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Reflection of the European Union to the US Bilateral Immunity Agreements

Till the end of the 20th century it was a large problem of the international criminal jurisdiction that a sufficient judicial body did not exist which could operate permanently and efficiently for the aim of repressing and preventing the most serious crimes of an international character such as war crimes or crimes against humanity. In 1998 a great step was taken with the birth of the Rome Statute of the International Criminal Court which will proceed in the case of war crimes, genocide and crimes against humanity conducted in armed conflicts.

After this event the European Parliament adopted resolutions to encourage states (and before all the member states of the Union) to ratify the Statute so that it could enter into force earlier. Greece was the latest member state which ratified it on the 15 May 2002. Although all of them were members of the Rome Statute as well, a lot of dominant countries had not ratified it. In the Council Common Positions related to the issue of the ICC can be found the common aim of supporting the widest possible ratification. In these documents the Council requested the member states to make every effort to further this process in negotiations or political dialogues with third states, groups of states or relevant regional organisations.[2] The Union's opinion is reflected in these provisions that universal accession to the Rome Statute is essential for the full effectiveness of the Court. This position is totally against any special international agreement which could undermine the integrity of the Statute.

The United States of America endeavours to conclude such kind of special agreements as many as possible. Although on the 31 December 2000 U.S. Ambassador David Scheffer signed the Rome Statute on behalf of the U.S. government during the Clinton administration, on the 6 May 2002 the Bush administration revoked the signature. The main reason of this act was the fear that the ICC could be a forum for politically motivated prosecutions. The settings of the European Parliament were loud of disapproval full of the strongest terms related to this step of the US.[3]

Beyond that the US denied to recognise the jurisdiction of the ICC its main aim was to ensure the immunity of the American nationals from the jurisdiction of the Court. To reach this goal they try to conclude bilateral impunity agreements (BIAs) with as many states as possible. In the text of the agreement is declared that the government wants to ensure the impunity of officials, employees, military personnel, or other nationals of US

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[2] Council Common Position 2003/444/CFSP on the International Criminal Court. 16 June 2003. Official Journal L 150, 18/06/2003 P. 0067-0069. Art 2(1)
[3] EP vote 1st reading. 15 May 2002. COS/2001/2139 *wwwdb.europarl.eu.int/oeil/oeil.Res112* Date of downl.: 10 February 2004

committed the international crimes falling under the jurisdiction of the ICC.[4] Any state becoming a contracting party is obliged to surrender all of the affected persons present in its territory to the authorities of the United States instead of the Court after the provisions of BIA:

"1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
(a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
(b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X.
4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States."[5]

These obligations of the contracting states make sure that none of the nationals of the US will be brought to the Court but on the other hand the agreement does not mention any obligation which would ensure the punishment of persons conducting the most serious crimes of an international character. It does not declare any obligation of the national authorities of the Parties to proceed in the cases of the affected nationals after that they were taken home. On this way US nationals would be returned automatically to the United States, without the need of any formal request of extradition from the competent judicial authorities. In a memorandum of Parliamentarians for Global Action is mentioned an example which illustrates the absurd situation well: if Italy signed the bilateral agreement, this could lead to the following situation: if a US national steals a car in Rome, he runs the risk to be tried and punished under the law of Italy, but if a US national perpetrates a crime against humanity, he shall automatically be returned to the country of nationality.[6] It shows that the real aim of these agreements is not to protect the national jurisdiction but to avoid the procedure of the ICC and to undermine its integrity. Beyond that must be mentioned that the bilateral agreements declare that US will investigate and prosecute people accused of the affected crimes only where appropriate. As US national law does not include many of the crimes listed in the Rome Statute, this may be interpreted as a situation where investigation and prosecution is not appropriate.[7] Genocide is codified by US internal law but in case of this crime may proceed US courts only if it is committed in the United States or the offender is a US national (this category does not include the officials without American nationality). Crimes against humanity are not codified at all in the United States.[8]

[4] Text of Article 98 Agreements with the United States. Art B-C. www.iccnow.org/documents/otherissues/impunityart98/USArticle98Agreement1Ang02.pdf Date of downl.: 14 February 2004
[5] Ibid.
[6] Parliamentarians for Global Action: Parliamentary action to defend the territorial jurisdiction of the International Criminal Court. New York, 3-10 September 2002. Art 1 www.iccnow.org/documents/otherissues/impunityart98/pga200209.pdf Date of downl.: 4 February 2004
[7] Amnesty International: International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements. October 2002. page 2 www.iccnow.org/documents/otherissues/impunityart98/AI.EueffectiveSteps.pdf Date of downl.: 4 February 2004
[8] Ibid. page 17-18

After examining this legal background can be clearly outlined the intent behind the BIAs. This is contrary to the overall purpose of the ICC, which is to ensure the proceeding in case of genocide, crimes against humanity and war crimes either at the national level or before the ICC.
The opinion of the European Union related to BIAs was clearly declared immediately after the first requests of the Government of US for concluding such agreements. The European Parliament stated in its resolutions that no special agreement may ever make possible the impunity of any individual accused of war crimes, crimes against humanity or genocide. After its opinion ratifying such an agreement is incompatible with the membership of the EU.[9]

A Council Common Position of 2003 declares the aim of EU to hinder the conclusion of such agreements:

"(5) The serious crimes within the jurisdiction of the Court are of concern to all Member States, which are determined to co-operate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof.
(6) The principles and rules of international criminal law embodied in the Rome Statute should be taken into account in other international legal instruments."[10]

These provisions furnish an explicit official position and a clear message to the member states about their requested attitude to this issue and although all of the member states publicly refused to conclude a BIA[11], the question can be still posed: are the resolutions enacted by the organs of the Union and the public affirmations strong enough to prevent the member states to conclude such agreements? One negative example can be Romania as a candidate state for EU membership, although ratified the Rome Statute in April 2002, became the first state signing an immunity agreement with the United States in August 2002. The European Council's reaction to this act was consistent to the above mentioned EU resolutions as it requested Romania to align its Common Position related to the ICC.[12]

On 30 September 2002 the EU foreign ministers met in Brussels where they adopted their decision on BIAs. This resolution of the Council of the EU includes an annex about the EU guiding principles concerning the impunity agreements. After them any solution should include appropriate operative provisions ensuring that the accused persons do not enjoy impunity. These provisions should ensure appropriate investigation and prosecution by national jurisdictions but only *"where there is sufficient evidence"*.[13] This condition can be interpreted in many ways which finally can become the ground of denying the procedure. Actually this part of the sentence gives to the US complete political discretion whether to investigate or prosecute the worst possible crimes. It would be necessary for the EU to make clear for the member states that there is no way to avoid proceeding nor on the ground of such an interpretation.

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[9] European Parliament opinion or resolution. 24 October 2002 RSP/2002/2592 *wwwdb.europarl.eu.int/oeil/oeil.Res112* Date of downl.: 10 February 2004
[10] Council Common Position 2003/444/CFSP on the International Criminal Court. 16 June 2003. Official Journal L 150, 18/06/2003 P. 0067-0069. Art (5)-(6)
[11] Bilateral Immunity Agreements: Breakdown of Countries. 26 November 2003. *www.iccnow.org/documents/otherissues/impunityart98/BIAWaiversWICC24Nov03.pdf* Date of downl.: 4 February 2004
[12] Council Common Position 2003/444/CFSP on the International Criminal Court. 16 June 2003. Official Journal L 150, 18/06/2003 P. 0067-0069. Art 9(2)
[13] Council of the EU: EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States regarding the conditions to surrender of persons to the Court. 30 September 2002 12386/02 COJUR 9 USA 35 PESC 369

The other strict opinion which is declared in the Guiding principles is that "entering into US agreements would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute".[14] Why would it violate the rules of the Statute? The US government drafted the text of bilateral agreement bearing in mind the Article 98(2) of the Statute. After their explanation this provision enables them to conclude such agreements. The text of this critical Article sounds that:

"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 the State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender."[15]

Delegates involved in the negotiations about this Article 98 indicate that this provision is not intended to allow the conclusion of *new* agreements but to prevent legal conflicts which can arise because of *existing* agreements. They consider that some states had previously special agreements such as Status of Forces Agreements (SOFAs), which obliged them to send the nationals of another country (the "sending State") back home when a crime had allegedly been committed.[16] Although the earlier mentioned EU Guiding principles related to this subject declares the intent to prevent the conclusion of bilateral agreements but related to the interpretation of this problematic Article it does not include any clear official position. It says: *"Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute."*[17] The expression of "sending State" can have a wide interpretation. It is essentially important to clear that it means only the sending state after SOFAs or such kind of special existing agreements with the aim of ensuring the sufficient legal ground for refusing the US requests related to BIAs.

Beyond this problem it would cause further violations of the provisions of the Rome Statute as well. If a State Party concludes bilateral agreement providing impunity also for their nationals in case of crimes listed in the Statute which is contrary to the main aim of it. After reciprocity BIAs ensure that also the US will not surrender the nationals of the other Party. It is clear that if the other State is a Party to the Rome Statute it violates its obligations declared in the Statute. Actually the scope of persons covered by the BIAs is too broad. The Article 98(2) can be applied only for those persons "sent" by the US in a military manner and not for all US nationals. These agreements would give special privileges for persons only on a national ground, so this would breach the fundamental principles of non-discrimination and equality before the law. The Rome Statute includes also a provision about the general obligation of the Parties to co-operate with the Court in its investigation and prosecution which would be violated as well.[18] Beyond the provisions of the Statute concluding BIA would breach also the Article 18 of the Vienna Convention on the Law of Treaties which obliges the states parties to refrain from acts which would defeat the object and purpose of the treaty.[19] This rule is the ground of a very interesting question: after that US government had signed the Rome Statute which already obliges it

[14] Ibid.
[15] The Rome Statute on the International Criminal Court. 17 July 1998 Art. 98(2)
[16] Coalition for the International Criminal Court: U.S. bilateral immunity or so-called „Article 98" agreements. Questions and Answers. 30 September 2003. page 3 www.iccnow.org/pressroom/factsheets/FS-BIAsSept2003.pdf Date of downl.: 04 February 2004
[17] Council of the EU: EU Guiding Principles concerning… 30 September 2002
[18] The Rome Statute on the International Criminal Court. 17 July 1998 Art. 86
[19] The Vienna Convention on the Law of Treaties. 23 May 1969 Art. 18

not to defeat the object and purpose of the treaty, is it possible to behave in a totally inconsistent way after "unsigning"?
It has been reported on numerous occasions that when countries sign a bilateraly agreement, the US has simultaneously announced the provision of large financial packages to those countries and on the other hand in many cases of countries not concluding or publicly refusing to conclude BIA the United States denied financial aid.[20] In May 2002 Under Secretary for Political Affairs Marc Grossman explained the US policy toward the ICC saying that, *"the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court."*.[21] To tell the truth the strong economical and political pressure which the US uses cannot be mentioned as a sign of respect regarding to decision of the other sovereign state at all.

The largest danger of BIA is that it can become a precedent and it may encourage other nations, particularly those opposed to the Court, to pursue similar immunity for their own citizens. This would fundamentally undermine the activity of the ICC. On the other hand many governments, non-governmental organizations and other international law experts argue against the bilateral agreements. Amnesty International's one million members around the world, along with the more that one thousand members of the Coalition for the International Criminal Court, are campaigning to prevent all states to sign such agreements.[22] Till now 70 states have signed BIAs but only 13 have ratified them and already 45 countries have publicly refused signing (including all of the member states of the European Union as mentioned earlier).[23] Only in this way of a world-wide refusal of conclusion of bilateral immunity agreements can be ensured the integrity of the Rome Statute on the International Criminal Court.

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