The Continuing Struggle on the Jurisdiction of the International Criminal Court

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I. Introduction

On 31 December 2000 President B. Clinton took a very important and far-reaching decision. Literally in the last hours of the last day of the signing period provided for by Art. 125, para. 1 of the Rome Statute he authorized the U.S. signing of the treaty creating the International Criminal Court ('the Court').

With the signature of the United States and the one of Israel, also on 31 December 2000, the current number of signatures grows to 139 States while 27 signatory States have already ratified the treaty. The new tally of signatures reflects even greater support for the Court than when the Statute was adopted in Rome in July 1998, when 120 States voted for the treaty and only seven against it (among them the United States). It shows that support for the Court is now nearly universal.

The decision by the American president was immediately welcomed by the most interested parties in the United States themselves as well as in signatory States all across the globe. Kofi Annan, the Secretary-General of the United Nations, praised the courage and political vision of President Clinton. For those, who for a long time believed that the future ICC needed the support of the United States, the decision of President Clinton revived hope and confidence that eventually the United States will reassume its traditional role in building the institutions of a peaceful and better world and that it will one day, together with the other signatory States of the Statute, promote the rule of law and international justice through active participation in the ICC.

Despite the very understandable satisfaction, indeed joy over the decision of President Clinton one cannot overlook that his signing statement of 31 December contained some elements which warrant caution. Nobody can or should overlook that once again the well-known U.S. argument that the Rome Statute allegedly is 'flawed'[1] was reiterated.

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* The views expressed in this article are those of the author alone and do not necessarily reflect the views of the German government.

1 The President's statement said in the relevant paragraph: 'In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over

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How must one interpret such a statement? Clearly it contains a reiteration of the well-known American criticism that Art. 12 on preconditions to the exercise of jurisdiction is not based exclusively on the nationality principle and the related demand that only the consent of the home State of the perpetrator can lead the Court to have jurisdiction. Furthermore, the next American administration was seemingly encouraged to pursue the negotiating course of the outgoing administration aimed at bringing about a de facto amendment of the jurisdiction system of the Statute or another form of exemption for U.S. nationals. One does not have to be a prophet to forecast that in some circles in Washington such a recommendation will not fall on deaf ears. Clearly, the difficult struggle to fully safeguard the integrity of the Statute and in particular its jurisdictional regime under Art. 12 is not yet over.

It is against this background and because of the absolutely decisive importance of the jurisdiction regime of the future Court that it seems timely and appropriate to recapitulate the sometimes rather tough discussions and negotiations which took place on this subject since the Diplomatic Conference in Rome in 1998. For this it will be necessary to review the developments, informal or more formal discussions during the six sessions that the ICC PrepCom held in 1999 and 2000. It is already known - also through numerous media reports - that the basic negotiating situation in the PrepCom has been by and large consistently the following:

On the one side, an active and influential delegation of the United States, dissatisfied in particular with Art. 12 and the territoriality principle contained therein, therefore preparing the ground and exploring ways and means to de facto alter the Statute or to bring about an exemption for American nationals from the jurisdiction of the Court as long as the United States are a non-State party.

On the other side, the like-minded States, committed to fully safeguard the integrity of the Rome Statute, with EU countries, playing together with countries such as Argentina, Australia, Canada, Norway, South Africa, many other African countries and Switzerland, a crucial role in the effort to prevent a further weakening of the jurisdiction and co-operation regime of the Statute.

This picture would be very incomplete and incorrect if one were not to emphasize the steady support, indeed enormous contribution that the NGO Coalition for the International Criminal Court and its leading member organisations have given to the effort to fully safeguard the integrity of the jurisdictional system of the Rome Statute. Through their relentless and untiring effort the NGO Coalition and in particular Human Rights Watch, Lawyers Committee for Human Rights, Amnesty International and the Woman's Caucus made clear that they regard themselves as advocates and 'guardians' of the Rome Statute. They saw a possible dilution of the jurisdiction as contained in Art. 12 as a fundamental threat to the progress achieved in Rome. For many like-minded States it was a source of encouragement that time and again problematic aspects of various proposals floated by the United States were in the first instance identified and criticised by able and knowledgeable lawyers of American human rights organisations.

personnel of States that have ratified the Treaty, but also claim jurisdiction over personnel of States that have not.'

II. Art. 12: The Core of Contention and the Opposition of the United States

To put things into perspective it seems appropriate to recall that the able and resourceful U.S. delegation in Rome may well be counted among the most successful - if not the most successful - participants of the Rome Conference. More specifically, with regard to the preconditions to the exercise of jurisdiction as contained in Art. 12 it must be recalled that the American side can rightly claim a decisive role in reducing the Court's jurisdiction to the current situation in which the Court can act only in cases that involve the territory or citizens of countries that accept its jurisdiction. In general, many States participating in the Rome Conference were forthcoming even to restrictive U.S. proposals and were ready to accommodate even difficult U.S. concerns because they regarded eventual acceptance of the Statute by the United States as being of utmost importance.

On 23 July 1998, six days after the conclusion of the Rome Conference, Ambassador D. Scheffer was able to present in a United States Senate Hearing an impressive array of features of the Rome Statute in which the U.S. delegation had achieved its objectives.[2] In his words these achievements included:

> '- an improved regime of complementarity, meaning deferral to national jurisdictions, that provides significant protection, although not as much as we had sought;
> - a role preserved for the UN Security Council, including the affirmation of the Security Council's power to intervene to halt the Court's work;
> - sovereign protection of national security information that might be sought by the Court;
> - broad recognition of national judicial procedures as a predicate for co-operation with the Court;
> - coverage of internal conflicts, which comprise the vast majority of armed conflicts today;
> - important due process protections for defendants and suspects;
> - viable definitions of war crimes and crimes against humanity, including the incorporation in the statute of elements of offences (We are not entirely satisfied with how the elements have been incorporated in the treaty, but at least they will be a required part of the Court's work. We also were not willing to accept the wording proposed for war crimes covering the transfer of population[3] into occupied territory.);

2 See S. H. 105-724, pp. 9-27.

3 It should be noted that this U.S. concern has meanwhile been laid to rest in the Draft Elements of Crimes adopted on 30 June 2000, through an appropriate proviso achieved in

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- some progress on recognition of gender issues;
- acceptable provisions based on command responsibility and superior orders;
- an Assembly of States Parties to oversee the management of the Court; reasonable amendment procedures; and
- a sufficient number of ratifying States before the treaty can enter into force, namely 60 governments have to ratify the treaty.'

With regard to jurisdiction and to current Art. 12 Ambassador D. Scheffer also correctly stated that the United States together with others defeated initiatives to empower the Court with universal jurisdiction as had been proposed, in particular, by Germany.[4] It is a fact that the United States also had a decisive role in that the now famous South Korean proposal[5] was, with the assistance of some others, more or less 'negotiated away' at the last minute. As is known the South Korean proposal was favoured by the overwhelming majority of the delegations in Rome and normally, if there had not been common opposition by the five permanent members of the Security Council, would presumably have been the natural choice for settling the critical issue of jurisdiction.[6]

The eventual result was current Art. 12 as suggested by the compromise proposal of the Bureau of the Rome conference. It requires the ratification of the territorial State or the State of nationality of the suspect as the prerequisite for the exercise of the regular, not Security Council-based jurisdiction in a given case. This was and continues to be a very prudent and cautious, if not restrictive approach. The territoriality principle and the nationality principle are since long recognized universally by international law as solid bases for the exercise of jurisdiction.[7] Who could seriously dispute that, first and foremost, the territoriality principle and then the nationality

close American-German co-ordination concerning this war crime as contained in Art. 8, para. 2 (b)(VIII). Footnote no. 44 reads: 'The term "transfer" needs to be interpreted in accordance with the relevant provisions of humanitarian law,' see UN Doc. PCNICC/2000/INF/3/Add.2.

4 See UN Doc. A/AC.249/198/DP.2, 23 March 1998.

5 See UN Doc. A/CONF.183/C.1/L.6, 18 June 1998.

6 For a summary of the negotiations at Rome see H.-P. Kaul and C. Kreß, 'Jurisdiction and Co-operation in the Statute of the International Criminal Court: Principles and Compromises', in: 2 *YIHL* (1999), pp. 143-175; see also H.-P. Kaul, 'Special Note: the Struggle for the International Court's Jurisdiction', in: 6 *Eur. J. Crime, Criminal L. Criminal Justice* (1998), pp. 364 et seq.

7 See H.-P. Kaul 'Preconditions to the Exercise of Jurisdiction', in: A. Cassese, (ed.), *Commentary on the Rome Statute for the Establishment of the International Criminal Court* (2001); S. A. Williams, 'Art. 12', in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court.*

principle are the two classic grounds recognised by international law for the exercise of jurisdiction?[8] In addition, international law recognizes the authority of the State where a crime occurs to delegate its territorial based jurisdiction to a third State or international tribunal.

At the same time, when assessing this key compromise of the Statute one cannot fail to note that the regular jurisdiction of the Court under Art. 12 is rather weak. Only the fulfilment of the quite restrictive preconditions that either the State on the territory of which the crime was committed (territorial State) or the State of which the suspect is a national (nationality State) are a party to the Statute will lead to the Court having jurisdiction. Acceptance of the Statute by the custodial State or the victim State do not result in the Court having jurisdiction. Therefore, if there is an internal war - the most common form of conflict today - and neither the territorial State nor actually the nationality State are a State party or do not consent ad hoc and if there is no Security Council referral, perpetrators of core crimes will have nothing to fear from the ICC. It will be so even if they should be in the custody of a State party or of a State whose nationals (for example UN peace-keepers) have been killed by the perpetrator. Moreover, the regular jurisdiction under Art. 12 is further weakened by numerous procedural hurdles and so-called safeguard provisions, such as the one contained in Art. 18, applicable only to the regular jurisdiction triggered by a State complaint or by the prosecutor. In general, the most serious deficit of Art. 12 itself is the omission of the custodial State in the list of nations that could provide a jurisdictional link for the ICC. A provision including the custodial State would have avoided an important loophole. It would have meant in particular that core crimes committed during an internal conflict in a non-State party could have been prosecuted at least if the suspect had come into the custody of a State party. In general, the territory of State Parties would have become a risky place to be for perpetrators of such crimes. Thus, deterrence and prevention emanating from the ICC would have been increased. In practice, the non-inclusion of the custodial State in the jurisdictional regime and consequently a jurisdictional regime based only on the criteria of territoriality and nationality will mean that the ICC will not be able to exercise its regular jurisdiction over genocide and crimes against humanity, even if they are committed by a government terrorizing parts of the population of the country in question on 'its' territory, unless the State represented by this government has ratified the Statute. This situation marks a painful weakness of the general jurisdictional regime of the future ICC.

8 For a thorough analysis of the U.S. position on Art. 12 see M. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position, in: 63 *Law and Contemporary Problems* (2000) pp. 1-51; see also M. Bergsmo, 'Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court and Their Possible Implications for the Relationship between the Court and the Security Council', in: 69 *NJIL* (2000), pp. 87-113.

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All in all, the final compromise text of Art. 12 in fact represents a significant accommodation, since it is a dramatic compromise from broader proposals that were supported by an overwhelming majority of other nations.

Nevertheless, in the aftermath of the Rome conference it became increasingly clear, time and again, that the United States took a very critical position with regard to the jurisdiction compromise as contained in Art. 12.[9]

In his statement in the 53rd General Assembly Ambassador D. Scheffer made clear that Art. 12 in the U.S. view of the Statute Art. 12 was the most important of the 'flaws that render it unacceptable' and that 'our fundamental concern is, in the absence of a Security Council referral the Court asserting jurisdiction over non-party nationals.'[10] At later occasions U.S. opposition because of 'flaws in the Rome treaty' was bolstered, at least for a certain while, with the argument that Art. 12 violated international treaty law because only States that are party to a treaty are bound by its terms.[11] This argument trying to use Art. 34 of the Vienna Convention on the Law of Treaties was later dropped as it would be refuted quite easily.[12] But it was emphasized again that the United States were adamantly opposed to Art. 12.

What was and what continues to be the main reason behind this rejection? In the meantime, the motives behind the U.S. concerns about preconditions have become clear. It is feared that Art. 12 creates a theoretical potential that the regular jurisdiction of the Court under this provision would one day become relevant for a U.S. national if the suspected is to be involved in core crimes committed on the territory of a State party. In terms of the Statute, this risk is greatly diminished and made theoretical in particular through the implications and safeguards of the complementarity regime of the Statute. For a State that is able and willing to prosecute also its own nationals for core crimes, Art. 17 to 19 offer an unsurmountable wall of protection that its own national criminal jurisdiction has absolute priority. But this was and is seemingly not enough for the United States. What is sought is a 100 % exemption from any possibility or any risk that the Court might have jurisdiction over U.S. personnel before the United States become a party to the treaty. This is why the Rome Statute continues to be denounced as 'flawed.'[13] The U.S. view has became clear after Rome, that no matter how many safeguards exist to prevent unjustified prosecution it is better to bring about a situation in which the Court simply would not have even a theoretical possibility of jurisdiction.[14]

It is obvious that such a view amounts to a demand to somehow alter the Statute adopted in Rome. Consequently, the United States announced to discuss with other governments their fundamental concerns about the Rome treaty with a view to solving this problem. On the other side, it was to be expected that the 120 States who in Rome had voted for the Statute, among them in particular the like-minded States and the rapidly increasing number of signatory States or States even with ratification would not easily agree to some kind of alteration or de facto amendment of the Statute outside the regular amendment provisions of Art. 121.

On 8 December 1998 the 53rd General Assembly decided to hold in 1999 and 2000 several sessions of the ICC Preparatory Commission in order to elaborate Draft RPE and the Draft EOC. In a reference meant to cover U.S. concerns, the Assembly asked the PrepCom also to 'discuss ways to enhance the effectiveness and acceptance of the Court.'[15] Thus, the stage was set for further discussions in which serious differences of view concerning the regular jurisdiction of the Court under Art. 12 between the United States and the overwhelming majority of the member States of the PrepCom would again emerge.

III. Efforts to Prepare the Ground for a Change of the Statute

During the First session of the PrepCom (16-26 February 1999) it was a matter of satisfaction for most delegates that the work to elaborate Draft RPE and Draft EOC had a reasonably good start also. It was also encouraging that the delegation of the United States, despite its negative vote in Rome, took part in a co-operative and constructive manner.

At the same time, a pattern evolved which would repeat itself also at later PrepCom sessions: The U.S. delegation under Ambassador D. Scheffer engaged in a number of intensive contacts and consultations with the aim of fostering understanding and support for the U.S. demand to somehow change the jurisdictional issues related to Art. 12. The objective of these talks seemed to prepare the ground to make the Statute more acceptable to Washington and to explore which changes and

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9 See D. Scheffer, *supra* note 3, p. 13: 'Our position is clear. Official actions of a non-party State should not be subject to the Court's jurisdiction if that country does not join the treaty, except by means of Security Council action under the UN Charter.'

10 See statement by Ambassador D. Scheffer before the Sixth Committee of the 53rd General Assembly, The International Criminal Court, 21 October 1998.

11 See D. Scheffer 'The United States and the International Criminal Court', in: 93 *AJIL* (1999), pp. 12-22.

12 For criticism of the treaty law argument see H.-P. Kaul and C. Kreß, *supra* note 5; see also G. Hafner, K. Boon, A. Rübesame and J. Houston, 'A Response to the American View as Presented by Ruth Wedgwood', in: 10 *EJIL* (1999), pp. 115 et seq.; A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', in: 10 *EJIL* (1999), pp. 159 et seq.

13 See M. Scharf, *supra* note 8.

14 See Lawyer's Committee for Human Rights, *The International Criminal Court, The Case for US Support* (1998), pp. 21-24.

15 See UN Doc. A/RES/53/105, para. 4; see also UN Doc. A/RES/54/105, para. 3.

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procedures might have the best chances to be acceptable to as many delegations as possible. It was made clear that Art. 12 and the preconditions for the exercise of jurisdiction would be in the centre of the envisaged changes and that insofar another 'compromise' was necessary. Text proposals were not yet presented.

It is not surprising that these intensive lobbying efforts, because of the importance of the Rome Statute so painfully achieved, were immediately reported in American and other media.[16] Immediately, they also stirred suspicion among NGO observers and delegations that this was the preparation to reopen the treaty to renegotiation especially with regard to jurisdiction.

In this situation, the Court-supportive group of the like-minded countries, most of their 62 members already being signatory States, reacted by a decision of which the full importance would reveal itself only later. On 26 February 1999 it adopted, under the chairmanship of Australia, five principles as common guidance for the work of the like-minded group.[17] Though the significance of these understandings on that day seemed somewhat unclear, it was obvious that principle '(4) to fully safeguard the integrity of the Statute adopted in Rome' contained some kind of a mutual pledge. It was a pledge not to admit any changes which would further dilute the effectiveness and independence of the future Court.

During the Second session of the PrepCom (26 July to 13 August 1999) the course of discussion on the well-known U.S. concerns with regard to part 2 of the Statute, in particular the jurisdiction regime, essentially repeated itself. Beside the negotiations on the RPE and EOC, the U.S. delegation undertook even more comprehensive and intensive bilateral lobbying with the aim of fostering support for its 'ideas' to make the Statute acceptable. One obvious difficulty for like-minded States consisted in the strictly bilateral nature of these lobbying efforts. This led to the often time-consuming and demanding necessity for other delegations to keep track of the

[16] See e.g., U.S. Lobbies on War Crimes Court: Administration Fears Political Prosecution of Americans, Washington Post, 26 February 1999, p. A 22; See US Seeks Changes to Accept International Criminal Court, The Washington Times, 26 February 1999, p. A 70.

[17] The text of these principles of 26 February 1999 reads:

> 'Members of the Like-minded Group are, in particular, committed to the following principles:
>
> (1) to complete the tasks assigned to the Preparatory Commission in Resolution F as early as possible;
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> (2) to sign and to ratify the Rome Statute as early as possible;
>
> (3) to encourage other States, through appropriate contacts and to the extent possible, to sign and to ratify the Rome Statute as early as possible;
>
> (4) to fully safeguard the integrity of the Statute adopted in Rome;
>
> (5) to work jointly for the Rome Statute's early entry in force.'

American efforts and contacts in order to reassure oneself that others had not been inclined 'to give away more' with regard to concessions on the Statute. It speaks for the cohesion and solidarity of like-minded States that apparently in most cases such possible fears or suspicions turned out to be unfounded.

The U.S. delegation did not submit any text proposals. According to the account given by delegations the American side presented in its bilateral consultations with other States more or less consistently the following 'ideas:'

The Administration would be prepared to sign the Statute and recommend it to Congress for ratification if in particular the following could be achieved. There should be a binding formula which should ensure full protection for U.S. military personnel engaged in official activities (i.e., UN operations, individual or collective self-defence, NATO operations, other types of military operations etc.). As a general rule the use of force not manifestly unlawful should not be covered by the Statute. Consequently, such use of force in official activities should be outside the jurisdiction of the Court. At the same time this binding formula in question should not cover internal armed conflicts and major human rights violations and other atrocities committed therein. To achieve the outlined approach one option would be to change the system of complementarity without touching the current wording of Art. 17 as contained in the Statute. Also Art. 12 of the Statute as such would not have to be amended. With regard to procedure, many creative possibilities existed to achieve this, for example through a protocol, a resolution of the GA with an agreement with a binding formula as annex, an interpretative statement or declaration etc. The binding formula as outlined should be binding on all signatories. The binding effect should be so strong that the formula in question could be changed in the future only in accordance with Art. 121 on amendments.

Most delegations seemingly listened to these efforts to prepare the ground for some alteration of the Statute with interest but remained non-committal. Behind the scenes there was obviously serious concern with regard to the integrity of the Statute. Other States pointed to the undoubtedly positive fact that the United States remained interested in the ICC project and were edging nearer to the Statute. It was argued that as long as the American side only presented 'ideas,' but not concrete text proposals, the most appropriate approach to be taken was 'wait and see.'

It cannot surprise that the NGO Coalition and in particular American Human Rights groups followed these discussions intensively and with considerable concern. For example, in an NGO letter addressed to delegations at the end of the August PrepCom the fear was expressed that the latest American proposals would amend the treaty and weaken the Court.[18] It was stressed that the substantive essence of these binding guarantees for maximum protection for U.S. servicemen was categorically unacceptable, whatever procedural packaging they were presented in - an amendment, a protocol or an interpretative understanding. At the same time like-minded

[18] See letter of Human Rights Watch to delegates, 9 August 1999.

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countries were encouraged to maintain, on the basis of the five principles of the like-minded group as mentioned above, an approach of 'constructive engagement' with the American side.

During the Third session of the PrepCom (29 November-17 December 1999) the course of discussions was somewhat different. While the U.S. delegation in bilateral talks and consultations reiterated its well-known concerns and arguments regarding the jurisdictional regime and Art. 12, it did not present new 'ideas' or even a text proposal on how to deal with these issues. Instead it presented in the Working Group on Rules of Procedures and Evidence a complex 'Proposal concerning Art. 17, 18 and 19 of part 2 of the Rome Statute concerning jurisdiction, admissibility and applicable law.'[19] For many delegations it became quickly clear that this proposal was geared at achieving in the critical field of jurisdiction and complementarity additional restrictive 'safeguards' in the form of rules open to restrictive interpretations.

It is therefore not surprising that the various elements of the U.S. proposal for rules on Art. 17, 18 and 19 were met in the PrepCom with very little enthusiasm. One important counter argument was that the very delicately balanced Art. 17, 18 and 19 were in themselves a self-contained regime, which did not need further elaboration through RPE in particular if these rules were not in full conformity with the Statute. Other delegations criticised that the U.S. proposal contained various complex notions, with unclear content not to be found in the Statute. Fear was expressed that the possible introduction of such complex and critical notions in the RPE would lead to complications, risk of misinterpretation and protracted back and forth between the Court and concerned States, in particular, if these States were not acting 'bona fide.'

Given this situation, it became clear rather soon that not too much of the elements contained in the comprehensive proposal would be acceptable. Eventually a compromise was arrived at which incorporates at least important parts of the U.S. proposal for a rule on Art. 17 on complementarity. According to Rule 51 of the Draft RPE the Court may consider inter alia information that a State may choose to bring to the attention of the Court showing that its Courts meet internationally recognised norms and standards for an impartial prosecution.[20]

19 See UN Doc. PCNICC/1999/WGRPE/DP.45, 2 December 1999.

20 See Rule 51 of the Finalized Draft Text of the Rules of Procedure and Evidence, UN Doc. PCNICC/2000/INF/3/Add. 1, 12 July 2000.

IV. A Proposal to Change the Jurisdiction and Co-operation Regime of the Statute Emerges

At the beginning of the year 2000 a situation was reached in which the repeatedly and openly declared intent of the United States to somehow achieve an alteration of the Statute with the explicit aim of an exemption for U.S. personnel was so well-known that most governments of the now almost 100 signatory and like-minded States were acutely aware of it. In reaction, calls on all levels, including the political level, to fully safeguard the integrity of the Statute had multiplied.[21] The member States of the European Union, on their side, had meanwhile adopted as standard language the demand that the work of the Preparatory Commission had to 'respect the letter and spirit of the Rome Statute and the balance achieved therein.'[22]

Shortly before the Fourth session of the PrepCom (13-31 March 2000) the United States conveyed to other States a rather complex package proposal which immediately became the focus of intensive discussions and consultations at the PrepCom. It consisted of the following two parts dealing with co-operation and jurisdiction:

Proposed Text of Rule to Art. 98 of the Rome Treaty

'The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international agreement.'

Proposed Text to Supplement Document to the Rome Treaty

'The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a UN Member State, and such directing

21 See, for example, the statement by Foreign Minister J. Fischer in the German Bundestag on 24 February 2000 during the first reading of the bill on the ratification of the Rome Statute of the International Criminal Court, in which he said '... another goal in this framework must be to ensure that those States sceptical of the Court do not water down the compromise agreed in Rome. Germany had hoped that Rome would come up with a more robust arrangement on the competence of the Court. This aspect must not be weakened further. The integrity of the Rome Statute must be preserved so that the Court's jurisdiction is not diluted;' see also the interview of Canadian Foreign Minister L. Axworthy with the New York Times in which he said: 'But there has to be flexibility on the U.S. side. They have to adjust their sights now too and recognize that they are not going to get an exemption from this court. That's pretty clear. They have been told that,' see U.S. Resists War Crimes Court as Canada Conforms, New York Times, 22 July 2000.

22 See press releases of the Finnish Presidency of the European Union, 26 July and 29 November 1999.

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> State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the UN Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.'[23]

While many delegations were still exploring in extensive exchanges also with the U.S. delegation the implications and legal consequences of this package proposal and the envisaged procedural ways and means to make it work, lawyers of the NGO Coalition for an International Criminal Court on 19 March provided a first commentary. The paper entitled 'A Short Analysis of the Proposed Texts for Art. 98 and the 'Supplemental Document'' was quickly circulated among all delegations at the PrepCom. It developed in a sober and lawyerly manner, in particular, the following points:

This text would prevent the Court from exercising jurisdiction beyond the surrender stage except where the State of the accused's nationality or the Security Council gave its consent.

The proposal would be tantamount to giving a veto to the State of nationality of the accused or the Security Council permanent members; proposals to this effect were firmly rejected at Rome.

The proposal would be inconsistent with the Statute by adding agreements of the ICC to the interstate agreements contemplated by Art. 98 (2).

The proposal purports to amend the Statute through the Rules and a Supplemental Document, contrary to Art. 121.[24]

It was obvious that this comprehensive two-part proposal could not be discussed in a formal manner at this PrepCom. Delegates needed time to 'digest' the meaning and legal implication of its components, to explain them to their respective governments with a view to obtaining in good time appropriate instructions. At the same time it became increasingly clear, that virtually the entire NGO Coalition including all of its American member organisations such as Human Rights Watch, Lawyers Committee for Human Rights as well as the Woman's Caucus and Amnesty International would resolutely oppose it. A general feeling seemed to emerge that despite the common wish to bring the United States to a constructive relationship 'as a good

[23] This proposal has already been published and commented upon; see e.g., B. Zagaris, PrepCom to Finish Work on Procedure and Elements of Crime While Status of U.S. to the Court Undecided, in: 15 *IELR* (2000); R. Wedgwood, The Fall of Rome, contribution circulated at the Sixth PrepCom (27 November-8 December 2000), p. 6, note 30; M. Scharf, *supra* note 8, p. 51.

[24] Because of the significance of this contribution from the NGO Coalition for the opinion-building process at the PrepCom, this paper is annexed to this contribution as Annex 1.

neighbour' to the Court the prize to be paid in terms of the integrity of the Statute and effectiveness of the Court was simply too high.

This was also the broad agreement which after the March PrepCom gradually developed within the member States of the European Union. Most EU partners seemed to feel that the U.S. proposal presented them with a very serious dilemma: On the one side the strong and sincere desire based on well-understood interests of EU member States themselves to enable the United States to participate in the International Criminal Court; On the other side the commitment to the letter and spirit of the Statute and to its integrity. After careful analysis of the elements of the U.S. proposal EU member States came to the conclusion that the acceptance of that proposal would be equivalent to substantive modifications of key provisions of the Statute related to the jurisdiction of the Court including those related to the role of the Security Council and those related to co-operation with the Court. While the EU for these reasons considered the proposal as not being acceptable it also communicated to Washington at the end of May its desire to continue a constructive dialogue with the United States and other non-signatory States and its readiness to examine further proposals which would fully respect the integrity, balance and fundamental principles of the Rome Statute.

The Fifth session of the PrepCom (12-30 June 2000) had as its primary task to complete the well advanced work on the RPE and on the EOC. On its first day the U.S. delegation introduced an amended version of the first part of the above two-part proposal intended to prevent the surrender of U.S. nationals to the ICC. The proposal required the addition of a rule to the RPE for Art. 98 to allow the Court itself to enter into agreements preventing surrender to the ICC.[25] The proposal contained the following text:

> '2. The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with international agreements applicable to the surrender of the person.'

When the usual process of intensive scrutiny of the amended proposed rule for Art. 98 started, it was again the NGO Coalition which already on 16 June was able to provide delegations with a widely circulated legal analysis.[26] Examining various critical elements of the American proposal the paper concluded that the proposed rule was aimed at further limiting the ICC's power to request the surrender of a person to the Court and thus would have the effect of amending the Statute. Before that, American media had already described the U.S. initiative as an attempt to weaken the ICC.[27]

[25] See UN Doc. PCNICC/2000/WGRPE(9)/DP.4*, 13 June 2000.

[26] See the paper 'A Short Analysis of the Proposed US Rule for Art. 98', 16 June 2000.

[27] See U.S. Pushes to Weaken World Court on Atrocities, New York Times, 12 June 2000.

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Some days after the formal introduction of the U.S. proposal in the working group by Ambassador D. Scheffer[28] a full debate in the working group on the proposal demonstrated overwhelming scepticism, if not outright criticism or objections. One main concern were serious doubts about the compatibility of the rule with the Statute. The Portuguese EU Presidency speaking on behalf of 15 EU member States and 14 associated States put forward the conclusion that 'the proposal raises important technical and substantive problems with regard to provisions of the Statute relating to the way the Court will operate and that it contains elements that do not adequately reflect Art. 98, para. 2 of the Statute.'[29] After the debate, the delegation of Germany distributed among like-minded States an analytical paper aimed at options for a compromise formula which would be in conformity with the Statute.[30]

Following some difficult negotiations, a compromise text was developed for a rule which - while introducing some degree of ambiguity - can certainly be interpreted in harmony with the Statute and which would not negatively effect negotiations on the relationship agreement at the next session of the PrepCom. The result was a rule which reads as follows:

> 'The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under Article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.'[31]

Furthermore, in order to balance this compromise and also as some kind of a bar against attempts to later use the relationship agreement for indirect jurisdictional changes of the Statute, the European Union and the like-minded States insisted on the inclusion of a proviso in the report on the PrepCom proceedings which indicated how the above rule should be interpreted. It reads as follows:

> 'It is generally understood that Rule 9.19 (i.e., Rule 195, paragraph 2) should not be interpreted as requiring or in any way calling for the negotiations of provisions in any particular international agreement by the Court or by any other international organization or State.'

[28] See U.S. Statement on Proposed Rule 9.19 (2), 19 June 2000.

[29] See Statement by the Representative of Portugal on Behalf of the European Union, 23 June 2000.

[30] See U.S. Proposal on Art. 98 as Contained in DP.4: A Legal Analysis of the Proposal and Options for a Compromise Formula in the Light of the Debate in the Working Group on Friday, 23 June 2000. 'A Contribution by Germany for the Group of Like-minded States', 25 June 2000; this paper is annexed to this contribution as Annex 2.

[31] This is current Rule 195, para. 2 of the Draft Rules of Procedure and Evidence, see UN Doc. PCNICC/2000/INF/3/Add. 1, 12 July 2000; on the need to interpret this Rule in line with the Statute, see the contribution by I. Gartner in this volume.

The above compromise cleared definitively the way for adoption of the Draft RPE and also of the Draft EOC by general agreement. The timely completion of the work on these two important and indispensable side-instruments of the ICC Statute was regarded by most delegations as a very significant progress towards the effective establishment of the ICC in The Hague.[32]

The interpretation of Rule 195 by the U.S. side was made clear by Ambassador D. Scheffer in various interviews with American media.[33] He also indicated that the American side would come back to try to negotiate an exemption. But in general the positive tone of his comments on the ICC project was noted by many observers.

The debate on the International Criminal Court in the sixth committee of the 55th General Assembly in October 2000 proved to be very encouraging. The main result was a surprisingly strong and clear affirmation of the integrity of the Statute and thereby a rejection of possible attempts to change it through provisions of, in particular, the envisaged relationship agreement. Ambassador D. Scheffer reiterated the U.S. concerns on jurisdiction and the wish to achieve 'workable arrangements.'[34] But even China 'urged caution in proposing amendments to the Statute in any way other than those provided in it.' The member States of the European Union strongly reaffirmed their demand to 'respect the letter and spirit of the Rome Statute and the balance achieved therein.'[35]

The Sixth PrepCom (27 November-8 December 2000) all in all went smoothly. On its agenda were three new items, namely draft texts for financial rules and regulations, for an agreement on privileges and immunity and a relationship agreement between the Court and the United Nations.

Some had assumed that the United States would take the discussion on the draft relationship agreement as the opportunity to introduce the second part of its comprehensive two part package proposal either in the above or in an amended form. However, this did not happen. Instead, it formally introduced two proposals aimed at

[32] For a detailed report on the Fifth PrepCom see C. Keitner, *Drafting the International Criminal Court: Trials and Tribulations in Article 98 (2)*, unpublished manuscript (on file with the author).

[33] See U.S. Gains a Compromise on War Crimes Tribunal: Keeps Role as it Tries to Exempt Americans, New York Times, 13 June 2000.

[34] See statement of Ambassador D. Scheffer before the Sixth Committee of the 55th UN General Assembly, 18 October 2000.

[35] See Statement of the French EU Presidency before the 55th UN General Assembly, 18 October 2000, Creation de la Cour Penal Internationale.

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strengthening or clarifying certain aspects of the complementarity regime.[36] Because of lack of time their consideration was postponed to the seventh session of the PrepCom (26 February-9 March 2001).

Another noteworthy episode was a quickly ill-fated attempt to explore, whether one should open up the optional possibility of unpopular Art. 124 (Transitional provision) for ratifying States to use a period of seven years for an opt-out with regard to war crimes also for signatory States. The rationale behind this idea was clearly to offer a political concession, in particular, to the United States as an encouragement to sign the Statute. The informal suggestion made orally by the co-ordinator for resolution 53/105, experienced Chilean diplomat Cristian Maquiera quickly turned out to be unrealistic. As such an approach in the view of most delegations also amounted to a de facto amendment of the Statute it became clear within one day that the proposal would be unable to find the necessary measure of general agreement. The extent and intensity of critical reactions were so strong that the protagonists of this idea quickly renounced to present it in a written form. Whether this 'idea' may reemerge one day at later discussions of the PrepCom is unclear.

V. Towards the Early Establishment of the Court

Especially the developments of the year 2000 have again demonstrated that the momentum towards the early effective establishment of the Court in The Hague is now irreversible. 139 signatures, now 27 ratifications, more ratifications and accessions to come, continuing good progress in the PrepCom negotiations in New York - all indicators point into the same direction. The effective inauguration of the Court in The Hague is coming closer, day by day. In all likelihood we will witness it already in 2002 or 2003.

It is in the logic of this development that the somehow slim chances of those who might continue to try to bring about substantive changes or an exemption from the Statute seem to have been reduced to irrelevance. The general mood in the PrepCom is now so full of aversion and opposition against a change of or exemption from the Statute that - regardless what the attitude of individual States may be - it seems impossible to achieve the necessary measure of general agreement which such a substantive change would require. For those who are committed to the integrity of the Statute and of in particular its key provisions on jurisdiction and co-operation there is therefore every reason to be calm and confident.

At the same time it must be the common hope of all supporters of the Court that the United States will eventually participate in the International Criminal Court. The Court needs the support of the United States, in moral, political, material and other

[36] See UN Doc. PICNICC/2000/D.P.1 and UN Doc. ICNICC/2000/WGICC-UN/D.P. 17, 7 December 2000.

terms. Given the support and popularity that the Court project enjoys already in American civil society and the mainstream[37] of this great country, there continues to be hope that over time our American partners will increasingly recognize that their concerns are already fully met by a great number of 'safeguards' which have been included in the Statute as it stands. It would, no doubt, be most welcome to all supporters of this new judicial institution if the United States could make its peace with the Statute to which it has contributed so much.

[37] See, for example, the remarkable testimony in support of the ICC given by M. Leigh for the American Bar Association to the House International Relations Committe on the American Servicemembers Protection Act Bill, 25 July 2000.

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Annex 1: A Short Analysis of the Proposed Texts for Art. 98 and the 'Supplemental Document'

The recently-circulated proposals for an Art. 98 rule and for a supplemental document to the 'Rome Treaty' would limit the powers of the Court and change carefully crafted provisions of the Statute which were fundamental to the compromise reached at Rome.
This paper develops the following points:

- This text would prevent the Court from exercising jurisdiction beyond the surrender stage except where the State of the accused's nationality or the Security Council gave its consent.
- The proposal would be tantamount to giving a veto to the State of nationality of the accused or the Security Council permanent members; proposals to this effect were firmly rejected at Rome.
- The proposal would be inconsistent with the Statute by adding agreements of the ICC to the interstate agreements contemplated by Art. 98 (2).
- The proposal purports to amend the Statute through the Rules and a Supplemental Document, contrary to Art. 121 and 51 (4).

If accepted, these proposals would severely limit the competence of the Court. They would be inconsistent with important substantive and procedural provisions of the Statute and, in particular, would seriously affect at least Art. 12 (Preconditions to the exercise of jurisdiction), 13 (Exercise of jurisdiction), 16 (Deferral of investigation or prosecution) and 27 (Irrelevance of official capacity).

Furthermore, the proposed texts would require the Preparatory Commission and later the Assembly of States Parties to circumvent Art. 121 (Amendments) of the Statute. Any such circumvention of Art. 121 would be beyond the competence of these bodies.

The proposed texts for a rule and a 'Supplemental Document' form one comprehensive two-stage proposal. The 'Proposed Text of Rule to Art. 98 of the Rome Treaty' provides a necessary platform for the 'Proposed Text to Supplemental Document to the Rome Treaty.'

The two texts are inherently linked, with the rule providing the means to bind the Court to the substantive provisions in the 'Supplemental Document.' This 'Supplemental Document' will be the 'relevant international agreement' provided for in the 'Proposed Text of Rule to Art. 98 of the Rome Treaty.' Without the proposed Art. 98 rule, the proposed text for the 'Supplemental Document' would be unable to bind the Court.

Preparatory Commission negotiations on the Rules (and the Elements) must be finalized by 30 June 2000. After that date negotiations on other instruments will continue. Given the sequencing of the Preparatory Commission's mandate, the proposal for the Art. 98 rule is the first stage of the two-stage proposal. This paper will therefore analyze first the proposed rule related to Art. 98 and then turn to the substantive proposal relating to the 'Supplemental Document to the Rome Treaty.'

1. Issues Related to the 'Proposed Text of Rule to Art. 98'

Art. 98 (2) of the Statute contains an exception to the regular international co-operation and judicial assistance regime set out in the Rome Treaty. Art. 98 (2) only allows an exception in the case of agreements between a 'requested State' and a 'sending State.' However, nowhere does Art. 98 refer to any obligations of the Court itself under a 'relevant international agreement.' The proposed rule would expand the Art. 98 (2) exception to encompass not only agreements between such States, but also agreements between the ICC and States or between the ICC and other entities including, but not limited to, the United Nations. It would do this by referring to 'its (i.e., the Court's) obligations under the relevant international agreement.' Such a rule, providing the Court with the capacity to narrow its own powers, would be a clear deviation from the Statute. It would be a de facto amendment of the Statute through the Rules.

Furthermore, acceptance of the proposed rule for Art. 98 would provide a basis in the RPE, clearly not provided for in the Statute, for future negotiations between individual States and the Court for exclusions under Art. 98 (2).

It should be noted also that the proposal introduces the phrase 'acceptance of a person into the custody of the Court,' where Art. 98 (2) refers only to a request for surrender. This language restricts the powers of the Court in a manner not authorized by the Statute.

2. Issues Related to the 'Proposed Text to Supplemental Document to the Rome Treaty'

The 'Proposed Text to Supplemental Document to the Rome Treaty' would fundamentally modify the jurisdictional balance that was negotiated with great care at Rome. This text would prevent the Court from exercising jurisdiction beyond the surrender stage except where the State of the accused's nationality or the Security Council gave its consent. The proposal would do so, not through the amendment procedures laid down in Art. 121 of the Statute, but through a 'Supplemental Document' (presumably the Relationship Agreement with the UN provided for under Art. 2) that would bind the Court through a rule to Art. 98. This would be an improper use of the Rules of Procedure and Evidence and the Relationship Agreement under Art. 2.

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2.1 Truncating the Exercise of Jurisdiction

The proposal would prevent the Court from continuing to exercise its jurisdiction beyond the point of seeking surrender of the national of a 'directing State' who is accused of a crime on the territory of a State party, unless the conditions in the proposal are fulfilled.

Under the proposed text the Court would be able to exercise its jurisdiction up to the point of seeking surrender. Investigations may already have been authorized under Art. 15 and been conducted, and an arrest warrant and indictments issued. In fact, proceedings under Art. 18 and even under Art. 19 may already have been completed. The Prosecutor may have made co-operation requests and arrest warrants may have been issued. The proposal would prevent the Court from proceeding past this stage solely because the State of nationality or the Security Council did not consent. Such a limitation would seriously affect the credibility and perceived legitimacy of the Court.

2.2 The 'Proposed Text to Supplemental Document' and Art. 12 of the Statute

By requiring the consent of the 'directing State' to surrender one of its nationals (unless the Security Council decides otherwise), the proposal would transform consent of the State of nationality of the accused into a condition for the Court's effective exercise of its jurisdiction. For all practical purposes this rewrites the 'either or both of' language of Art. 12 (2) and would be a de facto amendment of the Statute. Such a requirement was considered and decisively rejected at Rome.

2.3 The 'Proposed Text to Supplemental Document' and Art. 16 of the Statute

The Proposal would prevent the Court from exercising its jurisdiction over nationals of non-State Parties which do not consent, except where the Security Council expressly authorizes measures under Chapter VII against the specific 'directing State.' Where the Security Council has authorized measures under Chapter VII, the permanent members would have a veto over Court proceedings, including those against their own nationals. This is contrary to the carefully crafted compromise over the role of the Security Council under Art. 13 and 16.

2.4 The 'Official Acts Exemption'

The reference to the acknowledgement of the 'directing State' that its national was acting within its overall direction is in essence an 'official act' exemption. This exemption was proposed and decisively rejected at Rome. Where official capacity is relevant it is explicitly mentioned in the Statute, for example with regard to official capacity (Art. 27), command responsibility (Art. 33), superior orders (Art. 28), and plan or policy requirements (Art. 7 and 8). Such an exemption would be tantamount to a repudiation of the Nuremberg principle, in which the official position is no bar to prosecution for genocide, crimes against humanity and war crimes.

Conclusion

These proposals would effectively amend the Statute with respect to some of its most carefully crafted core provisions. Such amendments are contemplated only in accordance with the provisions of Art. 121, and should not be undertaken through the Rules and the Relationship Agreement.

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Annex 2: U.S. Proposal on Art. 98 as Contained in DP.4

A Legal Analysis of the Proposal and Options for a Compromise Formula in the Light of the Debate in the Working Group on Friday, 23 June 2000: A Contribution by Germany for the Group of Like-minded States

I. The Purpose of this Paper

The formal debate in the Working Group about the proposal contained in DP.4 has been very useful. It has emerged clearly from this debate to what extent the proposal in DP.4 is inconsistent with Art. 98, para. 2 of the Statute and the relevant legal arguments have been clearly spelled out by numerous delegations. At the same time all delegations have demonstrated a constructive spirit and some interesting ideas have been expressed pointing in the direction of possible compromise formulas.

This paper draws on the interventions made by like-minded delegations in the course of the debate in the Working Group. In doing so it - first - seeks to present a comprehensive summary of those interventions which have presented detailed legal reasoning as to what extent the proposal in DP.4 is consistent with Art. 98, para. 2 of the Statute and as to what extent it deviates from this provision. It is important to have the precise meaning of Art. 98, para. 2 of the Statute in mind when seeking a compromise formula which is 100% consistent with the Statute. The paper - in its second part (under III) - identifies options for compromise formulas - again drawing on ideas put forward by like-minded delegations during the debate. The paper suggests that these options be explored with the United States in the course of this week.

II. The Legal Evaluation of the Proposal in DP.4 in the Light of the Debate of the Working Group

1. The Element of the Proposal in DP.4 Which Is Consistent With the Art. 98, para. 2 of the Statute: the Inclusion of Multilateral Agreements

The proposal in DP.4 refers not only to bilateral but also to multilateral international agreements. This is consistent with Art. 98, para. 2 of the Statute which does not contain language which would restrict its application to bilateral agreements. The concrete example which has been given for a multilateral agreement which may come within the scope of Art. 98, para. 2 of the Statute, that is NATO's status of force agreement, is pertinent.

2. The Elements of the Proposal in DP.4 Which Are Inconsistent With the Art. 98, para. 2 of the Statute

(a) Which Are the International Agreements Within the Meaning of Art. 98, para. 2 of the Statute? (or: What Is the 'Software' for the Operation of Art. 98, para. 2 of the Statute?)

The basic assumption underlying the proposal in DP.4 has been made clear during its presentation in the following words: 'the text of the Statute does not limit or characterize the relevant international agreements.' Numerous interventions in the debate of the Working Group have made it clear that this assumption is legally untenable. At the same time these interventions have clearly spelled out that the international agreements which are relevant to Art. 98, para. 2 of the Statute - and which have been usefully called the 'software' of this provision - are clearly characterized and hereby limited. It has been made clear that the relevant 'software' has two characteristics, the first one relating to the parties, the second one relating to the content of the international agreement.

(1) Art. 98, para. 2 of the Statute Is Confined to International agreements Between the Requested State and Another State or Other States. Art. 98, para. 2 of the Statute Does Not Extend to International Agreements Concluded by the Court

Art. 98, para. 2 of the Statute refers to 'a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements.' The language of Art. 98, para. 2 of the Statute thus makes it plain that the international agreement within the meaning of Art. 98, para. 2, must pose an obligation for the requested State *vis-à-vis* a sending State. Contrary to this, the proposal in DP.4 suggests that the international agreement in question poses an obligation for the Court. Under the proposal the Court could itself enter into an agreement and hereby accept an obligation not to proceed with a request for surrender. The proposed rule seeks to 'change' Art. 98, para. 2 of the Statute to the effect that the conclusion of an agreement between the Court on the one side and an international organization or a State on the other side may become part of the relevant 'software.'

(2) Art. 98, para. 2 of the Statute Does Not Apply to all Kind of 'Agreement Applicable to the Surrender of the Person' But Is Limited to International Agreements

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'Pursuant to Which the Consent of a Sending State is Required to Surrender a Person of That State to the Court'

It has been pointed out during the debate that the words 'consent of the sending State' contain a number of important characterizations of the relevant 'software.' They may be summarized as follows.

'Sending State' is a term of art which makes it plain that Art. 98, para. 2 of the Statute does only apply to those international agreements where you have (a) sending State(s) on the one side and (a) receiving State(s) on the other side. The agreement must pose the specific obligation for the receiving State(s) to obtain the consent of the sending State(s) before the surrender by the receiving State of a person of the sending State to the Court. This characterization has been deliberately **included** in Art. 98, para. 2 of the Statute. Art. 98, para. 2, has been inserted in the Statute to meet the concerns of some delegations that existing status of forces agreements might conflict with an unqualified obligation to surrender suspected persons to the Court. The term 'status of forces agreements' had been used in the draft version of Art. 98,para. 2 of the Statute. The term 'status of forces agreements' has been replaced by the words 'international agreements pursuant to which the consent of a sending State is required to surrender that person to the Court.' It was, however, the common understanding that only the term 'status of forces agreements,' not the concept would hereby be replaced.

It has been made clear by many interventions that the proposal in DP.4 does not reflect this characterization of the content of the international agreements under Art. 98, para. 2 of the Statute. The words 'agreements applicable to the surrender of the person' do not require the existence of a sending State nor do they refer to the requirement to obtain the consent of that very State prior to surrender. This means that the proposal in DP.4 would cover, for example, an agreement by which State A accepts that no national of State B who is living in State A may be surrendered by State A to the Court.

(3) Due to Its lack of Characterization of the International Agreements the Proposal in DP.4 Has the Potential to Immeasurably Widen the Scope of Application of Art. 98, para. 2 of the Statute

Many delegations have concluded their legal analysis by saying that the proposal in DP.4 functions as a sort of open ended opt out-clause which would allow States and even the Court to create obstacles to the surrender regime under Part 9 by concluding whatever kind of international agreement. This, it has been said, goes beyond the limited function of Art. 98, para. 2 of the Statute.

(b) The concept of 'Acceptance of a Person Into the Custody of the Court' Has No Basis in Art. 98, para. 2 of the Statute

This point has been made in almost all interventions. In particular, it has been made clear by reference to Art. 58, para. 7 of the Statute, that the voluntary appearance of a person before the Court is entirely distinct from the surrender of a person to the Court and that the concept of 'acceptance of a person into the custody of the Court' therefore falls outside the scope of Art. 98, para. 2 of the Statute.

III. Options for a Compromise Formula

Apart from the very useful clarification of the relevant legal issues some ideas on options for a compromise formula have been expressed during the debate.

1. The Issue of 'Acceptance of a Person Into the Custody of the Court'

The United States have indicated flexibility in this respect. While this indication must be welcomed it must be borne in mind that the element of 'acceptance of a person into the custody of the Court' is only of secondary importance. And it should be noted that the inconsistency of this element with Art. 98, para. 2 of the Statute is particularly obvious.

2. The Issue of Multilateral Agreements

A number of delegations have indicated that it might help the United States to clarify that Art. 98, para. 2, applies to both bilateral and multilateral agreements. A compromise formula could therefore contain such clarification.

3. The Characterization of the Relevant International Agreements or: How to Deal With the Relevant 'Software'

One option which has been alluded to during the debate is to stick as closely as possible to the compromise language in Art. 98, para. 2 of the Statute itself. Such an option seems perfectly acceptable and guarantees consistency with the Statute.

Another option which came out of the debate would be not to elaborate too much on the 'software' in substance but rather to focus on the procedural aspect that it is for the Court to apply Art. 98, para. 2 of the Statute and to decide which agreements come within that provision. It would not seem beyond reach to find a compromise

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formula in this direction. In such case it would be crucial, however, to make a specific reference in the new rule to Art. 98, para. 2 of the Statute and, as it has been suggested during the debate, to specify the distinct and separate nature of the rule in an appropriate manner in order to guarantee the consistency of the new rule with Art. 98, para. 2 of the Statute.

The German delegation would suggest to explore both options in consultations with the United States and other interested States.

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