

Article 98 of the Rome Statute: U.S. Immunity Agreements in the Framework of International Law

Mohamed Abdelfetah BELHAMEL

Faculty of law and political science - University of SETIF 2 (ALGERIA), m.belhamel@univ-setif2.dz

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Abstract:

The establishment of the International Criminal Court (ICC) aims to effectively combat impunity and uphold justice and the rule of law. For the ICC to function optimally, it needs broad adherence to its statutes, especially since it lacks universal jurisdiction. The United States has used Article 98 of the Rome Statute—which respects national sovereignty and principles of the UN Charter like free consent and good faith—to avoid legal accountability. This inquiry examines the legitimacy of the U.S. using Article 98 to negotiate exemption agreements, exploring their impact on international justice and the ICC's mission, and assessing their consistency with the Rome Statute's goals.

Keywords: International Criminal Court; The Rome Statute; Immunity agreements.

1. INTRODUCTION

During the 1990s, the United States actively participated in United Nations discussions to shape the International Criminal Court (ICC) charter. As the 1998 Diplomatic Conference drew near, the U.S. displayed increasing reluctance towards endorsing the court, culminating in a firm opposition to its establishment. With the formal inception of the ICC in 2002, which sought to bolster international collaboration to eradicate legal immunity, the U.S. made strategic use of Article 98. This article permits exemptions from extradition obligations for states bound by pre-existing international agreements, it was an opportunity that The U.S. sought to secure bilateral treaties to prevent the extradition of its citizens to the ICC.

It becomes evident that engaging with Rome Statute signatory states in agreements under Article 98 could potentially undermine the statute's objectives. Conversely, such agreements are considered valid for non-signatory states, barring any conflicting national or international obligations. This discourse evaluates the legitimacy of the immunity agreements orchestrated by the U.S. with various states, ostensibly to safeguard its nationals from prosecution by the ICC.

Despite asserting commitment to the ICC's mission of holding accountable those responsible for crimes under its jurisdiction and upholding the principle of complementarity,

as articulated in the Preamble and Articles 1 and 17 of the Rome Statute (RS), these assertions appear precarious. The fundamental purpose of these treaties is to shield U.S. citizens from the ICC's investigative and prosecutorial efforts¹

In light of international legal norms that require states to abide by their ratified treaties, member states of the Rome Statute are obligated to honor these treaty commitments. Similarly, the states that have entered into agreements with the U.S. raise an important research question: **To what extent are these various agreements legitimate under international law?**

2. The Extent of United States Compliance with Article 98

The United States has long employed a strategy of securing bilateral immunity agreements to protect its nationals from prosecution by the International Criminal Court (ICC). This approach marks a continuation of earlier policies; from 1995 to 2000, while the U.S. initially endorsed the creation of the ICC, it simultaneously sought to wield influence over the court's proceedings, either through the Security Council or by securing exemptions for its citizens and officials.. However, in a shift during 2001, the Bush administration ceased active involvement in ICC processes and, on May 6, 2002, formally withdrew the signature accorded to the Rome Statute by the previous Clinton administration. This retraction was justified by concerns over potential politically motivated prosecutions by the ICC, notwithstanding the statute's extensive preventive measures against such misuses.

In their efforts to enforce these immunity agreements, U.S. officials did not hesitate to leverage economic pressures, threatening to cut military assistance to countries that refused to enter into such agreements. Additionally, financial incentives were often extended to states as an inducement to sign these agreements, further emphasizing the U.S.'s commitment to shielding.²

Before assessing the U.S.' adherence to Article 98, it's crucial to evaluate its overall commitment to the Rome Statute, especially considering the U.S. signed but did not ratify the treaty. This raises key questions first about: whether the objectives of the Rome Statute align with the agreements the U.S. has pursued. Second, the distinction between signing and ratifying the treaty needs to be examined, as signing indicates an intention to comply but does not create binding obligations, whereas ratification would fully commit the U.S. to the Statute's terms. Finally, there are challenges in executing successive treaties on the same subject, which can lead to conflicts and complications in international law.

2.1 Purpose of Establishing the Court:

This issue is pertinent as it questions whether the treaties have conflicting objectives, and if so, what would be the legal resolution?

¹ Lilian V. Faulhaber ,” American Servicemembers' Protection Act of 2002” , Harvard Journal on Legislation, Vol. 40,2003, PP(537-558).

² Leila N. Sadat and Mark A. Drumbl, The United States and the International Criminal Court: A Complicated, Uneasy, Yet at Times Engaging Relationship, Washington University in St. Louis, Legal Studies Research Paper Series, July 2016, PP(1-27).P.3-5

In its advisory opinion, the International Court of Justice (ICJ) affirmed that contracting states bear a collective responsibility to uphold a treaty's fundamental purposes.¹ Additionally, Article 18 of the Vienna Convention on the Law of Treaties requires states that have signed a treaty to avoid actions that would undermine its objectives and purposes before it comes into force.² This provision creates a passive obligation, a duty of "refraining," which compels a signatory state to avoid any actions that could potentially impede its capacity to fully adhere to the treaty once it becomes effective. Consequently, the United States, by virtue of its signature — even without ratification — is bound to abstain from any measures that would contravene the provisions of the treaty or undermine its foundational purposes post-ratification. This requirement highlights the principle of good faith in international treaty relations and underscores the forward-looking nature of treaty commitments.³

The Constitutional Court of South Africa has asserted that the state's obligation to prevent impunity now constitutes a general rule, non-derogable because it is classified among peremptory norms⁴. Additionally, President Arthur Robinson of Trinidad and Tobago has noted that the presence of international criminal law illustrates global recognition of the necessity to adhere to certain behavioral standards and commitments by states in their dealings with individuals and other states.⁵

Despite signing the Rome Statute in 2000, the United States later spearheaded a diplomatic campaign to secure immunity agreements for its nationals and dissuade states from ratifying the treaty. Therefore, the United States cannot dismiss its international obligations to extradite criminals and prevent their impunity under the pretext of bilateral agreements; it remains bound by the treaty's stipulations.

¹ The advisory opinion issued by the International Court of Justice on May 28, 1951, addresses the legal implications of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. This opinion was issued in response to a request by the United Nations General Assembly on November 16, 1950. The Court clarified that reservations which are inconsistent with the substantive and fundamental objectives of the Convention are not permissible.

² Article 18 of the Vienna Convention on the Law of Treaties states.

³ Crawford, James & Philippe Sands and Ralph Wilde, "In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute; Joint Opinion", written on behalf of the Lawyers' Committee on Human Rights and the Medical Foundation for the Care of Victims of Torture. Found on Human Rights First webpage, 5 June 2003 .in: <http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf> at http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf Read 11 April 2007, P. 24

⁴ National Commissioner of the South African Police Service v the Southern African Human Rights Litigation Centre and Others, Judgment of 30 October 2014 of the South African Constitutional Court, 4. para at) CC (1428 BCLR) 12 (2014

⁵ Daniel D Ntanda Nsereko, Op.Cit.P.113

In a May 6, 2002 communication to the UN Secretary-General, the United States declared its decision not to ratify the ICC's foundational statute, asserting it would not feel obliged to abstain from actions that could obstruct the statute's objectives and purposes.

According to Scheffer, given the United States' substantial involvement in the negotiations and its drafting role in the Rome Statute, it should be recognized that the U.S. had shown an intention to comply with the statute¹

2.2 Signing and Ratification:

Article 11 of the Vienna Convention on Treaties details various ways for a state to give consent to be bound, like signature, exchange of instruments, ratification, acceptance, approval, accession, or other agreed methods. The legal significance of a treaty's signature is underscored, particularly since the Rome Statute does not stipulate a single method for expressing consent. Article 125 of the Rome Statute allows for the signature by all states, mentions ratification, acceptance, or approval in its second paragraph, and opens the door for accession in its third paragraph². As such, the treaty does not require ratification, signature, or accession to be effective against states—a provision not outlined in the Vienna Convention. Jurists are divided on this issue: some insist on the necessity of ratification, despite its absence in explicit language, while the prevailing view is that if the will of the treaty parties does not explicitly or implicitly necessitate ratification, then a signature alone suffices.³

An examination of the Vienna Convention's documents shows that the terminology associated with "withdrawal" or "unsigning" a treaty is notably absent. Typically, states that sign a treaty but later opt not to continue with the process generally just decline to ratify the treaty. The concept of "unsigning" a treaty does exist in practice, albeit it should not be given undue emphasis if it represents only a potential scenario.

Upon taking office in January 2001, President George W. Bush, along with his advisors, voiced their opposition to the United States joining the Rome Statute. However, it was not until the next year that the Bush administration undertook significant actions regarding the International Criminal Court (ICC).

The U.S. presented several untenable arguments to justify its unsigning, including that the ICC's jurisdiction infringes on state sovereignty—a baseless claim, given that the court adheres to the principle of complementarity outlined in its Preamble and Article 17.

Ambassador David Schaeffer, while serving as the chief negotiator for the United States, raised concerns about the ICC's authority to prosecute officials from countries not party to the treaty or not accepting the court's jurisdiction. He highlighted the rareness of extraterritorial jurisdiction in treaty practices, especially when applied to non-consenting

¹ Scheffer, David J, "Article 98(2) of the Rome Statute: America's Original Intent" in *Journal of International Criminal Justice*, May (2005), Vol. 3, No. 2p 333.

² Article 125 of the Rome Statute states.

³ Muhammad Al-Saeed Al-Daqaq , *Origins of International Law (Usul Al-Qanun Al-Dawli)*, Dar Al-Matbuat Al-Jamia, Algeria, 1986, pp. 43-44.

nations. Schaeffer stressed the importance of establishing the court's jurisdiction over individuals from non-ratifying countries, unless the Security Council intervenes under Chapter VII of the UN Charter, compelling compliance from all member states. This isn't the first instance where such a phenomenon has occurred.

Delegates at the Rome Conference rejected these arguments, contending that when a foreigner enters a country's territory, that foreigner must abide by its judicial and legal jurisdiction, and if found in violation of its laws, is subject to that state's legal proceedings. Signing the Rome Statute integrates its provisions into a state's legal framework, granting the state discretion over extraditing individuals to the ICC. Importantly, criminal responsibility is individual, independent of nationality.¹

U.S. Senator Robert Bennett (Republican from Utah) cited the fear of Americans losing rights guaranteed by the U.S. Constitution—rights not present in the Rome system. The U.S. cited reasons such as the court's lack of guaranteed defendant rights for its withdrawal. Members of Congress and other government officials who opposed the court repeatedly expressed concerns about Americans being deprived of a jury trial, the right to cross-examine witnesses, and protection against self-incrimination.²

Human Rights Watch countered the U.S. argument regarding bilateral agreements, particularly the American Service-Members' Protection Act (ASPA). They pointed out that the U.S. stance, which suggests that these agreements permit the cessation of aid if it conflicts with national interests, lacks validity. This is because the President already has the authority to waive military aid for reasons of 'national interest,' regardless of whether any agreement has been signed.³

2-3 Successive Treaty Implementation on the Same Subject:

The United States has entered into numerous international agreements under Article 98 of the Rome Statute, both preceding and following the Statute's enactment, raising questions about the legality of implementing these treaties on the same subject. To answer this, Article 30 of the Vienna Convention, which explains how to implement successive treaties on the same subject, is relevant. It divides into three cases:

The first case pertains to the incorporation of treaty provisions by reference to previous or subsequent treaties. In this situation, the treaty explicitly stipulates its subjection to the terms delineated in an antecedent or subsequent treaty, thereby aligning with the stipulations outlined therein. Likewise, if the treaty contains clauses mandating conformity

¹ Jordan J. Paust, "The U.S. and The ICC: No More Excuses", Washington University Global Studies Law Review, Volume 12 Issue 3 Th International Criminal Court At Ten (Symposium) 2013, PP(563-580).P.570 -Daniel D Ntanda Nsereko,Op.Cit P.109.

² Lilian V. Faulhaber Op.Ci-P.550

³ HUMAN RIGHTS WATCH, Bilateral Immunity Agreements, June 20, 2003 ,document provides a summary of the bilateral negotiations occurring around the world as part of U.S. efforts to undermine the ICC.at :

https://www.hrw.org/sites/default/files/related_material/2003.06_US_Bilateral_Immunity_Agreements.pdf

with a secondary treaty, regardless of chronological order, adherence to the provisions of either the antecedent or subsequent treaty is requisite.

The second case revolves around a subsequent treaty whose contents deviate from those of a preceding treaty. In instances where identical parties are signatories to both treaties, precedence is accorded to the later treaty, thus rendering its provisions binding.

The third cases where a subsequent treaty involves parties that do not fully overlap with those of a previous treaty, a dual regulatory framework applies: among states signing both treaties, the principle from the second scenario prevails, prioritizing the provisions of the later treaty, while for states signing both treaties but only one, their mutual rights and obligations are governed by shared provisions.

When this framework is applied to the U.S. scenario, it becomes evident that the U.S. has entered into some treaties concerning Article 98 with states that are members of the Rome Statute, as well as with states that are not members. Additionally, these agreements were made both before and after the U.S. signed the Rome Statute.¹

It seems that the first paragraph does not pertain to agreements involving the United States, but the second and third cases do. Thus, it is crucial to reference Article 98 for the analysis of these situations.

Article 98 of the Rome Statute delineates the interaction between the obligations of States Parties under the statute and their existing commitments under international treaties and customary law, particularly concerning diplomatic and state immunities. The second paragraph focuses specifically on the interaction between the obligations of States Parties within the Rome system and their international obligations arising from agreements that necessitate the sending state's consent as a condition for surrendering a national to the court.²

Article 98 of the Rome Statute serves as a pivotal expression of the court's commitment to harmonizing its activities with concurrent international obligations. It delineates procedural mechanisms for addressing both assistance requests (Paragraph 1) and surrender requests (Paragraphs 1 and 2) concerning matters of international immunity. This diplomatic immunity framework extends protection to individuals summoned for testimony, as well as to assets of significance, particularly military archives within the context of assistance requests, and individuals targeted by arrest warrants in the context of surrender requests. Article 98 navigates the intricate dynamics inherent in the tripartite relationship involving the court and two sovereign states. State A, the recipient of the court's cooperation plea, grapples with compliance constraints arising from its affiliations with State B. This scenario encapsulates a collision of interests, with the court striving to prosecute individuals while State B endeavors to safeguard its assets and citizens.

Though Paragraph 1 appears clear, the US contends it applies to both prior and later agreements. This stance aligns with Article 31 of the Vienna Convention on the Law of

¹ Tallman, David A., "Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict" in *Georgetown Law Journal*, Vol. 92, June 2004, PP(1033-1056), PP. 1048-1049.

² The term "sending state" refers to the state that dispatches its military forces under an agreement or treaty to a third state exclusively for military purposes.

Treaties, stressing the interpretation of treaties in good faith, considering not just the text but also the preamble, annexes, and subsequent agreements. Article 32 of the Vienna Convention further outlines interpretative methods, including examining the convention's preparatory work and surrounding circumstances.

The US's pursuit of such agreements is seen as an effort to avoid accountability, raising questions about the sincerity of their negotiation and conclusion. Upon reviewing interpretative terms, it's evident that the language in Article 98(1) specifically refers to agreements existing before the signing or ratification of the Rome Statute. However, the court has stated that a state utilizing Article 98 must provide all relevant documents supporting the existence of evidence that could assist its deliberations.

This stipulation underscores that the state providing assistance is not vested with discretionary authority; rather, the primary impetus for finding a resolution lies within the court's purview.

As for Paragraph 2 of Article 98, its wording suggests that it narrowly pertains to specific types of agreements, such as Status of Forces Agreements (SOFAs). This implies that the subject matter within the scope of Article 98(2) relates specifically to military personnel who are serving abroad under the auspices of their home state¹.

Scholars such as David A. Tallman have critically analyzed the wording of Article 98 of the Rome Statute, suggesting that the phrasing "strongly indicates" an intent for a significantly narrower range of interpretive options than the expansive interpretation often promoted by the United States. This nuanced interpretation focuses particularly on the designation "sending state" as it appears within Article 98. It posits that this term specifically pertains to state officials, akin to those covered under Status of Forces Agreements (SOFAs), and potentially extends to civilians and individuals affiliated with non-governmental organizations who are similarly deployed

Furthermore, Tallman argues that bilateral agreements entered into by the U.S. could contradict the principles of the Statute and undermine the structural coherence and operational effectiveness of the ICC's legal framework. .²

Given this detailed interpretation, bilateral agreements that deviate from this scope should not exist. Nevertheless, the United States and other nations continue to interpret Article 98 agreements as aligning with the stipulations of Article 98 of the Rome Statute, thus asserting no conflict with international law.³

¹ Scheffer, David J., "Original Intent at the Global Criminal Court", in Wall Street Journal Europe. September 20, 2002, found at <http://www.iccnw.org/documents/09.20.02-UNAUSA-WSJ-A98OpEd.pdf>
[Read 20 April 2007.P.17](#)

See also: 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 », JICJ, 1 (2003), p. 125.

² Tallman, David A, Op.Cit..P.1046.

³ - Meyer, Eric M, PP. 110-111.

Referencing Rule 195 of the International Criminal Court's Rules of Procedure and Evidence¹, established post the founding statute and informed by Article 32 of the Vienna Convention, it is articulated that when a state benefits from this provision, the process is not terminated but merely suspended through the surrender of the individual or property involved².

Despite the United States' assertion that it is not bound by the goals of the Rome Statute—claiming that the second paragraph of the Rome Convention extends protection beyond military personnel to include civilian officials—David Scheffer, the former chief U.S. negotiator at the Rome Conference, has provided clarification. Scheffer explained that during the negotiations of Article 98 of the treaty, they were able to uphold its fundamental purpose while finalizing around 100 agreements between the United States and different countries. He emphasized that the term "sending state" was specifically negotiated to ensure that Americans on official overseas missions—whether military, diplomatic, or humanitarian—would maintain essential protection. However, he pointed out that Article 98 was never meant to provide cover for unofficial activities, such as those carried out by mercenaries or others without U.S. authorization.³

Violations of international law and the Rome Statute by agreements entered into by the United States cannot be justified or rendered legal. For such agreements to be considered unlawful, they must breach an international obligation incumbent upon that state.⁴ Consequently, it is evident that the U.S. cannot legitimately promote Article 98 agreements unless it is not bound by either the Rome Statute or the Vienna Convention on the Law of Treaties.

3. Perspectives of the International Community on Article 98 Agreements

This section reviews the stances of diverse international entities, with particular emphasis on the United Nations Security Council's perspective, given its significant interaction with the court.

•**Human Rights Watch:** it articulates that Article 98 of the Rome Statute was designed to facilitate a structured and rational approach in handling suspects among states cooperating with the International Criminal Court (ICC). The provision was not intended to enable non-cooperative states to negotiate agreements that exempt their citizens or impair the court's effectiveness. Human Rights Watch also notes that the United States has applied illegitimate pressure to forge these bilateral agreements, which it perceives as a constructive way to address its reservations about the ICC⁵.

•**European Union:** It has robustly countered the U.S. criticism of the Rome Statute, labeling it as unfounded and strongly opposing U.S. policies towards the

¹ The International Criminal Court's Rules of Procedure and Evidence were adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court at its first session, held in New York from September 3 to 10, 2002.

² Anne-Laure Chaumette, *Commentaire de l'article 98 du Statut de la Cour pénale internationale*, 2017. ffal-01483706f Soumis le 12 mars 2017.P.5

³ Daniel D Ntanda Nsereko, Op.Cit.

⁴ Tallman, David A., Op.Cit.,PP. 1048

⁵ RIGHTS WATCH, Op.Cit.

International Criminal Court (ICC) and all its Article 98 agreements. The EU has adopted a consistent stance against these agreements, advising candidate countries to refrain from signing them under any circumstances. The EU argues that these agreements are not in conformity with international law and, as such, are not binding on the signatories. Further reinforcing this position, Switzerland explicitly declared on August 13, 2002, that it would not sign any exemption agreements.¹

•**Security Council Resolutions:**

•• **U.S. Opposition:** Since around mid-2002, the U.S. has adopted an adversarial stance towards the ICC, with the Bush administration actively seeking to undermine and marginalize the court to hinder its effectiveness as a justice mechanism.²

•**Subsequent Council Decisions:** Following initial resolutions like 1487 and 1497 were America's steps to shield its personnel in UN missions from the ICC's jurisdiction. These also included U.S. threats to withdraw all its peacekeeping forces unless the Security Council adopted an exemption from the ICC's jurisdiction for non-party states involved in such operations. The U.S. consistently used its veto power to block any decisions that contradicted its interests³, underscoring the necessity of analyzing Security Council decisions within the context of Article 98 and U.S. policy.

•**Resolution 1422⁴:** passed under Chapter VII of the UN Charter, instructed the ICC to refrain from investigating or prosecuting nationals of non-party states involved in UN operations for a 12-month period, citing Article 16 of the Rome Statute. The Security Council's goal was to curtail the ICC's authority by limiting its jurisdiction over potential violators of international humanitarian law.⁵

•**Resolution 1487:** In 2003, the UN Security Council extended Resolution 1422 via Resolution 1487, noted for abstentions by Germany, France, and Syria. This development effectively deterred the United States from attempting a third renewal due to pressures from its allies and other Security Council member states. By June 2004, the U.S. efforts to secure another renewal faltered due to a lack of substantial support from the majority of the Council members⁶.

The timing was particularly inopportune for the United States, following widespread international criticism over alleged misconduct by its military forces in Iraq. This criticism led to pointed remarks from then UN Secretary-General Kofi Annan, who expressed disapproval of UN funding decisions from the preceding

¹ Lilian V. Faulhaber Op.Cit,P.555-556

² HUMAN RIGHTS WATCH ,Op.Cit.

³ Hugh King,Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute,New Zealand Journal of Public and International Law, (Nov 2006) ,Volume 4 Issue 2, PP(296-310)P.290

⁴ Security Council Resolution 1422, adopted at its 4572nd session on June 12, 2002; available at: [https://undocs.org/ar/S/RES/1422\(2002\)](https://undocs.org/ar/S/RES/1422(2002))

⁵ Daniel D Ntanda Nsereko, Triggering, Op.Cit,P.118

⁶ Ibid, P.119

years (2002-2003). In a controversial decision, the United States has pulled its personnel out of UN missions in Eritrea, Ethiopia, and Kosovo, citing disproportionate risks to its forces. This action has been viewed as a challenge to the principles of legal accountability, aiming to undermine the jurisdiction of the International Criminal Court and perpetuate impunity.¹ thereby contravening the foundational tenets of the Rome Statute.

•**Resolution 1497:** This resolution authorized a multinational peace enforcement mission in Liberia², stating in Paragraph 7 that personnel from non-party states involved in the mission would not be subject to the jurisdiction of the ICC or of Liberia.³

In contrast to Resolutions 1422 and 1487, which explicitly referenced Article 16 of the Rome Statute, Resolution 1497 effectively terminated the jurisdiction of the International Criminal Court permanently by not only temporarily suspending it. When the renewal of Resolution 1487 was being considered, France and Germany abstained from voting, citing Paragraph 7's inconsistency with both national and international legal principles. Despite the questionable legitimacy of Paragraph 7, the Security Council incorporated a similar stipulation in its resolution on Sudan, thus perpetuating a contentious legal precedent.

These resolutions and others have undermined the effectiveness and credibility of the Security Council, revealing it as an instrument influenced by U.S. foreign policy that is antagonistic toward the court. As the only traditional ally not ratifying the Rome Statute, the United States has a compelling incentive to join the ICC: to ensure robust international support for the fundamental principle of international justice⁴.

4- U.S. Implementation of Bilateral Immunity Agreements Under Article 98

To fully appreciate the scope and application of the United States' bilateral immunity agreements (BIAs) under Article 98, it is essential first to outline the U.S. policy framework surrounding these agreements and then to discuss the specific types of agreements that have been enacted.

4-1 U.S. Policy on Article 98 of the Rome Statute:

Between 1995 and 2000, the United States supported the ICC's establishment with a specific aim —ultimately unsuccessful—to design a court that could be influenced through the United Nations Security Council or that could offer exemptions for U.S. officials and citizens from prosecution. On December 31, 2000, during the Clinton administration, U.S. Ambassador David Scheffer signed the Rome Statute. However, in 2001, Following the Bush administration's decision, the United States halted its involvement with the ICC and officially withdrew its signature from the Rome Statute on May 6, 2002. Afterward, the

¹ Daniel D Ntanda Nsereko, Triggering Op.Cit.P.118

² Security Council Resolution 1497 (2003), adopted at its 4803rd session on August 1, 2003, is available at the following link: [https://undocs.org/ar/S/RES/1497\(2003\)](https://undocs.org/ar/S/RES/1497(2003)) .

³ Paragraph 7 of Security Council Resolution 1497 (2003) articulates.

⁴ Lilian V. Faulhaber ,Op.Cit,PP(537-558).-P.554

U.S. engaged in more than 100 Bilateral Immunity Agreements. (BIAs)¹ Following the Bush administration's move, the United States pursued numerous Bilateral Immunity Agreements with different countries. These agreements granted immunity from ICC prosecution to U.S. nationals who might commit crimes falling under the ICC's jurisdiction within the territories of states parties to the Rome Statute.

To enforce these Bilateral Immunity Agreements, the U.S. Congress swiftly enacted the American Service-Members' Protection Act (ASPA)² in 2002 in response to perceived risks of politically motivated targeting and detention of U.S. soldiers by the ICC.

The U.S. also exerted diplomatic pressure on countries that had not ratified the Rome Statute and refused to sign a BIA, leveraging economic aid as a tool of coercion³.

4-2 Expansion of Anti-ICC Legislation

The U.S. further solidified its stance against the ICC on July 13, 2004, when Congressman Nethercutt introduced an amendment to the Foreign Operations Appropriation Bill, which was passed in December 2004. Known as the Nethercutt Amendment, this legislation extended beyond ASPA, authorizing the suspension of economic support funds to all countries—including key U.S. allies—that had ratified the ICC treaty but had not signed a BIA with the United States. This measure threatened to cut a wide range of foreign aid, including funds for international security and counterterrorism, economic development, democracy, human rights, and peacekeeping initiatives. The Nethercutt Amendment was revisited and adopted again in the 2006 joint appropriations bill⁴.

The importance of adhering to international justice was emphasized by the International Criminal Tribunal for Yugoslavia, which pointed out that permitting the concept of state sovereignty to supersede human rights would constitute a travesty of justice and betray the global demand for justice. The tribunal argued that borders should not act as barriers to the law or as protections for those who violate fundamental human rights. Additionally, Judge Louise Arbour, who served as the prosecutor for both the Yugoslav and Rwandan tribunals, expressed similar concerns about the potential for the abuse of power.⁵

4-3 Policy Shift under the Obama Administration:

Following Barack Obama's election in 2009, the United States adopted a policy of "cautious engagement" with the International Criminal Court (ICC). This shift became evident when a prominent U.S. delegation attended the eighth session of the Assembly of

¹ BIA is an acronym for the word Bilateral Immunity Agreements

² American Servicemembers' Protection Act, *The American Journal of International Law*, Vol. 96, No. 4 (Oct., 2002), PP(975-977).

American Servicemembers' Protection Act
(Title II of Public Law 107–206, approved Aug. 2, 2002).at :
<https://legcounsel.house.gov/Comps/aspa02.pdf>

³ Leila N. Sadat and Mark A. Drumbl, *Op.Cit.*P.5

⁴ For more information, please refer to the Coalition for the International Criminal Court's website at:
www.iccnw.org/documents/usandtheicc.html.

⁵ Daniel D Ntanda Nsereko, *Op.Cit.*P.116-117

States Parties in November 2009. The 2010 U.S. National Security Strategy presented a refined approach to the ICC, focusing on safeguarding U.S. personnel while interacting with states parties to the Rome Statute. It emphasized collaboration on ICC matters aligned with American interests and values, ensuring compliance with U.S. law.¹ The Obama administration demonstrated readiness to support ICC prosecutions and provide specific assistance, aligning such actions with U.S. national interests.

This policy was consistently expressed through U.S. National Security Strategy statements and international engagements concerning the ICC. Although the United States did not provide direct financial support to the court, it assisted governments pursuing ICC fugitives, such as Uganda's efforts to capture Joseph Kony². Despite significantly increasing U.S. efforts to combat impunity for international crimes, the U.S. still faced challenges in reconciling its domestic laws with the global framework for preventing crimes and ensuring accountability.³

In 2017, ICC Prosecutor Fatou Bensouda announced plans to seek authorization to investigate potential war crimes in Afghanistan, potentially implicating U.S. military personnel. Subsequently, the United States revoked the visa of Bensouda, a Gambian national, due to her potential investigation into the conduct of American soldiers in Afghanistan. On November 20, 2017, the ICC Prosecutor requested permission to investigate alleged war crimes and crimes against humanity in Afghanistan since May 1, 2003,⁴ and in other Rome Statute States since July 1, 2002. However, on April 12, 2019, the ICC's Pre-Trial Chamber II unanimously denied the request, citing it wouldn't serve justice at that stage.⁵

From this overview, it is clear that the U.S. has maintained a complex and often adversarial stance towards the International Criminal Court.

4-4 Types of Agreements under Article 98

4-4-1 Agreements according to Article 98(1)

When examining agreements outlined in Article 98(1) of the Rome Statute, it's vital to recognize that Bilateral Immunity Agreements (BIAs) are rooted in its provisions. This article prohibits the Court from pursuing surrender or assistance requests that would require

¹ Leila N. Sadat and Mark A. Drumbl, Op.Cit.P.8

² Ibid

³ Julian Bava and Kiel Ireland, The American servicemembers protection act: Pathways to and Constraints on U.S. Cooperation with the International Criminal Court at: <https://law.stanford.edu/publications/the-american-servicemembers-protection-act-pathways-to-and-constraints-on-u-s-cooperation-with-the-international-criminal-court/>

⁴ Pre-Trial Chamber II of ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan -02 / 17-33,12 April 2019, available in : <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33>

⁵ ICC judges reject opening of an investigation regarding Afghanistan situation,ICC-CPI-20190412-PR1448, available in : <https://www.icc-cpi.int/Pages/item.aspx?name=pr1448>

the requested state to violate its international law obligations regarding state and diplomatic immunities of third-party property or personnel.¹

The Article 98(1) agreements typically manifest in three forms according to the first paragraph:²

➤ **Bilateral Immunity Agreements (BIAs):** These agreements involve two parties agreeing not to extradite each other's nationals, including government officials, military personnel, and state employees, to the ICC without mutual consent.

➤ **Unilateral Agreements:** In these arrangements, one state agrees not to extradite U.S. nationals to the ICC without explicit U.S. consent, while the U.S. decides on extraditing nationals from the other state to the ICC.

➤ **Agreements with Non-Party States:** These agreements involve non-Rome Statute states pledging non-cooperation with third-party states in extraditing individuals to the ICC. The first such agreement was signed by East Timor and the United States on August 26, 2002.

The United States has leveraged ASPA to prompt other nations to enter into these Article 98 agreements, blocking the extradition of U.S. nationals to the ICC. By mid-August 2002, Romania and Israel had signed such agreements under significant pressure from the Bush administration to expand the list of signatory states.³

4-4-2 Article 98(2) Agreements

The U.S. engages in Status of Forces Agreements (SOFAs) concerning its armed forces abroad, which regulate jurisdiction over criminal activities between the host state and the U.S. forces. SOFAs provide functional immunity for U.S. forces, adhere to host state laws, and define their respective responsibilities.

These U.S. bilateral immunity agreements conflict with Article 98 of the ICC treaty. They aim to alter ICC treaty terms by essentially excluding the notion of "sending state" from Article 98(2), suggesting it covers SOFAs and similar agreements. SOFAs delineate responsibility for personnel sent from one country to another and define how any crimes they commit are handled. Moreover, these agreements don't guarantee U.S. investigation of alleged crimes.⁴

Except for the multilateral NATO SOFA, each SOFA is an autonomous executive agreement. The State Department and the Department of Defense work together to evaluate the need for a SOFA with a particular state and negotiate its terms. The NATO SOFA is

¹ Leila N. Sadat and Mark A. Drumbl, Op.Cit.,P.5

² Meyer, Eric M.Op.Cit.,P.116

³ Lilian V. Faulhaber , ,Op.Cit ,PP(537-558).-P.554

⁴ The coalition for the international criminal court, **Questions & Answers US, BILATERAL IMMUNITY AGREEMENTS OR SO CALLED "ARTICLE 98" AGREEMENTS**.at:

http://www.iccnw.org/documents/FS-BIAs_Q&A_current.pdf

distinctive as it is incorporated into the Treaty and was ratified by the Senate on May 19, 1970, without modifications to its terms.¹

5- Conclusion

The International Criminal Court (ICC) was established with the main objective of curbing impunity, but it respects national sovereignty by enacting Article 98. The article is divided into 2 sections and allows states that have signed a waiver agreement before signing the Rome Statute to be exempted from the obligation to surrender individuals, in line with the Vienna Convention on Treaty Law and other principles of international law. Nevertheless, the United States has extended this provision to include both existing and subsequent agreements with various states. Despite U.S. efforts to eliminate the term "sending state," the second paragraph of Article 98 maintains this language, addressing obligations under Status of Forces Agreements (SOFAs) based on established international law and treaty rules.

Contrary to promises by high-ranking U.S. officials to respect other nations' decisions to support the ICC, various U.S. administrations have resorted to coercive tactics to ensure immunity from ICC jurisdiction. U.S. officials have explicitly threatened to impose economic sanctions and cut off military and economic aid under the American Service-Members' Protection Act unless countries agreed to immunity deals. Furthermore, hefty financial incentives have been provided to those states that agreed to these terms.

The U.S. has broadly interpreted Article 98, forging bilateral immunity agreements with both member and non-member states of the ICC after the Rome Statute was signed, and expanded the scope of the second paragraph to cover all U.S. citizens, not just military personnel covered under SOFAs, thus exceeding the intended limits of the article and violating international law.

The U.S. has undertaken a comprehensive campaign against the ICC, including through preparatory works, legislation that penalizes allies who support the ICC, and efforts in the UN Security Council to secure exemptions for U.S. peacekeeping forces from ICC jurisdiction.

This multifaceted approach has created significant political barriers to holding Americans accountable for crimes under the ICC's mandate, leading to a complex and often adversarial U.S. relationship with the ICC.

Moreover, resolutions issued by the Security Council under Articles 16 and 98(2) of the Rome Statute have compromised the Council's effectiveness and credibility, transforming it into a mechanism that can be manipulated by U.S. foreign policy in opposition to the ICC.

Recommendations:

¹ Ibid, P. 3

- Empowerment of the International Community: It is essential for the global community to reinforce its commitment to raising awareness about the International Criminal Court (ICC), as it embodies the unified voice of nations within the United Nations and acts as a moral compass for global justice.

- Promote Near-Universal Ratification: The international community should continue advocating for nearly universal ratification of the Rome Statute to ensure robust support for the ICC and enhance its effectiveness in achieving international justice.

- The international community should advocate for the United States to abstain from engaging in immunity arrangements that do not comply with the legal provisions set forth in Article 98 of the ICC Statute, as such agreements may compromise the court's pursuit of international justice.- The court must also remain vigilant to ensure that States Parties fulfill their obligations under the Statute and do not violate them, as happened with bilateral immunity agreements some concluded with the U.S.

By implementing these recommendations, the international community can bolster its support for the International Criminal Court and enhance its effectiveness in achieving international justice.

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