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.”1 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

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in Afghanistan”). 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.

Fatou Bensouda, chief prosecutor of the ICC, announced that she would seek authorization to formally investigate the alleged crimes. Victims of the alleged crimes committed in the Situation in Afghanistan had the opportunity to submit “representations”—views, concerns, and expectations—to the ICC. 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.

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2. 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 (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.


6. 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. It also directly linked allegations against members of the CIA for crimes committed in European states to the Situation in Afghanistan. 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. 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. Second, the United States attempted to immunize Americans from ICC jurisdiction by creating “Article 98 agreements.” Article 98 agreements are highly controversial bilateral agreements, signed by
the Bush administration and states parties,\textsuperscript{12} that purport to provide Americans with immunity at the ICC.\textsuperscript{13} Despite questions about their legality under international law, the international community has long believed that the agreements immunized Americans from ICC jurisdiction.\textsuperscript{14}

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.\textsuperscript{15} 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\textsuperscript{16} 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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\textsuperscript{12} 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).
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\textsuperscript{13} 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).
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\textsuperscript{14} 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).
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\textsuperscript{15} 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 (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.”).
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\textsuperscript{16} See infra Section III.A.2.
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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. One hundred thirty-nine states signed the Rome Statute establishing the Permanent International Criminal Court—the ICC, the first permanent court of its kind. 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.” In 2002, the Rome Statute entered into force after it was ratified by sixty signatory states. Since 2002, 123 countries—referred to as “states parties”—have signed and ratified the Rome Statute.

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. The ICC has jurisdiction ratione materiae (subject-matter jurisdiction) over crimes that fall within “either the definition of war crimes, crimes against humanity

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20 Rome Statute, supra note 9, at 3–5; About, Int’l CRIM. COURT, supra note 1 (giving the history of creation of the ICC).


22 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.

and/or genocide” as defined by the Rome Statute, and as of July 17, 2018, over crimes of aggression. 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). The ICC maintains jurisdiction ratione personae regardless of where an alleged crime was committed. Similarly, it has jurisdiction ratione loci over any individual—regardless of citizenship—who commits crimes on the territory of a state party.

B. Principles and Procedures

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

24 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 (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).


26 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”).

27 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.

28 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).

inciple 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. The Rome Statute mandates that in the first instance, states make good faith efforts to initiate domestic proceedings—investigation and prosecution—where alleged crimes are within both domestic and ICC jurisdiction. In its discretion, the ICC initiates proceedings only when it concludes that a state is “unwilling or unable” to act. 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-

30 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.icij.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).

31 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-%20E%20-%20Complementarity%20in%20 Transitional%20Justice%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).


33 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 hypoethical 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; thus, in practice, the ICC considers complementarity well before a situation becomes a case.

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. 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. The ICC has also broadly interpreted the phrase “unwilling or unable” to act, and the vagueness of this operative language can result in apparently contradictory complementarity determinations even for individuals implicated in the same situation.

34 See Rome Statute, supra note 9, at 101 (outlining requirements for finding complementarity in a given case).
35 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).
36 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).
38 See HANDBOOK ON COMPLEMENTARITY, supra note 29, at 42–43 (giving an example of the broad interpretation of the phrase).

There are three ways in which the ICC can initiate proceedings—typically a preliminary examination or formal investigation—into a “situation.” 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. 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). 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.

An investigation may also originate with the Prosecutor, who has the authority to initiate an investigation proprio motu (independently). Without a referral by the Security Council or states parties,
the Prosecutor acting *proprio motu* is required to conduct a preliminary examination.\(^{45}\) 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.\(^{46}\)

*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.\(^{47}\) However, it is for this reason that *proprio motu* investigations are susceptible to claims of bias and politically motivated prosecution.\(^{48}\) 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.\(^{49}\) The years-long preliminary examination into the Situation in Afghanistan reflects this political reality.\(^{50}\) In 2017, Prosecutor Bensouda sought authorization

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\(^{45}\) 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.

\(^{46}\) 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).


\(^{48}\) *See, e.g.*, id. (discussing critiques of *proprio motu* investigations).

\(^{49}\) *See* Rome Statute, *supra* note 9, at 100 (explaining the process by which the Prosecutor can initiate a *proprio motu* investigation).


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.\footnote{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).} At the preliminary examination stage, admissibility is determined by assessing complementarity and the gravity of the crime(s).\footnote{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”).} 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.\footnote{Supra note 7, ¶ 240–74.}

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.\footnote{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)).} 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.\footnote{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 OTP’s}
Victims Participation and Reparations Section solicited victim “representations” or statements in the Situation in Afghanistan.57

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.58 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.59 When the Pre-Trial Chamber authorizes a formal investigation *propter motu*, it has determined that “potential case[s]” likely to arise out of a formal investigation are admissible and in the interests of justice.60

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

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”).

57 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’t 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”).


59 See *Preliminary Examination: Afghanistan, Int’t 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).

60 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)”).


62 Id.
the suspects or summons to appear before the Court. 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. States parties must assist in the surrender of an individual wanted by the ICC. 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.

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. Despite the contention that the ICC was incompatible with American democracy, President Clinton signed the Rome Statute in 2000. President George W. Bush reversed course after the statute came into force by suspending the United States’ signature.

63 Id.
64 See, e.g., Rome Statute, supra note 9, at 126 (“The accused shall be present during the trial.”).
65 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).
66 See infra Section III.C.3 (discussing surrender and extradition).
67 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).
68 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).
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.70

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.71 Article 98 agreements prohibit parties from aiding the ICC or other states in surrendering an American to the ICC.72 However, the agreements have also been broadly interpreted as prohibiting cooperation with the ICC at any phase of investigation or prosecution of an American.73 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


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

72 Id. at 1 (noting that the agreements “remove the ICC’s oversight function”).

73 See infra Section III.C.3.
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repealed in 2008)—the Bush administration successfully negotiated approximately one hundred agreements.74

B. Legal Bases for Article 98 Agreements

Article 98 includes two provisions—Article 98(1) and 98(2)—that address circumstances where states parties’ duties and obligations to the ICC potentially conflict with their agreements with another state.77 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.78 Article 98(2) ambiguously refers to conflicts between an ICC request for surrender and “international agreements.”79 Article 98(2) states:


75 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.hsl.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).

76 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.

77 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.”).

78 Id.

79 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.\footnote{Id. (emphasis added).}

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.\footnote{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).} Specifically, it argued that international agreements included an entire category of unanticipated agreements: Article 98 agreements.\footnote{Id. at 5.}

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.\footnote{Article 98 does not state a time frame for entering into agreements. See Rome Statute, supra note 9, at 148.} 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.\footnote{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).} 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).\footnote{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”).}

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—
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parties’ intent. Second, Article 98 agreements violate international treaty norms, namely because, when enforced, they are inconsistent with the object and purpose of the Rome Statute. Lastly, the negotiation tactics employed by the Bush administration—primarily with underdeveloped and developing countries—further undermine the legitimacy of Article 98 agreements. 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. 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

86 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).


89 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”).

90 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 immunity91 and international agreements.92 The drafters of the Rome Statute understood that states had preexisting agreements with—and duties to—other states when they ratified the Rome Statute.93 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.94 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.95 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.96

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

91 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”).


94 See Rome Statute, supra note 9, at 148.

95 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).

96 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). 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. SOFAs define the legal rights and responsibilities of foreign military forces operating in the territory of a friendly state. 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.

States primarily enter into SOFAs to ensure that foreign military personnel “respect the law of the receiving State.” 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. Article 98 agreements are different from SOFAs because they do not establish any criminal jurisdiction, which makes impunity much more likely. Additionally,
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. 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.” Although largely a term of art, the “object and purpose” of a treaty is best defined as a “treaty's essential goals.” 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.” Therefore, states parties must act in accordance with the Rome Statute’s goal of eradicating impunity. States parties' obligations include refraining from taking actions that under-

(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).

104 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”).


106 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”).

107 Tan, supra note 19, at 1130.

108 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. 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. 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. 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. 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.” 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 . . . .”

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

109 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).

110 See supra Section II.A.

111 See Jonas & Saunders, supra note 105, at 571 (describing the object and purpose of treaties as “a necessarily abstract concept”).


114 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.\textsuperscript{115} The European Union issued guidelines for states parties coerced into signing Article 98 agreements.\textsuperscript{116} 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.\textsuperscript{117} If the United States breached its duty to investigate or prosecute individuals, states parties could refuse to comply with their non-surrender duties.\textsuperscript{118} 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.\textsuperscript{119}

3. Predatory Negotiation Tactics

The Bush administration aggressively negotiated Article 98 agreements following the passage of the ASPA.\textsuperscript{120} Before 2008, the

\textsuperscript{115} 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 U.S over Criminal Court Exemption Deals, AGENCE FR. PRESSE, June 25, 2003, LEXIS) (alteration in original)).

\textsuperscript{116} 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 Conflicts, 92 GEO. L.J. 1033, 1045 n.93 (2004) (summarizing the EU guidelines issued in response to the Article 98 agreements).

\textsuperscript{117} See EU Response, supra note 88, at 10 (rejecting the possibility of impunity under Article 98 agreements).


\textsuperscript{119} 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.”).

\textsuperscript{120} 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);
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ASPA required the administration to withhold military aid to states that refused to sign Article 98 agreements.\textsuperscript{121} 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.\textsuperscript{122} 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.\textsuperscript{123}

The systemically coercive and one-sided nature of Article 98 agreements offers further grounds to doubt their legitimacy.\textsuperscript{124} 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.\textsuperscript{125} 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-

\textsuperscript{121} See supra note 74 and accompanying text.


\textsuperscript{123} See supra note 74 and accompanying text.

\textsuperscript{124} 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).

\textsuperscript{125} Vienna Convention, supra note 10, at 344.
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.127 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.

126 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).

127 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”\(^{128}\) in Afghanistan after the Taliban refused to hand over al-Qaeda leader Osama bin Laden to the United States.\(^{129}\) American-led forces overthrew the Taliban by materially supporting the Afghan Northern Alliance\(^{130}\) and deploying thousands of American troops, Special Forces, and intelligence officers to Afghanistan.\(^{131}\) Beginning in 2002, the Taliban and other anti-government armed groups conducted insurgency operations against Afghan and American-led forces.\(^{132}\) Despite Afghanistan’s deteriorating security situation, a democratically elected government took power in 2004.\(^{133}\) The security situation in Afghanistan worsened, prompting an increase in the number of American troops in Afghanistan to approximately 100,000 by late 2009.\(^{134}\) Combat missions officially concluded in 2014, but foreign military forces continue to be present in Afghanistan.\(^{135}\)


\(^{131}\) As many as 10,000 U.S. troops were officially present in Afghanistan in 2003. See US Intervention Timeline, supra note 129.

\(^{132}\) See The Taliban Resurgence in Afghanistan, BBC, http://www.bbc.co.uk/history/events/the_taliban_resurgence_in_#fghanistan (last visited Aug. 18, 2018) (detailing the Taliban insurgency’s recruitment tactics and operations against NATO and pro-government forces).


\(^{134}\) 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”).

Afghanistan ratified the Rome Statute and acceded to ICC jurisdiction in 2003. That same year, Afghanistan’s Article 98 agreement with the United States also entered into force. 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.

1. Procedural History

The preliminary examination into the Situation in Afghanistan became public in 2007. 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. Since receiving these communications, the OTP has released annual preliminary examination reports into the Situation in Afghanistan. The 2016 and 2017 reports allege Americans committed crimes relating to the Situation in Afghanistan. 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. Should Prosecutor Bensouda’s request be granted, the OTP will formally investigate the Situation in Afghanistan as evidenced by “the deployment of more troops and an increase in air strikes . . . across Afghanistan”).

137 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. SCHAEPER, 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).
138 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”).
142 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”).
143 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. 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. 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. 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.” Many of the crimes “were designed and implemented as part of a policy to obtain actionable intelligence.” 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.

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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144 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 (noting that “[t]his would be the first time that the ICC has set its sights on US personnel”).

145 Preliminary Examination Report (2016), supra note 37, ¶¶ 253–54 (noting the relevant time period and providing details regarding the allegations).

146 Id.

147 Id. ¶ 255.

148 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”).

149 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.\textsuperscript{150} Determining admissibility entails preliminary complementarity determinations.\textsuperscript{151} 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.\textsuperscript{152} The complementarity determination for Americans in the Situation in Afghanistan is complex because it must consider Afghanistan, other states parties, and the United States.\textsuperscript{153} Understanding why complementarity exists at the preliminary examination phase is important because individuals and states can challenge complementarity in future proceedings.\textsuperscript{154} Furthermore, well-

\textsuperscript{150} 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).

\textsuperscript{151} 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)).

\textsuperscript{152} 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”).


\textsuperscript{154} See Rome Statute, supra note 9, at 102 (listing those entitled to challenge admissibility of a case); see also Nora Beres, MULTI-SCIENCE - 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://wwwni-miskolc.hu/~mircad/publikaciok/2016/ E_feliratozvaE_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.”

## 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. 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. Notwithstanding Afghanistan’s dependence on U.S. aid, the current SOFA does not grant American military contractors immunity from

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155 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.

156 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).

criminal prosecution in Afghanistan, so Afghanistan could conceivably prosecute military contractors.\(^{158}\) 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.\(^{159}\)

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.\(^{160}\) Numerous sources corrobore the Prosecutor’s allegations of CIA torture on the territory of several states parties.\(^{161}\) The allegations specifically refer to crimes between 2003 and 2004 in Lithuania, Poland, and Romania.\(^{162}\) Advocates lodged complaints against Poland and Romania with the European Court of Human Rights (ECHR).\(^{163}\) There are ongoing


\(^{159}\) 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).

\(^{160}\) 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).

\(^{161}\) 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.

\(^{162}\) Preliminary Examination Report (2017), supra note 7, ¶ 254.

\(^{163}\) 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.\footnote{See, e.g., \textit{PRELIMINARY EXAMINATION REPORT} (2017), \textit{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 \textit{GLOBALIZING TORTURE}, \textit{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); \textit{id.} at 93 (criticizing Lithuania’s unwillingness to “re-open the criminal investigation” that was opened in 2010); \textit{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, \textit{Poland Says Washington Stonewalling CIA Jail Investigation}, \textit{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.}

3. \textit{The United States’ Unwillingness to Act}

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

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.


168 See Holder Press Release, supra note 166 and accompanying text.


171 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/torture_report_why_obama_won_t_prosecute_cia_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/2012/09/2012958221965587 (noting that “[t]he decision not to prosecute” CIA torture that lead 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 Ghrabi 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. The Pre-Trial Chamber serves as a check on this power by authorizing any *proprio motu* investigation. 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. 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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172 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).

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

through a resolution. A Security Council resolution requires nine affirmative votes and is subject to the permanent Security Council members’ veto power. However, postponement is rarely in the interest of nine permanent members, and any of the permanent members reserve veto power. 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. However, over time, the United States—with the complicity of the international community—confounded the agreements as


177 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 (“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.”).

178 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”).

179 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”).

180 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”).
DELEGITIMIZING ARTICLE 98 AGREEMENTS

viding blanket immunity from the ICC’s jurisdiction to Americans.\(^{181}\) 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.\(^{182}\) 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.\(^{183}\) 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.\(^{184}\) 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.\(^{185}\)

Article 98 agreements create extradition challenges for the ICC\(^ {186}\) because states parties may be obligated to surrender any individual with an open warrant to the ICC who is on their territory.\(^ {187}\) 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

\(^{181}\) 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”).

\(^{182}\) 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).

\(^{183}\) 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).

\(^{184}\) 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”).

\(^{185}\) 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).

\(^{186}\) 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”).

\(^{187}\) 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)(f)).
American to The Hague. 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, 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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188 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).

189 See supra note 187 and accompanying text.
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December 2018 discusses how “soft law” 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. Acculturation is a mechanism which “induces behavioral changes through pressures to assimilate.” 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.

190 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”).

191 See Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 DUK 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).

192 Id. at 626.

193 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.\textsuperscript{194} 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 \textit{after} the effective date of termination.\textsuperscript{195} 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.

\textbf{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

\textsuperscript{194} 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.”).

\textsuperscript{195} 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.”).
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to fighting impunity and the broader goal of international criminal law in giving victims a voice.