *supra* note 19, at 1130.

<sup>108</sup> See Crawford et al., *supra* note 87, ¶¶ 24–26 (arguing that states parties have the obligation to act in accordance with the object and purpose of the Rome Statute, which is to prevent impunity for those who would fall under ICC jurisdiction).

mine the Rome Statute's object and purpose.<sup>109</sup> Article 98 agreements created the risk of states violating international treaty norms by undermining their ability to comply with an ICC surrender request for Americans.<sup>110</sup> Though states parties have a duty to act in accordance with the object and purpose of the Rome Statute, mere inconsistency between the goals of Article 98 agreements and the Rome Statute does not necessarily constitute a violation of treaty norms.<sup>111</sup> Although the Bush administration's stated intention behind Article 98 agreements was "providing American citizens with essential protection from the jurisdiction of the International Criminal Court," the text of Article 98 agreements does not plainly contradict the ICC's anti-impunity goal.<sup>112</sup> The boilerplate preamble for all Article 98 agreements states that the parties entering into the agreement "[r]eaffirm [ ] the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes."<sup>113</sup> The agreements further express anti-impunity intentions consistent with the object and purpose of the Rome Statute: "[T]he Parties have each expressed their intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel or other nationals . . . ."<sup>114</sup>

The text creates a presumption that the parties are willing and able to act in the case of an American alleged to have committed crimes within the ICC's jurisdiction. The Situation in Afghanistan demonstrates that, in practice, this presumption is a fallacy because the United States and implicated states parties are unwilling and unable to act in cases of Americans. Therefore, states parties that comply with Article 98 agreements undermine the Rome Statute's

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<sup>109</sup> See Vienna Convention, *supra* note 10, at 336 (establishing the "[o]bligation not to defeat the object and purpose of a treaty prior to its entry into force"); RICHARD K. GARDINER, *TREATY INTERPRETATION* 161–62 (2d ed. 2015) (explaining how the object and purpose of a treaty is used in treaty interpretation under the Vienna Convention).

<sup>110</sup> See *supra* Section II.A.

<sup>111</sup> See Jonas & Saunders, *supra* note 105, at 571 (describing the object and purpose of treaties as "a necessarily abstract concept").

<sup>112</sup> Press Release, Richard Boucher, Spokesperson for the U.S. Dep't of State, Article 98 Agreements (Sept. 23, 2003), <https://2001-2009.state.gov/r/pa/prs/ps/2003/24331.htm>.

<sup>113</sup> *E.g.*, Agreement Regarding the Surrender of Persons to the International Criminal Court, Belize-U.S., at 1, Dec. 8, 2003, T.I.A.S. No. 03-1208 [hereinafter Article 98 Agreement Belize-U.S.]; Agreement Regarding the Surrender of Persons to the International Criminal Court, Afg.-U.S., at 1, Sept. 20, 2002, T.I.A.S. No. 03-823 (entered into force Aug. 23, 2003) [hereinafter Article 98 Agreement Afg.-U.S.].

<sup>114</sup> *E.g.*, Article 98 Agreement Afg.-U.S., *supra* note 113, at 1; *see also, e.g.*, Article 98 Agreement Belize-U.S., *supra* note 113, at 2 (stating the same with only minor differences).

anti-impunity object and purpose by wholly shielding Americans from accountability for grave crimes in the Situation in Afghanistan.

Early on, critics recognized that Article 98 agreements were inconsistent with the object and purpose of the Rome Statute.<sup>115</sup> The European Union issued guidelines for states parties coerced into signing Article 98 agreements.<sup>116</sup> The guidelines responded to the boilerplate language of Article 98 agreements by recommending language to require that execution of Article 98 agreements would *necessarily* result in U.S. prosecution of any individual surrendered to the United States pursuant to an Article 98 agreement.<sup>117</sup> If the United States breached its duty to investigate or prosecute individuals, states parties could refuse to comply with their non-surrender duties.<sup>118</sup> Although Article 98 agreements did not adopt provisions requiring U.S. action, states parties could argue that the United States necessarily breached its obligations under the agreements by failing to act in good faith to investigate or prosecute crimes alleged in the Situation in Afghanistan.<sup>119</sup>

### 3. *Predatory Negotiation Tactics*

The Bush administration aggressively negotiated Article 98 agreements following the passage of the ASPA.<sup>120</sup> Before 2008, the

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<sup>115</sup> See EU Response, *supra* note 88, at 10 (expressing EU disapproval with Article 98 agreements and noting that “entering into [Article 98] agreements—as presently drafted—would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute”); Peter Beattie, *The U.S., Impunity Agreements, and the ICC: Towards the Trial of a Future Henry Kissinger*, 62 GUILD PRAC. 193, 203 (2005) (quoting Swiss Liberal Dick Marty who described U.S. pressure on Council of Europe member states to sign Article 98 agreements as “shocking because [it was] applied to small countries in relations of political, financial and economic dependency with the US” (quoting *Council of Europe Condemns US over Criminal Court Exemption Deals*, AGENCE FR. PRESSE, June 25, 2003, LEXIS) (alteration in original)).

<sup>116</sup> See EU Response, *supra* note 88, at 10 (establishing guiding principles for countries considering entering into Article 98 agreements with the United States); see also David A. Tallman, Note, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L.J. 1033, 1045 n.93 (2004) (summarizing the EU guidelines issued in response to the Article 98 agreements).

<sup>117</sup> See EU Response, *supra* note 88, at 10 (rejecting the possibility of impunity under Article 98 agreements).

<sup>118</sup> See generally Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMP. & INT’L ENVTL. L. 142, 145–47 (2016) (discussing why mandatory—rather than aspirational—provisions create legal obligations under international law).

<sup>119</sup> See Vienna Convention, *supra* note 10, at 339 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); *id.* at 343 (“A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”).

<sup>120</sup> See Galbraith, *supra* note 70, at 686–90 (systematically reviewing the Bush administration’s relationship to the ICC and noting the administration’s attempts to undermine the ICC); Roth, *supra* note 89 (critiquing the Bush administration’s tactics);



ASPA required the administration to withhold military aid to states that refused to sign Article 98 agreements.<sup>121</sup> The majority of Article 98 agreements were concluded between the United States and developing countries dependent on non-military aid, including aid for health, relief, and border security programs.<sup>122</sup> While the ASPA required withdrawal of aid from states that refused to conclude Article 98 agreements, it also carved out an exemption for U.S. allies—mostly developed countries.<sup>123</sup>

The systemically coercive and one-sided nature of Article 98 agreements offers further grounds to doubt their legitimacy.<sup>124</sup> The Vienna Convention on the Law of Treaties supports this argument. It codifies the principle that a treaty is not valid when consent is obtained through coercion of a state representative or through the threat or use of force against a state.<sup>125</sup> Coercion has been interpreted to include “the threat or use of force” and extends to “the employment of economic, political, military and psychological coercion” that leads “a State to conclude a treaty against its wishes or its inter-

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*U.S.: ‘Hague Invasion Act’ Becomes Law*, HUM. RTS. WATCH (Aug. 3, 2002, 8:00 PM), <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> (explaining how the ASPA was “part of a multi-pronged U.S. effort” to undermine the ICC by preventing countries from ratifying the Rome Statute or threatening to withdraw aid by forcing them to sign Article 98 agreements immunizing Americans).

<sup>121</sup> See *supra* note 74 and accompanying text.

<sup>122</sup> See Beattie, *supra* note 115, at 203–04 (noting specific instances of explicitly coercive negotiation against developing and underdeveloped countries and estimating that the United States threatened to withhold hundreds of millions of dollars in foreign aid). The number of Article 98 agreements in force decreased between 2006 and 2016. *Compare Status of US Bilateral Immunity Agreements (BIAs)*, COAL. FOR THE INT’L CRIMINAL COURT, [http://www.iccnw.org/documents/CICCFStatus\\_current.pdf](http://www.iccnw.org/documents/CICCFStatus_current.pdf) (last visited Aug. 28, 2018) (“As of 11 December 2006, the U.S. State Department report[ed] 102 agreements . . .”), with A LIST OF TREATIES IN FORCE, *supra* note 11 (listing ninety-five Article 98 agreements that were in force in 2016). Between 2006 and 2016, the United States did not penalize countries for refusing to enter into the agreements during the Obama administration. See LUCIA DiCICCO, AMICC, THE NON-RENEWAL OF THE “NETHERCUTT AMENDMENT” AND ITS IMPACT ON THE BILATERAL IMMUNITY AGREEMENT (BIA) CAMPAIGN 1 (2009) (discussing the Obama administration’s decision not to extend the cuts to economic aid for countries who did not sign BIAs with the United States).

<sup>123</sup> See *supra* note 74 and accompanying text.

<sup>124</sup> The Bush administration secured agreements with underdeveloped and developing countries by threatening to withdraw critically important development and military aid. See Roth, *supra* note 89 (noting threats to Croatia, the Bahamas, Comoros, Niger, Honduras, Bosnia, the Philippines, and Georgia by the United States in order to force them to sign Article 98 agreements); see also HRW, BILATERAL IMMUNITY AGREEMENTS, *supra* note 13, at 7–14 (cataloguing states parties’ justifications for signing Article 98 agreements, including threatened loss of aid).

<sup>125</sup> Vienna Convention, *supra* note 10, at 344.

ests.”<sup>126</sup> The Bush administration’s actions to secure Article 98 agreements, as well as Congress’s passage of the ASPA, neatly fit within the language used to describe coercion in the Vienna Convention.

These three critiques of Article 98 agreements—(1) that the Bush administration’s interpretation of Article 98(2) was contrary to its intended scope; (2) that Article 98 agreements violate international treaty norms; and (3) that the Bush administration’s negotiation tactics were coercive—raise serious concerns about these agreements’ legality, and the Situation in Afghanistan demonstrates why these critiques matter.

### III

#### THE SITUATION IN AFGHANISTAN DEMONSTRATES THE NEED TO DELEGITIMIZE ARTICLE 98 AGREEMENTS

Critiques of Article 98 agreements offer support for doubting their legitimacy. Article 98 agreements have survived for so long because the ICC has not investigated or prosecuted an American, so the United States has not needed to enforce them.<sup>127</sup> This Part explores how the Situation in Afghanistan bridges the gap between abstract critiques of Article 98 agreements and how the agreements operate in practice. Section III.A discusses the history of the Situation in Afghanistan in order to better contextualize the Situation. Section III.B discusses the legal complexity of allegations against Americans. Finally, Section III.C considers potential challenges to pursuing allegations against Americans and argues that the Situation in Afghanistan demonstrates why Article 98 agreements need to be permanently delegitimized.

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<sup>126</sup> *Id.* at 506 (stating the Reservations of the Syrian Arab Republic and interpreting the provisions in Article 52). *But see, e.g., id.* at 509 (stating the objections of the United Kingdom and Northern Ireland to the Government of Syria’s interpretation of Article 52 regarding the definition of coercion).

<sup>127</sup> Although an American has never been prosecuted by the ICC, and no Americans have been investigated yet, the ICC recently requested authorization to open an investigation into U.S. activities in Afghanistan. *See infra* note 143 and accompanying text (discussing the Prosecutor’s request to open an investigation into U.S. activities in Afghanistan); *see also* David Davenport, *Will the International Criminal Court Prosecute Americans over Afghanistan?*, FORBES (Mar. 26, 2018, 4:25 PM), <https://www.forbes.com/sites/daviddavenport/2018/03/26/will-the-international-criminal-court-prosecute-americans-over-afghanistan/#28b32f710a57> (reporting that if the Prosecutor’s 2017 request to open an investigation into U.S.-led activities in Afghanistan is granted, it would be the first time that an American “would face the real possibility of prosecution before the ICC”).

### A. Background

In response to the attacks of September 11, 2001, the United States launched operation “Enduring Freedom”<sup>128</sup> in Afghanistan after the Taliban refused to hand over al-Qaeda leader Osama bin Laden to the United States.<sup>129</sup> American-led forces overthrew the Taliban by materially supporting the Afghan Northern Alliance<sup>130</sup> and deploying thousands of American troops, Special Forces, and intelligence officers to Afghanistan.<sup>131</sup> Beginning in 2002, the Taliban and other anti-government armed groups conducted insurgency operations against Afghan and American-led forces.<sup>132</sup> Despite Afghanistan’s deteriorating security situation, a democratically elected government took power in 2004.<sup>133</sup> The security situation in Afghanistan worsened, prompting an increase in the number of American troops in Afghanistan to approximately 100,000 by late 2009.<sup>134</sup> Combat missions officially concluded in 2014, but foreign military forces continue to be present in Afghanistan.<sup>135</sup>

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<sup>128</sup> Press Release, The White House, Presidential Address to the Nation (Oct. 7, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html> (announcing military operations in Afghanistan).

<sup>129</sup> See *Timeline: US Intervention in Afghanistan 2001 to 2017*, AL JAZEERA (Aug. 22, 2017), <https://www.aljazeera.com/news/2017/08/2001-2017-intervention-afghanistan-170822035036797.html> [hereinafter *US Intervention Timeline*] (providing detailed timeline of the U.S. presence in Afghanistan since 2001).

<sup>130</sup> See *id.* (explaining how U.S.-led forces overthrew the Taliban through air raids and their backing of the Afghan Northern Alliance). The U.S. occupation of Afghanistan continues today. See, e.g., Eltaf Najafizada, *Afghanistan Rejects Surprise Taliban Peace Outreach to U.S.*, BLOOMBERG (Feb. 16, 2018, 5:20 AM), <https://www.bloomberg.com/news/articles/2018-02-16/afghanistan-rejects-surprise-taliban-peace-outreach-to-u-s> (describing the ongoing U.S. “occupation” in Afghanistan).

<sup>131</sup> As many as 10,000 U.S. troops were officially present in Afghanistan in 2003. See *US Intervention Timeline*, *supra* note 129.

<sup>132</sup> See *The Taliban Resurgence in Afghanistan*, BBC, [http://www.bbc.co.uk/history/events/the\\_taliban\\_resurgence\\_in\\_afghanistan](http://www.bbc.co.uk/history/events/the_taliban_resurgence_in_afghanistan) (last visited Aug. 18, 2018) (detailing the Taliban insurgency’s recruitment tactics and operations against NATO and pro-government forces).

<sup>133</sup> See, e.g., Carlotta Gall, *Election of Karzai is Declared Official*, N.Y. TIMES (Nov. 4, 2004), <http://www.nytimes.com/2004/11/04/world/asia/election-of-karzai-is-declared-official.html>; see also CONSTITUTION OF AFGHANISTAN, Jan. 26, 2004, <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf> (noting that Afghanistan’s Constitution was ratified in 2004 following elections).

<sup>134</sup> See *US Intervention Timeline*, *supra* note 129 (explaining the increase of U.S. troops in order to “put brakes on the Taliban and to strengthen Afghan institutions”).

<sup>135</sup> See Press Release, The White House, Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan> (recounting the Obama administration’s initial announcement that “the longest war in American history is coming to a responsible conclusion”). *But see* Najafizada, *supra* note 130 (noting the Trump administration’s resistance to ending the seventeen-year occupation

Afghanistan ratified the Rome Statute and acceded to ICC jurisdiction in 2003.<sup>136</sup> That same year, Afghanistan's Article 98 agreement with the United States also entered into force.<sup>137</sup> The agreement purports to immunize Americans from the ICC's jurisdiction by preventing the Afghan government from aiding the ICC or state party in the surrender of an American.<sup>138</sup>

### 1. Procedural History

The preliminary examination into the Situation in Afghanistan became public in 2007.<sup>139</sup> Between 2006 and 2011, the OTP received fifty-six communications pursuant to Article 15 of the Rome Statute alleging that crimes were committed by Afghan security forces and the Taliban.<sup>140</sup> Since receiving these communications, the OTP has released annual preliminary examination reports into the Situation in Afghanistan.<sup>141</sup> The 2016 and 2017 reports allege Americans committed crimes relating to the Situation in Afghanistan.<sup>142</sup> In November 2017, the OTP expanded the scope of the Situation in Afghanistan and requested authorization from the Pre-Trial Chamber to commence a formal investigation.<sup>143</sup> Should Prosecutor Bensouda's request be granted, the OTP will formally investigate the Situation in

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as evidenced by "the deployment of more troops and an increase in air strikes . . . across Afghanistan").

<sup>136</sup> PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 234.

<sup>137</sup> Afghanistan's Article 98 agreement entered into force after it acceded to ICC jurisdiction, but at the time Afghanistan ratified the Rome Statute it already had "preexisting, countervailing legal obligations." BRETT D. SCHAEFER, HERITAGE FOUND., HOW THE U.S. SHOULD RESPOND TO ICC INVESTIGATION INTO ALLEGED CRIMES IN AFGHANISTAN 3 (2017), <https://www.heritage.org/courts/report/how-the-us-should-respond-icc-investigation-alleged-crimes-afghanistan>; *see also* Article 98 Agreement Afg.-U.S., *supra* note 113 (noting the agreement was signed in 2002 and entered into force in 2003).

<sup>138</sup> *See So-called "Article 98" Agreements*, *supra* note 15, at 1 (explaining that Article 98 Agreements provide that "neither of the two parties to the [agreement] would surrender the other's 'persons' without first gaining consent from the other").

<sup>139</sup> PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 230.

<sup>140</sup> PRELIMINARY EXAMINATION REPORT (2011), *supra* note 50, ¶¶ 20, 24–29.

<sup>141</sup> *See, e.g.*, PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7; PRELIMINARY EXAMINATION REPORT (2016), *supra* note 37. The Rome Statute mandates that the Office of the Prosecutor "independently and impartially select situations for investigation" when crimes are committed on the territory of states parties or by their nationals. *Office of the Prosecutor*, INT'L CRIM. COURT, <https://www.icc-cpi.int/about/otp> (last visited Aug. 18, 2018).

<sup>142</sup> *See* PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶¶ 253–55 (elaborating on allegations of war crimes committed by the United States); PRELIMINARY EXAMINATION REPORT (2016), *supra* note 37, ¶ 211 (noting for the first time "Acts allegedly committed by members of the US forces and of the CIA").

<sup>143</sup> *See Preliminary Examination: Afghanistan*, INT'L CRIM. COURT, *supra* note 2 (reporting on the status of the preliminary examination in Afghanistan).

Afghanistan, and Americans could face ICC investigation and prosecution.

## 2. *Allegations Against Americans*

The 2016 OTP preliminary examination report was the first allegations in the ICC's history that Americans committed crimes within the ICC's jurisdiction.<sup>144</sup> The OTP found "a reasonable basis to believe that at least 54 detained persons" were subjected to grave crimes by United States' armed forces, including "the war crimes of torture and cruel treatment" within the territory of Afghanistan since May 2003.<sup>145</sup> The OTP further alleged that from 2003 to 2004, members of the CIA committed grave crimes, including "rape and/or sexual violence" against "at least 24 detained persons" within the territory of Afghanistan and other states parties, including Poland, Romania, and Lithuania.<sup>146</sup> Although the alleged crimes in this latter category occurred on territories of states parties other than Afghanistan, they "took place in the context of, and were associated with the armed conflict in Afghanistan" and "were allegedly committed against conflict-related detainees suspected of being members of the Taliban."<sup>147</sup> Many of the crimes "were designed and implemented as part of a policy to obtain actionable intelligence."<sup>148</sup> In addition to evidence collected during the preliminary examination, the ICC received 1.17 million victim statements alleging war crimes committed as part of the Situation in Afghanistan.<sup>149</sup>

### *B. Complementarity Conundrum*

The OTP's 2017 report states that the potential cases it has identified as likely to arise "from an investigation of the situation in

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<sup>144</sup> See, e.g., PRELIMINARY EXAMINATION REPORT (2016), *supra* note 37, ¶ 211 (alleging that "[m]embers of US forces appear to have subjected at least 61 detained persons to torture, cruel treatment, [and] outrages upon personal dignity" in Afghanistan); *ICC: U.S. Forces May Have Used Torture in Afghanistan*, AL JAZEERA (Nov. 15, 2016), [www.aljazeera.com/news/2016/11/icc-forces-torture-afghanistan-161115035831479.html](http://www.aljazeera.com/news/2016/11/icc-forces-torture-afghanistan-161115035831479.html) (noting that "[t]his would be the first time that the ICC has set its sights on US personnel").

<sup>145</sup> PRELIMINARY EXAMINATION REPORT (2016), *supra* note 37, ¶¶ 253–54 (noting the relevant time period and providing details regarding the allegations).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* ¶ 255.

<sup>148</sup> *Id.* (noting that interrogation techniques "appear to have been discussed, reviewed, and authorised within the US armed forces, the US Department of Defence ('DoD'), the CIA, and other branches of the US Government").

<sup>149</sup> See Gannon, *supra* note 6 (reporting that Afghans submitted 1.17 million statements to the ICC alleging war crimes including allegations against "groups like the Taliban and the Isis, but also Afghan security forces and government-affiliated warlords, the US-led coalition, and foreign and domestic spy agencies").

Afghanistan would be . . . admissible.”<sup>150</sup> Determining admissibility entails preliminary complementarity determinations.<sup>151</sup> Even though the United States is not a state party and is therefore not subject to the ICC’s procedures, the ICC’s legitimacy depends on complementarity.<sup>152</sup> The complementarity determination for Americans in the Situation in Afghanistan is complex because it must consider Afghanistan, other states parties, and the United States.<sup>153</sup> Understanding why complementarity exists at the preliminary examination phase is important because individuals and states can challenge complementarity in future proceedings.<sup>154</sup> Furthermore, well-

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<sup>150</sup> PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 256. If the Prosecutor is authorized to open an investigation into the Situation in Afghanistan, states can request “deference to domestic proceedings under Article 18.” Carsten Stahn, *Admissibility Challenges Before the ICC: From Quasi-Primacy to Qualified Deference?*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 228, 240 (Carsten Stahn ed., 2015). However, given the scope of the Situation in Afghanistan, it is unlikely that any involved state could address all “potential cases.” See PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 256 (explaining that the potential cases arising from the Situation in Afghanistan relate to conduct from three distinct groups of alleged perpetrators).

<sup>151</sup> See Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT’L L. 115, 123 (2010) (describing complementarity as “a restrictive principle” and explaining that the “operative language in Article 17 mandates that ‘the Court shall determine that a case is inadmissible’ where the criteria warranting exclusive domestic authority are met” (quoting Rome Statute, *supra* note 9, at 100–01)).

<sup>152</sup> See HANDBOOK ON COMPLEMENTARITY, *supra* note 29, at 4 (stating that complementarity is “one of the most important (if not *the* most important)” idea in the Rome Statute); Newton, *supra* note 151, at 119 (“The long term viability of the International Criminal Court . . . depends upon an implementation of the complementarity principle that preserves cooperative synergy between the Court and domestic jurisdictions.”). It is unclear from the Rome Statute, the statute’s legislative history, or ICC case law whether the court must consider America’s willingness or ability to address the alleged crimes when making its complementarity determination. See *generally* LEGISLATIVE HISTORY OF THE ICC, *supra* note 15, at 139 & n.26 (noting that the Rome Statute does not fully explain the standards by which the court is to determine when a state is unwilling or unable, but that ICC jurisprudence is used to “assist in clarifying the application of the principle of complementarity”).

<sup>153</sup> See PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶¶ 257–74 (discussing the willingness and ability of potentially implicated states to address allegations against Americans). See *generally* Ignaz Stegmüller, *Positive Complementarity and Legitimacy—Is the International Criminal Court Shifting from Judicial Restraint to Interventionism?*, in *THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS* 247 (Nobuo Hayashi & Cecilia M. Bailliet eds., 2017) (discussing the implications of political complexities in complementarity decisions).

<sup>154</sup> See Rome Statute, *supra* note 9, at 102 (listing those entitled to challenge admissibility of a case); see also NÓRA BÉRES, MULTISCIENCE - MICROCAD INT’L MULTIDISCIPLINARY SCI. CONFERENCE AT THE UNIV. OF MISKOLC, HUNG., *THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE BASED ON THE CASE-LAW OF THE INTERNATIONAL CRIMINAL COURT* 4–5 (2016), [http://www.uni-miskolc.hu/~microcad/publikaciok/2016/E\\_feliratozva/E\\_12\\_Beres\\_Nora.pdf](http://www.uni-miskolc.hu/~microcad/publikaciok/2016/E_feliratozva/E_12_Beres_Nora.pdf) (detailing a challenge to the admissibility of a case before the ICC regarding the situation in the Democratic Republic of the Congo); Michele

reasoned complementarity demonstrates that the United States has not made good-faith efforts to act in line with the intentions explicitly stated in the boilerplate preamble of every Article 98 agreement, which are “to investigate and to prosecute where appropriate acts within the jurisdiction of the [ICC] alleged to have been committed by its . . . nationals.”<sup>155</sup>

### *1. Afghanistan’s Inability and Unwillingness to Act*

The ICC is unconvinced that Afghanistan is making genuine efforts to facilitate proceedings against Afghan forces or members of the Taliban, let alone American forces.<sup>156</sup> Practically speaking, any efforts by Afghanistan to prosecute American servicemembers would be stifled by Afghanistan’s dependence on U.S. aid and the current SOFA, which grants immunity to members of U.S. armed forces.<sup>157</sup> Notwithstanding Afghanistan’s dependence on U.S. aid, the current SOFA does not grant American military contractors immunity from

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Tedeschini, *Complementarity in Practice: The ICC’s Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions*, 7 *AMSTERDAM L.F.*, Summer 2015, at 76, 81–88 (2015) (detailing two admissibility challenges filed by Libya).

<sup>155</sup> Article 98 Agreement Afg.-U.S., *supra* note 113, at 1; *see also* Article 98 Agreement Belize-U.S., *supra* note 113, at 2 (stating nearly the same). For a discussion of good faith and its effect on the validity of a treaty, *see supra* Section II.C.2.

<sup>156</sup> *See* PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 264 (“[T]he information available does not indicate that relevant national proceedings have been carried out against those most responsible for such alleged crimes.”). Since 2016, Afghanistan has used a domestic “Amnesty Bill,” which allows for victims of war crimes to file a lawsuit with the Afghan courts, to stall ICC proceedings by demonstrating its willingness to act domestically. *See* PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶¶ 258–59 (describing Afghanistan’s Amnesty Bill). The Afghan government can defend the apparent impunity resulting from the Amnesty Bill and other peace negotiations with organizations accused of human rights abuses by pointing to new penal legislation as well as “successful” individual prosecutions since 2016. *See Afghanistan Refers Anas Haqqani, Hafiz Rasheed to International Criminal Court: AAN*, *ASIA NEWS* (July 7, 2017, 5:49 AM), <http://www.asianews.af/en/18067/> (noting that the ICC “received a large amount of new information from the Afghan government that could influence” its decision as to whether it will open a formal investigation of sixteen domestic war crimes prosecutions and the conviction of Anas Haqqani); Ehsan Qaane, *Investigating Post-2003 War Crimes: Afghan Government Wants “One More Year” from the ICC*, *AFG. ANALYSTS NETWORK* (June 27, 2017), <https://www.afghanistan-analysts.org/investigating-post-2003-war-crimes-afghan-government-wants-one-more-year-from-the-icc/> (discussing negotiations to delay formal investigation in the Situation in Afghanistan allegedly initiated by the Afghan government with the ICC).

<sup>157</sup> *See* INT’L SEC. ADVISORY BD., REPORT ON STATUS OF FORCES AGREEMENTS 42 (2015), <https://www.state.gov/documents/organization/236456.pdf> (noting that Afghanistan agreed to provide immunity from criminal prosecution to U.S. forces); Mohammad Samim, *Afghanistan’s Addiction to Foreign Aid*, *DIPLOMAT* (May 19, 2016), <https://thediplomat.com/2016/05/afghanistans-addiction-to-foreign-aid/> (discussing Afghanistan’s dependence on aid coming from the international community, including billions of U.S. dollars).

criminal prosecution in Afghanistan, so Afghanistan could conceivably prosecute military contractors.<sup>158</sup> However, the crimes alleged in the Situation in Afghanistan occurred as long as fifteen years ago, so it is implausible that Afghanistan would be capable of prosecuting military contractors who have left the country.<sup>159</sup>

## 2. *Other States Parties' Unwillingness to Act*

The ICC also alleges that detainees were victims of crimes by members of the CIA on the territories of states parties that have a sufficient nexus to the Situation in Afghanistan.<sup>160</sup> Numerous sources corroborate the Prosecutor's allegations of CIA torture on the territory of several states parties.<sup>161</sup> The allegations specifically refer to crimes between 2003 and 2004 in Lithuania, Poland, and Romania.<sup>162</sup> Advocates lodged complaints against Poland and Romania with the European Court of Human Rights (ECHR).<sup>163</sup> There are ongoing

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<sup>158</sup> See INT'L SEC. ADVISORY BD., *supra* note 157, at 21 (explaining the "contractor" loophole). The United States does not have an extradition treaty with Afghanistan. See Ashley Deeks, *Dusting Off the U.S.-Iraq Extradition Treaty?*, LAWFARE (May 11, 2012, 6:55 PM), <https://www.lawfareblog.com/dusting-us-iraq-extradition-treaty> (discussing how the absence of extradition treaties between the United States and several nations creates challenges for legal surrender in counterterrorism operations).

<sup>159</sup> The United States does not have an extradition treaty with Afghanistan, therefore Afghanistan could not request extradition of military contractors to stand trial in Afghanistan. See 18 U.S.C. § 3181 (2012).

<sup>160</sup> See PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 254 (stating that available information reasonably demonstrates that members of the CIA committed crimes against detainees on territory belonging to Afghanistan and other states parties).

<sup>161</sup> See, e.g., *Timeline: The Council of Europe's Investigation into CIA Secret Prisons in Europe*, COUNCIL OF EUR.: PARLIAMENTARY ASSEMBLY (July 24, 2014), <http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=5722&lang=2> (detailing the Council of Europe's inquiry into torture committed by the CIA in Europe and voicing "serious concerns at the 'apathy' shown by EU member states and institutions . . . between 2001 and 2006"); see also Amrit Singh, OPEN SOC'Y JUSTICE INITIATIVE, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION* 6 (2013), <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> [hereinafter *GLOBALIZING TORTURE*] (noting the involvement of numerous states parties in CIA detention and interrogation programs, including Germany, Italy, Macedonia, Malawi, Poland, Romania, and Sweden). The Open Society Justice Initiative report serves as a comprehensive account of the widespread complicity involved in torture and, importantly, recognizes the human toll this complicity took by giving detailed accounts of injuries suffered by known victims. A list of detainees—1 (Shaker Aamer) through 136 (Abu Zubaydah)—who reportedly were subjected to CIA secret detention and extraordinary rendition is detailed in the report. *Id.* at 30–60. The "facts in th[e] list are derived from credible public sources and information provided by reputable human rights organizations." *Id.* at 30.

<sup>162</sup> PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 254.

<sup>163</sup> See, e.g., *Paying for Torture*, ECONOMIST (Feb. 25, 2015), <https://www.economist.com/news/europe/21645097-cia-tortured-suspected-terrorists-polish-soil-european-court-human-rights-making> ("America may have no interest in prosecuting its intelligence officers for torturing detainees, but the ruling against Poland has made it clear



attempts at domestic investigations into the alleged crimes committed against CIA detainees in Poland, Romania, and Lithuania; however, critics characterize them as superficial.<sup>164</sup>

### 3. *The United States' Unwillingness to Act*

Prior to the ICC's allegations against Americans, the U.S. Senate published an extensive report—the Senate “Torture Report”<sup>165</sup>—in 2014 alleging systemic CIA torture, and the U.S. Department of Justice conducted a criminal investigation into alleged war crimes.<sup>166</sup> Despite the sheer volume of evidence, the only individual prosecuted

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that European governments will be held responsible for abetting them.”); *Poland Pays \$250,000 to Victims of CIA Rendition and Torture*, *GUARDIAN* (May 15, 2015, 12:02 PM), <https://www.theguardian.com/world/2015/may/15/poland-pays-250000-alleged-victims-cia-rendition-torture> (noting that after a failed appeal by the Polish government, the ECHR ordered Poland to pay two detainees who were held in Poland in 2002 and 2003). Romania faced claims before the ECHR for aiding the CIA's detention and torture of Abd al-Rahim al-Nashiri between 2003 and 2005. See Press Release, Open Soc'y Found., Romania's Role in CIA Torture and Rendition Comes Before European Court (June 20, 2016), <https://www.opensocietyfoundations.org/press-releases/romaniacs-role-cia-torture-and-rendition-comes-european-court>.

<sup>164</sup> See, e.g., PRELIMINARY EXAMINATION REPORT (2017), *supra* note 7, ¶ 270 (“[C]riminal investigations are reportedly ongoing in Poland, Romania and Lithuania regarding alleged crimes committed in relation to the CIA detention facilities on their respective territories.”); see also GLOBALIZING TORTURE, *supra* note 161, at 99–102, 104–06 (noting that the investigation in Poland lasted years without any findings or actions and discussing the ineffectiveness of the Romanian Senate's inquiry into CIA detention and its denial of hosting a secret CIA prison); *id.* at 93 (criticizing Lithuania's unwillingness to “re-open the criminal investigation” that was opened in 2010); *id.* at 101–02 (criticizing Polish attempts at domestic investigations). The United States appears to have hampered the Polish investigation by refusing to send requested reports needed to adequately investigate the allegations against the CIA and Polish government. See Christian Lowe & Wojciech Zurawski, *Poland Says Washington Stonewalling CIA Jail Investigation*, *REUTERS* (June 12, 2015, 10:26 AM), <https://www.reuters.com/article/us-usa-cia-torture-poland/poland-says-washington-stonewalling-cia-jail-investigation-idUSKBN0OS1N220150612>.

<sup>165</sup> S. SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113–288 (2014).

<sup>166</sup> DOJ investigated the destruction of CIA interrogations videos and whether any unauthorized interrogation techniques had been employed. Assistant U.S. Attorney John Durham recommended opening a full criminal investigation into specific instances where loss of life occurred in U.S. custody overseas. See Press Release, U.S. Dep't of Justice, Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012), <https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees> [hereinafter Holder Press Release] (announcing that the investigations have concluded and been closed); Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, *N.Y. TIMES* (Aug. 30, 2012), <https://nyti.ms/PTEEOs> (reporting that Attorney General Eric Holder announced no criminal charges would be filed following CIA torture investigation).

for torture was a whistleblower,<sup>167</sup> and charges in the United States were never brought against perpetrators of torture.<sup>168</sup> The Obama administration's efforts to preserve and substantiate<sup>169</sup> the Torture Report in 2016 may have been the catalyst for the ICC's initial allegations against Americans in the Situation in Afghanistan.<sup>170</sup> In the absence of subsequent domestic proceedings, the Torture Report and other investigations are inadequate.<sup>171</sup>

### C. Challenges of Pursuing Allegations Against Americans

Despite a well-reasoned complementarity determination in the Situation in Afghanistan, the Prosecutor may still face challenges to pursuing allegations against Americans. First, the Pre-Trial Chamber could deny the Prosecutor's request to open a formal investigation.

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<sup>167</sup> Former CIA agent John Kiriakou pled guilty to federal charges in 2012 after acknowledging the existence of the CIA's torture program. See John Kiriakou, *I Went to Prison for Disclosing the CIA's Torture. Gina Haspel Helped Cover It Up.*, WASH. POST (Mar. 16, 2018), [https://www.washingtonpost.com/outlook/i-went-to-prison-for-disclosing-the-cias-torture-gina-haspel-helped-cover-it-up/2018/03/15/9507884e-27f8-11e8-874b-d517e912f125\\_story.html?utm\\_term=.876c37650a79](https://www.washingtonpost.com/outlook/i-went-to-prison-for-disclosing-the-cias-torture-gina-haspel-helped-cover-it-up/2018/03/15/9507884e-27f8-11e8-874b-d517e912f125_story.html?utm_term=.876c37650a79) (detailing former CIA agent's criminal convictions after disclosing the CIA's torture program and CIA Chief nominee Gina Haspel's cover up of the events).

<sup>168</sup> See Holder Press Release, *supra* note 166 and accompanying text.

<sup>169</sup> See Press Release, Human Rights First, President Obama Preserves Senate Torture Report (Dec. 13, 2016), <http://www.humanrightsfirst.org/press-release/president-obama-preserves-senate-torture-report> (discussing the "Obama Administration's decision to archive the Senate intelligence committee's report on the CIA's post-9/11 torture program").

<sup>170</sup> See Mark Kersten, *Did the Torture Report Just Open the U.S. up to ICC Prosecution?*, JUST. CONFLICT (Dec. 10, 2014), <https://justiceinconflict.org/2014/12/10/did-the-torture-report-just-open-the-u-s-up-to-icc-prosecution/> (opining that the Torture Report could serve as the basis for an ICC prosecution).

<sup>171</sup> See Holder Press Release, *supra* note 166 (stating that admissible evidence gleaned from the DOJ's investigation into CIA torture would be insufficient to obtain a conviction); see also Eric Posner, *Why Obama Won't Prosecute Torturers*, SLATE (Dec. 9, 2014, 4:39 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2014/12/senate\\_torture\\_report\\_why\\_obama\\_won\\_t\\_prosecute\\_cia\\_and\\_bush\\_administration.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/12/senate_torture_report_why_obama_won_t_prosecute_cia_and_bush_administration.html) (arguing that "Obama's best argument for letting matters rest" following the torture investigations "is the principle against criminalizing politics"); Shane, *supra* note 166 (examining Attorney General Holder's decision not to bring charges including "on cases in which interrogators exceeded legal guidelines"); *Will US Personnel Ever Face Torture Charges?*, AL JAZEERA (Sept. 5, 2012, 1:04 AM), <http://www.aljazeera.com/programmes/insidestoryamericas/2012/09/20129582212965587> (noting that "[t]he decision not to prosecute" CIA torture that led to the deaths of "Gul Rahman, who died in a secret CIA prison in Afghanistan in 2002, and Manadel al-Jamadi, who died in CIA custody at Iraq's notorious Abu Ghraib prison in 2003" left Obama supporters "dismayed"). Furthermore, the ASPA practically forecloses the U.S. government from cooperating meaningfully with the ICC. See Julian Bava & Kiel Ireland, *The American Service-Members' Protection Act: Pathways to and Constraints on U.S. Cooperation with the International Criminal Court*, 12 EYES ON THE ICC 1, 5–6 (2016–2017) (listing practical ways in which the ASPA prohibits the United States—including the President—from cooperating with the ICC).

Second, if an investigation is authorized, the United Nations Security Council could defer it. Finally, Article 98 agreements have the potential to create challenges to effective investigation and prosecution.

### 1. *Pre-Trial Chamber*

*Proprio motu* investigations are controversial because the decision to act originates with one individual—the Prosecutor—as opposed to collective referrals by the Security Council or states parties.<sup>172</sup> The Pre-Trial Chamber serves as a check on this power by authorizing any *proprio motu* investigation.<sup>173</sup> The Situation in Afghanistan is the most legally complex situation to come before the ICC, particularly because it has the potential to spawn cases against American citizens, which are likely to result in Article 98 agreement conflicts.<sup>174</sup> Therefore, despite the gravity of the allegations, the Pre-Trial Chamber could avoid legal and political complications by rejecting the Prosecutor’s request outright or by limiting the formal investigation’s scope to non-Americans.

### 2. *United Nations Security Council*

The second potential roadblock to pursuing allegations against Americans is the United Nations Security Council (Security Council). Even if the Pre-Trial Chamber approves the Prosecutor’s request, the United States could request the Security Council to defer or postpone an investigation into allegations against Americans for twelve months

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<sup>172</sup> See, e.g., DAN ZHU, *CHINA AND THE INTERNATIONAL CRIMINAL COURT* 115–34 (Palgrave, *Governing China in the 21st Century* Ser. No. 15023, 2008) (discussing concerns of the Chinese government that the Prosecutor would abuse their *proprio motu* power); Nathiya Nagendra, *Prosecutorial Power: Proprio Motu in the International Criminal Court 3* (Fall 2010) (unpublished B.A. thesis, American University), <https://auislandora.wrlc.org/islandora/object/1011capstones%3A229/datastream/PDF/view> (explaining that *proprio motu* “became a controversial subject in the development of . . . the Court since many people were concerned about the Court’s legitimacy and accountability and were unsure if an independent prosecutor could foster these principles”); see also *supra* Section I.B.2 (discussing various ways in which Situations and Cases come before the ICC).

<sup>173</sup> See *supra* note 46 and accompanying text (explaining the Pre-Trial Chamber’s role in authorizing investigations).

<sup>174</sup> See David Bosco, *Exclusive: International Criminal Court Poised to Open Investigation into War Crimes in Afghanistan*, *FOREIGN POL’Y* (Oct. 31, 2016, 4:57 PM), <http://foreignpolicy.com/2016/10/31/exclusive-international-criminal-court-poised-to-open-investigation-into-war-crimes-in-afghanistan> (characterizing an investigation into the Situation in Afghanistan as “one of the most difficult investigations the court has undertaken, both practically and politically”); Alex Whiting, *An ICC Investigation of the U.S. in Afghanistan: What Does It Mean?*, *JUST SECURITY* (Nov. 3, 2017), <https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean> (discussing the challenges of an ICC investigation of Americans and arguing that an ICC investigation into allegations against Americans “will certainly be a difficult, if not nearly impossible investigation”).

through a resolution.<sup>175</sup> A Security Council resolution requires nine affirmative votes and is subject to the permanent Security Council members' veto power.<sup>176</sup> However, postponement is rarely in the interest of nine permanent members,<sup>177</sup> and any of the permanent members reserve veto power.<sup>178</sup> In this instance, the Security Council would not pose a hurdle to the prosecution of Americans in the ICC.

### 3. Article 98 Agreements

Article 98 agreements are the most serious roadblock in prosecuting Americans in the Situation in Afghanistan. The agreements only explicitly prevent states from extraditing Americans to the ICC.<sup>179</sup> However, over time, the United States—with the complicity of the international community<sup>180</sup>—conflated the agreements as pro-

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<sup>175</sup> See Rome Statute, *supra* note 9, at 100; see also LAWRENCE MOSS, LIBRARY OF THE FRIEDRICH-EBERT-STIFTUNG, THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: TOWARDS A MORE PRINCIPLED RELATIONSHIP 4, (2012), <http://library.fes.de/pdf-files/iez/08948.pdf> (critiquing the UN Security Council's use of its deferral power).

<sup>176</sup> U.N. Charter art. 27, ¶ 3; see also Stuart Ford, *The ICC and the Security Council: How Much Support Is There for Ending Impunity?*, 26 IND. INT'L & COMP. L. REV. 33, 42 (2016) (discussing the role of the Security Council in the ICC's investigation in Darfur); Stewart Manley, *Gauging the Economic and Political Costs to China of Article 13(b) Referrals of Sudan and Myanmar to the International Criminal Court*, 7 E. ASIA L. REV. 333, 343–45 (2012) (noting China's reluctance to use its veto power in the UN Security Council to block ICC investigations and prosecutions).

<sup>177</sup> See Tiina Intelmann, *The International Criminal Court and the United Nations Security Council: Perceptions and Politics*, HUFFPOST (July 28, 2013), [https://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council\\_b\\_3334006.html](https://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html) (“On several occasions States have argued that deferral under Article 16 of the Rome Statute of an ICC investigation was necessary; the Council, however, has so far never used this power of deferral.”).

<sup>178</sup> Additionally, based on the allegations, French citizens would not be implicated in an investigation into war crimes in Afghanistan, therefore France would likely foreclose the Security Council as an option for deferral because it would veto deferral. See Ford, *supra* note 176, at 51 (describing France as a “firm supporter” of the ICC and noting its proposed agreement among the permanent members of the Security Council “not to veto resolutions in situations where mass atrocities are being committed”).

<sup>179</sup> See, e.g., Agreement Regarding the Surrender of Persons to the International Criminal Court, Uganda-U.S., at 1, June 12, 2003, T.I.A.S. No. 03-1023 (entered into force Oct. 23, 2003) [hereinafter Article 98 Agreement Uganda-U.S.] (providing that American or Ugandan nationals present in the territory of the other shall not “be surrendered or transferred by any means to the International Criminal Court” or “be surrendered to or transferred . . . to any other entity or third country” in order to “surrender or transfer to the International Criminal Court”).

<sup>180</sup> See, e.g., Paul Meller, *Europeans to Exempt U.S. From World Court*, N.Y. TIMES (Oct. 1, 2002), <https://www.nytimes.com/2002/10/01/world/europeans-to-exempt-us-from-war-court.html> (explaining how by failing to completely reject Article 98 agreements, the EU's response constituted complicity and arguing that it came “close to the blanket immunity for U.S. government employees sought by the Bush administration”).

viding blanket immunity from the ICC's jurisdiction to Americans.<sup>181</sup> This misunderstanding created the perception that the ICC was unable to act when Americans allegedly committed crimes within the territory of states parties that signed Article 98 agreements.<sup>182</sup> The Situation in Afghanistan shattered this misunderstanding and demonstrates how the agreements could create investigative and extradition challenges.

Gathering evidence relating to CIA torture and detention during a formal investigation in the Situation in Afghanistan would require Afghanistan's cooperation as well as that of other countries.<sup>183</sup> If the formal investigation leads the ICC to the territory of Afghanistan, the United States could interpret Article 98 agreements broadly to prevent cooperation with the ICC's investigation into Americans.<sup>184</sup> Although the text of Article 98 agreements does not explicitly support the interpretation that they apply to investigations, there is evidence that they were originally intended to apply to investigations and extraditions alike.<sup>185</sup>

Article 98 agreements create extradition challenges for the ICC<sup>186</sup> because states parties may be obligated to surrender any individual with an open warrant to the ICC who is on their territory.<sup>187</sup> Article 98 agreements do not require extradition of an American wanted by the ICC to the United States; however, they do create an obligation *not* to aid the ICC or any other state in surrendering an

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<sup>181</sup> See Press Release, Boucher, *supra* note 112 (explaining that Article 98 agreements provide "American citizens with essential protection from the jurisdiction of the International Criminal Court, particularly against politically motivated investigations and prosecutions").

<sup>182</sup> See *So-called "Article 98" Agreements*, *supra* note 15, at 2–3 (describing the United States' position that Article 98 Agreements immunized it from the ICC's jurisdiction).

<sup>183</sup> See Abdul Mahir Hazim, *Toward Cooperation Between Afghanistan and the International Criminal Court*, 49 *GEO. WASH. INT'L L. REV.* 615, 653–63 (2017) (arguing that Afghanistan should adopt certain legal and political changes that would increase cooperation with the ICC and allow the ICC to assert jurisdiction over crimes that occurred in Afghanistan).

<sup>184</sup> See Press Release, Boucher, *supra* note 112 (stating that the United States entered into Article 98 agreements in order to protect Americans "from the jurisdiction of the International Criminal Court" and "particularly against politically motivated investigations").

<sup>185</sup> See *LEGISLATIVE HISTORY OF THE ICC*, *supra* note 15, at 162 (acknowledging that the ICC would have no control over the investigation of a person who had been surrendered to a non-state party under an Article 98(2) agreement).

<sup>186</sup> See *id.* at 163 (recognizing the "danger that Paragraph 2 could be used by States Parties as an escape clause from their obligation to surrender to the ICC").

<sup>187</sup> See Rome Statute, *supra* note 9, at 121–22, 139, 141–45 (enumerating a state party's obligations to cooperate with the ICC in Articles 57(3)(e), 86, 89(1), 90, and 93(1)(I)).

American to The Hague.<sup>188</sup> If the ICC issued an arrest warrant for an American in the Situation in Afghanistan, individuals wanted by the ICC would automatically trigger inconsistent obligations with their presence in a state party's territory that signed Article 98 agreements.

A hypothetical scenario is helpful for comprehending the extent of the extradition challenges created by Article 98 agreements:

The ICC issues an arrest warrant for an American citizen, an ex-CIA officer alleged to have committed torture in Poland, who permanently lives in Panama. Panamanian and American authorities both learn that she is present in Panama and is wanted by the ICC. As required by the Rome Statute,<sup>189</sup> the ICC requests Panama's assistance in surrendering the ex-CIA officer to the ICC to stand trial. However, the United States moves to enforce its Article 98 agreement with Panama and threatens to withdraw millions of dollars in aid if Panama surrenders the ex-CIA officer to the ICC. In an effort to assist the ICC and Panama, Costa Rica—which does not have an Article 98 agreement with the United States—issues an extradition request to the Panamanian government for the ex-CIA officer. Panama agrees to extradite the ex-CIA officer to Costa Rica, but the United States again moves to enforce its Article 98 agreement with Panama because Costa Rica's extradition request does not specifically prohibit Costa Rica from surrendering the individual to the ICC.

There are infinite outcomes to this hypothetical scenario because Article 98 agreements prevent states parties from acting *and* assisting other states parties not bound by Article 98 agreements. This next Part recommends specific actions that the ICC and states parties could take to delegitimize Article 98 agreements.

#### IV

#### PROPOSALS FOR DELEGITIMIZATION

This Part argues that recognizing the extent of potential conflicts between Article 98 agreements and the ICC's mission in the Situation in Afghanistan should serve as a catalyst for permanently delegitimizing the agreements. In addition, this Part proposes two approaches to delegitimizing Article 98 agreements through ICC prosecution of Americans in the Situation in Afghanistan. First, this Part

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<sup>188</sup> See, e.g., Article 98 Agreement Afg.-U.S., *supra* note 113, at 1 (prohibiting the surrender of an American to the ICC without "express consent" of the United States); Article 98 Agreement Uganda-U.S., *supra* note 179, at 1 (same). For a more comprehensive explanation of extradition to and from the U.S., see MICHAEL JOHN GARCIA & CHARLES DOYLE, CONG. RESEARCH SERV., 98-958, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES 1-3 (2010).

<sup>189</sup> See *supra* note 187 and accompanying text.

discusses how “soft law”<sup>190</sup> can serve to delegitimize the agreements, focusing on acculturation. Second, this Part considers how states parties could permanently delegitimize Article 98 agreements with or without ICC prosecution by formally withdrawing from the agreements. Finally, this Part considers the potential ramifications associated with withdrawal.

### A. *Acculturation*

Despite potential challenges, the ICC would necessarily create conflicts like those discussed in Section III.C’s hypothetical by moving forward with the prosecution of Americans in the Situation in Afghanistan. As an international institution, the ICC can influence the behavior of states parties when it comes to Article 98 agreements through a soft law approach known as acculturation.<sup>191</sup> Acculturation is a mechanism which “induces behavioral changes through pressures to assimilate.”<sup>192</sup> In the context of Article 98 agreements and the Situation in Afghanistan, the ICC has already initiated the acculturation process of signaling that Article 98 agreements lack legitimacy by completely ignoring their existence and potential effect on states parties in the Situation in Afghanistan. By proceeding with prosecution, the ICC would further facilitate the acculturation process by creating conflicts between states parties’ obligations under both the Rome Statute and Article 98 agreements in order to force states parties to choose between the ICC and impunity. If states parties surrender Americans wanted by the ICC instead of complying with Article 98 agreements, the process of acculturation could render the agreements meaningless over time.<sup>193</sup>

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<sup>190</sup> See, e.g., Dinah Shelton, *Soft Law*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW* 68, 69 (David Armstrong ed., 2009) (describing “soft law” as “any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior”).

<sup>191</sup> See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 626 (2004) (arguing that acculturation is an important “mechanism of social influence” and is compatible with the unique structure of human rights regimes). Goodman and Jinks argue that acculturation plays an important role in affecting poorer countries’ adoption of international human rights norms and regimes. *Id.* at 650–55, 655 tbl.1 (comparing the differences in basis of influence, behavioral logic, forms of influence, and results between coercion, persuasion, and acculturation).

<sup>192</sup> *Id.* at 626.

<sup>193</sup> See *id.* at 652–53 (noting that because human rights “norm adoption does not correlate with the economic wealth or development of countries” acculturation leads governments to adopt human rights policies and “global scripts” regardless of powerful states’ interests in doing the same, and offering adoption of human rights norms for children and decolonization as examples of acculturation).

### B. *Withdrawal*

States parties might be prompted to withdraw from their Article 98 agreements with the United States by actual or perceived conflicts created by the Situation in Afghanistan. All Article 98 agreements include a provision allowing either party to withdraw from the bilateral agreement by notifying the other of its intent to terminate.<sup>194</sup> If states parties withdraw from Article 98 agreements—particularly in the context of the Situation in Afghanistan—they could face consequences from the current U.S. administration. Specifically, the United States could withdraw myriad types of aid from countries that really need it.

Although mass withdrawal would make significant strides toward permanently delegitimizing Article 98 agreements, withdrawal is only valid with respect to acts or allegations against Americans arising *after* the effective date of termination.<sup>195</sup> Therefore, withdrawal would only prospectively delegitimize Article 98 agreements, and the United States could still enforce the agreements to prohibit states parties from surrendering Americans in the Situation of Afghanistan. Even if withdrawal would not affect the Situation in Afghanistan, it would allow states parties to comply with their obligations to the ICC should future cases against Americans arise, and, like ICC prosecution, withdrawal could signal to other states parties that Article 98 agreements lack legitimacy.

### CONCLUSION

Since the United States began negotiating Article 98 agreements with ICC states parties, these agreements have threatened to undermine the ICC's anti-impunity mission. The Situation in Afghanistan has already helped make strides toward permanently delegitimizing Article 98 agreements by rejecting the previously held belief that Article 98 agreements completely immunized Americans from the ICC's jurisdiction. If the ICC Prosecutor investigates and prosecutes Americans for alleged crimes in the Situation in Afghanistan, conflicts between states parties' obligations under the Rome Statute and their Article 98 agreement will arise. Regardless of states parties' actions, prosecuting those responsible for grave crimes committed in the Situation in Afghanistan is vital to reaffirming the ICC's commitment

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<sup>194</sup> See, e.g., Article 98 Agreement Uganda-U.S., *supra* note 179, at 2 (“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.”).

<sup>195</sup> See, e.g., *id.* (“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.”).



to fighting impunity and the broader goal of international criminal law in giving victims a voice.