



MEGHAN JAKOBSEN

Immunity versus impunity?

Reconciling Articles 27(2) and 98(1) of the Rome Statute

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I am delighted to introduce a fine paper, "*Immunity v. Impunity? Reconciling Articles 27(2) and 98(1) of the Rome Statute*," by Ms. Meghan Jakobsen. The paper was originally prepared as a Master's Thesis for the Riga Graduate School of Law (RGSL). I served as Ms. Jakobsen's thesis supervisor.

Let me take this opportunity to thank the government of the United States which appointed me as a Fulbright Senior Scholar for two month long visits to RGSL in 2003 and 2004. I would also like to thank the Latvian government, the Swedish government, and the Soros Foundation which support RGSL. Such four-cornered support, public and private, for first class international legal education is truly remarkable. RGSL is a fine institution, providing vigorous legal education, strong both in idealistic goals and practical results.

Ms Jakobsen's thesis is a wonderful example of RGSL excellence. She pursues a difficult legal problem - the apparent contradiction of two parts of the same treaty. The Rome Treaty constituting the new International Criminal Court seems to be of two minds respecting the immunity to be accorded heads of state and other high state officials. Ms Jakobsen's paper looks closely at the legislative history of the Statute and at its formal language and subsequent commentary to conclude that the two articles are in a sense complementary: Article 27 setting out an ideal and Article 98 setting out a practical path. She deals well with both legal and political complexities of the real world of modern international law.

I am glad to recommend the paper to all readers and also to congratulate Ms Jakobsen, RGSL, and RGSL's sponsors for this job well done.

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Table of Contents

Introduction	7
Part One: A Clash of Provisions	9
1.1 Reading the Articles	10
1.2. Drafting History of Article 27	13
1.3 Legal Basis for Article 27	17
1.3.a Article 27(1)	17
1.3.b Article 27(2)	20
1.4 Drafting History and Legal Basis for Article 98	25
1.5 Conclusion to Part One	27
Part Two: Reconciliation	28
2.1 Like-minded versus Non-Aligned	29
2.2 Reconciling Articles 27(2) and 98(1)	34
2.2.a Applicability of Article 98(1) - States Parties	34
2.2.b Applicability of Article 98(1) - Non-States Parties	40
2.4 Conclusion to Part Two	42
Conclusion	43

Introduction

“It can never be lawful for any man to do wrong: but we fall into a great mistake in the use of that word: for we consider a thing to be lawful, which any one may do with impunity.” - Cicero¹

There were delegates from 160 States², representatives from over 200 NGOs, employees from 14 UN specialized agencies, 80 interpreters, 474 members of the press.³ And all the political goodwill in the world. This time, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, it was going to happen: Having been work in progress for over 40 years, the Statute for the Court would become a reality. And it did.

After five weeks of grueling negotiations -- during which delegates, communicating in six different languages, consolidated highly conflicting visions of the Court in a draft text comprised of 17,000 brackets and 200 alternate proposals -- the Rome Statute was finalized in the Italian capital on July 17, 1998.⁴ Such was the exhilaration over the monumental accomplishment that the distinguished delegates rose to their feet after the final vote and cheered.

The elation was undeniably warranted. Never before had the need for an International Criminal Court been more pressing. Despite the promise of *never again* that spurred the creation of the UN, the Universal Declaration of Human Rights and the Convention on Genocide in the immediate wake of World War II, the 50 years that followed had produced 86 million victims of armed conflict and human rights abuse.⁵ The 20th Century had been labeled the bloodiest in human history, and the bloodshed threatened to continue if States could not agree to put an end to impunity for *all* perpetrators. Which amazingly, in Rome, they did. Soldiers, civilians, bureaucrats, diplomats, generals, ministers, presidents or kings

¹ H. Grotius, *On the Law of War and Peace*, translated by A.C. Cambell, A.M. Batoche Books, Kitchener 2001, Book III, Chapter Four, p. 283. Available on the internet at: <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/grotius/Law2.pdf>.

² This was the highest number of nations ever represented at an international UN codification conference. See R. Lee “Introduction - The Rome Conference and Its Contributions to International Law” in R. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*. Kluwer Law International, The Hague, 1999, p. 9.

³ These statistics are taken from R. Lee “Introduction - The Rome Conference and Its Contributions to International Law” in Lee, R. (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*. Kluwer Law International, The Hague, 1999, pp. 14 -15.

⁴ *Ibid.*, p. 13.

⁵ *Ibid.*, p. 1.

- under the Rome Statute all would now be equal under the law and all would be punished.

Or such was at least the intention. But the Statute was, as is any agreement among States, a result of compromise. In the interest of expediency, intention at times gave way to necessity. And despite all the goodwill that surrounded it in Rome, the Statute became flawed by what legal scholars point to as apparent omissions and inconsistencies that lessen the scope and forcefulness of the Statute and the effectiveness of the Court.⁶

One such apparent inconsistency is found in the relationship between the Statute's two Articles on immunity, Articles 27 and 98, which scholars agree will pose problems for the ICC panel of judges destined to reconcile them: Article 27 makes everyone equal before the law, even State officials who might attempt to hide behind immunities attached to their official capacity. Article 98, in contrast, protects some of the very immunity agreements under international law that might provide officials such a shelter of impunity

The drafting history of the two Articles would suggest that Article 27 represents the legal ideal behind the Statute, while Article 98 represents the practical and political reality in which the Statute was created. This thesis seeks to determine whether the two Articles actually conflict, why both were included in the Statute nevertheless and whether and how they can be reconciled.

The focus of the thesis will be solely on diplomatic immunity and personal immunities for Heads of State and senior State officials, which fall under Article 98(1). It will not deal with problems pertaining to extradition agreements, Status of Forces Agreements (SOFAs) and Article 98-agreements, which fall under Article 98(2). Part One will be a detailed review of the drafting history of Articles 27 and 98, while Part Two will examine the possibilities of reconciling Article 27(2) and Article 98(1) in a manner that is both legally sound and politically palatable.

⁶ The lack of a definition of the crime of aggression, the lack of any kind of provisions on drug trafficking, and the exclusion of the crime of terrorism are all examples of such failures. See H. von Hebel and D. Robinson "Chapter Two - Crimes within the Jurisdiction of the Court", in *ibid.*, p. 81-85; and P. Robinson "Chapter 11.7 - The Missing Crimes," in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, pp. 497-525.

Part One: A Clash of Provisions

“On some occasions when it is said that men may lawfully do a thing, the expression only means that doing such act will not subject them to human and legal penalties, but it by no means indicates that the action is strictly conformable to the rule of religion and morality.” - Hugo Grotius⁷

“Does Article 27 of the Rome Statute conflict with international laws on immunity?” a member of the audience asked Judge Tuiloma Neroni Slade of the International Criminal Court (ICC) following a speech on the future of the Court in Brussels in Spring 2004.⁸ “Well, there are apparent conflicts of immunity even within the Statute itself. Look at Article 27 and 98,” Judge Slade replied.

Per Saland, the Swedish chief negotiator in Rome who headed the working group on General Principles of Law that drafted Article 27, concurs: “It is difficult to determine how [Article 27] relates to Article 98 (1) ... It seems there may be a contradiction between the two Articles.”⁹ In fact, consensus exists among most scholars who have dealt with the Statute that the relationship between Articles 27 and 98 is precarious. Exactly how precarious it is depends on how the Articles are ultimately interpreted and reconciled, something this thesis will deal with in Part Two. But, as it becomes evident below, scholars agree that at a minimum Article 98 may interfere with Article 27 to the point of being detrimental to justice.

Judge Slade and Saland were both in Rome, as were several other experts who have since pointed to possible difficulties in reconciling Articles 27 and 98. Certainly, the potential for problems was no less evident then than it is now. To be sure, the pressure to complete the Statute was tremendous; but the pressure to make it workable was even greater. Considering the predicament that might follow, why did negotiators force the marriage of two Articles that they agree were at odds and possibly even incompatible? Because a compromise that included both was vital for the success of the Statute:

⁷ H. Grotius, *On the Law of War and Peace*, translated by A.C. Cambell, A.M. Batoche Books, Kitchener 2001, Book III, Chapter Four, p. 283. Found on the internet at: <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/grotius/Law2.pdf>.

⁸ Judge Slade spoke at the Third Transatlantic Conference on International Criminal Justice: A Transatlantic Dialogue, in Brussels on May 7th. Organizers behind the conference were Leuven Catholic University, Belgium, and Northwestern University School of Law, USA. The author was present at the conference.

⁹ P. Saland mentions these reservations, but does not elaborate further in “Chapter Seven - International Criminal Law Principles” of R. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*. Kluwer Law International, The Hague, 1999, p. 202.

Article 27 represented one of the ideals behind the Statute -- the end to impunity for all State officials. Stepping beyond the boundaries of customary law, however, it also caused the Rome Statute to clash with recognized principles of international law. Article 98 was therefore added as a fix, a procedural practicality that would bring the Statute back into conformity with international law, so States Parties could sign the Statute with ease. Drafters were well aware that the Statute would have no point without Article 27, but no signatures without Article 98. Therefore, they included both.

1.1 Reading the Articles

Article 27 is, in the words of Ambassador Arnold Skibsted, “an expression of principle and a matter of substance,”¹⁰ It is found among the General Principles of Law in Part Three of the Statute. These are the principles -- *nullum crimen sine lege, nulla poena sine lege*, no retroactivity, personal responsibility and, of course, irrelevance of official capacity -- that govern the Statute. Article 98, in contrast, is a “matter of procedure”¹¹ found under International Cooperation and Judicial Assistance in Part Nine of the Statute.

The two Articles read as follows:

Article 27 Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected government representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹²

Article 98 Cooperation with respect to waiver of immunity and consent to surrender

1. 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, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. 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

¹⁰ Interview in June 2004 with His Excellency, Ambassador Arnold Skibsted, who represented Denmark in negotiations on the Rome Statute from 1995 to 2001.

¹¹ Ibid.

¹² The Rome Statute, available on the internet at: www.un.org/law/icc/statute/rome fra.htm.

can first obtain the cooperation of the sending State for the giving of consent for the surrender.¹³

Under Article 27(1), official status cannot be used to shirk criminal responsibility for crimes under the Statute. Nor can official status be used to obtain a reduction of sentence. Under Article 27(2), a claim of immunity based on official status cannot be used to prevent the Court from exercising its jurisdiction, i.e. it cannot be used to avoid arrest and extradition to the Court.

Under Article 98(1), the Court can only require a State to act in contravention of its obligations under international laws on immunity if the Court obtains an immunity waiver from the third State(s) in question. Under Article 98(2), the Court can only require a State to act in contravention of any other obligations it might have under international agreements if it obtains consent from the third State(s) in question.

Reading Articles 27 and 98 back-to-back, the problem between them becomes evident. As Paula Gaeta writes in the Cassese, Gaeta, Jones Commentary on the Rome Statute:¹⁴

“On one hand, Article 27(2) provides that the Court can exercise its jurisdiction over those individuals who, under international law, enjoy personal immunities. On the other, Article 98(1) seems to significantly narrow the scope of Article 27(2). Because of Article 98(1), the Court may find a considerable impediment to the exercise of its jurisdiction over individuals who, as they discharge official functions in a foreign State, enjoy in that State personal immunities by virtue of international law.”¹⁵

To a certain degree, this problem extends to someone discharging official functions in a foreign State who does not necessarily enjoy personal immunities, but who is instead under the protection of a bilateral agreement on division of jurisdiction, e.g. a Status of Forces Agreement, which falls under Article 98(2). That issue, however, is outside the scope of this thesis.

Because one Article is a matter of substance and the other a matter of procedure, it would formally be incorrect to say that the two were incompatible

¹³ Ibid.

¹⁴ It is beneficial to keep in mind here that under Article 12(a) of the Statute, the Court has jurisdiction over nationals from non-States Parties if the crime was committed on the territory of a State Party.

¹⁵ P. Gaeta, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 992.

or contradictory, states Ambassador Skibsted¹⁶, who represented Denmark at negotiations in Rome.¹⁷

“But the limitations that the Statute lays down in the area of cooperation with the ICC will in practice mean that a suspected person with immunity - who would otherwise fall under the jurisdiction of the Court - will not be extradited to the ICC.”¹⁸

This view is taken a step further in the Triffterer Commentary on the Rome Statute, in which Otto Triffterer writes:

“The applicability of all other regulations in the Rome Statute leads to Article 98 which endeavours to avoid a conflict of interest on the State level when cooperation of States is needed to enable the Court to properly exercise the functions assigned to it by the Statute ... However, a failure to proceed successfully according to Article 98 may *in practice* and contrary to the wording of Article 27 ‘bar the Court from exercising its jurisdiction.’”¹⁹

What, concretely, does all this mean? The following hypothetical provides a good example:

A diplomat posted in a State Party, or a senior official visiting a State Party is wanted by the Court for war crimes. The Court has already established its jurisdiction according to the provisions laid down in Article 12 of the Statute.²⁰ The Court wishes the State Party where the wanted person is located to extradite him or her to the Court, so the Court can conduct legal proceedings.²¹ Both diplomats and senior State officials enjoy personal immunities under international law, so asking the State Party, the receiving State, to extradite either places that State in a position of having to contravene obligations under international law. So, under Article 98(1), the Court must ask the home State of the wanted person, the sending State, for a waiver of immunity before it can proceed with a request for assistance or surrender.

However, the sending State is unlikely to favor a member of its diplomatic corps or its senior leadership being on trial at the ICC for war crimes, so it denies

¹⁶ Others, too, have made the point that substance and procedure cannot formally be considered conflicting. In the opinion of this author, however, it is a matter of semantics. If a procedural provision hampers the proper exercise of a substantial provision, the two counteract each other and are for all intents and purposes conflicting. As it is apparent in this paper, numerous scholars on Articles 27 and 98 share the author’s view.

¹⁷ Interview with Ambassador Arnold Skibsted.

¹⁸ Interview with Ambassador Arnold Skibsted. The quote is a translation from Danish: Der er ikke uforenelighed mellem de to bestemmelser. Men de begrænsninger, som statuten opstiller med hensyn samarbejdsforpligtelsen over for ICC, vil i praksis kunne betyde, at en mistænkt immun person - som iøvrigt er omfattet af ICC’s jurisdiktion - ikke bliver udleveret til ICC.

¹⁹ O. Triffterer, “Article 27 - Irrelevance of Official Capacity in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 513.

²⁰ The Rome Statute, available on the internet at: www.un.org/law/icc/statute/rome fra.htm.

²¹ “Under Articles 58 and 59 of the Statute, the ICC may transmit a request for the arrest and surrender of a person accused of an international crime to any State Party on the territory of which that person may be found.” See G. Danilenko, “Chapter 48 - ICC Statute and Third States”

the request. The Court will continue to have jurisdiction in the case, but cannot compel the sending State to extradite.²² Unless the receiving State decides to contravene its obligations towards the third State *or the Court decides to reconcile Articles 27 and 98 so as to eliminate or minimize the problem*, then the wanted person escapes liability on a claim of immunity, something entirely contrary to the intentions of Article 27(2).

Clearly, there seems to be an immunity loophole in the Statute. A detailed history of both Articles gives a good indication as to how and why it came about.

1.2. Drafting History of Article 27

Delegates arrived in Rome with numerous visions and ambitions about the Court. While some found ways of uniting these visions, others found the gap between them too wide. Roughly half the States represented at the Conference ended up dividing into two camps. One became known as the alliance of “like-minded” States, the other, the Movement of Non-Aligned States.²³ The like-minded States envisioned an independent Court with wide-reaching jurisdiction, while the non-aligned States favored a Court tightly controlled by the UN Security Council and with limited jurisdiction.²⁴ This division led to numerous clashes throughout negotiations.

But despite the contrasting ideas, “the principle provided for in this article was uncontested throughout the discussions, and it was relatively easy to agree on its formulation,” Saland wrote on the drafting of Article 27 in Rome.²⁵ In fact, the principle behind the Article, if not the Article itself, was included in the Draft Statute well before Rome.

Although founding an international criminal court had been in the works since the end of World War II, differences -- including the wording of a provision

in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 1885.

²² But “...third States must cooperate with the ICC if the proceedings are triggered by a referral from the Security Council. Refusal to cooperate in this case may constitute a violation of the Third’s States obligations under the UN Charter.” See G. Danilenko, “Chapter 48 - ICC Statute and Third States” in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 1889.

²³ Forslag til lov om Den Internationale Straffedomstol (Danish Bill on the International Criminal Court), available in Danish on the internet at: www.folketinget.dk/samling/20001/lovforslag_som_fremsat/120.htm.

²⁴ Ibid.

²⁵ P. Saland, “Chapter Seven - International Criminal Law Principles” in R. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*. Kluwer Law International, The Hague, 1999, p. 202.

on aggression -- had halted drafting during the Cold War.²⁶ With the break-up of the Soviet Union and the violence ensuing in Yugoslavia, UN Member States agreed to disagree on the definition of aggression and resume work on the Court, the need for which had never seemed more urgent. In 1994, the International Law Commission completed the first Draft Statute and presented it to the UN General Assembly, which responded by creating an Ad-Hoc Committee of experts to develop the Statute. The first Draft Statute contained no provision on irrelevance of official capacity, although it did contain one on personal responsibility.²⁷ A reference to this principle first appeared in Annex II of the Ad-Hoc Committee's report on the Statute, which included a short discussion of general principles of law to be included.²⁸ Yet, including an Article on irrelevance of official capacity in the Statute was not a novel idea. While official work on the Draft Statute had experienced a stand-still during the Cold War years, the Foundation for the Establishment of an International Criminal Court had presented an alternative version of the Statute. This became known as the Bellagio-Wingspread Draft, and it included a provision specifically on irrelevance of official capacity.²⁹

Following the Ad Hoc Committee's report, a Preparatory Committee (PrepCom) was established to continue work on the Statute. In the discussion of substantive issues in Volume I of its report from 1996, the PrepCom examined the irrelevance of official capacity in considerable detail.³⁰ It was also in this report that allusions were first made to possible problems with other immunity laws that later resulted in Article 98.³¹

In Volume II of the report, which was a consolidated version of proposals to the ILC Draft Statute, the PrepCom included under the heading of individual criminal responsibility two options for an Article on official capacity that read as follows:

²⁶ R. Lee, "Introduction - The Rome Conference and Its Contribution to International Law", in *ibid.*, p. 2.

²⁷ According to Triffterer, "[i]t appeared so obviously predominant that a reference in some of the international documents to the irrelevance of official capacity for the exercise of jurisdiction of a permanent International Criminal Court was thought to be superfluous." See O. Triffterer, "Article 27 - Irrelevance of Official Capacity in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, Nomos, Baden Baden, 1999, pp. 507-508.

²⁸ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court (G.A., 50th Sess., Supp. No. 22, A/50/22, 1995), p. 58. Available on the internet at: <http://npwj.org/iccrome/cdrom/index.htm>.

²⁹ O. Triffterer, "Article 27 - Irrelevance of Official Capacity" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 504.

³⁰ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, (Proceedings of the Preparatory Committee During March/April and August 1996) (G.A., 51st Sess., Supp. No. 22, A/51/22, 1996), p. 193.

Irrelevance of official positionProposal 1

[1. This Statute shall be applied to all persons without any discrimination whatsoever.]

The official position of a person who commits a crime under this Statute, in particular whether the person acts as Head of State or of Government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.

2. Immunity

In the course of investigations or procedures performed by, or at the request of the court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law.

Proposal 2Official capacity of the accused

1. The official capacity of the accused, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as an agent of the State shall in no case exempt him from his criminal responsibility under this Statute, nor shall it constitute a ground for reduction of the sentence.

2. The special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court.³²

These two proposals were combined into the following Article during the Committee's third session in 1997:

Irrelevance of official position

1. This Statute shall be applied to all persons without any discrimination whatsoever:

official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.³³

A footnote to the Article indicated that paragraph 2 would need further discussion "in connection with procedure as well as international cooperation."³⁴

A year later, the Article and footnote were included in the so-called Zutphen Draft (named for the place in the Netherlands where it was produced),

³¹ Ibid.

³² Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of Proposals; G.A., 51st Sess., Supp. No. 22, A/51/22, 1996), p. 85. Available on the internet at: <http://npwj.org/iccrome/cdrom/index.htm>.

³³ Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997 (A/AC.249/1997/L.5, 1997), p. 23. Available on the internet at: <http://npwj.org/iccrome/cdrom/index.htm>.

which consolidated all changes put forth following the PrepCom report in 1996.³⁵ The list of persons in paragraph one was considered exhaustive, and so did not include diplomatic agents or members of international organizations, which were then considered as included under paragraph two.³⁶ The Zutphen Draft was 158 pages long and included numerous alternative options -- at times as many as seven -- for a great majority of the Articles. There were, however, no alternative options to this particular Article. It was unanimously agreed upon, and the text was included verbatim in the Consolidated Draft ultimately presented to negotiators at the Rome Conference.³⁷

While the official drafting process took place, NGOs put together two alternative drafts. One became known as the Siracusa Draft, the other as L'Association Internationale de Droit Pénal (AIDP) Model Draft Statute. Although these were not official initiatives, cooperation between the UN and the NGOs was extremely close.³⁸ So close, in fact, that the wording of Article 27 was eventually changed at the recommendation of the head of AIDP, Cherif Bassiouni, who argued that the phrase "This Statute shall be applied to all persons without any discrimination whatsoever" was redundant and misleading.³⁹ It was redundant because a phrase with a similar intent was included in Article 25 on individual responsibility, and misleading because "the application of criminal law does not involve discriminating ..."⁴⁰

In December 1997, the General Assembly considered the work on the Statute far enough along to convene the United Nations Diplomatic Conference in the summer of 1998 to finalize and adopt the Statute. At the conference, the scope of Article 27(1) was widened by making the list of persons non-exhaustive.⁴¹ No disagreement arose as to inclusion of the Article, or to the language of paragraph one, although Mexico -- one of the non-aligned States -- and Spain initially expressed reservations about the language of paragraph two.⁴² These

³⁴ Ibid.

³⁵ Report of the InterSessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands (A/AC.249/1998/L.13, 1998), pp. 44-45. Available on the internet at: <http://npwj.org/iccrome/cdrom/index.htm>.

³⁶ O. Triffterer, "Article 27 - Irrelevance of Official Capacity" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 509.

³⁷ Ibid., p. 506.

³⁸ Ibid., p. 507.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid., p 509.

⁴² P. Saland mentions these reservations, but does not elaborate further. See P. Saland, "Chapter Seven - International Criminal Law Principles" in R. Lee (ed.), *The International Criminal Court*.

were dropped, presumably when issues of immunity under paragraph two were transferred to a different working group tasked with drafting an Article to prevent the Statute from clashing with international laws on immunity -- later to be Article 98.⁴³ Article 27 was completed and included in the Statute without further ado. It was said to be

“one of the clearest manifestations in the Statute of the determination in paragraph five of the Preamble ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to preventing such crimes.’”⁴⁴

1.3 Legal Basis for Article 27

1.3.a Article 27(1)

Article 27(1) caused little stir in otherwise heated negotiations in Rome, perhaps because irrelevance of official capacity was long recognized a matter of international customary law and a ‘must’ for any self-respecting war crimes tribunal.

Heads of State and government as well as State agents of lesser rank (including diplomatic agents) have traditionally enjoyed immunities for acts carried out in their official capacity. These immunities are known as immunities *rationae materiae* or simply functional immunities.⁴⁵

Functional immunities are an extension of the doctrine of State immunity under which no State can exercise its jurisdiction over another: *par in parem non habet imperium* or an equal has no power over an equal.⁴⁶ The purpose of functional immunities is twofold: It prevents interference with the conduct of official affairs through lawsuits (frivolous or legitimate), and it protects State agents from personal liability for official acts of State both at home and abroad.

The Making of the Rome Statute. Issues, Negotiations, Results. Kluwer Law International, The Hague, 1999, p. 202.

⁴³ Ibid., p. 202 and O. Triffterer, “Article 27 - Irrelevance of Official Capacity” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 507.

⁴⁴ O. Triffterer, “Article 27 - Irrelevance of Official Capacity” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 509.

⁴⁵ For extensive overviews of immunities *rationae materiae* and *personae* see the following: P. Gaeta,, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta, P and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 975; S. Wirth, “Immunities, Related Problems, and Article 98 of the Rome Statute” *Criminal Law Forum*, Vol. 12, 2001; and S. Zappala, “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?,” *EJIL(The European Journal of International Law)*, Vol. 12, No. 3, 2001.

Functional immunities thus lift personal responsibility, thereby providing a substantive defense. Furthermore, functional immunities are for life; State agents cannot be held liable for acts carried out on behalf of the State while in office, not even after they leave office. That is *unless* these acts constitute “core crimes” such as genocide, war crimes, or crime against humanity, which, in the words of Salvatore Zappala, “cannot be considered as legitimate performance of official functions.”⁴⁷

Thus, under International Law, all State agents are liable for core crimes, regardless of their rank and the functional immunities attached to it. Indeed, as the ILC commented in the 1996 Draft Code of Crimes against the Peace and Security of Mankind:

“It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.”⁴⁸

The notion of irrelevance of official capacity in international law dates back more than a century.⁴⁹ The Hague Conventions of 1899 and 1907 had provisions for personal responsibility regardless of rank. The Versailles Peace Treaty held Emperor William of Germany directly liable for World War I atrocities, although the Emperor escaped trial on a technicality: The Netherlands, where he was residing, was not a party to the Treaty, lacked extradition treaties with States that were, and refused to hand him over.⁵⁰

Since World War I, in the words of Triffterer, “the idea of holding Heads of State or government responsible has been continuously promoted.”⁵¹ In the period between the two world wars, attempts were made to include the idea in the body of international law. Following the horror of World War II, the Allies were quick to

⁴⁶ S. Wirth, “Immunities, Related Problems, and Article 98 of the Rome Statute”, *Criminal Law Forum*, Vol. 12, 2001, p. 430.

⁴⁷ S. Zappala, “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?” *EJIL*, Vol. 12, No. 3, 2001.

⁴⁸ See the Commentary to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind 1996, available on the internet at: www.un.org/law/ilc/texts/dcodefra.htm.

⁴⁹ Humans have in fact grappled with the question of immunity versus impunity for centuries: In his treatise *On the Law of War and Peace* from 1625, Grotius deals extensively with the subject matter, quoting a variety of Roman and Greek philosophers. See H. Grotius, *On the Law of War and Peace*, translated by A.C. Cambell, A.M. Batoche Books, Kitchener 2001.

Furthermore, while they do not specifically discuss immunity, Ancient Eastern texts like Sun Tzu’s *The Art of War* from 500 B.C., and the Indian *Laws of Manu* from 1500 B.C. discuss the standards for acceptable treatment of enemies in situations of war.

⁵⁰ O. Triffterer, “Article 27 - Irrelevance of Official Capacity” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 502.

agree that impunity for crimes that had so shocked the world was not acceptable, so Articles on irrelevance of official capacity were included in both the Nuremberg Charter⁵² and the Charter for the Tribunal of the Far East⁵³ (Article 7 and 6, respectively). After the Nuremberg trials, the notion was restated in Principle III of the Nuremberg Principles of 1950, which reads as follows:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.⁵⁴

The Nuremberg Principles --a series of principles laid down in Nuremberg case law -- were signed without debate by every UN Member State, and thus, it has been argued, instantly became customary law.⁵⁵ Article III of the Nuremberg Principles formed the base for Article IV of the Genocide Convention of 1948.⁵⁶ Likewise, the principle was restated in various ILC Draft Codes on the Peace and Security of Mankind, where it was eventually widened to include officials of all ranks and capacities, even those acting only *de facto* as State officials.⁵⁷ Finally, the principle was included in Article 7 of the Statute for the Yugoslavia War Crimes Tribunal (ICTY) and Article 6 of the Statute for the Rwanda War Crimes Tribunal (ICTR).⁵⁸

In its advisory opinion on reservations to the Genocide Convention in 1951, the International Court of Justice held:

“The principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation.”⁵⁹

⁵¹ Ibid, p. 503.

⁵² Charter of the Nürnberg International Military Tribunal, available on the internet at: www.derechos.org/nizkor/nuremberg/judgment/ncharter.html.

⁵³ As a result of the political decision not to prosecute Emperor Hirohito, there was, however, no reference to Head of State in the Charter for the Far East Tribunal. See O. Triffterer, “Article 27 - Irrelevance of Official Capacity” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 503; and Charter of the International Military Tribunal for the Far East, available on the internet at: www.oup.co.uk/pdf/bt/cassese/intcrimlaw/ch02/1945_int_mil_tribunal_east.pdf.

⁵⁴ Principles of the Nuremberg Tribunal, available on the internet at: www.rise4news.net/Nuremberg_Principles.html.

⁵⁵ S. Zappala, “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?” EJIL, Vol. 12, No. 3, 2001.

⁵⁶ O. Triffterer, “Article 27 - Irrelevance of Official Capacity” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 503.

⁵⁷ Ibid., p. 509.

⁵⁸ Statute for the International Tribunal for Yugoslavia, available on the internet at: www.un.org/icty/basic/statut/statute.htm#7; and Statute of the International Tribunal for Rwanda, available on the internet at: www.un.org/icty/statute.html.

⁵⁹ A. Cassese, “When May Senior State Officials Be Tried For International Crimes - Some Comments on Congo v. Belgium,” EJIL, Vol. 13, No. 5, 2002.

The Court thus established that the underlying principles of the Convention were already a matter of State practice and were binding as a matter of customary law, including the principle of irrelevance of official capacity.

As a matter of fact, the principle has continually been a matter of both State practice and *opinio juris*: Israel's Supreme Court held in the Eichmann case in 1961 that Article 7 of the Nuremberg Charter and all the Nuremberg Principles were "principles that have formed part of customary international law since time immemorial."⁶⁰ Several judges of the House of Lords stated in the *Pinochet Case* that "immunity *rationae materiae* cannot co-exist with international crimes".⁶¹ As Wirth points out, this constitutes State practice not only in the UK, but also in Spain, Belgium and France, who all requested the extradition of Pinochet.⁶² Finally, several trial chambers of ICTY have since the Tribunal was set up in 1993 held that Article 7 of the ICTY Statute is a matter of customary law.⁶³

By the time negotiations on the Rome Statute began in earnest after the first Draft was presented to the General Assembly, irrelevance of official capacity was a well-established principle of international customary law and had proven its importance in four previous war crimes tribunals. It was therefore a given that to be at all effective in eliminating impunity, the Rome Statute should include a provision eliminating any shield of functional immunity for core crimes. This provision became Article 27(1).

1.3.b Article 27(2)

As mentioned, early in the drafting process discussion focused on whether the list of officials in Article 27(1) should be exhaustive.⁶⁴ If it was exhaustive, then diplomats and members of international organizations, who also enjoy functional immunities, were not included in the paragraph and so would have to be covered under Article 27(2).⁶⁵ If it was not exhaustive, then diplomats, etc., would be covered by Article 27(1) along with all other officials. It was eventually decided that the list in paragraph one should not be exhaustive and should thus include all

⁶⁰ Eichmann v. Attorney-General of Israel: Supreme Court Decision Supreme Court of Israel (1962) 136 I.L.R. 277.

⁶¹ A. Bianchi, "Immunity versus Human Rights: The Pinochet Case" EJIL, Vol. 10, No. 2, 1999, p. 247.

⁶² S. Wirth, "Immunities, Related Problems, and Article 98 of the Rome Statute" Criminal Law Forum, Vol. 12, 2001, p. 441.

⁶³ A. Cassese, "When May Senior State Officials Be Tried For International Crimes - Some Comments on Congo v. Belgium," EJIL, Vol. 13, No. 5, 2002.

⁶⁴ O. Triffterer, "Article 27 - Irrelevance of Official Capacity" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 509.

⁶⁵ *Ibid.*

categories of officials.⁶⁶ But what then was the purpose of Article 27(2)? As the ICJ put it in the *Arrest Warrant Case*, “immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts.”⁶⁷ Certain officials might try to circumvent the issue of personal responsibility altogether by invoking personal immunity in order to escape arrest and prosecution. While personal immunity provides only a procedural defense, it ensures “total inviolability” for officials while in office.⁶⁸

So, to meet its stated aim of ending impunity, the Rome Statute should include both categories of immunities in its provision on irrelevance of official capacity. While Article 27(1) applied to functional immunities, Article 27(2), as Gaeta argues, thus came to apply to personal immunities.⁶⁹ But this presented certain difficulties: since personal immunities are absolute under international law, then any provision abrogating them would be stepping outside the bounds of international law.

Along with functional immunities, such senior State or government officials as Heads of State, Prime Ministers⁷⁰ and Foreign Ministers⁷¹ enjoy *immunities rationae personae* or simply personal immunities while they are serving. During that time, they are immune not only from prosecution for official acts, but also for acts carried out in a private capacity. Again, the idea is that affairs of State might be hampered by judicial interference either by opposition at home or

⁶⁶ Ibid.

⁶⁷ International Court of Justice: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002, General List No. 121, para. 60.

⁶⁸ A. Cassese, “When May Senior State Officials Be Tried For International Crimes - Some Comments on Congo v. Belgium,” EJIL, Vol. 13, No. 5, 2002.

⁶⁹ P. Gaeta, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 978.

⁷⁰ It has not been established in international law how far below Head of State personal immunities extend. Danilenko writes that Heads of government who are not also Heads of State do not enjoy personal immunities under international law. In contrast, the Belgian Court of Cassation held in the *Sharon Case* that Heads of Government like Ariel Sharon do in fact enjoy personal immunities. Furthermore, the International Court of Justice held in the *Arrest Warrant Case* that Foreign Ministers are protected by certain procedural immunities as well (see note 70 for further discussion of the case and a full citation.) See G. Danilenko, “Chapter 48 - ICC Statute and Third States” in A. Cassese, P. Gaeta and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 1885; and the Belgian Court of Cassation ruling No. P.02.1139.F/1 (Sharon and Others), English language translation [8]. Available on the internet: www.indictsharon.net/12feb2003dectrans.pdf.

⁷¹ In the much criticized *Arrest Warrant* judgment, the International Court of Justice failed to make the distinction between functional and personal immunities, although this distinction is commonly made by scholars and practitioners of international law (see e.g. P. Gaeta, O. Triffterer, S. Wirth, A. Cassese) as well as by those who enjoy these immunities. As mentioned, however, the Court did hold that Foreign Ministers are protected by procedural immunities on par with Heads of State. See International Court of Justice: Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002.

abroad or by foreign governments.⁷² Such senior State officials commonly enjoy personal immunities under both domestic and international law, although domestic law usually provides for various ways in which these immunities might be waived.⁷³

As envoys of their State, diplomatic agents enjoy a type of personal immunity referred to as diplomatic immunity, governed by the Vienna Convention on Diplomatic Relations. The Vienna Convention also lays down rules for other aspects of the diplomatic interaction between States.⁷⁴ Under Articles 28-31 and 40 of the Vienna Convention, diplomats are immune from prosecution in the State to which they are posted -- the receiving State -- and any State they must travel through to take up their diplomatic assignment.⁷⁵ This immunity may be waived only by their own State. The purpose of diplomatic immunity, which the ICJ has labeled a principle of “extreme importance”⁷⁶, is to ensure that channels of communication among nations are kept open even in the direst of circumstances. It is, at least, a way of ensuring the safe and unhampered conduct of international affairs, and, at best, a chance for peaceful settlement even in war. Like all personal immunities, diplomatic immunity is limited to the time in office, but it is complete and covers even core crimes.

Some have called for an exception to personal immunities for core crimes equal to the one that exists for functional immunities.⁷⁷ There is no evidence, however, that such an exception is a trend in State practice. To the contrary, the complete immunity of diplomats (the idea of ‘don’t kill the messenger’) goes back hundreds of years. In his treatise *On the Law of War and Peace* from 1625, Grotius wrote in a chapter entitled “On the Rights of Embassies:

“Almost every page of history offers some remark on the inviolable rights of ambassadors, and the security of their persons, a security sanctioned by every clause and precept of human and revealed law. Nor is it surprising that the persons of those should be deemed inviolable, who form the principal link in that chain, by which sovereigns and independent states maintain their

⁷² The U.S. Supreme Court case *Clinton v. Jones* is a good example of how litigation may interfere with the affairs of State. The Court held that the sitting president enjoyed no personal immunities for private acts carried out before the time in office. This ultimately resulted in the infamous Lewinsky scandal that nearly cost the U.S. president his job.

⁷³ See footnote no. 71 on the example of *Clinton v. Jones*.

⁷⁴ Consular Staff enjoy a far more limited form of immunity that does not cover “grave crimes.” See Article 41 of the Vienna Convention on Consular Relations, available on the internet at: www.un.org/law/ilc/texts/consul.htm.

⁷⁵ Vienna Convention on Diplomatic Relations, available on the internet at: www.un.org/law/ilc/texts/diplomat.htm.

⁷⁶ International Court of Justice: *United States Diplomatic and Consular Staff in Tehran (United States v. Islamic Republic of Iran)*, 24 May 1980. Diplomatic immunity is discussed at length in para. 84-88.

⁷⁷ A. Bianchi “Immunity versus Human Rights: The Pinochet Case” *EJIL*, Vol. 10, No. 2, 1999, p. 261.

intercourse with each other. To offer violence to them is not only an act of injustice, but, as Philip in his letter to the Athenians says, is acknowledged by all to be an act of impiety.”⁷⁸

No international treaty awards personal immunities to Heads of State or other leading officials, but as the ICJ confirmed in the *Arrest Warrant Case*, it is long-standing State practice and thus a matter of customary law.⁷⁹ Indeed, judges in the *Pinochet Case* held that Pinochet, despite the accusations against him, would have enjoyed the protection of personal immunities had he still been a Head of State.⁸⁰ And, judges in the *Sharon Case* confirmed that as a Head of Government, Prime Minister of Israel, Ariel Sharon, enjoyed personal immunities.⁸¹ In addition, it seems no one has to date been successful filing suit in one State against the serving Head of another - whether that was for reasons of immunity as in the French *Ghadafi Case*, or for lack of jurisdiction as in the Belgian *Sharon Case* mentioned above.⁸²

Contrary to this, the ILC wrote in its commentary to the Draft Code:

“The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence 56/ [sic]. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of his responsibility.”⁸³

In practice, however, only the ICTY and ICTR have veered away from the position of complete personal immunities for Heads of State or senior officials, albeit only implicitly.⁸⁴ Based on a Security Council resolution with legal foundations in the UN Charter, the ICTY and ICTR Statutes oblige all UN Member States to issue arrest warrants for criminals wanted by the Tribunals for core crimes, among

⁷⁸ H. Grotius *On the Law of War and Peace*, translated by A.C. Cambell, A.M. Batoche Books, Kitchener 2000, Book II, Chapter 18, p. 164. Found on the internet at: <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/grotius/Law2.pdf>.

⁷⁹ International Court of Justice: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002.

⁸⁰ House of Lords: *R.v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (1999) 2 W.L.R. 827, 38 I.L.M 430, pp.880-881; and P. Gaeta, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 983. According to the BCC, the Chilean Supreme Court also held in its most recent decision in the Chilean case against Pinochet that Pinochet can no longer enjoy personal immunities as a former Head of State. This decision was published in August 2004 in Spanish and was not available in English at the time of writing.

⁸¹ See discussions in *supra* notes 67 and 68.

⁸² For an analysis of the *Ghadafi case*, see S. Zappala, “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?” *EJIL*, Vol. 12, No. 3, 2001. For an analysis of the *Sharon Case*, see A. Cassese, “The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Other cases”, *ICJ* 1.2(437), August 2003, *ICJ (Journal of International Criminal Justice)* 1.2(437).

⁸³ Draft Code of Crimes against the Peace and Security of Mankind, Commentary to Article 7. Available on the internet at: www.un.org/law/ilc/texts/dcodefra.htm.

⁸⁴ P. Gaeta, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 989.

them the then sitting Serbian president, Slobodan Milosovic.⁸⁵ Possibly, certain drafters of the Rome Statute found inspiration for Article 27 in the ICTY and ICTR, but unlike the ICTY and ICTR Statutes, the Rome Statute is treaty-based. The Court cannot find legitimacy in the UN Charter for exceptions to international law on immunities, nor is the UN Security Council likely to sanction such exceptions. To the contrary, several Security Council members were unwilling partners at the time of the Rome Statute negotiations and have since become declared enemies of the ICC.

Although implausible,⁸⁶ States Parties to the Rome Statute might agree amongst themselves to change their practice on the immunity of senior State officials. They would in any case have to bring their own domestic immunity laws into compliance with the Statute. However, any change in the practice of personal immunity for senior State officials would be a violation of customary law, and, arguably, of Article 34 of the Vienna Convention on the Law of Treaties, under which a treaty “does not create either obligations or rights for a third State without its consent.”⁸⁷

Likewise, any exception to diplomatic immunity would be problematic. The States Parties could agree to interpret the Rome Statute as a permanent waiver of personal immunities for core crimes amongst themselves (Part Two discusses this option in further detail). But claiming that this exception also applies to non-States Parties would be contrary to Article 31 of the Vienna Convention on Diplomatic Relations, which guarantees diplomats immunity from prosecution in the receiving State⁸⁸. This in turn would arguably violate a series of Articles of the Vienna Convention on the Law of Treaties, among them Article 26, which holds that *pacta sunt servanda*, Article 31(c) which calls for consideration of relevant rules of international law in the interpretation of a treaty, and Article 34, which was mentioned above.⁸⁹ In addition to these problems of immunity, Article 27(2) would clash with existing bilateral agreements between States Parties and non-States Parties such as extradition treaties and SOFAs, which

⁸⁵ Ibid.

⁸⁶ As Part Two will show, this is implausible because of the consequences to inter-State relations if one State could arrest and prosecute senior officials of the other.

⁸⁷ Vienna Convention on the Law of Treaties, available on the internet at: www.un.org/law/ilc/texts/treaties.htm.

⁸⁸ Vienna Convention on Diplomatic Relations, available on the internet at: www.un.org/law/ilc/texts/diplomat.htm.

⁸⁹ Ibid. and Vienna Convention on the Law of Treaties, available on the internet at: www.un.org/law/ilc/texts/treaties.htm.

carefully divide jurisdiction between sending and receiving States over crimes committed by troops of one State posted in another.⁹⁰

In summary then, Article 27(2) closed the loophole to impunity created by personal immunities, but opened the way for a host of problems *vis-à-vis* existing international treaties and customary law. No matter what States Parties agreed among themselves, they could only make it binding on third States if it was already a matter of customary law. Gaeta has argued that personal immunities take effect at the vertical level, not the horizontal level; i.e. they operate between two States, not between the States and the Court.⁹¹ “Clearly,” she writes, “these immunities cannot be relied upon before the ICC; hence they cannot preclude the exercise of the Court’s jurisdiction.”⁹² But, as Gaeta herself recognizes to some extent, this is a technicality that makes no difference in practice. If a State Party were barred by an immunity agreement from surrendering an accused to the Court it could not do so without violating international law. If at the same time it were bound by the Rome Statute to extradite, then it could only refrain from doing so by violating international law. Article 27 would create a “damned if you do, damned if you don’t” situation. A legal Catch 22.

1.4 Drafting History and Legal Basis for Article 98

In Rome, delegates from both like-minded and non-aligned States expressed concerns over possible consequences of Article 27(2).⁹³ Rather than rewording Article 27, negotiators opted to pass the problem to drafters in the working group for International Cooperation and Judicial Assistance who were thus charged with finding a quick solution. They came up with Article 98. While Singapore put forth the first draft version, some say the idea behind the Article came from the US or NATO countries, concerned as much with the NATO SOFA as with the Vienna

⁹⁰ For a detailed discussion of SOFAs and the ICC see D. Fleck, “Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?”, ICJ 1.2(651), December 2003; and S. Zappala, “The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements,” ICJ 1.1(114), April 2003.

⁹¹ P. Gaeta, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 991.

⁹² *Ibid.*

⁹³ K. Prost and A. Schlunk, “Article 98 - Cooperation with Respect to Waiver of Immunity and Consent to Surrender” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 1131.

Convention on Diplomatic Relations.⁹⁴ In any case, the Article was written to include both, with paragraph one covering the Vienna Convention on Diplomatic Relations and paragraph two covering SOFAs and bilateral extradition treaties.⁹⁵

The first version of Article 98 allowed the Court to request extradition of a State Party before obtaining an immunity waiver from the sending State. Several States felt, however, that this might continue to place them in an awkward position both legally and politically.⁹⁶ Thus, the Article was rewritten so that the Court must obtain an immunity waiver from the relevant sending State *before* it can pursue extradition from a State Party of someone protected by immunities or bilateral agreements.⁹⁷

Disagreement raged over whether Article 98 should apply to existing agreements only, i.e., agreements already entered into when the Statute became effective, or to future agreements as well. Germany took the former view,⁹⁸ while the United States and the U.K. advanced the latter, citing difficulties that might otherwise arise when NATO expanded and new members were to sign the NATO SOFA.⁹⁹ No consensus was reached, and the issue was finally left for the Court to decide.

Under Article 98, it is up to the Court to determine, before issuing an extradition request or any other request for assistance such as a an arrest warrant, that it is not placing the requested State in a position of having to violate an agreement under international law. Should this fail, a requested State may under Rule 195 of the Court' Rules of Procedure and Evidence notify the

⁹⁴ General media coverage of the Rome Statute and Article 98 as well as NGO discussions tend focus on the U.S.A. and NATO members as authors of the idea behind Article 98.

⁹⁵ Drafting history aside, it is clear that Article 98(2) refers to SOFAs because it uses the terms "sending State" and "receiving State," which are found only in the Vienna Conventions on Diplomatic and Consular Relations, covered under Article 98(1), and in SOFA agreements. See Vienna Convention on Diplomatic Relations, available on the internet at: www.un.org/law/ilc/texts/diplomat.htm; and Vienna Convention on Consular Relations, available on the internet at: <http://www.un.org/law/ilc/texts/diplomat.htm>; and Amnesty International: International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes. Available on the internet at: <http://web.amnesty.org/library/Index/engIOR400252002?OpenDocument&of=THEMES%5CINTERNATIONAL+JUSTICE>.

⁹⁶ K. Prost, and A. Schlunk, "Article 98 - Cooperation with Respect to Waiver of Immunity and Consent to Surrender" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 1131.

⁹⁷ *Ibid.*

⁹⁸ Amnesty International: International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes <http://web.amnesty.org/library/Index/engIOR400252002?OpenDocument&of=THEMES%5CINTERNATIONAL+JUSTICE>.

⁹⁹ S. Zappala, "The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements," ICJ 1.1(114), April 2003.

Court that a request raises a problem.¹⁰⁰ The requested State should then supply relevant material to the Court to help it evaluate whether Article 98 applies to the particular situation.¹⁰¹

In this way, Article 98 provided a quick fix, safeguarding obligations under international immunity laws or bilateral agreements and bringing the Rome Statute into conformity with international law, and thereby the Vienna Convention on the Law of Treaties. To quote Skibsted, “Article 98 offered a solution to a valid problem.”¹⁰² Unfortunately, it also opened up an entirely new can of worms: How would judges be able to reconcile Article 27(2), which allowed no shelter of immunity for State officials, with Article 98(1), which did - albeit only in certain procedure-related cases?

1.5 Conclusion to Part One

As we have seen, Article 27(1) codifies existing customary law on irrelevance of official capacity and functional immunities,¹⁰³ while Article 27(2), in its approach to personal immunities, goes a step beyond. This places the Rome Statute in the precarious situation of clashing with international law. The aim of Article 27 was to send a message of no impunity. While this aim was admirable, however, an Article clashing with international law threatens to undermine the Statute because no State could ratify it. Given the divide between States, the legal and political climate was not ripe for elimination of personal immunities for core crimes, and the drafters were better off agreeing to bring the Statute into compliance with existing treaty and customary law even if this meant limiting its scope. And they did so by adding Article 98, which gives preference over the Statute to international immunity laws and bilateral agreements. However, with Article 98, the drafters did not manage to eliminate the problem. They only managed to shift it: The Rome Statute no longer conflicts with international law. Instead, as Judge Slade pointed out, it contains two Articles on immunity that apparently conflict, or at least interfere, with each other.

Some have suggested that including both Articles in the Rome Statute was a sacrifice on the altar of expediency, and that more time might have yielded a

¹⁰⁰ Rules of Procedure and Evidence of the ICC in the Materials Section of A. Cassese, P. Gaeta and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 134.

¹⁰¹ *Ibid.*

¹⁰² Interview with Ambassador Arnold Skibsted.

¹⁰³ Forslag til lov om Den Internationale Straffedomstol (Danish Bill on the International Criminal Court), available in Danish on the internet at: www.folketinget.dk/samling/20001/lovforslag_som_fremsat/120.htm.

better solution.¹⁰⁴ That may be so, but perhaps the sacrifice will pay off in the long run. Resolving the immunity conflict inherent in the Statute is no longer in the hands of diplomats biased by the political interests of the States they represent and bent in favor of personal immunities that benefit them directly. Rather, it is left in the hands of ICC judges. And while they, too, may be colored by politics and certainly depend on personal immunities¹⁰⁵, which they also enjoy, they have at the forefront of their agenda the continued existence of the Court that provides them their livelihood. They are therefore more likely to strike a balance between Article 27(2) and 98(1) that ensures the survival of both personal immunities and the Court.

Part Two: Reconciliation

“It behoves you to consider, what is becoming your character, and not what the rigour of the law allows you to inflict. For if you consult the full extent of your authority, you may make away with any citizen you please.” - Cicero¹⁰⁶

In its first investigations, the ICC prosecutor’s office is focusing on several States Parties where conflicts between rebel groups, foreign troops, and government forces have claimed tens of thousands of victims since the Rome Statute came into effect in 2002.¹⁰⁷ Accusations of atrocities have been made against all sides

¹⁰⁴ Ibid.

¹⁰⁵ Article 48 of the Rome Statute reads as follows:

Article 48 Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.
2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.
3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.
4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.
5. The privileges and immunities of:
 - (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;
 - (b) The Registrar may be waived by the Presidency;
 - (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;
 - (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

In theory, there is a chance that the Court might not waive immunity for one of its own. One might therefore argue that Article 27(2) is also in conflict with Article 48, although it is, of course, highly unlikely that an official of the ICC should stand accused of core crimes in the first place. See The Rome Statute, available on the internet at: www.un.org/law/icc/statute/rome.htm.

¹⁰⁶ H. Grotius, *On the Law of War and Peace*, translated by A.C. Cambell, A.M. Batoche Books, Kitchener 2001, Book III, Chapter Four, p. 283. Found on the internet at: <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/grotius/Law2.pdf>.

¹⁰⁷ These investigations are taking place in the Democratic Republic of Congo, Uganda, and most recently Darfur, Sudan, which is the Security Council’s first referral to the Court. The Congo

in these bloody conflicts, including State agencies and senior State officials.¹⁰⁸ So, in this connection it is not unlikely that the Court will eventually find itself in a situation similar to the hypothetical described above in Part 1.2. That is, a situation where it has to seek the surrender from a State Party of either an accused diplomat posted there, or a visiting senior State official, both of whom are, of course, covered by personal immunities.

How should the Court proceed in such circumstances? On one hand, Article 27(2) stipulates “no impunity.” On the other, Article 98(1) gives preference to immunity laws under international law. The Court could lean towards Article 27(2) and insist on extradition no matter what, which is likely to please like-minded but anger non-aligned States. Or it could lean towards Article 98(1) and let existing immunity laws prevail without interference, which is likely to anger like-minded but please non-aligned States. Either way, the Court faces a difficult predicament: It depends equally on the goodwill of both like-minded States and non-aligned States, some of which have quite openly declared themselves “enemies” of the ICC. Angering either side will therefore ultimately serve to impair the Court. So, to find a practicable solution to the inconsistency between Article 27(1) and 98(2), judges must attempt to reconcile them in a manner that if not satisfies then at least pacifies both sides.

2.1 Like-minded versus Non-Aligned

It is commonplace that States approach treaty negotiations with differing aims and interests, continuing to disagree long after treaty adoption. What distinguishes the Rome Statute is the vehemence with which States disagree and the ability and determination of certain non-aligned States to deliver on threats to cripple the Court. A short review of the motivating factors that drive each side of the divide will thus aid the understanding of why the Court must so carefully consider both.

A great majority of UN Member States participated in negotiations surrounding the ICC. Characteristically, UN negotiations tend to divide States

Conflict: Q&A BCC News Africa, available on the internet at: <http://news.bbc.co.uk/1/hi/world/africa/148462.stm>; and ICC Targets DRC Radio Netherlands, transcript available on the internet at: www.rnw.nl/hotspots/html/drc030717.html; and UGANDA: ICC team arrives to prepare LRA probe IrinNews.org, UN Office for the Coordination of Humanitarian Affairs, available on the internet at: www.irinnews.org/report.asp?ReportID=42877&SelectRegion=East_Africa&SelectCountry=UGANDA.

¹⁰⁸ Ibid.

along regional interests,¹⁰⁹ but this was not the case in Rome. Instead, States came together on national interests, which, as mentioned in Part One, caused the division into like-minded and non-aligned States.¹¹⁰ The first category included States that envisioned an independent Court with far-reaching jurisdiction; the second included States that favored a Court tightly controlled by the UN and with limited jurisdiction.¹¹¹ On the positive side, this division created an opportunity for new partnerships within the UN.¹¹² On the negative side, it caused certain members of the two camps to declare themselves “friends” and “enemies” of the Court and engage in a legal and political tug of war, continuing long after the Statute was adopted.

That like-minded States should declare themselves “friends of the Court”¹¹³ is no mystery. The need for an international court was, as mentioned earlier, evident in a century during which genocide, war crimes and crimes against humanity had become a fixed item in the daily news. Heading the group of like-minded States were Canada, Australia, New Zealand, South Africa, Argentina, Germany, Holland, the Nordic countries and, later on, the UK¹¹⁴ -- States that in general had the common factor of being well-functioning democracies. These were joined by numerous less stable South American, African, and Eastern European States.

Naturally, being a proponent of a strong Court necessitated a certain sacrifice of national sovereignty. This would not frighten many of the European Union Member or prospective Member States who had already relinquished sovereignty for the sake of the Union and who were accustomed to the idea of supra-national Courts, namely the European Court of Justice and the much respected European Court of Human Rights. Only France, which is constitutionally similar to the United States, had strong reservations and initially joined the group

¹⁰⁹ Forslag til lov om Den Internationale Straffedomstol (Danish Bill on the International Criminal Court), available on the internet at: www.folketinget.dk/samling/20001/lovforslag_som_fremsat/120.htm.

¹¹⁰ Interview Ambassador Skibsted and Forslag til lov om Den Internationale Straffedomstol (Danish Bill on the International Criminal Court), available on the internet at: www.folketinget.dk/samling/20001/lovforslag_som_fremsat/120.htm.

¹¹¹ Ibid.

¹¹² Forslag til lov om Den Internationale Straffedomstol (Danish Bill on the International Criminal Court), available on the internet at: www.folketinget.dk/samling/20001/lovforslag_som_fremsat/120.htm.

¹¹³ Ambassador Skibsted consistently uses this expression. See Interview with Ambassador Skibsted.

¹¹⁴ Despite a favorable stance on international courts in general, the UK was initially torn between its loyalty towards the U.S., its longstanding ally, and its loyalty towards its fellow EU Members. Furthermore, one might speculate that given its involvement in Northern Ireland, the UK had its own worries about the Court.

of non-aligned States.¹¹⁵ Other States in the group of like-minded States were perhaps less comfortable with a sacrifice of sovereignty, but had been torn apart by wars and bloodshed and very likely found compelling emotional reasons to join nevertheless.¹¹⁶

It is maybe less evident why some of the non-aligned States would declare themselves opponents or even enemies of a strong Court. The explanation is that these States have what they view as overriding political interests preventing them from handing over sovereignty to the Court. Some of these -- China, Pakistan, North Korea, Iran, and a number of Arab States -- have a questionable human rights record and a leadership that clings to power by methods that flout international law. Their natural concern was that their leaders might be among the first to be indicted. Some were nevertheless swayed and ended up signing and ratifying the Statute.

Others are (more or less) democratic States who play controversial roles on the international scene, like Russia, Israel, India, and the United States. It is not within the scope of this thesis to examine the legal arguments put forth by these States against the Court. Many of these arguments are in any case cover for strong underlying political considerations because above all these States fear that the Court will become a forum for their political adversaries¹¹⁷; that they will be punished for unpopular political decisions through international legal initiatives.¹¹⁸

It is common knowledge that Russia, Israel, and India are engaged in bloody conflicts over divided territories in which contentious methods have been used, methods that have caused a good deal of political uproar and enmity. The United States has also been involved in controversial conflicts, although, being the sole super-power, its role internationally is unique and far more complex. Like the other States, it aggressively pursues its own national interests. At the

See Interview Ambassador Skibsted and Forslag til lov om Den Internationale Straffedomstol (Danish Bill on the International Criminal Court), available on the internet at: www.folketinget.dk/samling/20001/lovforslag_som_fremsat/120.htm reference in note 97 and 98.

¹¹⁵ Forslag til lov om Den Internationale Straffedomstol (Danish Bill on the International Criminal Court), available on the internet at: www.folketinget.dk/samling/20001/lovforslag_som_fremsat/120.htm.

¹¹⁶ Some of the States of the former Yugoslavia, e.g.

¹¹⁷ H. Ball, "U.S. Opposition to the ICC: A Political Perspective on International Criminal Justice", in *Materials for the Third Transatlantic Conference on International Criminal Justice: A Transatlantic Dialogue*, Brussels, May 7-8, 2004, pp. 6-15 and 27-33; and Amnesty International: International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes <http://web.amnesty.org/library/Index/engIOR400252002?OpenDocument&of=THEMES%5CINTERNATIONAL+JUSTICE> Transcript: Prosper Sees Good Progress With Article 98 Bilateral Agreements.

same time, it actively engages in and is vital for the resolution of global conflict. It is a key player in the UN Security Council and covers more than one fourth of all costs associated with UN peacekeeping missions.¹¹⁹ While the United States was crucial in the creation of ICTY and ICTR, it grew concerned that an independent ICC with wide-reaching jurisdiction could become an unchecked political tool in the hands of U.S. adversaries.¹²⁰ Hoping to negotiate some control over the Court through the Security Council, the United States initially signed the Statute.¹²¹ But after a change of political administration, it opted to withdraw the signature, contending, in the words of Under Secretary of State for Political Affairs, Marc Grossman, that the Court was “built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.”¹²²

Russia, Israel and India have apparently chosen to ignore the Court,¹²³ and are unlikely to cooperate with it if requested to do so. Whether they will actively work against the Court if they feel pressured by it remains to be seen. These nations may not devastate the Court, but their resistance will certainly undermine its efforts. Becoming increasingly politically exposed, however, the US is not secure with this kind of passive approach, and since the turn of the new century has made it a matter of principle to actively and at times belligerently counteract the Court.¹²⁴ It has labeled the Court “contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances, and national independence.”¹²⁵ It has argued that the US has a strong democratic tradition and a solid legal system and is fully capable of pursuing criminals at home without the added political risk.¹²⁶ And it has sought to secure a right to do so through the so-called Article 98 agreements, which

¹¹⁸ Ibid.

¹¹⁹ This figure is according to the U.S. Mission to the UN, available on the Mission’s homepage at: www.un.int/usa/iofact3.htm.

¹²⁰ H. Ball, H. “U.S. Opposition to the ICC: A Political Perspective on International Criminal Justice”, in *Materials for the Third Transatlantic Conference on International Criminal Justice: A Transatlantic Dialogue*, Brussels, May 7-8, 2004, p. 5.

¹²¹ Ibid., pp. 6-15 and 27-33.

¹²² Ibid, p. 11.

¹²³ There has been very little discussion on the resistance towards the Court of these nuclear powers, perhaps because they have kept a relatively low profile compared to the U.S.

¹²⁴ H. Ball, “U.S. Opposition to the ICC: A Political Perspective on International Criminal Justice”, in *Materials for the Third Transatlantic Conference on International Criminal Justice: A Transatlantic Dialogue*, Brussels, May 7-8, 2004, p.15.

¹²⁵ John R. Bolton, Under Secretary for Arms Control and International Security, remarks at the American Enterprise Institute, Washington, D.C. November 2003, available on the internet at: www.iicnow.org/documents/statements/governments/USBoltonAEI3Novo3.pdf.

¹²⁶ This has been widely argued in all official U.S. Statements. See, among others, H. Ball, “U.S. Opposition to the ICC: A Political Perspective on International Criminal Justice”, in *Materials for the Third Transatlantic Conference on International Criminal Justice: A Transatlantic Dialogue*, Brussels, May 7-8, 2004, p. 21 and 22.

guard U.S. personnel against surrender to the ICC. It has furthermore made these agreements “the foundation for military cooperation relationships around the world,”¹²⁷ and has instituted the American Service-Members’ Protection Act, allowing it to cut off military aid to States unwilling to sign the agreements. This has put substantial pressure on a number of like-minded States Parties who depend on the US militarily, forcing them to place a foot in each camp, and has caused much division among States Parties in general. Finally, the US has threatened to paralyze UN peacekeeping operations by withdrawing U.S. troops unless they are exempted from ICC jurisdiction. Such an exemption is possible under Article 16 of the Rome Statute, and this led to UN SC Resolutions 1422 and 1487 exempting U.S. peacekeepers for two years running.¹²⁸

By demonstrating its inclination and capability to block the Court no matter what, the U.S has in the tug of war between proponents and opponents of the Court pulled forcefully in one direction.¹²⁹ In response, those of the like-minded States who did not succumb to U.S. pressure have pulled fervently in the other. The EU Member States, including France,¹³⁰ have chosen a united front that is highly critical of Article 98 agreements -- although it does not rule them out entirely¹³¹ -- and the U.S. stance in general. The Parliamentary Assembly of the Council of Europe has gone a step further and rejected agreements outright.¹³²

The like-minded States Parties have become entrenched and will likely expect the judges of the ICC to do the same. However, that would not necessarily be wise. When reconciling Articles 27 and 98, the judges must, of course, first and foremost keep in mind the underlying legal principles of the Statute, principles supported by all who have ratified the Rome Statute. Doing otherwise would lose the Court all credibility with its supporters, without whom it would not exist in its present form, if at all. At the same time, the judges must seriously consider the consequences of the kinds of legal activism that might push adversaries into a corner.

¹²⁷ John R. Bolton, Under Secretary for Arms Control and International Security, remarks at the American Enterprise Institute, Washington, D.C. November 2003, available on the internet at: www.iicnow.org/documents/statements/governments/USBoltonAEI3Novo3.pdf.

¹²⁸ In the light of the mistreatment of prisoners in the Abu Ghraib prison in Iraq, the U.S. opted not to request an extension of the exemption which therefore ended in July 2004.

¹²⁹ In return for a number of concessions, the U.S. did not block the Security Council’s referral of the Darfur case to the Court. Whether this should be seen as a softening of the U.S. stance in general, however, is too early to determine.

¹³⁰ Interestingly, rumor would have it that France initially came up with the idea of Article 98 Agreements.

¹³¹ S. Zappala, “The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements,” ICJ 1.1(114), April 2003.

2.2 Reconciling Articles 27(2) and 98(1)

Returning to the hypothetical above, the Court is seeking surrender of a suspected criminal who enjoys personal immunities as Head of State or in some other official capacity. The Court must decide whether it needs to issue an immunity waiver request to the sending State before requesting extradition from the State Party. In that connection, it may either choose to consider Article 27(2) a general waiver of immunity among States Parties and consequently decide that an immunity waiver request is necessary only if the sending State is a non-State Party. Or it may decide that the Status of the sending State is irrelevant and that an immunity waiver request is appropriate regardless. If it does, it will have to rely on other aspects of the Statute to ensure that State Parties do not seek shelter behind immunity claims.

2.2.a Applicability of Article 98(1) - States Parties

Any obligation cited by the requested State concerning personal immunities will fall under Article 98(1) - whether the obligation arises from the Vienna Convention on Diplomatic Relations ('the Vienna Convention') or from the principles under international law protecting senior State officials.¹³³ As established in Part One, no functional immunity exists for core crimes. For that reason, the State immunity referred to in Article 98(1) must pertain to other aspects of State immunity relevant to diplomatic relations, e.g. inviolability of diplomatic missions, which enjoy protection as representations of the sending State under the Vienna Convention.¹³⁴

Gaeta has suggested that, for the underlying principle of Article 27(2) to be fully effective, Article 98(1) should apply only in interaction between States Parties and non-States Parties.¹³⁵ If the Court decides to follow Gaeta's "*effet utile*" reasoning,¹³⁶ then Article 98(1) does not apply in interaction among States Parties, so that Article 27 stands alone. Without the added stipulations of Article 98, Article 27(2) could be interpreted as a waiver among States Parties of all

¹³² Ibid.

¹³³ Obligations stemming from SOFAs, extradition agreements or other bilateral agreements fall under Article 98(2).

¹³⁴ S. Wirth, "Immunities, Related Problems, and Article 98 of the Rome Statute" Criminal Law Forum, Vol. 12, 2001, p. 454 and Vienna Convention on Diplomatic Relations, Article 23. Available on the internet at: www.un.org/law/ilc/texts/diplomat.htm.

¹³⁵ P. Gaeta, "Chapter 24.3 - Official Capacity and Immunities" in A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 994.

¹³⁶ Ibid.

personal and procedural immunities attached to official capacity. This would allow the Court, without first seeking an immunity waiver, to request arrest by or surrender from one State Party of anyone from another State Party who enjoys personal immunities under international law.¹³⁷ As Genady Danilenko comments in the Cassese, Gaeta, Jones Commentary, that could have a profound impact on State officials from States Parties:

“Because the Rome Statute denies personal immunity, public officials, including Heads of State, accused of international crimes, will have to think twice about traveling abroad ...”¹³⁸

Indeed, proponents and opponents of the Court alike -- the first with glee, the latter with dread -- have envisaged a situation where a Head of State attending an international summit is apprehended and whisked away to the Hague for prosecution.

If to the contrary, as Skibsted argues,¹³⁹ Article 98(1) applies across the board, then the Court must seek immunity waivers from States Parties and non-States Parties alike before extending a request for surrender or assistance.

To whom and in what situations does Article 98(1) apply? The wording of the Article itself does give a few clues as to the intentions of the drafters. As Gaeta points out, the term “non-contracting State” is used repeatedly through the Statute to indicate a non-State Party.¹⁴⁰ The term “third State” only appears in Article 98, in which it is used in contrast to “requested State.” She writes:

“It could be argued that this wording was not haphazard. Arguably the draftsmen used that expression precisely to indicate *third States*, i.e. States other than the *requested State*, regardless of whether or not such a third State is party to the Statute”¹⁴¹

That, Gaeta continues, might indicate that an immunity waiver constitutes “a *sine qua non* condition” for extraditing anyone who enjoys personal immunities.¹⁴² One might add to this that the term “third State” is used exactly to this effect in numerous conventions, i.e. to refer to *any* third State, signatory or not.¹⁴³

¹³⁷ Ibid.

¹³⁸ See G. Danilenko, “Chapter 48 - ICC Statute and Third States” in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 1885.

¹³⁹ Interview with Ambassador Skibsted.

¹⁴⁰ P. Gaeta, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 993.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ See, among others, the Vienna Convention on Diplomatic Relations, available on the internet at: www.un.org/law/ilc/texts/diplomat.htm, and the Vienna Convention on Consular Relations, available on the internet at: <http://www.un.org/law/ilc/texts/diplomat.htm>.

However, Gaeta argues, such an interpretation would lead to “absurd consequences” because no one would be brought before the Court who actually enjoyed personal immunities, unless they voluntarily handed themselves over. She concludes:

“If this is so, why provide, as Article 27(2) does, that criminal proceedings instituted before the Court cannot be prevented by the fact that the accused enjoys immunities deriving from International Law.”¹⁴⁴

Gaeta’s view finds backing in Steffen Wirth’s article “Immunities, Related Problems, and Article 98 of the Rome Statute,” although his reasoning differs. He holds that with Article 27, States Parties have waived “any existing immunities concerning the application of the Statute, including the Cooperation Regime in part IX.”¹⁴⁵ This must in practice be understood to mean that for States Parties, Article 27 functions as an exception or a waiver to all immunities, *including those provided for in Article 98*. One might argue more logically, as do Kimberly Prost and Angelika Schlunk in the Triffterer Commentary,¹⁴⁶ that Article 98 functions as a *lex specialis* to Article 27, not the other way around, but the result is the same.

Contrary to Prost and Schlunk, Skibsted states that Article 98 does not provide a *lex specialis* to Article 27.¹⁴⁷ It is procedural and as such cannot affect the underlying substantial principle of Article 27. Article 98 may for procedural reasons limit cooperation, but it does not remove or even limit criminal responsibility, he states. Furthermore, and in contrast to Gaeta and Wirth, he states that the ratification of the Statute is not equal to a limitation of immunity among States Parties.¹⁴⁸ The Statute requires cooperation, but not extradition in “Article 98 situations.”¹⁴⁹ A State Party is free to turn down an immunity waiver request, but it is in turn required to prosecute itself. If it is unwilling and unable to do so, the principle of complementarity sets in, and the Court can request extradition directly from that State Party. He concludes:

¹⁴⁴ P. Gaeta, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 993.

¹⁴⁵ S. Wirth, “Immunities, Related Problems, and Article 98 of the Rome Statute” *Criminal Law Forum*, Vol. 12, 2001, pp. 452-453 and 456-457.

¹⁴⁶ K. Prost and A. Schlunk, “Article 98 - Cooperation with Respect to Waiver of Immunity and Consent to Surrender” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 1132.

¹⁴⁷ Interview with Ambassador Skibsted.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

“Article 98 does constitute a certain limitation to cooperation with the Court, but if ratification is to have any meaning at all, a State Party must not evade cooperation all together and thereby make Article 27 illusory.”¹⁵⁰

Gaeta’s and Wirth’s interpretations of Articles 27 and 98 are compelling because both would facilitate the work of the Court by limiting to a few instances the need to obtain an immunity waiver before launching proceedings. But the opportunity costs involved are likely to concern both opponents and proponents of the Court:

First, the consequences to international relations, not to mention the domestic stability of the States in question, would be immeasurable if one State could freely decide to arrest and prosecute a senior official or Head of State of another. As Gaeta herself stresses,

“... a balance is required between the two conflicting values at stake: the safeguard of the exercise of foreign powers abroad, and the dispensation of justice in the case of heinous violations of human dignity.”¹⁵¹

In this case, justice will have to give way to personal immunities, or, in the words of Grotius, “the law of nations” must deviate from the “law of nature” or conscience.¹⁵² This implies that Article 27(2) cannot possibly be a waiver of all personal immunities. At most, it can serve as a waiver of diplomatic immunity. But even that carries with it a set of practical challenges:

How should the arrest of a serving diplomat accused of core crimes be carried out in practical terms? Should the receiving State warn the sending State or negotiate a handover? If so, is this not equal to obtaining a *de facto* waiver? Alternately, should law enforcement of the receiving State simply arrest the diplomat as it would any citizen? Clearly, law enforcement could not enter the diplomat’s place of employment since the diplomatic mission is inviolable under Article 22 of the Vienna Convention.¹⁵³ Instead, the police could appear on the diplomat’s doorstep with arrest and search warrants, handcuff the diplomat and search the premises for possible evidence. Under Article 30 of the Vienna Convention, diplomatic immunity extends to a diplomat’s private residence and correspondence, but once the immunity is waived, nothing prevents them from

¹⁵⁰ Ibid. This is a translation from Danish: Artikel 98 er en indskrænkning i samarbejdet, men hvis ratifikation overhovedet skal have nogen mening, skal en medlemsstat ikke kunne undrage sig samarbejde og goere Art. 27 illusorisk.

¹⁵¹ P. Gaeta, “Chapter 24.3 - Official Capacity and Immunities” in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 988.

¹⁵² H. Grotius, *On the Law of War and Peace*, translated by A.C. Cambell, A.M. Batoche Books, Kitchener 2001, Book II, p. 164. Found on the internet at: <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/grotius/Law2.pdf>.

¹⁵³ Vienna Convention on Diplomatic Relations, available on the internet at: www.un.org/law/ilc/texts/diplomat.htm.

doing so.¹⁵⁴ However, any correspondence and documents in a residence belonging to a diplomatic mission are protected under Article 24 of the Vienna Convention and may not be confiscated or examined.¹⁵⁵ In all likelihood, diplomats would not be found at home with privileged official documents. But they are likely to have a work computer, work-related correspondence, duty officers' logs, telephone lists, security instructions and other sensitive official documents: all are protected property of the mission, which law enforcement of the receiving could not touch without violating international law. Further, diplomatic immunity extends to a diplomat's closest family members¹⁵⁶ under Article 37 of the Vienna Convention.¹⁵⁷ If immunity is lifted, could family members, too, be subject to search and arrest even if not accused of core crimes?

Under normal circumstance, the two States involved would presumably overcome these practical obstacles by negotiating the circumstances of surrender of the diplomat in their waiver negotiations. But the Rules and Procedures of the Rome Statute contain no mechanism to ensure that in the process of arresting a diplomat, official property is not confiscated and examined. Such a mechanism is in any case unworkable: In assessing which things are official and which are private, investigators would have to confiscate and examine them, which, of course, they cannot! It is not at all unthinkable that certain States might use the arrest of a diplomat as a pretext for taking possession of official documents belonging to another State. Not only might the Court thus inadvertently find itself embroiled in a spy scandal, but the Rome Statute would directly conflict with principles of State immunity.

Secondly, if Article 27 were considered a waiver of diplomatic immunity among States Parties, then it would constitute an exception for core crimes similar to that already existing for functional immunities.¹⁵⁸ This exception would

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ This is provided that the family members are not nationals of the receiving State. See Article 37 of the Vienna Convention on Diplomatic Relations, available on the internet at: www.un.org/law/ilc/texts/diplomat.htm.

¹⁵⁷ Vienna Convention on Diplomatic Relations, available on the internet at: www.un.org/law/ilc/texts/diplomat.htm.

¹⁵⁸ In fact, the Vienna Convention contains a minor exception to diplomatic immunity. Article 31(1) of the Convention reads as follows:

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

- (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

initially be treaty-based, applying only to States Parties of the Rome Statute. But with enough future ratifications of the Rome Statute and consistent ICC and States case law on the subject matter, it might be argued that the exception had become a matter of State practice and *opinio juris* and so a matter of customary international law. Customary law would thus provide an exception to both functional *and* personal immunities, thereby greatly narrowing the general scope of immunities under international law.

Considering the pace at which State practice becomes customary law, and given persistent U.S. objections to the Rome Statute, such a scenario could be envisaged only far into the future, if at all. But given the importance of diplomacy in international relations, any interpretation of the Rome Statute that threatens to punch a hole in the steel-clad protection of diplomatic immunity is not likely to be well received by non-aligned States, and especially not by the United States, which has diplomatic missions in close to 180 States (and more than one in some cases.)¹⁵⁹

Thus, interpreting Article 27(2) as a general waiver of personal immunities among States Parties may be more trouble than it is worth. Alternately, the Court might therefore choose to technically reconcile the two Articles by taking Prost and Schlunk's argumentation of Article 98 as *lex specialis* a step further.¹⁶⁰ The Court could make the case, as Triffterer essentially does,¹⁶¹ that Article 98(1) and (2) should be understood simply as additional paragraphs to Article 27, for practical reasons added at a later time by a different working group. That way, the two Articles could only be read and understood in conjunction with each other. But the question arises: if this is how drafters wanted it, why did they not

However, Article 31(3) provides that "No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence."

See Vienna Convention on Diplomatic Relations, available on the internet at: www.un.org/law/ilc/texts/diplomat.htm.

¹⁵⁹ This figures are from the U.S. Department of State website, available on the internet at: <http://usembassy.state.gov/>.

¹⁶⁰ K. Prost and A. Schlunk, "Article 98 - Cooperation with Respect to Waiver of Immunity and Consent to Surrender" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 1131.

¹⁶¹ Triffterer writes, "... it appears that the importance of paragraph 2 [of Article 27] relates to its interaction with Article 98." Unlike Gaeta and this thesis, Triffterer has not made the distinction of functional immunities in 27(1) and personal immunities in 27(2). He writes that the rules and privileges mentioned in paragraph two refer both to those that grant exemption from criminal liability (i.e. functional immunities) and impunity from prosecution (i.e. personal immunities), and that Article 27(2) does not stand alone. See O. Triffterer, "Article 27 - Irrelevance of Official Capacity in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 509.

make it that way? Perhaps because, as Triffterer indicates,¹⁶² a different working group came up with the idea of Article 98 after Article 27 was already drafted. Or perhaps because adding the wording of Article 98 to Article 27 would detract from the general message of no impunity as Article 27 would then in essence read “there is no impunity through immunity for anyone unless they have immunity.” The conflict inherent in the Statute would be transferred to within the Article itself and make it pure nonsense.

It would seem that Skibsted’s interpretation is the most appealing of all. Granted, requiring immunity waivers from States Parties and non-States Parties alike adds a layer of bureaucracy and time to the interaction between the Court and States Parties. But it allows States Parties to observe obligations under international law, thereby avoiding all the practical implications listed above, while barring them from using such obligations themselves to circumvent responsibility under Article 27. It also demonstrates the effectiveness of the complementarity mechanism, which will serve to strengthen confidence and trust in the Statute’s ability to operate as it was created, without a strong activist push from the Court. This is, of course, provided that in the final analysis States Parties adhere to the provisions of the Rome Statute and cooperate with the Court. If they do not, the Statute will in any case lose its effectiveness and the Court its authority.

2.2.b Applicability of Article 98(1) - Non-States Parties

The problem with all interpretations above is, of course, that they leave the Court helpless in a situation where it might claim jurisdiction over a national of a non-State Party, but cannot obtain an immunity waiver from that State.

Danilenko has suggested that State Parties resolve this outstanding immunity issue for the Court by, wherever possible, claiming *jus cogens* when extraditing a national of a non-State Party to the Court. He writes, “*Jus cogens* norms prevail and invalidate all other rules of international law, including rules concerning Head of State immunity.”¹⁶³ Based on *jus cogens*, States Parties could make an argument much like the one the Israeli Supreme Court used in the Eichmann case:

“These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offenses against the law of nations itself (delicta jurit gentium). Therefore, so far from international law negating or

¹⁶² Ibid.

¹⁶³ See G. Danilenko, “Chapter 48 - ICC Statute and Third States” in A. Cassese, P. Gaeta, and J. Jones, *The Rome Statute of the International Criminal Court - A Commentary*, Oxford University Press, 2002, p. 1887.

limiting the jurisdiction of countries with respect to such crimes, international law is ... in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal ...”¹⁶⁴

In theory, genocide, war crimes and crimes against humanity all constitute *jus cogens* crimes, writes Cherif Bassiouni in his article “International Crimes: Jus Cogens and Obligatio Erga Omnes.”¹⁶⁵ Not only is there valid basis in treaty and customary law as well as in legal literature to substantiate this claim. It can also be argued that these crimes by their very nature meet a higher doctrinal requirement of affecting

“...the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity.”¹⁶⁶

But in practice, Bassiouni points out, there is little agreement on the application of *jus cogens*.¹⁶⁷ Conservative States have expressed resistance to the idea that they should be bound by norms, defined by others as peremptory, to which they do not ascribe, while progressive States have attempted to use *jus cogens* norms as a tool to press for, in the words of Danilenko, “rapid reforms in the existing international legal order.”¹⁶⁸ This disagreement among States is well exemplified by the debate that surrounded the inclusion of Article 53 on peremptory norms in the Vienna Convention on the Law of Treaties: Without reaching a consensus, States argued heatedly on whether peremptory norms spring from new or existing sources of law, what constitutes a necessary majority of States in the adoption of peremptory norms, and to what extent these norms can be binding on dissenting States. France put forth the view that forcing States “to accept norms established without their consent and against their will infringed their sovereign equality,” while the United States held that the recognition of a norm as peremptory “would require, as a minimum, the absence of dissent by any important element of the international community.”¹⁶⁹

The concept of *jus cogens* is thus contentious, and while a *jus cogens* claim holds up in theory, it is in practice not likely to be well received by non-aligned States. Those who are more democratic might find it preferable to sever

¹⁶⁴ Eichmann v. Attorney-general of Israel: Supreme Court Decision Supreme Court of Israel (1962) 136 I.L.R. 277

¹⁶⁵ C. Bassiouni, “International Crimes: Jus Cogens and Obligatio Erga Omnes.” Available on the internet at: www.law.duke.edu/journals/lcp/articles/lcp59dFall1996p63.htm.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ G. Danilenko, “International Jus Cogens: Issues of Law-Making, Part III, EJIL, Vol. 2, No. 1, 1991.

diplomatic ties with States Parties rather than run the risk of being caught by a *jus cogens* claim that would set an unforeseeable future precedent for them. Less democratic States might simply use it as a pretext to circumvent the Vienna Convention on Diplomatic Relations by staking similar claims: They may allege the violation of fundamental norms as an excuse to enter diplomatic missions at will. As it is evident from the *Tehran Diplomatic Staff Case*,¹⁷⁰ such a violation may result in a complete breakdown of diplomatic relations, which has consequences far worse on a world-wide scale than the escape from justice of a single war criminal, as despicable as that is. The disaster that might ensue from such a breakdown is easily imagined: One need only think of the former Yugoslavia without the Dayton agreement or, even worse, the Cuban Missile Crisis without a peaceful ending.

It should be added that as a means of peaceful settlement, dispute resolution by way of international Courts or other legal bodies is in itself a form of diplomacy. And vice versa, the greatest forum for diplomacy, the UN, has its basis in international law. Diplomacy and international law are thus inextricably linked, and the deterioration of diplomatic relations is therefore by definition also a threat to the exercise of international law.

2.4 Conclusion to Part Two

As Part Two has shown, there are two conflicting visions of the Court: One, held by the group of like-minded States, is of an independent Court with wide-reaching jurisdiction. The other, held by the Non-Aligned Movement of States, is of a controlled Court with limited jurisdiction. Despite the goodwill that brought the two sides together at the negotiating table in Rome, they have since engaged in a bitter battle over the scope of the Court, with powerful adversaries like the United States openly threatening to undermine it. The difficult task of the ICC judges in reconciling Articles 27(2) and 98(1) will therefore be to strike a middle ground that may satisfy neither side entirely but will nevertheless appease both. This means taking a cautious rather than an activist approach and trusting that the mechanisms of the Statute will operate as intended without a kick-start from the Court:

¹⁶⁹ Ibid. Interestingly, although perhaps not surprisingly, these French and U.S. views on *jus cogens* bear a certain similarity to French and U.S. views on the Rome Statute and the ICC.

¹⁷⁰ International Court of Justice: *United States Diplomatic and Consular Staff in Tehran* (United States v. Islamic Republic of Iran), 24 May 1980.

Article 27(2) should not be seen as a general waiver of personal immunities among States Parties. Instead, Article 98(1) should apply in interactions among States Parties and non-States parties alike, and the Court should seek immunity waivers from all States before requesting the surrender of someone covered by international immunity laws or treaties. If a State Party denies the Court such a waiver, the complementarity principle ensures that the State Party will prosecute instead. At the price of letting someone slip, non-States Parties must retain their freedom to deny an immunity waiver because any insistence on the opposite may cause a breakdown in diplomatic relations, with devastating consequences for international relations.

This approach is neither particularly activist nor is it particularly conservative. It is, rather, diplomatic. Given the strong emotions that dominate one side of the debate and the forceful political motives that dominate the other, it is therefore not likely to please either one. Nor will it, however, provoke. And while it may be criticized all around for being vague, it will keep the Statute intact and the Court working. Indeed, as the president of the European Court of Human Rights, Luzius Wildhaber, remarked during a recent speech, “Activism is a delicate balance; better a little at the right time, than a lot at the wrong time.”¹⁷¹

Conclusion

“The question is whether legal absolutism involving the ‘duty to prosecute’ is necessarily helpful or realistic in national or international disputes involving genocide, terror and similar forms of lawlessness. Popular perceptions of the law as a ‘bulwark of freedom’ and being ‘of God not man’ perhaps need to give way to more humble metaphors that capture the tension between political vicissitude and the codification of law.” - Charles Villa-Vicencio¹⁷²

The Rome Statute was adopted by 120 votes out of 160.¹⁷³ Given the circumstances, this was an impressive majority, but it was reached only through a high degree of compromise, much of it to mollify the most outspoken members of the Non-Aligned Movement. They were, however, mollified only temporarily. Thus, when the Court opened its doors in July 2003, it did so in an atmosphere of

¹⁷¹ Luzius Wildhaber made this statement during a speech at the Riga Graduate School of Law, Riga, Latvia, on June 4, 2004.

¹⁷² C. Villa-Vicencio, “Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet,” *Emory Law Journal*, Vol. 49, July 2001., p. 102.

¹⁷³ According to Lee, 120 States voted for, 21 abstained and seven voted against. If 160 nations took part in negotiations, this leaves out 12! R. Lee, “Introduction - The Rome Conference and Its Contribution to International Law” in R. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*. Kluwer Law International, The Hague, 1999, p. 26.

division and hostility; and, although 94 States have now ratified the Rome Statute,¹⁷⁴ the Court is faced with having to carry out its duties while fighting for its existence. This requires a panel of judges who in interpreting the Statute understand how to strike a balance between securing the continued legitimacy and authority of the Court and furthering some of the important legal aims of the Statute.

One of these aims -- the end to impunity through immunity -- bumped up against the confines of politics and legality even before the Statute was finalized, and has continued to set off sparks in the debate over the Court. The Court currently faces powerful attempts to undermine its jurisdiction, and its judges are compelled to interpret and reconcile the Statute's immunity provisions, Articles 27(2) and 98(1), with utmost care and consideration for the ominous reality that surrounds them. This does not mean they must cower. It means, rather, that they must proceed soundly, weighing their reasons and actions carefully.

On one hand, a preference towards the ideal of Article 27 will strengthen the integrity of the Court, but it may undermine its very being by aggravating its adversaries. On the other, a preference toward the practicality of Article 98 will strengthen the workability of the Statute in a world governed more by political self-interest than by law, but it may threaten the integrity of the Court.

The Court was a product of compromise, and as such requires compromise to survive. ICC judges are faced with the difficult and delicate task of finding the perfect compromise between ideal and reality, integrity and efficiency, activism and self-survival -- if a compromise can ever be perfect, that is.

¹⁷⁴ See the Coalition for the International Criminal Court website, available on the internet at: www.iccnw.org/.