

# BILATERAL IMMUNITY AGREEMENT; ANALYTICAL STUDY OF THE TEXT OF ARTICLE (98) OF THE ROME STATUTE

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**ABSTRACT:** *The future of generations depends on the establishment of a true human being, away from all manifestations that deprive him of his fundamental rights, especially for ensuring international peace and security, but it has been seen in the past decade that this phenomenon does not conform to international Morality, that is, some countries release their nationals to commit crimes under the "Roman Statute" without punishing them, and believe that this violates the rules of public international law.*

## 1. INTRODUCTION

Since the end of the Second World War, the United States of America has supported the concept of individual criminal responsibility for serious international crimes in violation of the rules of international law and has contributed to the establishment of all efforts to prosecute the international judicial system [1]. Those who commit such crimes also believe that such courts must obey the powers of the Security Council, which is evident in the United States' relentless pursuit of the establishment of the International Criminal Court "United Nations" at the United Nations Conference of Plenipotentiaries on Plenipotentiary. The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held in Rome, Italy, from May 15 to July 17, 1998, in which the United States attempted to limit the transfer of courts to the Security Council, which gave some control, so Outside of Se, the jurisdiction of the court will not be controlled by the board of directors to guarantee a prestigious and controlled manner. When the United States realized that there was not much time, it signed the "International Criminal Court Convention" on December 31, 2000 ( ICC), in the late US President Bill Clinton, stated at the time that the reason for signing the US Convention did not mean that the United States of America did not care about the ambiguity of the Convention [2] , especially the opinion of the International Criminal Court on the signatory countries in terms of expanding jurisdiction. And the United States understands that the jurisdiction of the court extends even to citizens who have not signed the country to join the Rome Statute, and then (Little George Bush) decided to withdraw the law arising from the signing of the United States of America on June 5, 2002. obligation. From this point of view, studies have shown that the withdrawal of the United States from the "Roman Statute" and the conclusion of an immunization agreement are totally incompatible with the obligations of States parties to the Statute of the International Criminal Court, which may violate other provisions. The States parties to the "Roman Statute" are parties to international conventions, all of which clarify the concepts of these conventions, their images and the individuals they cover, the rules that contradict them and the reasons for such violations, and the following are details.

### INTRODUCTION TO ILLUSTRATE THE CONCEPT OF BILATERAL IMMUNITY AGREEMENT

The bilateral exemption agreement is a series of agreements

between the United States of America and the rest of the world that stipulate that these countries will not extradite or transfer the nationals of the United States of America to the International Criminal Court for trial, and it is worth mentioning that by withdrawing from the United States of America Economic and military assistance, the conclusion of these agreements puts pressure on the governments of these countries.

The concern of the United States of America is that although it is not a party to the Rome Statute of the International Criminal Court, it is not obliged to extradite the wanted persons of the Criminal Court of the International Criminal Court and that the United States of America has no obligation to provide evidence to the Court, but the Rome Statute does not The extradition of nationals of States not party to the Convention to the International Criminal Court is prohibited. If an indictment is filed against a person and the criminal proceedings are brought before the International Criminal Court and the person is identified on the territory of the State party to the Convention, the person is tried by the State or handed over to the International Criminal Court. Court trial [3] .

Therefore, "BIA" terminates the sovereign right of another State to have jurisdiction over its national courts or the jurisdiction of the International Criminal Court under multilateral agreements to investigate the crimes committed by persons on its territory on its territory, and Termination of the right of such courts to prosecute or extradite them for trial in an international criminal court.

Therefore, it can be said that "BIA" is a means of impunity and responsibility, and the United States has resorted to it to exempt its citizens from prosecution through illogical excuses and vague guarantees, which we will discuss in detail later.

As stated in the preamble to the "BIA", regarding the intention of the United States of America to investigate and prosecute the people – but only in favourable circumstances – the allegations of crimes covered by the jurisdiction of the International Criminal Court are carried out by its officials, military or members of its military , or other nationals.

The Convention also confirms in its preamble the importance of bringing to justice those responsible for genocide, crimes against humanity and war crimes, and the Convention does not provide for the initial jurisdiction of the United States of America or even any jurisdiction. United States. The Convention further affirms that extradition of perpetrators is

unacceptable such crimes to the International Criminal Court. Please note that the United States may not be able to prosecute these individuals for crimes within the jurisdiction of the Rome Statute of the International Criminal Court, as US law allows them to investigate and prosecute US soldiers outside the territory of war crimes under customary international law in military courts and allow The military commission previously sued the citizens of the enemy for war crimes. For crimes against humanity, it is unclear whether US law allows the trial of US soldiers and enemy citizens in front of the judiciary, as defined by the Rome Statute of the International Criminal Court [5].

Since the end of the Second World War, such crimes have not been tried before the trial of American soldiers in military courts or before the military commissions tried to test the crimes against humanity of enemy citizens. In addition, federal law does not explicitly mention the war crimes mentioned in the Rome Statute of the International Criminal Court, but according to federal law, the crime of torture is not a crime, and it is uncertain whether the US court will prosecute the United States law is not clearly considered a criminal habit. Crimes under international law and without any guarantee or legal prosecution of any US citizen after his return to the United States of America, because there is no law in the United States that criminalizes many American citizens. Offences agreed in the Rome Statute [6].

It should also be noted that genocide committed outside the country is within the jurisdiction of the federal courts only in the case of nationals of the United States of America and does not include members of the United States armed forces who are not nationals. Covered by "BIA"

#### **PHOTOS AND MODELS FROM BILATERAL IMMUNITY AGREEMENT**

These conventions have many images or forms, such as:

1-First picture:The first form of the Convention, which aims to immunize and imgone the citizens of the United States of America, takes the form of an agreement whereby the parties to the Convention agree not to surrender their wide range of nationals and others associated with them. They are not only those of the International Criminal Court who are engaged in United Nations peacekeeping operations without the consent of the other party, but also note that it has prevented States parties to the Convention from surrendering the nationals of the two countries and those associated with them. They are related, in particular to the various security agencies that are submitted to the court in various forms and in different forms without the consent of the other party, and the links between their contractors and agents of the United States forces. This version of the Convention has been adopted in many bilateral agreements in most countries [7].

2- second picture:

The second picture is similar to the first edition of the second edition of the Second Immunization Convention, but it differs from the former in that it does not prevent the United States from extradition the nationals of the second State Party to the Convention and its related personnel. (Some civilians associated with the International Criminal Court), but the extradition of nationals of the United States of America and their related personnel to the International Criminal Court is

prohibited.

Only two countries (Romania and Tajikistan) have signed the existing version of the Convention. These States are parties to the Statute of the International Criminal Court and note that the first two photographs include States parties to the Rome Statute of the International Criminal Court. The number of countries that have signed immunization agreements with the United States exceeds 102, of which 48 are members of the Rome Statute, 52 are not parties to the Rome Statute, and the States parties to the Rome Statute are 104 of the International Criminal Court. The number of signatories to the Rome Statute of the International Criminal Court is 139.

3-third picture:

The third version is similar to the other formulas, but it refers to countries that have not signed or approved or approved the Rome Statute. The wording of the Convention provides for a paragraph requiring States not to cooperate with the efforts of States, whether they are parties or the "Roman Statute of the International Criminal Court", in order to extradite persons to the International Criminal Court and note This version of the "Convention" was signed only by (East Timor), not a member of the "Roman Statute" and has not yet become a member of the United Nations [4].

It also stated that it went beyond the basic requirement of not extraditing personnel to the International Criminal Court, but rather prevented cooperation with other States in their efforts to extradite their nationals, associates or contractors.

It should be noted that the signing of bilateral immunization agreements does not eliminate other obligations of signatories to the International Criminal Court. The main focus of bilateral immunization agreements is extradition, which is a clear violation of their extradition obligations for crimes and requires them to appear before the courts of other countries.

Furthermore, the immunization convention constitutes a violation of and a violation of articles 27, 86, 87, 89, 89 and 90 of the Rome Statute.

#### **PERSONS COVERED BY BILATERAL IMMUNITY AGREEMENT**

"BIA" cover a wide range of people including:

1. Officials, citizens and government (including retirees).
2. Members of the armed forces.
3. Citizens of one of the parties (current and former).
4. Former members of the armed forces and civilians associated with them.
5. Persons traveling through the United States or other countries.
6. Persons who conduct personal business or spend their holidays in both countries.

The range of persons covered by the immunization conventions (BIA) is noted to exceed the list of persons covered by the status-of-forces agreement (SOFA); and it is contrary to these conventions and with article 98/2 of the Rome Statute of the International Criminal Court, As the persons covered by the BIA are not exclusively members of the armed forces and civilians associated with the sending States over the territory of the receiving State in accordance with that Convention, but also cover a wide range of persons not covered by the status-of-forces agreement, For example, the limitation of the Convention extends even to former

members of the armed forces and associated civilians, as well as persons traveling through the United States of America or who are vacationing in both countries. The list of persons covered by the Convention extends to nationals of another State not party to the Convention Including citizens of States parties to the Rome Statute of the International Criminal Court - that any categories of persons covered by the United States, such as individuals or armed forces (which include nationals from many other States), may include nationals of other State Parties Of the Convention, which could be a party to the Rome Statute of the International Criminal Court [1].

### **THE JUSTIFICATIONS FOR THE BILATERAL IMMUNITY AGREEMENT**

The United States of America, as it seeks to protect its vital interests in various parts of the world, especially after the collapse of the Communist camp in 1991, which declared the end of the cold war era between the great powers of the Soviet Union and the United States of America in practical and effective, In the United States of America's endeavor to consolidate the one-pole force and to direct its assertion of its actual leadership as a single superpower, it has been able to harness international institutions, particularly United Nations institutions and bodies, to protect its interests. This is evident in many of the Security Council resolutions adopted since 1990 on conflicts Regional and international levels, Despite the American control of the capabilities of international institutions, there were many failures in the American policy in the quest to establish its hegemony over international institutions, the most prominent failures was the clash raging between the United States and the International Criminal Court, a clash that emerged to the public after realized The United States of America that the International Criminal Court has become a reality and that at this time the international community has begun to be more vigilant and determined to support this institution, which the international community has worked hard for half a century In order to show it to exist.

While the United States has consistently sought to justify its unilateral political or military decisions on legal grounds, even if these legal grounds can not justify the resolution, the United States of America, when it has Resisted to the ICC and obstructed its work by concluding bilateral immunization agreements (BIA) Under which States that sign these conventions shall not extradite American nationals to the International Criminal Court to be tried whether or not their Contracting States are parties to the Rome Statute of the International Criminal Court. In article (98/2) of the Rome Statute, which we will address in greater detail to get a closer look at what surrounds these conventions.

### **OBLIGATIONS UNDER ARTICLE 98 OF THE ROME STATUTE**

Article 98 of the Rome Statute of the International Criminal Court provides that, in the context of cooperation with regard to waiver of immunity and consent to surrender, it must [2] :

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

The text of Article 98 of the Statute of the International Criminal Court, which is part of Part IX on International Cooperation and Judicial Assistance, states that, in dealing with the existence of previous international conventions relating to the non-extradition of a broad spectrum of persons who are nationals of a Contracting State or persons Others associated with them, persons with diplomatic immunity, or delegates or officials assigned to a third State for the purpose of prosecution or investigation of certain offenses, The Convention which includes the requirement prior consent of the State of the citizen prior to extradition to a third judicial body other than the two Contracting States.

In fact, the text of article (98) was clear in the directions it had set forth: respect for international obligations under international law, with respect to the immunities of States and diplomatic immunities of a person or property belonging to another State, and to respect international obligations to extradite nationals of States and conventions concluded in that regard, The authors of the Rome Statute and the States that negotiated its drafting had made a great effort to observe the principles of international law and were interested in addressing possible conflicts between the Rome Statute and existing and existing international obligations, Article (98/2) was designed to address the possible differences that might arise from the commitment of those States and thereby open the way for their cooperation with the ICC, particularly since the Rome Statute is based on the principle of complementarity, which gives priority to national jurisdiction in prosecuting persons for crimes within the jurisdiction of the International Criminal Court [3,] Which preceded the entry into force of the Rome Statute of the International Criminal Court. Those who established the principles of international criminal law hoped to put an end to the impunity enjoyed by the perpetrators of international crimes, in particular the provisions of the International Criminal Court system. Or invokes the Rome Statute of the International Criminal Court for any reason and purpose which is unlawful because it can not be justified in any way.

In light of this, it is illegal to conclude agreements contrary to the Rome Statute of the International Criminal Court, especially since article 98 represents the direction of the international will to respect the obligations of previous States to the entry into force of the Statute of the International

1 Aladdin Hussein, US Efforts to Ensure Impunity for Genocide and Crimes against Humanity, Working Paper presented to the Intellectual Symposium on the International Criminal Court, Academy of Graduate Studies Tripoli, Libya, 2007, p7.

2 Article 98 of the Statute of the International Criminal Court, 1998.

3 Amnesty International Statement, op.cit.

Criminal Court. Rome Statute of the International Criminal Court to conclude conventions incompatible with the Statute or devoid of its content, as this is contrary to an important rule of international law states that "a State party to a convention may conclude a subsequent convention deviates the first of its objectives and purposes and make them non-related effective Mechanism" [4].

There are two opinions on the legality of the immunization conventions and the extent of their violation of Article (98), which can be summarized as follows:

**The First Opinion:** The opinion of the owners of this view that these agreements are illegal and this is the position of non-governmental organizations and their evidence in this is:

- 1- The agreements concluded by the United States of America are outside the framework of the Convention in Article (98/2) of the Rome Convention and "BIA" are not considered as part of the conventions known as (SOFA) which the article (98/2) means.
- 2- Article 98/2 refers to agreements concluded prior to the signing and ratification of the Rome Statute of the International Criminal Court, and not after the signing or ratification of the Statute, and that the framers of the Rome Statute were not intended to allow the conclusion of new Conventions based on Article 98, Rather, their aim was to prevent legal disputes that might arise from new agreements or to renew existing agreements from previous conventions such as the status-of-forces agreements (SOFA) and the interpretation of article 98 by the United States of America was contrary to the general objective of the International Criminal Court which aimed at ensuring that perpetrators of war crimes, genocide or crimes against humanity are not released [5].
- 3- article (98/2) deals with agreements that include guarantees of investigation, which are not included in bilateral immunity agreement (BIA).

The provisions of articles (90/6) and (93/3) of the Rome Statute of the International Criminal Court refer clearly to previous international obligations, existing conventions or existing conventions. Paragraph (6) of Article 90 of the Rome Statute refers to " In cases where paragraph (4) [6], applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

- A- The respective dates of the requests.
- B- The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought.

[4] See the judgment of the International Court of Justice in the Nicaragua case against the United States 1986.

[5] Amnesty International Statement, op.cit.

[6] The text of paragraph (4) of Article (90) is " If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible."

While Paragraph (3) of Article (93) of the Rome Statute of the International Criminal Court provides that " Where execution of a particular measure of assistance detailed in a request presented under paragraph (1) [7], is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary"

**The Second Opinion:** In this opinion there was nothing in the text of article (98/2) indicating that it was related to previous conventions, namely, that no State could conclude non-extradition treaties to the Court and enter into the text of article (98/2), And the text of this article does not require that non-extradition be linked to the obligation to investigate and prosecute by the requesting State [8].

This view is in line with the European Union's decision of 11 June 2002, which is an initiative to support the International Criminal Court. It rejects the position of the US administration from the Court and urges European countries not to respond to their pressure and sets out general principles to be followed in the case of extradition agreements between European countries The Rome Statute with the United States of America [9], without prejudice to its legal obligations

[7] The text of paragraph (1) of Article (90) is " States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- (a) The identification and whereabouts of persons or the location of items;
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- (c) The questioning of any person being investigated or prosecuted;
- (d) The service of documents, including judicial documents;
- (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) The temporary transfer of persons as provided in paragraph 7;
- (g) The examination of places or sites, including the exhumation and examination of grave sites;
- (h) The execution of searches and seizures;
- (i) The provision of records and documents, including official records and documents;
- (j) The protection of victims and witnesses and the preservation of evidence;
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.

[8] Azza Kamel Al-Maghoor, op.cit p32.

[9] Before the end of July 2002, before the entry into force of the Rome Statute, the United States of America contacted most of the EU countries asking them to enter into bilateral agreements. On August 16, Secretary of State (Colin Powell) sent letters to the EU governments The European Union is requesting the signing of these agreements at the earliest possible opportunity without waiting for a unified position of the European Union, which was in the process of taking, which prompted the foreign ministers of the European Union to discuss the request at an informal meeting held in Denmark for the period from 30 to 31 August 2002, Legal advisers discussed ministries Foreign States of the European Union The substance of the agreements that the United States intends to conclude in

Brussels on 4 September 2002. The meeting sent a report of this meeting to the European Union Policy and Security Committee for discussion at a meeting held on 6 September 2002 in order to adopt a common position towards the end of September. The legal opinion of this meeting resulted in States Parties being in breach of their obligations Under the Rome Statute if it entered into bilateral immunization agreements for impunity with the United States, noting that the United Kingdom had worked hard to prevent the adoption of the European Union's position against these conventions and that the United Kingdom does not see any legal objection to enter into an agreement Of this kind with the United States of America, the spokesman for the British Foreign Office said in a statement that () the entry into the immunization agreements with the United States does not conflict with the

resulting from its prevention or ratification of the Rome Statute of the International Criminal Court, in recognition of the European Union's view that this is contrary to the Rome Statute.

In the general principles of the EU decision, the provisions of the agreements concluded must not include any immunity for persons to be extradited, and the United States of America must take criminal action against the person sought for extradition, And the resolution also states that the conventions should not relate to nationals of States not party to the Rome Statute, and that they should not apply to persons present on their land because they are sent by the requesting State on the basis of article 98/2 of the Rome Statute. The principles of the EU decision that the immunization agreements concluded by the United States of America with the other countries should be time-limited [10].

And that not setting a specific period for the termination of the Convention would help to further escape the perpetrators of crimes from punishment, which was contrary to the rules of justice and the norms of international law and international relations.

In this connection, it should be noted that the term "international convention" mentioned in the text of article (98) of the Rome Statute is not specific, since article 98 does not refer to the type or date of such conventions, Did not state that they were intended to be those agreements concluded before the Rome Statute or before its entry into force or until the time of ratification, Where time was unspecified, allowing the United States of America and other States parties to the Rome Statute or non-parties to sign many of "BIA"

The text of Article (98) of the Basic Law is subject to the consent of the sending State without specifying the nationality of the person, since it concerns the person to be sent, whether he is a delegate or an envoy in any official diplomatic, military or civilian capacity in a mission. If the person is on a private trip, retired military or any contracting party with an official body, and the definition contained in the bi-immunization agreements provided by the United States of America, including former and current government employees - Workers including contractors - Members of the armed forces or nationals of a Party beyond the limits of Article (98/2) of the Rome Statute of the Criminal Court

The wording of the international conventions mentioned in article 98 does not specify the type of conventions referred to in the article. Some argue that the international conventions mentioned in article 98/2 are the SOFA, Despite that the text had never come and did not refer to the definition of a particular type of agreement, whether the status-of-forces agreements (SOFA) or others.

## CONCLUSION

At the end of our research we reached many conclusions and suggestions as follows :

First: Conclusions

1. The United States of America is living in duality, It sometimes demands the establishment and promotion of human rights denounces its violations, and once again, it practices the worst human rights violations, such as the Iraq war.
2. Through the bilateral immunity agreements, the United States seeks to impede the exercise of its duties by the International Criminal Court by entering into a large number of bilateral immunity agreements with a number of countries in order to immunize of its nationals who commit serious crimes of an international character from appearing before the International Criminal Court Even if they were committed or arrested on the territory of a State party to the International Criminal Court.

Second: Suggestion

1. To affirm that the international community must call for the respect and promotion of human rights, and that the rules of general international law, particularly international humanitarian law and international human rights law, transcend the rules of force or claim them.
2. To bring to justice any person who commits any crime, especially of an international nature, and invites States parties to the Rome Statute of the International Criminal Court not to give any justification for the conclusion of an immunity agreement with States that are not a member or a party to it; Based on the fact that the State does not ask but asks the individual based on the system of individual criminal responsibility.
3. To call upon States to abide by the principle of universal jurisdiction, which includes the criminalization of acts which constitute crimes without regard to the place and nationality of those who commit them as serious crimes that threaten international peace and security.
4. Bilateral immunization agreements are in violation of article 98 of the Rome Statute of the International Criminal Court as this article concerns only the (SOFA) Conventions, ie extradition conventions.

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- [4] The American Convention on Immunity.Statute of the International Criminal Court for 1998.
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Rome Statute of the International Criminal Court, and that the United Kingdom has put pressure on this for the States Which wants to join the European Union.) See more: Philip Sechen, Eastern Europe under pressure from the United States and the European Union on immunity at the International Criminal Court, Wall Street Journal, August 16, 2002.

[10]Azza Kamel Al-Maghoor, op.cit p18.

