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Protecting U.S. Troops from the Reach of the U.N.'s International Criminal Court

Executive Summary

- Earlier this year, the Bush Administration offered a U.N. Security Council resolution to exempt (for one-year) U.S. soldiers from prosecution in the International Criminal Court (ICC). On June 23, the U.S. was forced to withdraw the resolution due to a lack of sufficient votes for passage.
- The U.S. is not a party to the ICC, and does not recognize its jurisdiction. Even so, this court can arrest and prosecute U.S. troops and personnel operating in U.N. peacekeeping missions.
- U.N. Secretary General Kofi Annan and some members of the Security Council opposed extending protections from ICC jurisdiction to U.S. troops for a variety of reasons, with the then-developing Iraqi prison abuse scandal being one of the most significant contributing influences.
- The Bush Administration objects to U.S. participation in the ICC because this court: undermines the role of the United Nations Security Council in maintaining international peace and security; creates a prosecutorial system that is an unchecked power; asserts jurisdiction over citizens of states that have not ratified the treaty; and is built on a flawed foundation.
- On July 24, 2002, Congress acted in the interest of U.S. troops and personnel, passing the American Servicemembers' Protections Act, which "prohibits cooperation with the ICC by any agency or entity of the federal government, or any state or local government."
- During the past two years, the Administration has negotiated nearly 100 bilateral agreements to protect U.S. persons, including U.S. troops and personnel operating on foreign soil, from being hauled before the ICC.
- Without the benefit of these agreements not to surrender U.S. persons, including U.S. troops, Congress and the Administration should conduct a review of where U.S. troops and personnel are operating as peacekeepers and determine whether their continued deployment is an appropriate use of U.S. resources as we conduct the War on Terrorism.
- Further, the Bush Administration should not commit troops or personnel to U.N. peacekeeping missions without adequate protections for our troops from ICC jurisdiction.

Introduction

Last summer, the United States suffered a political setback at the United Nations (U.N.) when it was forced to withdraw a Security Council resolution that would have ensured that U.S. troops and government personnel would not be prosecuted for crimes alleged by the U.N.'s world court, the International Criminal Court (ICC). The United States, it is important to note, is not a party to this court and does not recognize its jurisdiction.

Twice previously, the United States successfully offered similar resolutions to the 15-member U.N. Security Council (UNSC) for the purpose of protecting U.S. troops and personnel. However, on June 23, 2004, the United States formally withdrew its annual resolution after the Bush Administration determined it lacked sufficient votes for passage. Although the previous resolutions received overwhelming endorsement, this recent effort to attain support for the immunity resolution failed – largely due to vocal public opposition made by U.N. Secretary General Kofi Annan (who argued that such exemptions, although permissible, harm the court's legitimacy) and by Security Council members seeking to score political points against the United States during the then-developing Iraqi prison scandal at Abu Graib.

The news of last summer's setback received some attention at the time, but the focus has not been sustained even though the situation has great ramifications for U.S. participation in U.N. peacekeeping operations and U.S. national security policy. The opposition expressed by the UNSC and Annan to immunity for U.S. troops and personnel have caused some in Congress and the Administration to reconsider the level of U.S. participation in future U.N. peacekeeping operations.

Following the resolution's withdrawal, State Department spokesman Richard Boucher said the United States will “have to examine each of [future U.N. peacekeeping] missions case by case” and “we’re going to have to look at the consequences of not having this resolution.”¹ It also has resulted in a flurry of activity of developing alternative protections, both international and bilateral, for U.S. troops from arbitrary arrest and prosecution.

This paper will focus on: what the ICC is and why the United States is not a party to it; why the Security Council failed to support a third “exemption” for U.S. troops and personnel; and what actions U.S. policymakers should pursue to ensure Americans are not hauled before the world court.

A Thumbnail History of the ICC

In 1998, a U.N. Diplomatic Conference in Rome comprising representatives from 160 countries (including the United States) adopted a treaty, known as the “Rome Statute,” to create the International Criminal Court.² The opening of the conference was the culmination of decades of discussions and preparatory talks. The ICC officially came into effect on July 1, 2002 after having received the ratification of 60 member state governments. According to the Congressional Research Service, the ICC is the “first global permanent international court with jurisdiction to prosecute individuals for the most serious crimes of concern to the international community,” specifically, but not limited to, war crimes.³

¹ U.S. Department of State, “Daily Press Briefing: June 23, 2004.”

² U.S. Department of State, “Fact Sheet: The International Criminal Court,” August 2, 2002.

³ Congressional Research Service, “International Criminal Court: Overview and Selected Legal Issues,” June 5, 2002.

During the late 1990s, the Clinton Administration helped negotiate the terms and scope of the ICC. On December 31, 2000, as one of his final acts before leaving office, President Clinton signed the Rome Statute treaty. However, President Clinton stated that the treaty was fundamentally flawed, and he would not forward it to the Senate for advice and consent to ratify until the “fundamental concerns are satisfied.”⁴ President Clinton also recommended that his successor not forward the treaty to the Senate.

On May 6, 2002, the Bush Administration informed the U.N. that it would not become a party to the Rome Statute and essentially “unsigned” the Rome Statute. This meant that the United States renounced any commitments under the treaty to being a member of the ICC as well as recognition of the ICC’s jurisdiction over the United States. Undersecretary of State Marc Grossman argued that the Bush Administration opposed U.S. participation in the ICC for the following four reasons: ICC undermines the role of the United Nations Security Council in maintaining international peace and security; the Rome Statute creates a prosecutorial system that is an unchecked power; ICC asserts jurisdiction over citizens of states that have not ratified the treaty; and that the ICC is built on a flawed foundation.⁵

The Administration’s decision to “unsign” the Rome Statute was a significant and bold action. Some would argue that by not taking actions to remove itself from the Rome Statute, the Administration would nevertheless be obligated under the Vienna Convention on the Law of Treaties to avoid taking actions which might contravene the Rome Statute. Therefore, the Administration’s “unsigned” was a deliberate and meaningful decision to liberate the United States from an obligation made by the Clinton Administration to a treaty (and international institution) that is inconsistent with our Constitution as well as dangerous to our national security interests.

The view espoused by the Bush Administration has support among many current and former government officials and analysts who believe the ICC constitutes an unprecedented expansion of jurisdictional reach. Problems cited with the court are many. First, under Articles 12 and 13 of the Rome Statute, the ICC is empowered to arrest and prosecute not only the military personnel of states party to the Rome Statute, but also the military personnel of all other nations, including the United States.⁶ This grants wide-ranging and dangerous jurisdictional powers over all military personnel throughout the world, arguably intruding on both a country’s own legal system, and, more importantly, a nation’s sovereign integrity.

Second, under the Rome Statute, the ICC’s Prosecutor is given nearly unlimited discretion in conducting a preliminary inquiry into an alleged commission of a crime listed in the Statute.⁷ Under Article 15, the Court’s Prosecutor may initiate an investigation on any crime within the Court’s jurisdiction. Upon receiving an authorization from the Pre-Trial Chamber, the Court’s Prosecutor, under Article 89-99, could compel State Parties to arrest persons wanted by the Court, surrender sensitive documents, conduct searches and seizures, and order the interrogation of witnesses.⁸

⁴ U.S. Department of State, “Fact Sheet: The International Criminal Court,” August 2, 2002.

⁵ Undersecretary of State Marc Grossman, remarks to the Center for Strategic and International Studies, May 6, 2002.

⁶ Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/statute/romefra.htm>.

⁷ Andrew Olson, “Trouble on the Docket,” *Military Transition.Com*, July 10, 2000.

⁸ Olson.

Third, the crimes listed in the Rome Statute under Articles 5-8 present another layer of concern. For example, Article 8 lists as a “war crime” the intentional targeting of “buildings dedicated to art or science.”⁹ There is clearly a good deal of subjectivity to this “crime.” Were U.S. military or civilian decision-makers to order a strike upon what they believed to be a military facility (or a facility temporarily housing military operations), the final determination of whether the building was a legitimate military target could fall to the ICC — not to the elected leaders and military officers of the United States.¹⁰

An even more subjective war crime listed under Article 8 is the crime of “committing outrages upon personal dignity, in particular, humiliating or degrading treatment” committed in the context of international armed conflict. Such vague language would never withstand constitutional muster within the United States.

On July 24, 2002, Congress acted in the interests of U.S. troops and personnel, passing the American Servicemembers’ Protections Act, which “prohibits cooperation with the ICC by any agency or entity of the federal government, or any state or local government.” The bill became law on August 2, 2002 [P.L. 107-206].

The “Exemption” From Prosecution

Even though the United States does not recognize the ICC, U.S. troops and personnel operating in a U.N.-mandated mission can be arbitrarily arrested, hauled before the ICC, and tried for war crimes or other serious offenses if the host nation is a member of the ICC. It is no secret that the majority of U.N. peacekeeping operations are conducted in countries that are non-democratic and whose leadership and/or populations are likely hostile to U.S. policies. U.S. troops and personnel operating in U.N.-mandated missions are obvious targets for arrest and for serving as pawns for political showmanship.

It is because of these facts that the United States has pursued an annual “exemption” for U.S. troops and civilian personnel participating in U.N.-mandated missions. To be accurate, the United States has never sought nor acquired “immunity” for U.S. troops from prosecution before the ICC; rather, it has sought and, until this year, successfully negotiated a UNSC resolution granting a one-year delay of prosecution for U.S. troops and civilian personnel before the ICC.

The first effective exemption passed by the U.N. Security Council was Resolution 1422 on July 12, 2002; it simply stated that all prosecutions of nationals of states not party to the ICC would be deferred for one year. A second similar resolution, Resolution 1487, passed on June 12, 2003, again deferred prosecutions of nationals of states not party to the ICC for an additional one year.

Why the “Exemption” Was Opposed in 2004

In the final weeks of negotiating the 2004 annual exemption, the Administration encountered resistance from some Security Council allies who claimed that the recent prison abuse scandal in Iraq was making it politically difficult for their governments to support an exemption for

⁹ Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/statute/romefra.htm>.

¹⁰ Olson.

U.S. troops and personnel.¹¹ This controversy, combined with lingering opposition (or resentment) among veto- and nonveto-wielding Security Council members to the U.S.-led Coalition efforts to liberate Iraq in 2003, made negotiations all the more difficult. Despite the Administration's best efforts to obtain an "exemption" resolution — including reluctantly agreeing to some Security Council members' request that this year's attempt would be the last one — the votes simply were not there to support an extension. In addition to the Abu Graib scandal, there were three notable factors contributing to why the United States had to withdraw its ICC exemption resolution.

Kofi Annan Leads Opposition. On June 16, Annan stated in a press conference: "I think in this circumstance [referring to the Iraqi prison abuse scandal at Abu Graib] it would be unwise to press for an exemption, and it would be even more unwise on the part of the Security Council to grant it."¹² By making this statement, Annan was implicitly arguing that U.S. troops involved in the Iraqi prison scandal were possibly guilty of having committed "war crimes" (as defined by the ICC), that the implicated troops should possibly be sent to The Hague for prosecution, and that the United States was expressly looking for an ICC exemption for troops that may have been "human rights abusers."

This was the second year in a row that Annan publicly opposed the extension of immunity for U.S. troops and personnel. On June 12, 2003, Annan stated that he hoped that the extension of the one-year deferral from prosecution "does not become an annual routine." He claimed he feared it would be interpreted by the world community "as meaning that this [Security] Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes."¹³ He added, "If that were to happen, it would undermine not only the authority of the ICC but also the authority of this Council, and the legitimacy of United Nations peacekeeping."

European Union Echoes Opposition. At about the same time that Annan first publicly expressed his opposition to the U.S. exemption resolution, the European Union issued a formal statement objecting to the policy of "exemptions" and "bilateral non-surrender" agreements, and encouraging EU aspirant nations of central and eastern Europe not to sign any such agreements.¹⁴ Romania, an EU aspirant, as well as Germany, France, and Spain—all EU member states and signatories to the Rome Statute—were serving on the Security Council during June 2004.

People's Republic of China (PRC) Joins in Opposition. Having stated it would abstain from voting for the U.S.-backed resolution, the PRC, a permanent, veto-wielding member of the Security Council, decided to formally oppose the resolution once it was clear that the United States did not have the votes to prevail. PRC officials stated privately that their government opposed the U.S.-exemption resolution because of continued U.S. support for Taiwan's observer membership in the World Health Organization.¹⁵

Thus, as a confluence of these actions, UNSC Resolution 1487 expired on July 1, 2004, leaving U.S. troops and civilian personnel vulnerable to arrest and transport to the ICC. Following the decision to withdraw the resolution from consideration by the UNSC, the Bush Administration

¹¹ *Reuters*, "Opposition Growing to U.S. Exemption on Global Court," May 27, 2004.

¹² *BBC*, "Annan Slams War Crime Exemption," June 18, 2004.

¹³ U.N. Secretary General Kofi Annan speaking before United Nations Security Council, June 12, 2003.

¹⁴ European Union Council of Ministers' statement on "International Criminal Court (ICC) Council Conclusions," September 30, 2002.

¹⁵ *Washington Post*, "U.S. Abandons Plan for Court Exemption," June 24, 2004.

removed a small number of U.S. personnel from various U.N. missions around the world. This action sent the important message that the Bush Administration was going to reassess where it deployed its troops supporting U.N. missions.

What Should Be Done to Protect U.S. Troops and Personnel?

Congress and the Administration should conduct a review of where U.S. troops and personnel are operating as peacekeepers and determine whether the continued (or future) deployment of these troops and personnel is an appropriate use of U.S. resources as we conduct the War on Terrorism. The Bush Administration should not commit troops or personnel to U.N.-mandated peacekeeping missions unless and until the U.N. extends some form of permanent immunity for the United States.

Interestingly, France secured for itself, prior to signing the Rome Statute, a seven-year exemption for its troops from prosecution before the ICC; it was the only signatory to the Rome Statute that has such preferential treatment. Found in Article 124 of the Rome Statute, the provision reads that “a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.”¹⁶

Given that it is unlikely that the United States will be able to secure a multi-year “exemption” from the U.N. Security Council, U.S. policymakers must consider additional avenues to protect U.S. troops and civilians from the long arm of the ICC. Such alternative options, none of which should be considered mutually exclusive, include the following:

Status of Forces Agreements (SOFA). Where appropriate, the Administration should insist upon and negotiate a SOFA with the host country where U.S. troops are to be deployed. The SOFA should clearly define each party’s rights and responsibilities with regard to U.S. troops and personnel operating on foreign soil. The United States has SOFAs with dozens of governments around the world. Before handing over sovereignty in late June 2004, the Coalition Provisional Authority extended CPA Order 17, a SOFA in essence, that would allow troops to remain in Iraq under U.S. command and free from arbitrary arrest until December 2005.

According to the State Department, however, SOFAs, are limited in scope: “SOFAs generally cover only specified personnel, and do not cover all U.S. nationals. Because we aim to ensure that no U.S. nationals will be surrendered to the ICC, existing SOFAs do not provide sufficient protection.”¹⁷ Therefore, additional protective mechanisms must be sought.

Bilateral Non-Surrender or “Article 98” Agreements. The Administration has also stepped up its efforts to have foreign governments sign bilateral non-surrender agreements, commonly known as “Article 98” agreements, a provision that is part of the Rome Statute. Simply, an Article 98 is an agreement concluded by two nations that prohibits the surrender of U.S. persons to the International Criminal Court (regardless of whether either nation is a party to the ICC).

¹⁶ Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/statute/romefra.htm>.

¹⁷ U.S. Department of State, “Frequently Asked Questions About the U.S. Government’s Policy Regarding the International Criminal Court (ICC),” July 30, 2003.

According to the State Department, Article 98 agreements “allow the United States to remain engaged internationally with our friends and allies by providing American citizens with essential protection from the jurisdiction of the International Criminal Court, particularly against politically motivated investigations and prosecutions.”¹⁸ Negotiating bilateral Article 98 agreements is the best route for ensuring that U.S. troops and personnel are protected. The Bush Administration has negotiated and signed 96 Article 98 agreements.

Congressional Action. In addition to these actions being undertaken by the Administration, Congress should continue to play an active role in ensuring U.S. troops and personnel are protected when operating on foreign soil. Congress weighed heavily into the debate in 2002 when it passed the American Servicemembers’ Protection Act (see page 4), which included a provision denying U.S. government assistance at any level to the ICC and prohibiting “military assistance to countries that have ratified the Rome Statute but not entered into Article 98 agreements with the United States.”

The American Servicemembers’ Protection Act was the single most important piece of legislation that Congress has passed on this issue. That law made it clear to the United Nations that the United States has strong objections to the ICC. More importantly, the new law prohibited any level of U.S. government from cooperating with the ICC and required the Administration to pursue measures to protect U.S. troops from the Court’s reach. As listed above, the Administration has been very successful in securing bilateral agreements to protect U.S. troops and personnel operating on foreign soil, and continues to advocate that troop protections are included in all UNSC resolutions.

A way to maximize the number of Article 98 agreements negotiated with the United States is to have Congress legislatively remove the exemptions for NATO and Major Non-NATO Allies currently provided for under the American Servicemembers’ Protection Act. As noted earlier, the EU strongly objects, as a matter of policy, to EU member states signing Article 98 agreements with the United States. Currently, 19 NATO countries are EU member states. Securing protections for U.S. soldiers and government officials is hampered by maintaining exemptions for NATO allies because the EU continues to serve as a major force in keeping its member states in line and setting the standard for others outside of the EU.

Congress can also condition foreign assistance to countries that have not yet negotiated an Article 98 agreement with the United States (under the American Servicemembers’ Protection Act, military assistance can be withheld to countries that have not signed an Article 98 agreement). In the House of Representatives, Rep. George Nethercutt (R-WA) offered an amendment to the FY05 Foreign Operations Appropriations bill banning certain forms of economic aid to U.S. allies if they fail to sign an Article 98 agreement. The amendment passed by a vote of 241-166 on July 15, 2004.¹⁹

In addition to legislation that would encourage additional Article 98 agreements, members in both the House and Senate have drafted legislation that would restrict U.S. participation in U.N. peacekeeping operations unless and until the U.N. grants some form of permanent immunity for U.S. troops and personnel operating in U.N. peacekeeping missions. Proposals in the Senate range

¹⁸ U.S. Department of State, “Article 98 Agreements,” September 23, 2003.

¹⁹ As of press time, provisions of the House FY05 Foreign Operations Appropriations bill were being negotiated as part of an omnibus appropriations bill.

from withholding a portion of annual U.S. dues to the U.N. until it grants a one-year (or multiyear) deferral from prosecution for U.S. troops to cutting off all U.S. funding to the U.N. if the ICC tries to assert jurisdiction over U.S. troops and personnel.

Given the likelihood that the United States will be called upon to send troops to a future U.N. peacekeeping mission, it is important that Congress reaffirm its commitment to protecting U.S. troops and support the Bush Administration in its bilateral and multilateral efforts to secure these protections. Therefore, Congress should pass a joint resolution that has the following provisions:

- That the U.S. government should continue to actively seek passage of a U.N. Security Council resolution to achieve immunity from prosecution by any international or other foreign tribunal, including the Permanent International Criminal Court at The Hague, for any and all U.S. citizens, including members and veterans of the U.S. Armed Forces, involved in any past, current, or future peacekeeping, stabilization, enforcement, or other activity conducted under the U.N. Charter;
- That such a resolution approved by the UNSC should be permanent in effect; and
- That the United States should decline to provide U.S. personnel or resources, and if necessary, exercise its veto over any resolution offered in the U.N. Security Council to authorize or establish future activity that would otherwise involve U.S. personnel or resources, until such time as a resolution on permanent immunity has been approved by the Security Council.

Conclusion

On June 23, the United States withdrew — due to a lack of sufficient votes for passage — a U.N. Security Council resolution seeking a one-year exemption from prosecution at the International Criminal Court for American soldiers participating in U.N. peacekeeping missions. Members of the Security Council opposed extending “immunity” to U.S. troops for a variety of reasons, with the then-developing Iraqi prison abuse scandal being one of the most significant contributing influences. If Security Council members thought that the United States wanted to get “immunity” for its troops so that soldiers accused of committing abuses against Iraqi prisoners would be excused from punishment, they could not have been more wrong. The United States was strictly seeking to protect U.S. persons, including nonmilitary, from the ICC’s jurisdiction, and not to grant immunity from the rule of law. As witnessed during the past few months, the Department of Defense has held the accused American soldiers accountable for their actions in Iraq, and has properly ensured that they were prosecuted under the American military justice system — with its due process protections for the accused — and not under the ICC.

Without “immunity” from ICC jurisdiction, U.S. troops and personnel operating in U.N.-mandated peacekeeping missions are targets for arrest and prosecution before the ICC. The Administration has sought to ameliorate this by successfully negotiating 96 bilateral “Article 98” agreements. The Bush Administration should not commit any additional troops or personnel to U.N.-mandated peacekeeping missions unless and until the U.N. extends some form of permanent immunity to U.S. troops.