

EU BOLSTERS ICC: Credibility of International Criminal Court Maintained by European Union Decision to Allow American Nationals Limited Immunity.

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The headlines screamed “surrender” even “betrayal”, but in fact the European Union’s decision to allow US citizens limited immunity from the International Criminal Court, ICC, may be a defeat for America, not the court.

Washington is demanding blanket immunity from the ICC for its citizens, a move that would have undermined the legitimacy of the court even before it holds its first trial.

The EU decision, on September 30, to allow immunity for certain categories of Americans, including soldiers and diplomats, is not perfect. But it keeps the credibility of the ICC alive.

America’s worry is that the ICC, which came into force on July 1, may prosecute US nationals accused of war crimes while living or working abroad. So, starting this summer, Washington demanded immunity.

It dispatched envoys around the world armed with a “template” agreement under which individual nations would promise that Americans or those working for American companies would not be handed over to the ICC.

Washington insists there is a provision in the court’s statute for such a deal - Article 98. Just two paragraphs long, the article allows ICC member states to sign an immunity deal that covers citizens sent to their territory by a third country.

America says this rule means states can sign immunity deals covering all US citizens without fear of breaking the ICC statute.

But ICC supporters disagree, saying the key word in Article 98 is “sent” - a much narrower exemption.

The original intention of Article 98 was to get around the problem that some members already had immunity agreements with other states to cover the deployment of armed forces. ICC supporters said America’s proposal went much further.

“Article 98 is a loophole, or anyway a mouse hole,” said Jennifer Schense, legal advisor to the New York-based Coalition for the International Criminal Court. “What the US has done is take this gigantic elephant, put on some mouse ears, and try and shove it through this hole.”

US pressure mounted through the summer. In June, Washington said that unless an immunity deal with the UN was made, it would have to pull its peacekeeping troops out of Bosnia - an ICC member - by the time the court opened.

The United Nations came to the rescue, arranging a convoluted deal. Although the UN has no formal relationship with the ICC, the latter has nevertheless given the former a chance to influence prosecutions: Article 16 of the court statute allows the UN Security Council to block ICC indictments by majority vote.

So, with days to spare, the Security Council agreed that, in the unlikely event of an American peacekeeper being indicted by the new court in the 12 months from July, it would vote to block the prosecution. In effect, America got a Get Out Of Jail Free card.

Later in the summer, US officials, intimating that future NATO membership might be at stake, got their first immunity deal from an ICC member when Romania signed-up. Another was signed with non-member Israel.

Congress last year approved the American Servicemembers' Protection Act, which came into effect in August. The legislation was nicknamed the "Hague Invasion Act" because it gives the US president the power to send troops to free any American serviceman arrested and sent to the ICC's detention centre in The Hague.

EU states offered the bilateral deals postponed their decisions ahead of the September 30 meeting of the EU foreign ministers in Brussels.

The ministers, anxious not to ruffle Washington's feathers, announced they would not object to individual members signing immunity deals, but that these deals should be conditional - generating those shock headlines about an EU "surrender".

But these conditions, contained in an annex, are so tight they shatter US hopes of immunity.

First, the ministers agreed that the word "sent" in Article 98 means what it says - immunity can only be granted for Americans on government business.

In case Washington missed the point, the annex specifically ruled out America's standardised immunity agreement, saying, "US agreements - as presently drafted - would be inconsistent with ICC States Parties obligations with regard to the ICC Statue."

And the ministers said even these watered-down deals should have a "sunset clause" time limit, rather than being open-ended.

The ministers' decision is not binding, but EU members are expected to keep within the guidelines, offering America only the conditional immunity that is likely to be unacceptable on the other side of the Atlantic.

EU ministers tried to sweeten the pill, reminding Washington that under the Rome treaty national courts retain the right to try any indictee before the ICC takes charge. But America has never been satisfied with this stipulation, since the court - however unlikely in a US case - retains the right to declare such trials invalid.

ICC supporters are pleased. The EU is the most powerful block within the ICC, and other members of this new court are likely to follow Brussels' guidelines.

Washington has not given up, however. State Department spokesman Richard Boucher said the push for total immunity will go on. "Some elements in the guidelines section of the ministers' decision we do not agree with, and we'll continue to pursue these matters in the bilateral discussions that we expect to have," he said.

These discussions have seen America threaten to pull out troops, and economic aid, from countries refusing to sign immunity deals - a worry for smaller nations.

But Washington insists it has good reason for its objections. It fears abuses of power, and is suspicious of the ICC and of all institutions that are able to override democratically-elected governments.

The ICC argues America's concerns over the former are groundless, as the new prosecutor, expected to be appointed in February, can only issue an indictment after a panel of three ICC judges has approved it.

But the latter is harder to deal with. For it is precisely the quality of overriding power that the ICC possesses which makes it so attractive to members.

Many states, notably the South Americans, who have joined in force, hope the court will send a signal to the generals who, not so long ago, ran these nations as dictatorships. The message to the military is - you still have the tanks and guns to stage a coup, and to crush domestic justice, but even if you do, you will not be beyond the reach of international justice.

What happens next depends on Washington. It may make a fresh approach to the EU, perhaps threatening to pull peacekeepers out of Europe.

But EU nations have another worry. Even if they want to offer America exemption, they are stuck. The ICC statute is more than a piece of paper - it is embedded in the law of each member state. So signing a deal that breaks Article 98 risks seeing individual governments being challenged by their own courts.

ICC staff at their temporary headquarters in The Hague are optimistic, saying the EU decision has maintained the court's credibility, and that they will gain strength once it has started to operate. "We are optimistic," said the ICC's Advance Team Coordinator Sam Muller. "It should become clearer over the next few years what this court is all about."

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