

Safeguards in the Rome Statute Against Abuse of the Court to Harass American Servicemembers and Civilian Officials

Introduction

This paper examines the likelihood of politically biased prosecution in the ICC of Americans, the safeguards available to US nationals against such prosecution, and the protection available to those accused.

Background

The Rome Statute was adopted in 1998, despite US opposition, following a five week conference. The Statute will come into force once 60 countries ratify it. Thus far, 30 countries have ratified and 139 have signed the Statute. The US signed the Statute on December 31, 2000, the deadline for signature. Establishing the Court will begin with the convening of its Assembly of States Parties (ASP). Among its many duties to manage and oversee the Court, the ASP will nominate and elect judges and prosecutors and review and enforce the ICC's compliance with its mandate.

In the meantime, there have been seven UN Preparatory Commission sessions which will continue until the conclusion of the first meeting of the Assembly of States Parties. The commission mandate includes preparing proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of the Elements of Crimes, the Rules of Procedure and Evidence and of a relationship agreement between the Court and the United Nations. It is also charged with developing a proposal for a provision on aggression to be submitted to the Assembly of States Parties at a Review Conference. The Elements of Crimes and the Rules of Procedure and Evidence drafted by the PrepCom and adopted on June 30, 2000 further defined the jurisprudence of and the conduct of trials by the Court. The PrepCom's work seeks to apply the Statute to ensure the independence, effectiveness, and fairness of the Court as well as its practical ability to prosecute and punish crimes defined in the Rome Statute.

US position

Despite persistent efforts, the United States was unable to secure exemption of US servicemembers or officials from the jurisdiction of the International Criminal Court. As a result, they will be subject to the Court's jurisdiction even if the United States does not ratify the treaty or takes steps to annul its signature of the treaty. The ICC has jurisdiction over (i) nationals of states parties (ii) individuals accused of committing a crime on the territory of a state party (iii) cases referred by the Security Council. Given these conditions for jurisdiction it is possible that a US official or servicemember may be investigated and prosecuted by the Court. As a state non party the US government is not obliged to cooperate with the Court in such ways as handing over suspects and providing information or documents. However, if the US ratifies the Rome Statute, it will be obliged to cooperate fully with the ICC, which may include delivering accused Americans to the ICC. Considering the rapid speed of signatures and ratifications of the Rome Statute it appears that the Court's creation is imminent and is likely to occur in 2002. Thus, American citizens may soon be vulnerable to

investigation and prosecution by the ICC whether or nor the US ratifies the Rome Statute.

Subject Matter Jurisdiction

A. Genocide and Crimes Against Humanity

The crimes to be tried by the ICC are especially serious: war crimes, crimes against humanity, and genocide. The Statute limits prosecution of crimes against humanity and genocide to those which are part of planned and systematic government and/or military policies. Although the statute authorizes the ICC to investigate and prosecute individual incidents of war crimes, these are to be extremely serious. The nature of the crimes reduces the likelihood of ICC prosecution of an American by either a national or an international tribunal. The egregious nature of a war crime, a crime against humanity, and of genocide as defined in the Statute provides an inherent safeguard for US military personnel. They do not and are highly unlikely to engage in such serious, pre-planned atrocities. The prohibition against such behavior is imprinted in the moral consciousness of most Americans, not to mention in our own military manuals. The US military does not have policies to commit such crimes. Thus, ICC prosecution under these articles is highly unlikely, if not impossible. In any case, if the US military ever did commit such serious crimes, the United States would want to investigate the persons accused of them with or without the possibility of international action.

B. War Crimes

The ability of the ICC to prosecute war crimes under Article 8 causes great concern in some military circles. Sub paragraph 2 (IV) lists as a war crime, “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long term and severe damage to the natural environment which would be clearly excessive in relation to the concrete overall military advantage anticipated.” Thus, concern by the US military is understandable in light of possible ICC examination of proportionality, calculated risk, and the number of civilian casualties.

Nations frequently engaged in military operations, such as the US, are particularly vulnerable to war crimes prosecution. Quite recently, charges against US forces were brought before a prosecutor for an international tribunal. The ICTY prosecutor handled Serbia’s charges against NATO forces objectively and the investigation determined that NATO’s actions were not criminal. She concluded that the civilian casualty rate and destruction of non-military structures during NATO bombings were significant, but did not constitute war crimes. The prosecutor apparently examined NATO’s overall military strategy and determined that its purpose was not to kill Serbian civilians to secure military objectives. The investigation did not touch upon the broader geopolitical policy for the NATO presence in Kosovo. The ICTY solely examined the military strategy of which the incident was a part, which is also what the Rome Statute requires of the ICC.

The Statute’s requirements that the Court focus on crimes committed as part of a larger policy or program should alleviate American concern over war crimes. The war crimes to be tried by the ICC are not likely to be isolated incidents. Thus an unintended error or a miscalculation, which resulted in a “war crime”, is not likely to be taken up by the ICC. The Rome Statute does not require eliminating the deaths of

civilians from warfare. These deaths are a tragic consequence of armed conflict including sometimes, unfortunately, US military operations. The Court is only required to determine whether there was a military strategy specifically aimed at harming civilians. Since unaccountable governments and militaries frequently commit the crimes covered in the Rome Statute, the Tribunal will have to deal with larger issues than minor infractions (even if they are determined to be infractions), by the US military.

There is a further, explicit safeguard in Article 124 which would allow the US government to not accept jurisdiction over war crimes for seven years. While Americans would still fall under the court's jurisdiction, they would nevertheless receive considerable protection since their government could then refuse to cooperate with the ICC in handing them over, providing documents, and the like. The opt out provision would give the US, as a state party, the chance to observe the Court's adherence to its stated mission and regulations in dealing with war crimes which are of the greatest source of concern to the United States about the Court.

C. Aggression

Like war crimes, the crime of aggression is a particular concern for the United States because it frequently engages its military abroad. The ICC will prosecute aggression once a provision defining the crime and setting out conditions for jurisdiction is adopted. (Article 5, 121 and 123 of the Rome Statute.) This definition must be agreed to by 2/3 of the Assembly of States Parties. If the United States is a state party at the time such a definition is adopted, it would have to accept the definition for its nationals to be covered by the amendment. (Article 121.5) Should the US reject the definition, its nationals will not be tried for aggression. Even if the US does not ratify the Statute, the Court may still never include aggression in its jurisdiction. To date, a definition or provision on jurisdiction over aggression has not been adopted. The progress of the Prepcoms on the crime of aggression has been slow and painstaking. It is quite possible that the consensus necessary to include the crime of aggression in the Rome Statute will not be reached. Furthermore, since amendments cannot be added to the Statute until seven years after its entry into force, aggression is not likely, if ever, to be tried by the ICC for at least a decade.

D. Other Crimes

The rules for aggression apply to all crimes added as future amendments to the Rome Statute. As a state party to the Statute the US would be able to opt out of prosecutions based on crimes added as future amendments (Article 121). Thus, US citizens may never be prosecuted for aggression or any other crimes added to the Statute. Furthermore, since amendments to the Statute will not be made until seven years after its entry into force the US should have sufficient time to ratify the Statute and utilize the opt out provisions.

Jurisdiction over Persons

A. Basis for Jurisdiction

As stated above, the ICC has jurisdiction if (i) a crime has been committed by a national of a state party (ii) a crime has been committed on the territory of a state party (iii) the Security Council referred the case for investigation. There is an additional basis for jurisdiction provided in the Statute for states non party.

B. Jurisdiction by non state party reference

States not party to the statute, thus not subject to ICC jurisdiction, can nevertheless bring charges in the ICC against other nations. A state non-party may accept jurisdiction of the Court with regard to a specific matter. However, this is subject to a safeguard against manipulation of the Court for political objectives set out in Article 12(3) of the Rome Statute to be read in conjunction with Rule 2.1 in the Rules of Procedure and Evidence. The two taken together oblige a state non party wishing to lodge a charge against another nation to agree to ICC jurisdiction over the entire situation from which the charges arose. The Court may thus prosecute not only the charges lodged by the state but also any violations committed by that state during this specific situation.

The stringent rules for accepting jurisdiction for specific situations by non party states safeguard against politically motivated charges. If a nation not party to the Rome Statute wishes to bring charges against an American soldier on its territory in a peacekeeping force dealing with an internal political upheaval, that state must accept the ICC jurisdiction over the entire situation. If that nation committed war crimes, these would then come under ICC jurisdiction and officials of that state could be prosecuted for them. The state may find itself in a situation where US forces are acquitted but its own military personnel are convicted. This possibility would discourage charges brought solely to harass Americans.

Admissibility

A. Complementarity

The complementarity provisions in articles 17,18 and19 of the Rome Statute point to the subsidiary nature of the ICC. Complementarity allows the state with primary jurisdiction to exhaust its own legal and judicial procedures before the ICC considers prosecution. That is, after the ICC's mandatory notification of its investigation to the state involved, that state may invoke complementarity. If the state so requests, it then has the right to conduct its own investigation, conclude that the matter does not merit further action or decide to proceed to the trial stage. The ICC must allow that state to complete this process if it is able and willing to do so. However, the Statute does give ICC judges the right to determine whether a national investigation was or was not properly conducted. If they determine that the investigation shielded the accused from criminal responsibility or was in any way biased or impartial, they may authorize an ICC investigation and prosecution.

Thus, under the Rome Statute, the ICC may potentially duplicate a domestic prosecution. However, this is a last resort measure, undertaken when there is a breakdown of national governance and court systems or if these are not developed or objective enough to conduct a fair investigation or trial. It is only when governments are unable or unwilling to prosecute that the Rome Statute authorizes the ICC to take over. Investigations and prosecutions in the ICTY and ICTR indicate that the crimes that will be under ICC jurisdiction tend to occur in countries experiencing a breakdown after conflict, accompanied by a lack of legal and judicial resources to conduct a national investigation.

Complementarity would allow the US to conduct its own investigation and if, as is likely to happen in almost all cases, the ICC finds this fair, the Court's investigation

and prosecution would stop there. The United States is recognized as a bastion of stability, justice, and democratic process. Furthermore, the US judicial system is widely respected and independent from the US government. Therefore, the ICC is almost certain not to question an American investigation and/or prosecution as biased and “unwilling” and is thus unlikely to re-considered them.

B. Article 53 limitations on Admissibility

Many have voiced their concern that an investigation by the ICC may reopen old wounds or jeopardize the success of peace negotiations. Article 53 allows an out if this is the case. Once a case is admissible under Article 17, it still has to get through the stringent investigation requirements of Article 53. Under these provisions, even if a serious crime has been committed and there is sufficient legal and factual basis to seek a warrant, the Prosecutor may decide not to prosecute. The Pre-Trial Chamber may then review the decision upon the request of the Security Council or the nation which referred the case. Moreover, the Statute requires the chamber to reconfirm the Prosecutor’s decision if it is based solely on the rationale that the prosecution would not serve justice (Article 53(3b)). Accordingly, the ICC is not under a legal obligation to investigate and prosecute every crime listed in the Statute.

The United States may utilize the provisions in Article 53 to prevent prosecutions solely based on political motivations rather than a search for justice. It may argue for the effectiveness of such instruments for justice as domestic trials, investigations and truth commissions as reasons to prevent the prosecution of its servicemembers and officials by the ICC. Furthermore, it may present the argument that prosecution would not aid the parties involved and would not serve justice. Given such arguments and the provisions of Article 53, the ICC is equipped with a firm basis for not proceeding with a prosecution and at the same time avoiding questions of bias on its part.

C. Security Council Deferral

Furthermore, once a case gets through the admissibility requirements of Article 17 and 53, the Security Council may by a resolution postpone the investigation for 12 months under Article 16. The Security Council may renew the deferral thereafter annually and indefinitely. Thus even a case serious enough to get through the Court’s own admissibility requirements may not reach the prosecution stage due to a Security Council decision. The US may use its significant power in the Security Council to influence such decisions and thus shield its officials and servicemembers from prosecution.

D. Government Cooperation with ICC

The provisions in the Rome Statute requiring government cooperation with the ICC are limited. In fact, several provisions explicitly authorize non-cooperation. A government, either as a party or a non party, may withhold information and documents from the ICC if it determines that such disclosure would prejudice its national security interests. Furthermore, a state party, which received documents from a state non-party in confidence, must obtain that government’s permission in order to disclose these documents to the ICC. These protections would be available to the US without ratification.

Under the Rome Statute (Article 98), states party have to give precedence to Status of Forces Agreements (SOFA), which explicitly state the legal rights of military forces stationed abroad, bilateral extradition agreements and existing international

diplomacy law over cooperation with the Court. Furthermore, under this article the Statute states that the ICC may not require nations to violate their international law obligations to accord diplomatic immunity to certain officials of other countries.

Should the US remain a non party, US citizens held by another state can be returned to the United States under any existing extradition and status of forces agreements between the US and the second state. The provisions under Article 98 of the Rome Statute ensure that an American may not be handed over to the ICC by a state party to the Statute if that state has an extradition agreement or SOFA with the United States. These provisions would prevent a state willing to cooperate with the ICC from surrendering an American. As a further safeguard, to take maximum advantage of Article 98, the US has the option to begin negotiations to secure SOFAs and favorable extradition agreements with the few nations with which they do not already exist.

Administration of the Court

A. Judges

The ability to nominate judges and influence the election of prosecutors and judges is reserved for states party to the Rome Statute. Judges are elected by the Assembly of States Parties in accordance with article 35. The judges are to be highly qualified professionals of untarnished moral character (Article 36). They must be competent and experienced in either criminal or in relevant areas of international law. Of the 18 judges, no two can be nationals of the same state. Only states party may nominate and elect judges and only candidates who are nationals of states parties may be elected. Article 40 restricts the involvement of judges in any activities, which may compromise their independence, such as professional engagements. Furthermore, judges may be disqualified and/or excused if their independence with respect to a particular case is questioned (Article 41). In the case of misconduct or inability to perform his assigned duties, a judge may be removed from office, upon recommendation of 2/3 of the other judges, by a 2/3 majority of States Parties (Article 46).

The procedure for choosing and removing judges suggests that it would be advantageous for the US to be involved in it. As a state party, the US could nominate an American judge and/or support the nominees of its allies. US ability to do this would guarantee an American perspective in the rulings of the Court and the execution of the provisions in the Rome Statute. US participation in the ASP would ensure the integrity and experience of judges while upholding US and international professional standards. Furthermore, the US could nominate or back candidates who support the US position and/or understand the special needs of a nation often engaged in military operations. If an American comes before the Court when the US is a party, he or she would appear before a panel of judges who had been nominated and elected by the ASP of which the US would be an active and influential member. There would very likely be an American judge on the panel. If the US is not a party the suspect will come before a panel of foreign, nevertheless highly qualified, judges. Some will almost certainly be from powerful allies of the US.

B. Prosecutor

The Prosecutor is subject to similar stringent qualification and removal procedures as the judges (Article 42). The United States, as a state party, would be able to

participate in the procedures for nomination and performance review of prosecutors. Thus, the prosecutor would be subject to the stringent qualifications and accountability requirements of the Rome Statute, as well as US scrutiny. Through active participation in the ASP, the US may be able to secure the appointment of a Prosecutor from an ally nation, if not the United States itself.

Due Process

If an individual does come before the Court, the Rome Statute includes all but one of the protections present in our own Bill of Rights. Upon apprehension the suspect has the right to remain silent or to “not testify against himself”. Article 55(1)(a) and Article 67.1 (g) prohibit self-incrimination in the same way as our own Constitution. The suspect has the right to confront his accusers under Article 67.1(e), which provides “the right to cross examine the witnesses against him”. The use of anonymous witnesses is not permitted under the Statute and will not be utilized by the Court precisely because of the due process violations it would entail. The suspect is entitled to be tried with undue delay (speedy and public trials art. 67). There is protection against double jeopardy in Article 20. The accused has the right to be present at the trial (art. 63, art. 67 (1), 67(1)(c)). The list of due process protections also includes provisions for the presumption of innocence (art.66), assistance of counsel (arts. 67(1)(b),(d)), right to a written statement of charges (art. 61 (3)), right to have compulsory process to obtain witnesses (Art. 67 (1) (e)), prohibition against ex post facto crimes (art. 22), freedom from warrantless arrest and search (art. 57 (3), 58), exclusion of illegally obtained evidence (art. 69(7)).

A notable exception to the due process protections is trial by jury. The exception arose from a practical concern and not as an attempt to pre-determine the results of trials. A jury of peers for the likes of Hitler would be hard to find and its justice would be questionable. It would be difficult to find, after years of often widely publicized atrocities, a juror impartial and uninformed enough to enter the courtroom without previously formulated opinions of the defendant. Sequestering jurors as is often done to ensure a just verdict would be a futile attempt at the ICC level. Enforcement of the Statute’s due process protections has yet to be tested, but the US can begin influencing the process as a state party or even as a non state party through a close and supportive relationship with the Court.

Possible Cases and Safeguard Interaction

Several of the safeguards against prosecution of an American are formidable in their own right. However, it is the interaction of these safeguards that provides the most extensive and complete guarantee against such prosecution. Taking a hypothetical situation is a clear way to examine how these safeguards work together to the advantage of an American servicemember or official.

As this memo has already described, the nature of the crimes in their own right provide a safeguard against prosecution. Let’s suppose that an American soldier commits or is accused of a crime horrible enough to fall within ICC jurisdiction. Security Council reference of the case to the ICC is unlikely due to America’s veto power. Thus, the ICC would have jurisdiction only if America were a state party or if the state on whose territory the crime was committed were party. If the US is a state non party and has SOFA or extradition treaties with the state on whose territory the crime was committed, that state, despite its obligations to the ICC, is obliged to

surrender the accused to the US and respect US wishes. This is quite likely considering the number of SOFA and extradition agreements concluded by the United States. If the US is not party to the Statute, it may also refuse to cooperate with the ICC in providing information on the accused or surrendering him to the ICC. Assuming the Prosecutor decides to investigate, he/she would immediately have to report the investigation to the United States. Upon learning of this investigation the United States could invoke complementarity and transfer the case into its own courts. Following its own investigation and perhaps a trial the US may still find the accused not guilty. At this point, the Rome Statute allows ICC judges to determine whether or not the investigation was for the purposes of shielding the accused from justice. If so, the ICC may continue with its investigation and attempt to bring the accused to trial. At the same time, the ICC may be satisfied with an American investigation or otherwise decide under Article 53 that the case is not worth pursuing. The investigation would end there. Again, this is quite likely given the highly respected reputation of US Courts. If the ICC decides to proceed the US may use its influence in the Security Council to defer the investigation and renew indefinitely every year.

If the above safeguards fail, and it would take a grave crime and an incompetent domestic judicial system for them to do so, the accused would indeed be tried by the ICC. This situation would be akin to one where an American committed a crime on the territory of a foreign state and would thus be subject to prosecution in a foreign court. Prosecution in the state where the crime was committed, that is territorial jurisdiction, is a basic and well established tenet of international law. The ICC is merely an extension of that right. The accused would come before a Court where the US may have exercised some influence as a state party. The judges may have been nominated and selected by the US and/or its allies. Of course the situation may be different if the US was not a state party and actively undermined the Court during its creation. However, even in this case the Court's jurisprudence would be an international body of law created with the significant participation of the United States and other democratic nations. It is highly unlikely, as the experience with the ICTY shows, that such a tribunal would aim to harass Americans. Furthermore, if there are attempts to undermine the Court's impartial and unbiased system, the Statute's strong due process and rights of the accused provisions, would guard against abuse.

The concern over a politically motivated and possibly anti American court may be a valid one, but this depends on US handling of the ICC in the future. The Court was not designed to undermine or control American power. The concern over US sovereignty will become valid if the US actively shuns and attempts to undermine the ICC. While the ICC is not presently anti-American, American insistence on it being so may turn delusions into reality. Considering the imminent creation of the Court the best approach for the United States would be to participate actively in the Assembly of States Party, which would mean ratifying the Statute. Although this would oblige the US government to cooperate with the ICC, potential political manipulation of the ICC may be prevented or turned to US advantage through active participation.

Conclusion

We conclude that, ultimately, a review of the safeguards indicates that their cumulative effect is that the likelihood of an American official or servicemember coming before the Court is extremely low. This of course does not quite equal a 100% exemption. That would require a clear provision categorically stating that the Court

cannot prosecute American officials and military personnel. Nonetheless, the existing safeguards come close to exemption, especially if the US utilizes them as a state party rather than a signatory. Utilizing the safeguards to their maximum potential, and ensuring the accountability of the ICC and its strict adherence to the Statute's mandate, depends heavily on US involvement in the remaining Preparatory Commissions and the Assembly of States Parties.