

Replies and Comments:

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Focus

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Mr. Boucher,

Spokesperson of the State Department

"These are bilateral agreements that are totally compatible with the treaty. They respect the right of members to participate in the treaty and the Court, and they respect the right of people like the United States not to participate for what we think are very important reasons."

Deputy German Foreign Minister **Gunter Pleuger** said on Friday that while it was legally possible to keep Americans out of prosecution at the tribunal, such a move would erode the tribunal's charter. "It will certainly not be compatible with the spirit" of the tribunal, which was created to bring war crimes suspects to justice when national governments refuse to do so, Pleuger told reporters.

Bilateral agreements: permissible under the Rome Statute?

The United States has started in August to obtain bilateral agreements from States around the world that would prevent surrender of Americans to the jurisdiction of the new International Criminal Court (ICC). The reason behind this enormous deployment of the American administration is the US fear that the new war crimes tribunal could subject Americans to frivolous prosecutions because of the United States' superpower status.

As of now four countries have acceded to the Americans' request: Romania, Israel, Tajikistan and East Timor. Others such as Colombia, Canada and New Zealand have stood firm and refused to sign such agreements despite the increasing pressure exerted by the US. It is not yet clear what sort of diplomatic pressure the American administration has been using but provision has been made in the American Servicemembers Protection Act of 2002 (also dubbed the "Hague invasion clause") for the withdrawal of US military assistance from countries ratifying the ICC treaty, and the restriction of US participation in United Nations peacekeeping unless the United States obtains immunity from prosecution.

The argument that such agreements are lawful is based on a literal interpretation of article 98 of the ICC Statute. The provision clearly states that the ICC cannot request the surrender of an individual if the requested State has, through an international instrument, undertaken to surrender nationals of a third State. Consequently, it does not appear that the agreements sought by the US defy the ICC Statute.

An argument against is that article 98 of the ICC Statute envisaged a rational system for the handling of suspects among States co-operating with the court. Article 98 was not intended to allow a State that has refused to cooperate with the Court to negotiate a web of agreements internationally to secure exemption for its citizens or otherwise undermine the effective functioning of the Court. By doing so, States agreeing to sign such conventions would act in contravention of the spirit of this provision.

Such agreements can also be criticised on the basis that they violate the general spirit of the ICC Statute and erode the tribunal's charter. The ICC has been regarded as the triumph of justice over States' inability and unwillingness to prosecute individuals accused of having committed war crimes, crimes against humanity or acts of genocide. States parties are obliged by the Rome Statute to cooperate with the ICC and signatory States, by virtue of their legal obligations under customary international law as described in the Vienna Convention on the Law of Treaties, are obliged not to defeat the "object and purpose" of the Rome Statute and so should refrain from signing such agreements. In fact, as the purpose of the ICC Statute is to hold individuals accountable for war crimes, crimes against humanity and acts of genocide committed in war- or peacetime, then defeating the mechanism to surrender for a category of individuals (based on nationality) seems to be at odds with the overall "object and purpose" of the treaty.

Responsibility

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