



SAFEGUARDS AND PROTECTIONS FOR MILITARY AND DIPLOMATIC OFFICIALS UNDER THE ROME STATUTE

The Rome Statute provides two primary sets of safeguards to protect military and diplomatic personnel of all countries, including non-States Parties. The first set is found in Article 98. The second set of safeguards includes: the gravity threshold, the principle of complementarity, the ability of a defendant to challenge the prosecutor during the pre-trial phase, the Prosecutor's obligation to seek approval when investigating a case *proprio motu* (on his or her own initiative), and the oversight function of the Assembly of States Parties (ASP) over the Prosecutor.

The United States has the largest military presence worldwide and feels especially exposed to possible abuses by the Court. Further, without an "absolute guarantee" that its military personnel and diplomatic officials would never be brought before the Court, the US fears that if it joins it will be subjected to frivolous claims, politically motivated investigations and that US military personnel will become targets for anti-American campaigns. Therefore, the US military has previously concluded that the US should not join the Court.

This paper explains some of the safeguards and protections included in the Rome Statute. It also explains how the current protections adequately protect US nationals from frivolous claims. Also, it will suggest that the US has more to gain by engaging the Court than by isolating itself from it.

Article 98 Safeguards

Article 98 is different from the second set of protections provided by the Rome Statute because it requires no action by the Court to implement it. It is based on the long-standing international law on diplomatic immunity and the status of the representatives of one state conducting business in another state. The US, like many countries, depends on the recognition of diplomatic immunity in order to conduct its foreign affairs. Article 98(1) recognizes that if countries are unable to rely on diplomatic immunity then foreign relations will come to a grinding halt. Therefore, the Statute allows countries to choose to recognize diplomatic immunity in accordance with international law without violating obligations under the Statute.

In addition, the Rome Statute recognizes that countries form bilateral and multilateral agreements all the time on various issues, from trade to military. Therefore, Article 98(2) does not require a country to violate Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs) to comply with the Rome Statute. This allows states to recognize a SOMA or SOFA without violating the Rome Statute and continue to enter into agreements with other countries.

A SOFA is an agreement that details how troops will operate on foreign soil and which country has jurisdiction over civil and criminal matters. A typical US SOFA provides that a US military tribunal will have jurisdiction if a military servicemember commits a crime against another servicemember or during the course of his or her duties. It usually also requires extradition back to the US. A typical US SOFA allows the host nation to retain jurisdiction over civil and all other criminal matters. A SOFA is usually reciprocal.

A SOMA is an agreement that details how civilians will operate on foreign soil. A Typical US SOMA provides information on the purpose for civilians' present and the extent of their engagement and protections afforded





them. Also, it includes definitions as to who qualifies as civilian personnel, contractors and military personnel. A SOMA also answers questions on the jurisdiction over crimes committed by civilians conducting official business overseas. It usually extends diplomatic immunity for acts committed during the course of duty and permits the host nation to retain jurisdiction over all other acts committed.

The US will continue to use SOFAs and SOMAs to ensure that US military personnel and civilian officials are protected in host countries. This does not mean that military personnel and officials will not face justice. A member of the military or other official extradited back to the US pursuant to a SOFA or SOMA would face an investigation and trial in a US federal or military court. The willingness and ability of the US to try its nationals for any crimes within the jurisdiction enables the US ask the ICC to defer any cases against Americans if any were to arise.

Complementarity

In addition to Article 98, the Rome Statute offers another set of safeguards, including “complementarity.” The principle of complementarity obligates the Court to defer prosecution to a state that has jurisdiction unless it is unable or unwilling to prosecute. The Court determines if the country has adequate resources, a functioning judicial system and whether the investigation, prosecution or trial is fair.

In the US, the judicial system is divided between state, federal and military courts. US military courts are prepared to handle war crimes committed by military personnel or civilian personnel accompanying the military. Further, the US has recently included crimes of genocide and child soldiering within its federal law. The US has the protection of the complementarity now and may invoke it if a case were to arise.

Gravity of Crimes Threshold

The Prosecutor cannot pursue frivolous claims because the Court’s jurisdiction is severely limited. Under the Rome Statute, the ICC does not investigate crimes that do not rise to the level of serious war crimes, crimes against humanity and genocide. In addition, the Court only has jurisdiction over those most responsible for committing these crimes. Crimes by low level personnel and officers carrying out orders therefore do not fall within the jurisdiction of the Court. Therefore, it is very unlikely that the Prosecutor would charge US servicemembers or diplomatic officials for alleged crimes that were not sufficiently grave.

The Court has opened investigations and issued arrest warrants and has by all accounts investigated only the most serious crimes and only those most responsible. It is clear from the Court’s track record that it is not interested in pursuing frivolous claims or harassing individual military personnel.

Investigation and Pre-Trial Protections

The Prosecutor may open an investigation if the matter is referred to the Court by an ICC State Party or by the UN Security Council. Alternatively, he or she may open an investigation on his or her own initiative (*proprio motu*) with the approval of a three-judge panel of the Pre-Trial Chamber. In order for the Pre-Trial Chamber to approve the investigation, the Prosecutor must present evidence to establish that there is a reasonable basis to





proceed with an investigation and that the case appears to fall within the jurisdiction of the Court. Given this burden of proof, it would be difficult to take a politically motivated or frivolous case beyond the Pre-Trial Chamber.

After an investigation has been opened, the Prosecutor may submit an application to the Pre-Trial Chamber for the issuance of an arrest warrant or summons to appear. The Pre-Trial Chamber will not grant the request if the Prosecutor does not meet the burden of proof required. The Prosecutor must show that a crime was committed within the jurisdiction of the Court and the person named in the application is reasonably believed to have committed the crime. Therefore, although it is possible that a Prosecutor could open a politically motivated investigation against a US national, it would be dismissed without sufficient evidence.

However, if evidence is sufficient to issue an arrest warrant or summons to appear, a suspect still has the opportunity to have the charges dismissed. The Rome Statute permits, but does not require, a suspect to challenge the Prosecutor's case during the confirmation of charges hearing. Here, the suspect may be in custody and he or she may challenge the evidence presented, object to the charges and present evidence. The Pre-Trial Chamber must confirm the charges before the case goes to trial.

Therefore, a US national would have the opportunity to present evidence and challenge the Prosecutor's claims prior to trial. A US national would be protected from an unfair prosecution because he or she is entitled to see the evidence presented by Prosecutor and has the opportunity to argue his or her case before the Pre-Trial Chamber.

Protection Against Abuse of Power

Critics claim the Prosecutor has unchecked powers and will bring politically motivated charges against the US. However, he or she is accountable to the Assembly of States Parties (ASP) which may remove or discipline the Prosecutor for acts of misconduct.

If the US joins the Court, it would participate in the ASP and have the opportunity to express its concerns over any potential misconduct of the Prosecutor. Also, the US would have greater ability to persuade other States Parties of its views than it does as a non-State Party.

Conclusion

The protections and safeguards established in the Rome Statute adequately protect the US military and civilian officials from harassment and frivolous prosecutions by the Court. The US should engage with the Court in order to ensure that the Court performs as designed.

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