

UNITED STATES' SPECIAL AGREEMENTS: CONSISTENCY WITH THE OBJECT AND PURPOSE OF THE ROME STATUTE

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Resumen

Los Acuerdos Especiales promovidos por Estados Unidos de acuerdo con el Estatuto de Roma plantean ciertos cuestionamientos en relación con la eficacia del objeto y fin del tratado y su efecto en las obligaciones de los estados partes a la Corte Penal Internacional (CPI). Este análisis muestra cómo estos Acuerdos socavan los principios del tratado, por qué no son necesarios para prevenir que un Estado no parte se vea afectado por sus normas y la voluntad de Estados Unidos hacia la ratificación del Estatuto de Roma.

Palabras claves: Acuerdos Especiales, Estatuto de Roma, Estado parte, principios.

Abstract

The *United States' Special Agreements* to the Rome Statute provisions raise serious concerns regarding the efficacy of the object and purpose of the treaty and the effect on the State Parties' obligations to the International Criminal Court (ICC). This analysis shows how these agreements have undermined the principles of the Statute, why they are unnecessary in protecting non-party states from the treaty provisions' effect and the United States' willingness to ratify the Rome Statute.

Key words: Special agreements, Rome Statute, state party, principles.

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INTRODUCTION

The United States did not ratify the Rome Statute and voted against the final text of the instrument in July 1998 even though it was one of the States that supported the idea of the creation of an international criminal court. The principal objection of the U.S. was that the treaty would allow the International Criminal Court¹ to execute jurisdiction over nationals of states that had not ratified the Rome Statute.

The U.S. argues that Article 12 of the Rome Statute is against basic principles of international law, because it seeks to prosecute nationals who have committed crimes penalized under the Statute even if those state's nationality have not ratified the Statute.

As a result, President Bush signed a law called "The American Servicemember's Protection Act," in which the Act expresses the concern of the United States about the possibility under the Rome Statute that a person could be prosecuted by the ICC even if the state from which that person came from did not agree to be bound by the Rome Statute.² Therefore, U.S. forces can be subjected to in that risk when working overseas in a state that had signed the Statute.

However, it is necessary to analyze whether or not these agreements are consistent with the object and purpose of the Rome Statute, to bring every case regarding gross human rights abuses before an international court, under the principle of complementarity.

1. THE HISTORICAL APPROACH TO THE DECISION OF THE UNITED STATES NOT TO RATIFY THE ROME STATUTE

During the negotiation of the principles, penalties and rules that were going to be included in the Rome Statute of the International Criminal Court³, the United States as other states participated by submitting

¹ Hereinafter ICC.

² The American Servicemember's Protection Act Section 2005(a).

³ Hereinafter "Rome Statute."

different proposals over what it considered should be a part of the Statute.

Some of United States's proposals had support and others did not. Finally, on December 31, 2000, the "last day of possible for a signature without ratification"⁴ President Clinton signed the Rome Statute but he never sent it for Senate approval because he had no intention of ratifying it. The reason he signed it was to be able to influence the evolution of the Court.⁵

One of the significant reasons why United States did not ratify the Rome Statute was because it disagreed on the Article 12 that gave the Court the possibility to exercise jurisdiction over nationals even if the state of nationality was not a part of the Rome Statute.⁶ The United States considers this is a violation of the principle of sovereignty of the State to decide whether or not be bound by a treaty.⁷

The Article 12 of the Rome Statute provides:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

⁴ Kyl, J. "Unratified and Unsigned Treaties Still Constrain U.S. Action, Republican Policy Committee, United States Senate. 11, 3. Available at: rpc.senate.gov/_files/May1605UnsignedTreatiesMS.pdf

⁵ Wedgwood, R. (2001). *The Irresolution of Rome*. 64 *L & Contemp. Props* (p. 193).

⁶ Article 12.2, Rome Statute of the International Criminal Court.

- (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.⁸

In the Preparatory Committee negotiations, the U.S. tried to exempt the “official acts” from the third-party jurisdiction,⁹ but it failed because the Preparatory Committee sustained that there was not an effect on the third-party because it did not have to cooperate with the court when its nationals may be subject to the ICC.¹⁰ So this provision did not affect the principle of sovereignty.

The U.S. also tried to make a change in current Article 17 that provides the role of complementary jurisdiction of the Court, in order to make an exception to exercise its jurisdiction when the officials were acting under duties authorized by the State and if the state would be prepared to investigate the crime as well.¹¹ However, this proposal to exempt the “officials acting under their duties” was rejected too.

Consequently, the U.S. Senate saw a number of obstacles against U.S. security policy if it ratified the Rome Statute. They argued the fact that the Treaty was binding on all persons was against U.S. policy because it brings the possibility that its military personnel would be under ICC jurisdiction.¹² Thus, the U.S. considered that the principal intention of the Rome Statute was to prosecute U.S. forces and for this reason they

⁷ McNerney, P. (2001). *The International Criminal Court: Issues for Consideration by The United States Senate*. 64 *L & Contemp. Probs* (p.181, 182).

⁸ Rome Statute of the International Criminal Court.

⁹ This the name given to the state of nationality that have not ratified the Statute but its national could be prosecute through the authorization of the State (that is a party of the Statute) where the crime was committed.

¹⁰ Wedgwood, R. at 201.

¹¹ *Id* at 202.

¹² McNerney, P. at 183.

saw that this situation was going to affect the deployment of its troops overseas.¹³

It was also criticized that the Court would have been asked to interpret special norms such as the proportionality and “the nature of a military act versus civilian target.”¹⁴ They worried about the approach that the Court will reach, since this is a special topic and the military acts could be potentially misinterpreted.

On the other hand, they argued that this was a politicization of justice because the court will face criticisms if in the next twenty years it does not prosecute any American citizens, while dealing with cases in Eastern Europe, Africa, Asia and South America.¹⁵ They fear that even for an unjust reason, the Court will possibly prosecute Americans to avoid critics from the international community.

However, the crimes to be potentially prosecuted by the ICC are part of the principle of Universal jurisdiction, which allows prosecuting crimes recognized by the *jus cogens*, as crimes of high concern for the international community that cannot stay unpunished.

In the first place, it is well recognized that the crime of Genocide can be prosecuted under the principle of *jus cogens* because it is inserted in several international instruments such as the Charter of the Nuremberg Tribunal,¹⁶ where it was included as part of the crimes against humanity

¹³ Id at 184.

¹⁴ Wedgwood, R. at 194.

¹⁵ McNerney, P. at 188.

¹⁶ The Charter of the Nuremberg Tribunal, Article 6(c): “CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

and in the most recent special convention: the United Nations Genocide Convention of 1999. Hence, all states can exercise universal jurisdiction against the commission of genocide and this capacity includes, undoubtedly, the ICC.

Regarding crimes against humanity, there is a widely accepted view that those are a matter of universal jurisdiction too. However, at the time of the development of the Rome Statute there was not an exact definition of these crimes.¹⁷ Consequently, there were defined as the “[...] following acts¹⁸ when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]” The Rome Statute named a number of acts that constitute crimes against humanity where they are carried out with the mentioned purpose.

On the other hand concerning War Crimes, “it has been recognized since Nuremberg [a crime] of Universal jurisdiction under customary

¹⁷ Scharf, M.P. (2001). The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position. *64 L & Contemp. Props* (p.67, 88).

¹⁸ Article 7 of the Rome Statute:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

international law.¹⁹ It has been said that the definition of the Rome Statute was derived from the 1949 Geneva Conventions²⁰ as the widely known rule to protect civilians and war prisoners in the time or war. In fact, the Additional Protocol I to the Geneva Conventions establishes that any violation to the Geneva Convention must be considered as a war crime.²¹

Thus, it is undoubtedly clear that crimes subject to the ICC's jurisdiction are crimes subject to Universal jurisdiction under which the ICC can legally prosecute even if the nationality of the person to be potentially prosecuted is not a part of the Treaty. It also is completely adjusted to international law also because this is a complementarily jurisdiction and the Court should have the consent of the state where the crime was committed. Thus, in one side the court is receiving the authorization of the state most interested in the investigation of the crime and it should not be forgotten that the Security Council has the faculty to suspend an investigation or prosecution if it is asked for, under Chapter VII of the Charter of the United Nations.²²

Another principle that explains why Article 12 is legitimate under international law is the principle of territoriality to prescribe jurisdiction. It is historically recognized by the international community that states can exercise their domestic jurisdiction over foreign nationals if they commit any crime in their territory. This is widely recognized in United States' domestic law.²³ Thus, the opposition of the United States cannot

¹⁹ Scharf, M.P. at 91.

²⁰ Id.

²¹ Article 85.5: "Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes."

²² Article 16 of the Rome Statute: "Deferral of investigation or prosecution. No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

²³ For instance, in the provisions of the "Foreign Sovereign Immunity Act" the law requires that some actions should occur in the U.S. to activate the U.S. courts jurisdiction when dealing with states as defendants.

be acceptable since the only difference here is that the tribunal that is going to prosecute is not the domestic court (of the U.S. for example), but the ICC whose powers were given by 104 states parties.²⁴

In addition to the reasons why the U.S did not ratify the Rome Statute, is that after the rejection of its proposals they could not make any reservations to the Treaty because was prohibited under the Statute. Article 120 explicitly states: "Reservations. No reservations may be made to this Statute."²⁵ This prohibition is consistent with the object and purpose of the Rome Statute, otherwise if the states could void the jurisdiction of the Court in some circumstances this can make the Treaty ineffective. That provision is also protected by the Vienna Convention of the Law of Treaties that establishes that a state may formulate a reservation unless it is against the object and purpose of the treaty.²⁶

The United States, therefore, could not make any reservation to the Treaty in order to be able to ratify it under its personal considerations. However, if the establishment of an international court was the solution found by the members of the United Nations (or most of them) this court should not apply its jurisdiction under different conditions between the states parties. These are principle of justice and equality, those principles that United States usually ask for in the international community.

At this point it can not be said that the Rome Statute is violating any principle of international law as the United States has argued. Yet, when President Bush came to power, he did not ratify the Treaty but unsigned it to reverse what President Clinton had done. Colin Powel confirmed that the U.S. was going to oppose the international Criminal Court.²⁷

²⁴Number of states parties available at: <http://www.icc-cpi.int/statesparties.html>

²⁵ Article 120, Rome Statute of the International Criminal Court.

²⁶ Article 19 Formulation of reservations. A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

²⁷ "The new administration will be opposed to the International Criminal Court.

Finally, to conclude this section it is important to compare the position of two writers regarding the reason why the U.S. did not ratify the Rome Statute and whether or not those reasons are justified. William Lietzau²⁸ sustains that although the U.S. supported the Yugoslavia and Rwanda War Crimes Tribunals, it cannot support the Rome Statute because it has failed in balancing the protection of individual human rights and the interests of justice, while exercising the conviction of a criminal and protecting individual human rights of the innocent.²⁹

On the other hand, Professor Orentlicher states that the U.S.'s reasons for the opposition to the ICC are flawed because the possibility of prosecuting nationals of non-party states is accepted in a number of treaties of which the U.S. is a party.³⁰ Additionally she also explained that the ICC's power under Article 12 is subject to the consent of either the state where the crime was committed or the state of nationality of the perpetrator.

After analyzing these positions it is clear that U.S. reasons not to ratify the Rome Statute lack strong legal support under international law. In contrast, the Rome Statute has great support under international law because besides the explanation given above, it has more requirements to allow the court to exercise jurisdiction than those required by the principle of Universal Jurisdiction.

We read carefully what President Clinton said in his signing statement, recognized that he realized it could not be ratified. Take note of the fact, though, that once America signs a treaty such as this, we are in some ways expected not to defeat its purpose, intended purpose. And the expectation is that we would ultimately ratify it. But in this case I don't think it likely you'll see this administration send it up for ratification." Confirmation Hearing of General Colin L. Powell to be Secretary of State, Senate Foreign Relations Committee, Jan.17. 2001, available at <http://www.un.int/usa/01pow117.htm>.

²⁸ Member of the U.S. delegation to the ICC negotiations.

²⁹ Lietzau, W.K. (2001). International Criminal Law after Rome: Concerns from a U.S. Military Perspective. *64 L & Contemp. Props* (p. 120, 138).

³⁰ Orentlicher, D.F. (1999). Politics by Other Means: The Law of the International Criminal Court. *Cornell Int'l L.J.*, 32, 489-491.

2. STATES PARTIES' RESPONSIBILITIES TO THE ICC

There are several options allowed by international law to become a party of the Rome Statute, however, not all the options - signature, ratification, acceptance and approval or accession³¹ offer equal status in respect to the obligations with the Treaty.

Only the signatories to the Statute are allowed to ratify, accept or approve it. Once the State ratifies the Treaty it has to implement it in its domestic law, the states have to harmonize their national legislation with the provisions of the Treaty; this adaptation should be carefully done to avoid problems with the application of the jurisdiction of the Court in the future. In addition, it has to be "an internal review of the suitability of the domestic criminal system, the advantage of promoting and facilitating horizontal international cooperation in criminal matters between States, also for crimes not falling within the jurisdiction of the Court."³²

The Statute obligates the member states not only during the ICC's jurisdiction but regarding the jurisdiction of domestic courts when dealing with crimes listed in the Statute. Since all the crimes are going to be investigated on the state level, the international community has to verify whether the states have a judicial system according to international criminal law principles, this is a responsibility of the state, including the substantive and procedural rules that should be according to the standard of the ICC.³³

Under the ICC Statute, the obligation of the state party includes: "1) remove any provision of amnesty or special immunity from the [C]onstitution, which could be used to unlawfully shield a perpetrator, 2) maintain extradition treaty law consistent with the absolute obligation to surrender a national to the ICC; and 3) eliminate any provision on the

³¹ Article 125, Rome Statute of the International Criminal Court.

³² Krieb, C. & Lattanzi, F. (Eds.) (2000). *The Rome Statute and the Domestic Legal Orders* (p. 13). Baden-Baden: Nomos Verlagsgesellschaft, 1.

³³ Id.

death penalty.”³⁴ These amendments can include all types of law such as constitutional provisions, criminal, administrative, etc.

Accordingly, the states parties cannot invoke domestic law to protect a national accused of crime of the Rome Statute. This is an important process in international criminal justice because the finality when harmonizing domestic law with the Rome Statute is to encourage the citizens of the state parties to respect those principles in order to minimize the commission of those crimes such as, genocide, forced disappearance, torture, enslavement, as established in Article 7 of the Rome Statute. It is necessary to remember that the idea of an international criminal court is to guarantee that there will not be impunity but the idea of the international criminal justice is to protect potential victim of these horrendous crimes that have been recorded in history.

On the other hand, the states are also obligated to cooperate with the ICC. Part 9 of the Statute establishes: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”³⁵ During the investigation, the Court can request surrender of a person, any document and assistance from the state. Also, it may request assistance from non-party state.³⁶

Cooperation to international criminal justice is also among the States Parties; according to the preamble of the Treaty it is not only concerned with the obligation to prosecute the crimes of the Statute, but also to cooperate with the states that are exercising their criminal jurisdiction.

As has been said above, the Rome Statute does not allow reservations to the Treaty because it might undermine the jurisdiction of the ICC. These are the kind of treaties that do not allow any reservations in order to preserve the object and purpose of the Statute.

³⁴ Roach, S.C. (2006). *Politicizing the International Criminal Court* (p. 54). Rowman & Littlefield.

³⁵ Article 86, Rome Statute.

³⁶ Id at Article 87.5(a)

Regarding the main topic of this essay, the international community has considered the special agreements for Article 98.2 a violation of the obligations to the Rome Statute. And it has encouraged those states parties to the ICC to reject the “Article 98 Agreement” with the United States.

Human Rights Watch (HRW) is one of the organizations that were trying to discourage the states from signing these agreements. It argued that this was an obligation as states parties (including the states signatories to the Rome Statute), thus, it sustained the following statements:

Any State That Has Ratified the Rome Statute May Not Lawfully Sign an Agreement Providing Immunity from ICC Prosecution with a State that Has Repudiated or Has Not Signed the Rome Statute; To Do So Would Violate the Rome Statute.

Signed the Rome Statute; To Do So Would Violate the “Object and Purpose” of the Rome Statute.

Any state that has signed the Rome Statute is, according to Article 18 of the Vienna Convention on the Law of Treaties, “obliged to refrain from acts which would defeat the object and purpose” of the Rome Statute.

The “purpose” of the Rome Statute, as made clear in the Preamble and Articles 12 and 27, is to establish a system of individual accountability for the most serious international crimes. As mentioned above, the treaty is also predicated on ICC review of national prosecutions to remove the possibility of impunity.

Signatory states cannot lawfully confer exclusive jurisdiction over ICC crimes to repudiating or non-signatory states. Entering into impunity agreements would violate the signatory states’ obligations under the Vienna Convention to refrain from acts that would defeat the object and purpose of the Rome Statute.³⁷

³⁷ Human Rights Watch, “United States Efforts to Undermine the International Criminal Court *Legal Analysis of Impunity Agreements*”. Available at: <http://hrw.org/campaigns/icc/docs/art98analysis.htm>

Facing the legal analysis of HRW in terms of the obligation of the states parties to act according to the ICC Treaty, it can be seen that the discussion not only relied on the U.S.'s actions but on the states parties that could be violating the Rome Statute when accepting special agreements offered by the U.S. in order to protect its military forces.

3. SPECIAL AGREEMENTS OF ARTICLE 98.2: THE UNITED STATES'S RESPONSE TO ITS NONCONFORMITY WITH THE ROME STATUTE

Although the U.S. failed in its commitment to change some of the rules that it considered against international law, it was successful in obtaining the approbation of Article 98.2 of the Rome Statute.

Article 98.2 of the Rome Statute provides:

Cooperation with respect to waiver of immunity and consent to surrender [...].

2. 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 that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Although this Article was one of the most important proposals for the U.S., however, it is quite different from the original draft that it proposed. The United States proposed that the ICC's power to seek the surrender on the third-party state was going to be limited when dealing with *official acts* if the ICC did not receive either the consent of the accused's government and the authorization of the Security Council.³⁸ In the Rome Statute the Security Council has a special intervention, it

³⁸ Wedgwood, R. at 203.

only intervenes to order the deferral of an investigation or prosecution and to submit a case, but it does not activate the ICC's jurisdiction for all cases submitted to the Court.³⁹

As can be seen, the United States was seeking to protect its military forces. Moreover, Article 98 "was negotiated to provide the possibility that bilateral agreements such as Status of Forces Agreement (SOFA) could be negotiated to preclude surrender of U.S. personnel to the ICC by a host state. 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. An important critic to this proposal was that the "ICC's investigative jurisdiction would give to the national military authorities a strong incentive to investigate allegations" against them by their own means.⁴⁰ However, this approach was not necessary because it can not forget that the complementarily character of the ICC to domestic jurisdiction which rests in the ineffectiveness of the states to either investigate, prosecute or punish⁴¹ the perpetrator(s) of a crime of the Rome Statute.

Nonetheless, the U.S. had shielded its nationals with the signature of these agreements, with the states in which cooperates in military, intelligent or any other support. U.S. has been highly criticized by the international community thus, that is why the legitimacy of the incorporation of Article 98.2 in the Rome Statute should be analyzed too.

In 2002, President Bush signed a new law called "The American Servicemember's Protection Act" (ASPA), in which the Act expresses the concern of the United States about the possibility under the Rome Statute that a person could be prosecuted by the ICC even if the state's nationality of that person did not agree to be bound by the Rome Statute.⁴²

³⁹ The Security Council is empowered to present cases to the Court toward which it may exercise jurisdiction.

⁴⁰ *Id.*

⁴¹ See Article 17 of the Rome Statute: "Issues of Admissibility."

⁴² The American Servicemember's Protection Act Section 2005(a).

Section 2008 (a) allows the government to take the necessary measures to obtain the release of a U.S. force person or any U.S. national or alien who is being detained or imprisoned by, on behalf of, or at the request of the ICC. The Section 2008 (a) provides as follows:

AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES AND CERTAIN OTHER PERSONS DETAINED OR IMPRISONED BY OR ON BEHALF OF THE INTERNATIONAL CRIMINAL COURT.

AUTHORITY -The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.

a. PERSONS AUTHORIZED TO BE FREED -The authority of subsection (a) shall extend to the following persons:

1. Covered United States persons.
2. Covered allied persons.
3. Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government.⁴³

According to this statement, the U.S has obligated many states to sign special agreements in which they agree to not send any of the U.S. military personnel to the ICC. Since the launch of that Act, these agreements have been criticized by scholars, NGOs and the Council of Europe among others.

HRW summarized the European Union's "Guiding Principles" to advise the states to which the United States was going to sign the agreements in order to respect the principles of the Rome Statute and to minimize the effects that these agreements were going to cause against the ICC jurisdiction. There were seven guiding principles, the most important rules provide: the exemption of nationals from the jurisdiction of the ICC should not apply for *all* U.S. nationals, only military personnel; the agreement should include the principle of "no impunity"; it should

⁴³ The American Service member's Protection Act Section 2008 (a).

not include reciprocity between the states, in other words, immunity should not be recognized for nationals of the state party but only to U.S. nationals; and the agreements should not be in perpetuity.⁴⁴

HRW also criticized the treatment given to Article 98 by the U.S. In their approach, HRW said that the Article is not meant to undermine the ICC's jurisdiction over *all* U.S. nationals; instead, "it applies only to military personnel and other closely aligned civilian personnel 'serving' on a state's territory on an official mission."⁴⁵

However, the U.S. has signed these agreements including immunity to all the military forces but also to all who in general would be subject to the jurisdiction of the sending state (the United States). For instance, the agreement signed with Colombia and many other states⁴⁶ provides the same statement: "For purposes of this Agreement, the term "person" of the United States of America, means any current or former United States government official, employee (including any contractor), or member of the military, or any United States person who enjoy immunity from criminal jurisdiction under international law or who is subject in any manner to the jurisdiction of the Sending State (the United States of America)."

The inclusion of the sentence : (...) *or who is subject in any manner to the jurisdiction of the Sending State* is still too broad for the purpose and object of the Rome Statute that HRW was trying to preserve. This statement could take to a variety of interpretations, it is too open since it does not state specifically who is subject of the jurisdiction of the United States.

On the other hand, one of the principles that the European Union recommend to avoid from these agreements also included reciprocity

⁴⁴ Human Rights Watch, *Bilateral Immunity Agreements* (2003). Available at: www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf.

⁴⁵ *Id.*

⁴⁶ The "Article 98 Agreement" has been signed by 100 states.

between the states. For example, the agreement signed by Israel among other states establishes first, for the side of the United States:

3. When the United States extradites, surrenders or other 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 Party, absent the express consent of the [g]overnment of the State of Israel.⁴⁷

And for the Israel side:

4. When the Government of the State of Israel extradites, surrenders or other otherwise transfers a person of the other Party to a third country, the [g]overnment of the State of Israel will not agree to the surrender or transfer of that person to the international criminal court by the third Party, absent the expressed consent of the [g]overnment of the United States.⁴⁸

As can be seen, the agreement includes the collaboration with the government of the United States but also with the government that is signing the agreement. This is another obstacle to the jurisdiction of the Court since the agreement is “bilateral” which undermines the jurisdiction of the Court as HRW and the European Union have sustained.

As of March 2006, 100 states have signed the so called “Article 98 agreement”⁴⁹ with the United States. In contrast, the states that did not sign the agreement were sanctioned by the U.S. government; this response has been called “blackmail” to those states that depend in great part on United States financial aid. Moreover, it has been taken as a bargaining chip of the U.S. to obligate the states that signed the treaty.

⁴⁷ Agreement between the Government of the United States of America and the Government of the State of Israel regarding the surrender of person to the International Criminal Court. Available at: <http://foia.state.gov/documents/IntAgreements/0000BA10.pdf>

⁴⁸ Id.

⁴⁹ Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America. Available at: fpc.state.gov/documents/organization/66476.pdf

HRW has explained that the states parties were “legally required to ensure that [the] basic and important aspects of the Rome Statute [were] not violated” and that the signing of the agreement would undermine the effectiveness of the ICC. But one of the most interesting approaches that supports the theory of “blackmail” by the U.S. against the states is that the ASPA allows the deployment of U.S. military forces under some exemptions: “national interest”,⁵⁰ when regarding NATO countries and Taiwan. According to HRW the possibility that the U.S. will apply these exemptions to waive the prohibition thus, it will engage military forces for international missions anyway, because it will be combating terrorism and will be difficult to reduce its military influence in the world.

The opposition to the signature of these agreements has been concern for the European Union as well. At the time of the negotiation of these agreements the Council of Europe released a draft conclusion on the ICC expressing that it had noted the multilateral treaties existed between some states and the United States regarding Article 98.⁵¹ As a

⁵⁰ Section 2007 of ASPA:

(a) PROHIBITION OF MILITARY ASSISTANCE – Subject to subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute [i.e. 1 July 2003], no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.

(b) NATIONAL INTEREST WAIVER – The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.

(c) ARTICLE 98 WAIVER – The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel in such country.

(d) EXEMPTION – The prohibition of subsection (a) shall not apply to the government of –

- (1) a NATO member country;
- (2) a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or
- (3) Taiwan.

⁵¹ Council of the European Union. Draft Council conclusions on the International Criminal Court. Rev 1 12488/1/02. Available at: www.isgi.cnr.it/stat/ricerche/corte_penale_int/Linee_guida_UE.pdf

result the Council launched the “guiding principles” explained above (addressed by HWR) to encourage the states to avoid violations of the Rome Statute when dealing with that agreement. It is important to note that no member state of the European Union has signed any bilateral agreement with the U.S.

It is a hard task pretending to undermine a powerful country such as the United States to the jurisdiction of a new international criminal court having the opportunity to prosecute a national from a country that has always shown great respect for human rights and for the punishment of great crimes in the history. However, in this time of history when the U.S. is engaging in a number of international hostilities and the legitimacy of its military forces is being questioned the U.S. found the negotiation of Article 98 and the consecutive signing of these agreements urgent. Since the opposition of the international community, the U.S. has been feeling attacked because it considers that those critics are a political persecution toward intentionally prosecuting U.S. military forces.

However, any of the legal reasons that supported the U.S. to avoid the ICC jurisdiction have strong support. As has been showed in this essay, the principles of Universal jurisdiction and territoriality legitimate the jurisdiction over nationals of non-parties states. Moreover, the principle of complementarily protect those nationals from the jurisdiction of the Court if other state whose jurisdiction is prevalent exist.

Accordingly, if the U.S. does not want their nationals to be subject to ICC jurisdiction, it should commit to investigate and prosecute all crimes that may rise in the deployment of U.S. military missions in the world. Otherwise, what “Article 98 agreements” shows is that the U.S. will not want to face an international embarrassment if the ICC discovers crimes against humanity committed by U.S. forces in impunity, highly willing to happen taking in account the inquiries around human rights violations by U.S. military forces.

HRW said that Article 98 was included in the Rome Statute “to provide an orderly and rational process for the handling of suspects among states cooperating with the Court.” Hence, the U.S. misinterpreted Article 98.2

which had put into risk the effectiveness of the Court. This Article should have never been approved. As far as those agreements are against the object and purpose of the statute for the reasons explained above, that Article was wrongly included in the Treaty. It should be noticed that the U.S. participated in the approbation of this rule with high interest, so it was the state that took advantage of what Article 98.2 allows the U.S. to do.

U.S. policy against the ICC makes those agreements harmful to the legitimacy of the Rome Statute. It is definitively against the spirit of the Treaty and it can encourage other non-party states to sign similar accords for its personal interests in order to avoid the ICC's jurisdiction. This policy has to be changed for the behalf of the international community who has ratified this instrument as a strong defense against gross human rights violations (more than half of the nations worldwide have ratified the Statute).

4. MIGHT THE UNITED STATES RATIFY THE ROME STATUTE IN THE FORSEABLE FUTURE?

In 2009 the seven-year Review Conference of the Assembly of States Parties of the ICC will be addressed, in which the states parties will discuss issues concerning the penalties of the Rome Statute, especially, the definition of the "Crime of Aggression" which has not been defined yet. This Assembly is a great opportunity for the parties to discuss the effectiveness and the future of the Rome Statute and the ICC.

The crime of aggression is mentioned in the Rome Statute⁵² but the Court cannot exercise jurisdiction over that crime until the member

⁵² Article 5 The jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (...).

(d) *The crime of aggression.*

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

states agree on a definition of what constitute “aggression.” If the state parties concur in a definition, the state that disagrees can evade the application of that crime.

However, only the states parties can participate in the discussion of those issues that are going to be addressed. That is why this is an important moment for the United States to decide whether or not become a party of the Rome Statute and consequently participates in the formulation of rules that might govern the ICC in the future.

According to Daniel Scheffer⁵³ there are great possibilities that the United States will ratify the Treaty. He sustained that although United States walked away from the Rome Statute for the criticisms that have been addressed before, it needs the ICC and vice versa, the ICC needs the United States as a state party.

He explained that the doubts why the United States did not ratify the Treaty should have changed, due to the great role deployed by the ICC. Also that the “ICC has demonstrated the high degree of professionalism in all sectors”⁵⁴ including prosecutor and investigators and that the ICC is beginning to do its job in African countries such as Rwanda and the Congo.

Besides, he argued that the ICC needs the United States’s support to be more effective. For instance, it could help in investigations of war crimes regarding the speciality of this criminal type. At the same time, he said that the U.S. needs the ICC because this would help U.S. soldiers to be more disciplined and give guarantees when deploying operations.

Thus, the United States has to accept that the ICC is the international justice wished for by the international community and it should be part

⁵³ Former U.S. Ambassador -at Large for War Crimes Issues, served as head of the American delegation at the Rome Conference.

⁵⁴ Scheffer, David (March 30, 2007). Conference: “Possibilities for Ratification of the Rome Statute by the United States”, at Washington College of Law, American University.

of it. Nevertheless, it has said that it will not allow its soldiers to be subject to ICC jurisdiction; to be part of the ICC institution is a greater objective.

Consequently, the United States has to begin cooperation with the ICC currently, in order to participate in the 2009 Review Conference. David Scheffer clarified that the U.S. has to decide to have “a strong voice in the room”, it has to decide on the issue a long time before so it can sign and then ratify it prior to the conference.

The United States could collaborate with the ICC by offering “more cooperation in intelligence and logistical support”⁵⁵ and exercising pressure against situations of human rights violations. Scheffer sees this support as possible during the Bush administration and at the time of the conference because he considers that the United States could present project in which it proposes both critics and support to the ICC.

Finally, he considers that the United States will address the Review Conference as state party, a project of proposals of crimes regarding chemical and nuclear weapons and corruption issues and also, a presentation of some kind of declarations and understanding as an alternative solution to the prohibition of reservations to the Rome Statute.

To conclude this section, it could be said that the ratification of the Rome Statute by the United States is a greater possibility than what could be considered before, however, it does not have too much time to decide in order to assist the 2009 Review Conference. The time is running out, so this inquiry must be resolved soon.

CONCLUSION

Article 98 agreements signed by the U.S. are not necessary for the protection of U.S. troops because the ICC could only exercise jurisdiction

⁵⁵ Id.

over a national whose country is unwilling to either investigate or prosecute its nationals. Undoubtedly the United States is the kind of country that can guarantee justice to the victim of potential atrocities committed by U.S. nationals. Moreover, in order to avoid any political persecution against some state, the Security Council is empowered to defer any investigation or prosecution taken by the ICC. Also, in the political sphere the United States is a permanent member of the Security Council thus it is clear that its nationals are not likely to be unfairly prosecuted if the conditions to the ICC are met. These agreements only reveal the hostile attitude of the United States against the ICC.

On the other hand, the consent to the special agreements by the States Parties is against the principles of the Rome Statute, so these agreements are inconsistent with the Treaty in this sense as well. The special agreements are against the object and purpose of the Treaty and should be revised by the parties, especially the State Parties to the Rome Statute that have a special obligation to the Treaty.

Concerning the ratification to the Rome Statute, this is a great opportunity for the U.S. in considering the possibility to become a State Party. As has been exposed in this essay, there are important reasons to ratify the Rome Statute; the logistic and political support that the U.S. can offer to the ICC is just a one of them. However, the United States has to be subject to the same rules as the other states parties in order to criticize and play an important role in the growth of the ICC. This is a very young Court, the first permanent international criminal court in the world, thus, the U.S. should begin to make an effort and finally join the Rome Statute.

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