

# Report for Congress

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## **U.S. Policy Regarding the International Criminal Court**

**Updated September 3, 2002**

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# U.S. Policy Regarding the International Criminal Court

## Summary

One month after the International Criminal Court (ICC) officially came into existence on July 1, 2002, the President signed legislation that limits U.S. government support and assistance to the ICC, curtails military assistance to many countries that have ratified the Rome Statute establishing the ICC, and most controversially among European allies, authorizes the President to use “all means necessary and appropriate to bring about the release” of certain U.S. and allied persons who may be detained or tried by the ICC.

While most U.S. allies support the ICC, the Bush Administration firmly opposes it and has renounced any U.S. obligations under the treaty. The Administration initially vetoed a United Nations resolution to extend the peacekeeping mission in Bosnia because it did not contain any guarantee that U.S. participants would be immune to prosecution by the ICC. Ultimately, the Security Council and the U.S. delegation were able to reach a compromise that defers for one year any prosecution of participants in U.N. established or authorized missions, whose home countries have not ratified the Rome Statute. While the compromise falls short of the Administration’s original goal of ensuring permanent immunity for U.S. citizens from the ICC, it suggests that the role of the U.N. Security Council under the Rome Statute may prove effective in addressing some of the concerns U.S. opponents of the ICC have voiced.

This report outlines the main objections the United States has raised with respect to the ICC and analyzes the American Servicemembers’ Protection Act (ASPA) enacted to regulate the U.S. cooperation with the ICC. The report concludes with a discussion of the implications for the United States, as a non-ratifying country, as the ICC comes into force, as well as the Administration’s apparent strategy with regard to the ICC. This report is intended to serve as an update to the fifth and sixth parts of CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*.

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# U.S. Policy Regarding the International Criminal Court

## Introduction

July 1, 2002 marks the birth of the International Criminal Court (ICC), meaning that crimes of the appropriate caliber committed after that date could fall under the jurisdiction of the ICC, although the ICC is not expected to be ready to try cases until at least early next year. The ICC will be the first global permanent international court with jurisdiction to prosecute individuals for “the most serious crimes of concern to the international community;”<sup>1</sup> the United Nations, many human rights organizations, and most democratic nations have expressed support for the new court.<sup>2</sup> The Bush Administration, however, opposes it and in May, 2002, formally renounced any U.S. obligations under the treaty.<sup>3</sup> On August 2, 2002, President Bush signed into law the American Servicemembers’ Protection Act (ASPA) to restrict government cooperation with the ICC. The Administration had earlier stressed that the United States shares the goal of the ICC’s supporters – promotion of the rule of law – and does not intend to take any action to undermine the ICC.<sup>4</sup>

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<sup>1</sup> See Rome Statute of the International Criminal Court, Preamble, U.N. Doc. A/CONF.183/9 (1988) (“Rome Statute”). These include genocide, crimes against humanity, war crimes, and potentially the crime of aggression, if the Assembly of States Parties is able to reach an agreement defining it. *Id.* art. 5(1).

<sup>2</sup> See Barbara Crossette, *World Criminal Court is Ratified – Praised by U.N., Opposed by U.S.*, N.Y. TIMES Apr. 12, 2002, available at 2002 WL-NYT 0210200003. As of August 5, 2002, 77 nations have ratified the Rome Statute. For the current status of signatures, ratifications and reservations, visit <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

<sup>3</sup> See Jonathon Wright, *U.S. Renounces Obligations to International Court*, REUTERS, May 6, 2002. Although some in the media have described the act as an “unsigned” of the treaty, it may be more accurately described as a notification of intent not to ratify.

<sup>4</sup> See Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C., (May 6, 2002) (prepared remarks available at <http://www.state.gov/p/9949pf.htm>). Secretary Grossman promised that:

Notwithstanding our disagreements with the Rome Treaty, the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court.

So, despite this difference, we must work together to promote real justice after July 1, when the Rome Statute enters into force.

(continued...)

While the United States initially supported the idea of creating an international criminal court<sup>5</sup> and was a major participant at the Rome Conference,<sup>6</sup> in the end, the United States voted against the Statute.<sup>7</sup> Nevertheless, President Clinton signed the treaty December 31, 2000, at the same time declaring that the treaty contained “significant flaws” and that he would not submit it to the Senate for its advice and consent “until our fundamental concerns are satisfied.”<sup>8</sup> The Bush Administration has likewise declined to submit the Rome Statute to the Senate for ratification, and has notified the U.N. Secretary General, as depositary, of the U.S. intent not to ratify the treaty.<sup>9</sup> The primary objection given by the United States in opposition to the treaty is the ICC’s possible assertion of jurisdiction over U.S. soldiers charged with “war crimes” resulting from legitimate uses of force, and perhaps over civilian

<sup>4</sup>(...continued)

The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law.

<sup>5</sup> See Ruth Wedgwood, Harold K. Jacobson and Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT’L L. 124 (2001) (commenting that the United States has “repeatedly and publicly declared its support in principle” for an international criminal court). Congress expressed its support for such a court, providing the rights of U.S. citizens were recognized. See, e.g., Foreign Operations Appropriations Act § 599E, P.L. 101-513, 104 Stat. 2066-2067 (1990)(expressing the sense of the Congress that “the United States should explore the need for the establishment of an International Criminal Court” and that “the establishment of such a court or courts for the more effective prosecution of international criminals should not derogate from established standards of due process, the rights of the accused to a fair trial and the sovereignty of individual nations”); Anti-Drug Abuse Act of 1988, § 4108, P.L. 100-690, 102 Stat. 4181, 4266 (1988)(encouraging the President to initiate discussions with foreign governments about the possibility of creating an international court to try persons accused of having engaged in international drug trafficking or having committed international crimes, providing constitutional guarantees of U.S. citizens are recognized); P.L. 99-399, § 1201 (1986) .

<sup>6</sup> See *U.N. International Criminal Court: Hearings before the Subcomm. on International Operations of the Senate Foreign Relations Committee*, 105<sup>th</sup> Cong. (1998) (testimony of David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>7</sup>See Wedgwood, *et al.*, *supra* note 5, at 124 (noting that the final vote for the Statute was 120 in favor to seven against).

<sup>8</sup>See Statement on the Rome Treaty on the International Criminal Court, Dec. 31, 2000, 37(1) Weekly Compilation of Presidential Documents 4 (2001).

<sup>9</sup>Because the United States signed the Rome Statute, it had been obligated under international law to refrain from conducting activity in contravention of the object and purpose of the treaty. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 18, 1155 U.N.T.S. 335. However, this obligation ends once a signatory state has indicated an intent *not* to ratify the treaty. *Id.* Some press reports initially indicated the Administration was also planning to renounce the Vienna Convention, which the United States has signed but not yet ratified. See Neil A. Lewis, *U.S. to ‘Unsign’ Treaty, Disavow World Tribunal*, SAN DIEGO UNION & TRIB., May 5, 2002 at A1. The report was apparently based on a misunderstanding of the Administration’s statement explaining the intent behind its action, which was reportedly to avoid any obligations on the part of the United States that may have been incurred through its signature of the Rome Statute, in accordance with article 18 of the Vienna Convention.

policymakers, even if the United States does not ratify the Rome Statute. The United States sought to exempt U.S. soldiers and employees from the jurisdiction of the ICC based on the unique position the United States occupies with regard to international peacekeeping.<sup>10</sup>

On June 30, 2002, the United States vetoed a draft U.N. resolution to extend the peacekeeping mission in Bosnia because the members of the Security Council refused to add a guarantee of full immunity for U.S. personnel from the jurisdiction of the ICC, a move that provoked strong opposition from ICC supporters concerned with the viability of that institution, and that also raised some concerns about the future of United Nations peacekeeping.<sup>11</sup> Ultimately, however, the Security Council and the U.S. delegation were able to reach a compromise and adopted unanimously a resolution requesting the ICC defer, for an initial period of one year, any prosecution of persons participating in U.N. peacekeeping efforts who are nationals of states not parties to the ICC. The compromise reached by the Security Council does not provide permanent immunity for U.S. soldiers and officials from prosecution by the ICC, but invokes article 16 of the Rome Statute to defer potential prosecutions for one year, at which time the Security Council may vote to continue the deferral for another year. The United States is also pursuing bilateral agreements to preclude extradition by other countries of U.S. citizens to the ICC.

This report outlines the main objections the United States has raised with respect to the ICC and analyzes the American Servicemembers' Protection Act (ASPA) enacted to regulate the U.S. cooperation with the ICC. The report concludes with a discussion of the implications for the United States, as a non-ratifying country, after entry into force of the ICC Statute, as well as the Administration's apparent strategy with regard to the ICC. This report is intended to serve as an update to the fifth and sixth parts of CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*.

## **U.S. Objections to the Rome Statute**

The primary objection given by the United States in opposition to the treaty is the ICC's possible assertion of jurisdiction over U.S. soldiers charged with "war crimes" resulting from legitimate uses of force, or its assertion of jurisdiction over other American officials charged for conduct related to foreign policy initiatives. The threat of prosecution by the ICC, it is argued, could impede the United States in carrying out military operations and foreign policy programs, impinging on the sovereignty of the United States. Detractors of the U.S. position depict the objection as a reluctance on the part of the United States to be held accountable for gross human rights violations or to the standard established for the rest of the world.

Below, in bold type, are summarized some of the main objections voiced by U.S. officials and other critics of the Rome Statute. Each objection is followed by the

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<sup>10</sup>See Grossman, *supra* note 4.

<sup>11</sup>See Colum Lynch, *Dispute Threatens U.N. Role in Bosnia; U.S. Wields Veto in Clash over War Crimes Court*, WASH. POST, Jul. 1, 2002, at A1.

counterpositions likely to be voiced by representatives of U.S. foreign allies that support the ICC, as well as a very brief discussion of the issue. This section is intended to familiarize the reader with the basic issues that comprise the current debate, and not to provide an exhaustive analysis of the issues.<sup>12</sup> None of the statements in the section below should be interpreted to represent the view of CRS, since CRS does not take positions on policy issues.

## **Issue #1 Jurisdiction over Nationals of Non-Parties**

**Only nations that ratify treaties are bound to observe them. The ICC purports to subject to its jurisdiction citizens of non-party nations, thus binding non-party nations.**<sup>13</sup> ICC supporters may argue that the ICC has jurisdiction over persons, not nations. Non-party states are not obligated to *do* anything under the treaty. Therefore, the Rome Statute does not purport to bind non-parties, although non-party states may cooperate or defend their own interests that may be affected by a pending case. ICC opponents, however, may point out that if individuals are charged for conduct related to carrying out official policy, the difference between asserting jurisdiction over individuals and over the nation itself becomes less clear.<sup>14</sup> After all, it is arguably the policy decision and not the individual conduct that is actually at issue. The threat of prosecution, however, could inhibit the conduct of U.S. officials in implementing U.S. foreign policy. In this way, it is argued, the ICC may be seen to infringe U.S. sovereignty.

Some ICC supporters have asserted that the crimes covered by the Rome Statute are already prohibited under international law either by treaty or under the concept of “universal jurisdiction,” or both; therefore, all nations have jurisdiction to try persons for these crimes. The ICC, they argue, would merely be exercising the collective jurisdiction of its members, any of which could independently assert jurisdiction over the accused persons under a theory of “universal jurisdiction;” the Nuremberg trials serve as an example of such collective jurisdiction.<sup>15</sup> ICC opponents may note that the existence of “universal jurisdiction” has been disputed by some academics, who argue that actual state practice does not provide as much support for the concept as many ICC supporters may claim.<sup>16</sup> However, ICC supporters note, the

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<sup>12</sup>For a more in-depth analysis of these issues, see International Criminal Court: Overview and Selected Legal Issues, CRS Report RL31437.

<sup>13</sup>See Fact Sheet: The International Criminal Court, U.S. Department of State Office of War Crimes Issues, May 6, 2002; Grossman, *supra* note 4 (asserting “the United States has never recognized the right of an international organization to [detain and try American citizens] absent consent or a UN Security Council mandate”).

<sup>14</sup>See Ruth Wedgewood, *The United States and the International Criminal Court: The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 199 (2001) (arguing the state whose national is charged remains a “party in interest” to the prosecution).

<sup>15</sup>See Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L L. 1, 3-4 (2000).

<sup>16</sup>See Wedgewood, *supra* note 14, at 199 (pointing out there is “no ordinary precedent for delegating national criminal jurisdiction to another tribunal, international or national, (continued...)”).

Rome Statute does not rely entirely on universal jurisdiction; certain pre-conditions to jurisdiction must be met, including the consent of either the state on whose territory the crime occurred or the state of nationality of the accused.<sup>17</sup> The United States is already party to most of the treaties that form the basis for the definitions of crimes in the Rome Statute, meaning U.S. citizens are already subject to the prohibitions for which the ICC will have jurisdiction.

ICC supporters may further argue that if the ICC could not assert jurisdiction over non-party states, so-called “rogue regimes” could insulate themselves from the reach of the ICC simply by not ratifying the Rome Statute. The purpose for creating the ICC would be subverted. The United States had proposed to resolve this problem by creating a mandatory role for the U.N. Security Council in deciding when the ICC should assert jurisdiction, but the majority of other countries refused to adopt such a rule on the stated grounds that it would mirror the uneven prosecution of war crimes and crimes against humanity under the present system of *ad hoc* tribunals.

## ***Issue #2 Politicized Prosecution***

**The ICC’s flaws may allow it to be used by some countries to bring trumped-up charges against American citizens, who, due to the prominent role played by the United States in world affairs, may have greater exposure to such charges than citizens of other nations.**<sup>18</sup> ICC supporters argue that the principle of “complementarity” will ensure that the ICC does not take jurisdiction over a case involving an American citizen, unless the United States is unwilling or unable genuinely to investigate the allegations itself, a scenario some argue is virtually unthinkable. Some also take exception to the notion that Americans are more likely to be targeted for prosecution although many other countries that participate in peacekeeping operations, for example, are willing to subject their soldiers and officials to the jurisdiction of the ICC. Many U.S. opponents of the ICC express concern that the ICC will be able to second-guess a valid determination by U.S. prosecutors to terminate an investigation or decline to prosecute a person. It is not uncommon for unfriendly countries to characterize U.S. foreign policy decisions as “criminal.” The ICC could provide a forum for such charges. Some ICC supporters dispute the likelihood of such an occurrence, and express confidence that unfounded charges would be dismissed.

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<sup>16</sup>(...continued)

without consent of the affected states, except in the aftermath of international belligerency”). Some observers, however, note that one of the reasons for constituting an international criminal court was to do away with the need for military conquest prior to prosecuting war crimes, in the hope of eliminating the perception of “victor’s justice.”

<sup>17</sup>Rome Statute, *supra* note 1, art. 12. *See generally* International Criminal Court: Overview and Selected Legal Issues 21-26, CRS Report RL31437 (summarizing jurisdictional requirements). There is no consent requirement in cases referred by the Security Council.

<sup>18</sup>*See* Grossman, *supra* note 4.



### Issue #3 The Unaccountable Prosecutor

**The Office of the Prosecutor, an organ of the ICC that is not controlled by any separate political authority, has unchecked discretion to initiate cases, which could lead to “politicized prosecutions.”**<sup>19</sup> ICC supporters may counter that the ICC statute does contain some restraints on the Prosecutor, including a provision that the Prosecutor must seek permission from a pre-trial chamber to carry out a self-initiated prosecution, and a provision for removal of the Prosecutor by vote of the Assembly of States Parties.<sup>20</sup> The independence of the prosecutor, it is argued, is vital in order to ensure just results, free from political control. U.S. negotiators at the Rome Conference had pressed for a role for the U.N. Security Council to check possible “overzealous” prosecutors and prevent politicized prosecutions. The majority of nations represented at the Rome Conference took the view that the U.N. Security Council, with its structure and permanent members, would pose an even greater danger of “politicizing” ICC prosecutions, thereby guaranteeing impunity for some crimes while prosecuting others based on the national interests of powerful nations.

### Issue #4 Usurpation of the Role of the U.N. Security Council

**The ICC Statute gives the ICC the authority to define and punish the crime of “aggression,” which is solely the prerogative of the Security Council of the United Nations under the U.N. Charter.**<sup>21</sup> ICC supporters may argue that all states parties will have the opportunity to vote on a definition of aggression after the treaty has been in effect for seven years, which definition must comport with the U.N. Charter, thereby preserving the role of the U.N. Security Council.<sup>22</sup> The ICC, under this view, is merely providing a forum for trying persons accused of committing “aggression” under international law. Opponents of the ICC, however, may argue that the lack of agreement among nations as to the definition of aggression suggests that any definition adopted only by a majority of member states of the ICC may not be sufficiently grounded in international law to be binding as *jus cogens*.<sup>23</sup> The U.N.

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<sup>19</sup>*See id.*

<sup>20</sup>Rome Statute, *supra* note 1, art. 46, provides procedures for removing a Prosecutor who:

- (a) Is found to have committed serious misconduct or a serious breach of his or her duties under [the Rome] Statute, as provided for in the Rules of Procedure and Evidence; or
- (b) Is unable to exercise the functions required by this Statute.

<sup>21</sup>*See* Grossman, *supra* note 4

<sup>22</sup>*See* RL31437 at 20-21 (summarizing issues relevant to the definition of “aggression”).

<sup>23</sup>A mutually acceptable definition for the elements of the crime of aggression has long eluded the international community, impeding earlier attempts to establish an international criminal court. *See* Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT’L L.J. 1, 2 (2002). Article 39 of the U.N. Charter leaves it to the Security Council to determine the existence of and take action with respect to any act of aggression, but does not provide a definition.

General Assembly adopted a resolution in 1974<sup>24</sup> addressing the definition of aggression, but it has only been invoked once by the Security Council.<sup>25</sup> The definition contains an enumeration of offenses included as possible aggression,<sup>26</sup> but leaves the determination to the Security Council.

## **Issue #5 Lack of Due Process Guarantees**

**The ICC will not offer accused Americans the due process rights guaranteed them under the U.S. Constitution, such as the right to a jury trial.** Supporters of the Rome Statute contend it contains a comprehensive set of procedural safeguards that offers substantially similar protections to the U.S. constitution.<sup>27</sup> Some also note that the U.S. Constitution does not always afford American citizens the same procedural rights. For example, Americans may be tried overseas, where foreign governments are not bound to observe the Constitution. Moreover, cases arising in the armed services are tried by court-martial, which is exempt from the requirement for a jury trial. The current U.S. policy about the use of military tribunals in the war against terrorism could lead to suggestions of a double standard on the part of the United States with respect to procedural safeguards in war crimes trials.

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<sup>24</sup>G.A. Res. 3314, U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 19, U.N. Doc A/9615 (1974).

<sup>25</sup>See Kriangsak Kittichaisaree, *The NATO Military Action and the Potential Impact of the International Criminal Court*, 4 SING. J. INT'L & COMP. L. 498, 505 (2000) (citing U.N. Security Council Resolution 418 of 4 Nov. 1977, declaring South Africa guilty of aggression against Angola).

<sup>26</sup> G.A. Res. 3314, art. 3, lists the following examples of possible acts of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

<sup>27</sup>See *id.* at 29-38 (describing procedural safeguards in the Rome Statute); see also Selected Procedural Safeguards in Federal, Military, and International Courts, CRS Report RL31262 (providing brief comparison of ICC procedural safeguards to federal and military rules of procedure and evidence).

## Congressional Action

Congress has passed several riders effectively precluding the use of funds to support the ICC.<sup>28</sup> Congress passed the American Servicemembers' Protection Act of 2002 (ASPA) as title II of the supplemental appropriations bill for 2002, which was signed by the President on August 2, 2002.<sup>29</sup> Additionally, the House of Representatives added a rider to the Bob Stump National Defense Authorization Act for Fiscal Year 2003, H.R. 4546, expressing the sense of the Congress that "none of the funds appropriated pursuant to authorizations of appropriations in this Act should be used for any assistance to, or to cooperate with or to provide any support for, the International Criminal Court."<sup>30</sup>

### American Servicemembers' Protection Act of 2002

Both the House of Representatives and the Senate added the American Servicemembers' Protection Act (ASPA) to the supplemental appropriations bill for the fiscal year ending September 30, 2002, H.R. 4775. The conferees adopted the Senate version of the bill, which includes a new provision that the ASPA will not prevent the United States from cooperating with the ICC if it prosecutes persons such as Saddam Hussein or Osama bin Laden.<sup>31</sup>

#### Legislative History.

Originally introduced in the 106<sup>th</sup> Congress as S. 2726, the ASPA is intended to shield members of the United States Armed Forces and other covered persons from the jurisdiction of the ICC. The Senate Committee on Foreign Relations held hearings<sup>32</sup> the same day the bill was introduced but did not report it. The ASPA was reintroduced in the 107<sup>th</sup> Congress as S. 857 on May 9, 2001, and an amended version was introduced as S. 1610 on November 1, 2001. The House of Representatives also passed a version of ASPA in the Foreign Relations Authorization Act, Fiscal Years 2002 and 2003, H.R. 1646, Title VI, subtitle B. The Senate amended version of H.R. 1646 does not include the ASPA. H.R. 1646 is in conference at the time of this writing. The Senate passed a somewhat weakened version of the ASPA, as part of the Departments of Commerce, Justice, and State, the

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<sup>28</sup>See Department of Defense Appropriations for 2002, P.L. 107-117.

§ 8173. None of the funds made available in division A of this Act may be used to provide support or other assistance to the International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court.

See also Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, § 630, P.L. 107-77.

<sup>29</sup>P.L. 107-206.

<sup>30</sup>H.R. 4546 § 1034.

<sup>31</sup>See H.R. REP. NO. 107-593 (2002).

<sup>32</sup>*The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution, Hearing before the Senate Comm. on Foreign Relations, 106<sup>th</sup> Cong. (2000).*

Judiciary, and Related Agencies Appropriations Act, 2002, HR 3338, but it was replaced in the enacted law with language prohibiting spending to support the ICC.<sup>33</sup>

Title II of H.R. 4775 is substantially similar to S. 857 (H.R. 1794), and repeals the provision passed as part of H.R. 3338.

### **Prohibitions and Requirements.**

The ASPA prohibits cooperation with the ICC by any agency or entity of the federal government, or any state or local government. (Section 2004) Covered entities are prohibited from responding to a request for cooperation by the ICC or providing specific assistance, including arrest, extradition, seizure of property, asset forfeiture, service of warrants, searches, taking of evidence, and similar matters. It prohibits agents of the ICC from conducting any investigative activity on U.S. soil related to matters of the ICC. Section 2004(d) states that the United States “shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters ... to prevent ... use by the [ICC of such assistance].” It does not ban the communication to the ICC of U.S. policy or assistance to defendants. It does not prevent private citizens from providing testimony or evidence to the ICC. Section 2006 requires the President to put “appropriate procedures” in place to prevent the direct or indirect transfer of certain classified national security information to the ICC.

### ***Restrictions on Participation in Peacekeeping Missions.***

Unless subject to a blanket waiver under section 2003,<sup>34</sup> section 2005 of the ASPA restricts U.S. participation in U.N. peacekeeping operations to missions where the President certifies U.S. troops may participate without risk of prosecution by the ICC because the Security Council has permanently exempted U.S. personnel from prosecution for activity conducted as participants,<sup>35</sup> or because each other country participating in the mission is either not a party to the ICC and does not consent to its jurisdiction, or has entered into an agreement “in accordance with article 98” of the Rome Statute.<sup>36</sup> The latter option may not provide as much assurance as the first; an article 98 agreement would prevent the surrender of certain persons to the ICC by

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<sup>33</sup>P.L. 107-117 § 8173. *See supra* note 28. The version of ASPA passed by the Senate in H.R. 3338 omitted the prohibition on military assistance to non-NATO ICC member countries and the limitations on participation in U.N. peacekeeping missions.

<sup>34</sup>*See infra* page 16.

<sup>35</sup>The compromise reached by the U.N. Security Council in Resolution 1422 (2002) provides for a one-year deferral, thus providing neither immunity nor permanent protection, which would not appear to meet this criterion. *See infra* note 74.

<sup>36</sup>Rome Statute, *supra* note 1, art. 98, prohibits the ICC from pursuing requests for assistance or surrender that would require the requested state to act inconsistently with certain international obligations. This provision, as well as other provisions that refer to articles of the Rome Statute, may be seen as contradicting with finding (11) of section 2, which states that the United States “will not be bound by any of [the terms of the Rome Statute].”

parties to the article 98 agreement,<sup>37</sup> but would not bind the ICC if it were to obtain custody of the accused through other means. If the alleged crime is committed on the territory of a state party to the Rome Statute, the consent requirement for the jurisdiction of the ICC would be met, despite the existence of the article 98 agreement. That country could, however, carry out its own investigation and invoke complementarity to preclude the ICC's jurisdiction. Additionally, the country that is the object of the peacekeeping mission may consent to the ICC's jurisdiction over U.S. participants for alleged crimes committed on its territory, whether or not it is a member of the ICC.

The restriction may also be waived for peacekeeping missions where the President certifies that U.S. participation is in the national interest of the United States. The national interest qualification would appear to be the most easily met of the three waiver options; whenever the United States uses its vote in the Security Council to approve a peacekeeping operation, the mission presumably is deemed to serve the national interest.<sup>38</sup> This section could conceivably be interpreted to suggest the President has the authority to commit U.S. troops to participate in U.N. peacekeeping missions without the prior approval of Congress. The restriction does not apply to peacekeeping missions established prior to July 1, 2003.<sup>39</sup>

### ***Restriction on Provision of Military Assistance.***

Effective 1 July 2003, the ASPA also prohibits military assistance to any country that is a member of the ICC, except for NATO countries and major non-NATO allies,<sup>40</sup> unless the President waives the restriction (Section 2007) or a blanket

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<sup>37</sup>See Rome Statute, *supra* note 1, art. 98, which provides:

**Article 98 Cooperation with respect to waiver of immunity and consent to surrender**

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
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.

The article appears to cover only persons sent by the government to the requested state on official business, such as officials and military personnel, and would not cover private citizens who are present in the requested state for reasons unrelated to official duty. An agreement signed by a state party to the ICC that promises not to surrender any other citizens of another state to the ICC would appear to be covered by art. 97 of the Rome Statute, which requires the requested state to consult with the ICC if honoring a request for surrender to the ICC would cause the requested state to breach its international obligations.

<sup>38</sup>See, e.g., 22 U.S.C. § 287b(e)(2)(B) (requiring as part of an annual report to Congress on U.N. activities information about possible authorization for peacekeeping missions, including the "vital national interest to be served").

<sup>39</sup> See P.L 107-206, § 2005(b).

<sup>40</sup>Major non-NATO allies include Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand. (§ 2007(d)). Taiwan is also exempt under § 2007.

waiver is in effect under section 2003. Military assistance, as defined in the ASPA, includes foreign assistance under chapters 2 and 5 of Part II of the Foreign Assistance Act of 1961, as amended,<sup>41</sup> and defense articles and services financed by the government, including loans and guarantees, under section 23 of the Arms Export Control Act.<sup>42</sup> The President may waive the prohibition without prior notice to Congress if he determines and reports to the appropriate committees that such assistance is important to the national interest or the recipient country has entered into a formal article 98 agreement to prevent the ICC's proceeding against U.S. personnel present in such country. The following table provides a list of countries for which military assistance has been requested for FY 2003 that could be affected by the restriction (not including NATO allies and other countries exempt from the restriction).<sup>43</sup>

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<sup>40</sup>(...continued)

The President may designate other nations as major non-NATO allies under 22 U.S.C. § 2321k, by notifying Congress 30 days in advance.

<sup>41</sup>22 U.S.C. § 2151 *et seq.* Chapter 2 is codified at 22 U.S.C. §§ 2311 - 2321k (provision of defense articles and services). Chapter 5 is codified at 22 U.S.C. §§ 2347 - 2347d (international military education and training of foreign personnel in furtherance of the goals of international peace and security, to improve the recipient's self-defense capabilities, and to increase awareness of human rights).

<sup>42</sup>22 U.S.C. § 2763 (authorizing President to provide credit to friendly foreign countries and international organizations for the purchase of defense articles and services).

<sup>43</sup>Romania is not included because it has signed an article 98 agreement. *See* Press Release, United States Department of State, U.S. and Romania Sign Article 98 Agreement (Aug. 1, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/12393.htm>.

### FY2003 Requested Military Assistance for Certain States Parties to the ICC

Country	Date Ratified ICC	FY2003 FMF* (\$ in thousands)	FY2003 IMET** (\$ in thousands)	Total FY2003 Military Assistance
Belize	5 Apr 2000	300	175	475
Benin	22 Jan 2002	0	400	400
Bolivia	27 Jun 2002	2000	800	2800
Bosnia and Herzegovina	11 Apr 2002	2500	900	3400
Botswana	8 Sep 2000	1000	600	1600
Brazil	20 Jun 2002	0	500	500
Bulgaria	11 Apr 2002	9500	1350	10850
Cambodia	11 Apr 2002	0	200	200
Central African Republic	3 Oct 2001	0	110	110
Colombia	5 Aug 2002	98000	1180	99180
Democratic Republic of the Congo	11 Apr 2002	0	50	50
Costa Rica	7 Jun 2001	0	400	400
Croatia	21 May 2001	6000	700	6700
Ecuador	5 Feb 2002	1000	650	1650
Estonia	30 Jan 2002	6750	1100	7850
Fiji	29 Nov 1999	0	100	100
Gabon	20 Sep 2000	0	160	160
Gambia	28 Jun 2002	0	50	50
Ghana	20 Dec 1999	500	500	1000
Honduras	1 Jul 2002	0	650	650
Latvia	28 Jun 2002	7000	1100	8100
Lesotho	6 Sep 2000	0	100	100
Macedonia, The Former Yugoslav Republic of	6 Mar 2002	11000	650	11650
Mali	16 Aug 2000	0	325	325
Mauritius	5 Mar 2002	0	100	100
Mongolia	11 Apr 2002	1000	725	1725
Namibia	25 Jun 2002	0	200	200
Niger	11 Apr 2002	0	110	110
Nigeria	27 Sep 2001	6000	800	6800
Panama	21 Mar 2002	1000	200	1200
Paraguay	14 May 2001	0	300	300
Peru	10 Nov 2001	1000	600	1600
Senegal	2 Feb 1999	500	900	1400
Sierra Leone	15 Sep 2000	0	250	250
Slovakia	11 Apr 2002	9000	950	9950
Slovenia	31 Dec 2001	5000	950	5950
South Africa	27 Nov 2000	6000	1450	7450
Tajikistan	5 May 2000	0	350	350
Trinidad and Tobago	6 Apr 1999	400	150	550
Uganda	14 Jun 2002	0	170	170
United Republic of Tanzania	20 Aug 2002	0	230	230
Uruguay	28 Jun 2002	1000	450	1450
Venezuela	7 Jun 2000	0	700	700
Yugoslavia, Federal Republic of	6 Sep 2001	1000	300	1300
<b>Total (45 countries)</b>		<b>179453</b>	<b>24638</b>	<b>202088</b>

\* FMF is Foreign Military Financing \*\* IMET is International Military Education and Training.

Sources: Data regarding ICC membership status is from the United Nations website, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>. Requested military assistance for FY 2003 is from the Congressional Budget Justification, Foreign Operations, FY2003, U.S. State Department

The restriction does not appear to apply to any regional organizations that may receive military assistance. The restrictions on military assistance to the countries above will not apply to countries that agree to sign article 98 agreements with the United States, or if the President waives the restrictions as justified with respect to a particular country by national interests.

The following table provides a list of countries that have not ratified, but may have signed the Rome Statute (not including NATO allies and other countries exempt from the restriction) for which the Administration has requested military assistance for FY 2003. The restriction on military assistance will not apply to these countries unless they ratify the Rome Statute, irrespective of whether they sign an article 98 agreement with the United States or agree to withhold consent to the ICC's jurisdiction in the event a U.S. person is alleged to have committed a crime on the territory of the recipient state.



### FY2003 Requests for Military Assistance for Non-states Parties to the ICC

Country	Date Signed ICC	FY2003 FMF* (\$ in thousands)	FY2003 IMET** (\$ in thousands)	Total FY2003 Military Assistance
Albania	18 Jul 1998	5000	900	5900
Algeria	28 Dec 2000	0	550	550
Angola	7 Oct 1998	0	100	100
Armenia	1 Oct 1999	3000	900	3900
Azerbaijan		3000	750	3750
Bahamas	29 Dec 2000	100	0	100
Bahrain	11 Dec 2000	0	450	450
Bangladesh	16 Sep 1999	0	750	750
Burkina Faso	30 Nov 1998	0	50	50
Burundi	13 Jan 1999	0	50	50
Cameroon	17 Jul 1998	0	200	200
Cape Verde	28 Dec 2000	0	120	120
Chad	20 Oct 1999	0	130	130
Chile	11 Sep 1998	1000	600	1600
Comoros	22 Sep 2000	0	50	50
Congo	17 Jul 1998	0	110	110
Côte d'Ivoire	30 Nov 1998	0	50	50
Djibouti	7 Oct 1998	0	185	185
Dominican Republic	8 Sep 2000	320	0	320
El Salvador		2500	900	3400
Equatorial Guinea		0	50	50
Eritrea	7 Oct 1998	500	400	900
Ethiopia		500	500	1000
Georgia	18 Jul 1998	7000	1200	8200
Guatemala		0	350	350
Guinea	7 Sep 2000	0	250	250
Guinea-Bissau	12 Sep 2000	0	75	75
Guyana	28 Dec 2000	400	275	675
Haiti	26 Feb 1999	400	0	400
India		50000	1000	51000
Indonesia		0	400	400
Jamaica	8 Sep 2000	700	600	1300
Kazakhstan		3000	1000	4000
Kenya	11 Aug 1999	1500	600	2100
Kyrgyzstan	8 Dec 1998	4000	1100	5100
Loas		0	100	100
Lebanon		0	700	700
Lithuania	10 Dec 1998	75000	1100	76100
Madagascar	18 Jul 1998	0	170	170
Malawi	2 Mar 1999	0	360	360
Malaysia		0	800	800
Maldives		0	150	150
Malta	17 Jul 1998	1000	300	1300
Mauritania		0	100	100
Mexico	7 Sep 2000	0	1250	1250
Republic of Moldova	8 Sep 2000	1500	900	2400
Morocco	8 Sep 2000	5000	1500	6500
Mozambique	28 Dec 2000	0	215	215
Nepal		3000	500	3500
Nicaragua		500	400	900
Oman	20 Dec 2000	20000	750	20750
Pakistan		50000	1000	51000

Country	Date Signed ICC	FY2003 FMF* (\$ in thousands)	FY2003 IMET** (\$ in thousands)	Total FY2003 Military Assistance
Papua New Guinea		0	240	240
Philippines	28 Dec 2000	20000	2400	22400
Russian Federation	13 Sep 2000	0	800	800
Rwanda		0	150	150
Samoa	17 Jul 1998	0	120	120
Sao Tome and Principe	28 Dec 2000	0	100	100
Saudi Arabia		0	25	25
Seychelles	28 Dec 2000	0	100	100
Solomon Islands	3 Dec 1998	0	150	150
Sri Lanka		0	350	350
Suriname		250	150	400
Swaziland		0	100	100
Thailand	2 Oct 2000	200	1750	1950
Togo		0	100	100
Tonga		0	125	125
Tunisia		5000	1500	6500
Turkmenistan		700	450	1150
Ukraine	20 Jan 2000	4000	1700	5700
Uzbekistan	29 Dec 2000	8750	1200	9950
Vanuatu		0	100	100
Vietnam		0	100	100
Yemen	28 Dec 2000	2000	650	2650
Zambia	17 Jul 1998	500	0	500
<b>Total</b>		<b>282323</b>	<b>39303</b>	<b>319623</b>

\* FMF is Foreign Military Financing \*\* IMET is International Military Education and Training.

Sources: Data regarding ICC membership status is from the United Nations website, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>. Requested military assistance for FY 2003 is from the Congressional Budget Justification, Foreign Operations, FY2003, U.S. State Department

### Authority to Free Persons from ICC.

Section 2008 authorizes the President to use “all means necessary and appropriate” to bring about the release of covered United States and allied persons,<sup>44</sup> upon the request of the detainee’s government, who are being detained or imprisoned by or on behalf of the ICC. The Act does not provide a definition of “necessary and appropriate means” to bring about the release of covered persons, other than to exclude bribes and the provision of other such incentives. Section 2008 also authorizes the President to direct any federal agency to provide legal representation and other legal assistance, as well as any exculpatory evidence on behalf of covered U.S. or allied persons who are arrested, detained, investigated, prosecuted or

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<sup>44</sup>“Covered allied persons” includes military personnel, elected or appointed officials, and other persons working for a NATO country or a major non-NATO ally, “so long as that government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the [ICC].” Section 2013(3). Covered allies currently could include persons from the Czech Republic, Turkey, Egypt, Israel, Japan, the Republic of Korea, and Taiwan. (Of these countries, only Turkey, Taiwan, and Japan have not signed the Rome Statute.)

imprisoned by, or on the behalf of the ICC. Section 2008 further permits the government to appear before the ICC in defense of the interests of the United States.

### ***Waivers and Exceptions.***

The ASPA contains multiple waiver provisions and exceptions. Section 2003(a)-(b) provides for presidential waivers of sections 2005 and 2007 (restriction on U.S. participation in U.N. peacekeeping missions and prohibition on military assistance) if the President certifies to Congress that the ICC has agreed not to seek to assert jurisdiction over any covered U.S. or allied person with respect to actions undertaken by such person in an official capacity. This blanket waiver may be extended for successive periods of one year if the ICC abides by the agreement. As described above, section 2005 may be waived under its own terms with respect to specific peacekeeping missions if satisfactory protection can be achieved through U.N. Security Council measures or by agreement with other participants, or if the national interests of the United States justify participation in the mission. Section 2007 also contains its own waiver provision, allowing the President to provide military assistance to a particular country if he determines and reports to Congress that it is in the national interest or that the country in question has agreed not to surrender U.S. persons to the ICC. (NATO and major non-NATO allies are excepted from the prohibition in section 2007).

If the ICC enters into and abides by an agreement under sections 2003(a) or (b), section 2003(c) permits the President to waive sections 2004 and 2006 (prohibiting cooperation with the ICC and directing the President to implement measures to prohibit the transfer of classified information) with respect to specific cases before the ICC. To waive the prohibitions and allow cooperation with the ICC, the President must first certify to Congress that there is reason to believe the accused is guilty as charged, it is in the national interest to waive the prohibitions, and that the investigation and prosecution by the ICC will not result in the investigation or arrest of any covered U.S. or allied persons with respect to any actions undertaken by them in an official capacity. It is somewhat unclear what a waiver of section 2006 would entail, in that the section does not directly prohibit any action. Instead, it directs the President to implement rules to prevent transfer of classified national security information and law enforcement information to the ICC, and to prevent indirect transfer of material related to matters under investigation or prosecution by the ICC to the United Nations and ICC member countries unless assurances are received from the recipient that such information will not be made available to the ICC. A waiver of section 2006 could be interpreted to mean that the President's requirement to implement the rules is waived, or that the requirement to obtain assurances from recipients other than the ICC is waived, or that the rules themselves may be waived with respect to a particular case.

Section 2011 provides an exception for certain presidential authorities, stating that the restrictions on cooperation with the ICC (section 2004) and the requirement for procedures to protect certain sensitive information (section 2006) do not apply to "any action or actions with respect to a specific matter taken or directed by the President on a case-by-case basis in the exercise of the President's authority as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the United States Constitution or in the exercise of the executive power

under article II, section 1 of the United States Constitution.”<sup>45</sup> The section would require the President to notify Congress within 15 days of the action, unless such notification would jeopardize national security. It further clarifies that “nothing in [the] section shall be construed as a grant of statutory authority to the President to take any action.” Section 2012 prohibits delegation of the authorities vested in the President by sections 2003 (waiver provision) and 2011(a) (constitutional exception).<sup>46</sup>

Inasmuch as sections 2004 and 2006 are already subject to presidential waiver under section 2003(c) in the case of the investigation or prosecution of a “named individual,” it appears that this section is drafted to avoid possible conflicts of the separation of powers between the President and Congress. In the event that the President takes the position that the prohibitions of sections 2004 and 2006 infringe upon his constitutional authority in certain cases, he might assert that Congress has no power even to require a waiver under section 2003. Section 2011 appears to ensure notification of Congress, at least at some point after the action has been taken, regardless of whether the President believes that sections 2004 and 2006 impinge his constitutional authority.

The effect of section 2011 is not entirely clear, depending as it does on the interpretation of the President’s executive powers under article II, section 1 of the Constitution and his authority as Commander in Chief of the Armed Forces. Interpreted broadly, the constitutional executive power includes the power to execute the law, meaning the execution of *any* law, whether statutory or constitutional, or even international law. Such an interpretation would seem to render sections 2004 and 2006, as well as the waiver provision of section 2003(c), largely superfluous.<sup>47</sup> Interpreted narrowly, the executive authorities cited above could refer to those powers which the President does not share with Congress. Under a narrow interpretation, Congress would be deemed to be without authority to regulate such actions in any event, in which case it would appear to make little sense to restrict its application to sections 2004 and 2006. The language could be construed by a court to imply a waiver authority apart from the restrictions outlined in section 2003.

Section 2015 provides clarification with respect to assistance to international efforts. It states:

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<sup>45</sup> P.L. 107-206 § 2011.

<sup>46</sup> It is unclear what authority is meant with respect to section 2011(a), since 2011 does not vest any authority in the President. *See id.* § 2011(c). Perhaps section 2012 should be interpreted to prohibit delegation of the authorities to which sections 2004 and 2006 do not apply under section 2011.

<sup>47</sup>Section 2004 restricts the conduct of federal and state agencies and courts. Therefore, the exception in section 2011 could not be invoked with respect to state courts and other non-federal entities. Section 2006 applies only to the President, directing him to implement procedures to safeguard certain information from the ICC; a broad interpretation of section 2011 would appear to render section 2006 a nullity. Perhaps section 2011 is meant to provide the President authority to suspend regulations promulgated under section 2006 with respect to certain cases under the jurisdiction of the ICC.

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

This language would appear to have the effect of limiting the prohibitions in section 2004 to cases in which the ICC prosecutes non-U.S. citizens for the crimes currently under the jurisdiction of the ICC. It could also eliminate the restrictions on participation in peacekeeping missions or provision of military assistance where such participation or aid could be interpreted to further an international effort to prosecute the named crimes. There is no definition of “foreign national” in the ASPA; its use in section 2015 could lead to a conflict with sub-sections (d) and (f) of section 2004 as they apply to permanent resident aliens.

### ***Reporting Requirements.***

In addition to the congressional notifications required by some of the waiver authorities described above, the ASPA encourages the President to submit, within six months of its date of enactment, a report for each military alliance to which the United States is a party assessing the command arrangements they entail and the degree to which such arrangements may place U.S. servicemembers under the command or control of foreign officers subject to the jurisdiction of the ICC.<sup>48</sup> No later than August 2, 2003, the President should submit a report describing possible modifications to such alliance command arrangements that would reduce the risks to U.S. servicemembers identified in the first report.<sup>49</sup>

## **Prospective Legislation**

The Administration may also ask Congress to pass legislation to close jurisdictional gaps in U.S. criminal law in order to ensure U.S. territory does not become a safe haven for those accused of genocide, war crimes, and crimes against humanity.<sup>50</sup> The War Crimes Act of 1996,<sup>51</sup> for example, establishes U.S. federal jurisdiction to punish war crimes, as defined in international treaties to which the United States is a party, but only when perpetrated by or against U.S. nationals. Likewise, the Genocide Convention Implementation Act of 1987 prohibits acts that would constitute genocide under the Rome Statute, except that the U.S. Code covers only conduct committed by a U.S. national or conduct committed within the United States.<sup>52</sup> Some observers have expressed concern that war criminals or perpetrators of genocide from other countries could seek refuge in the United States from

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<sup>48</sup> P.L. 107-206, § 2009.

<sup>49</sup> *Id.*

<sup>50</sup> See Grossman, *supra* note 4.

<sup>51</sup> 18 U.S.C. § 2441.

<sup>52</sup> Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. §§ 1091-93).

extradition to and prosecution by the ICC. However, the exception in section 2013 of the ASPA, which allows U.S. entities to cooperate with the ICC in the case of foreign nationals accused of war crimes, may obviate the need for such legislation.

Some have suggested that changes in U.S. statutes to broaden the jurisdiction of federal courts to cover all crimes over which the ICC might assert jurisdiction could enhance the implementation of complementarity by precluding a finding by the ICC that the United States is “unable” to prosecute one of its citizens.<sup>53</sup> For the most part, war crimes committed by U.S. persons are covered by the War Crimes Act, although there may be some acts covered by the Rome Treaty that are not explicitly prohibited by U.S. law. Also, there is no U.S. statute codifying crimes against humanity as such. U.S. criminal law prohibits most of the crimes enumerated under the Rome Statute as possible crimes against humanity, as long as they are committed within the United States or by military personnel.<sup>54</sup> Under current law, acts that could constitute crimes against humanity committed by U.S. civilians overseas generally are not triable in U.S. civil or military courts unless they involve torture or certain acts of international terrorism.<sup>55</sup> In the event a U.S. citizen is alleged to have committed such an act, the United States may not be deemed able to investigate and prosecute the alleged crime, a prerequisite for asserting complementarity.

## **Implications of the ICC for the United States as a Non-member**

Now that the Rome Statute has entered into force, the Preparatory Commission will cease to exist after the first meeting of the Assembly of States Parties September 3 - 10, 2002. U.S. eligibility to participate on an equal basis with other states in setting some of the ground rules for the ICC will have ended. The Assembly of States Parties will take over as the governing body to oversee the implementation and possible amendment of the Rome Statute. Review Conferences are an alternative forum for considering amendments to the Statute; an initial Review Conference is to be convened in July of 2009, seven years after the Statute has entered into effect.<sup>56</sup> Thereafter, Review Conferences may be convened from time to time by the U.N.

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<sup>53</sup>See Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Court*, 35 NEW ENG. L. REV. 421, 437 (2001); Robinson O. Everett, *American Servicemembers and the ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 137, 142 (Sarah B. Sewall and Carl Kaysen, eds. 2000).

<sup>54</sup>See Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Court*, 35 NEW ENG. L. REV. 421, 429 (2001).

<sup>55</sup>See *id.* n.39 (listing relevant crimes over which U.S. courts have extraterritorial jurisdiction). Additionally, U.S. courts have jurisdiction to try criminal offenses committed by persons employed by or accompanying the armed forces overseas, or ex-servicemembers who committed a crime overseas, if such crime would be punishable by imprisonment for more than one year if it had committed within the territorial jurisdiction of the United States. 18 U.S.C. § 3261.

<sup>56</sup>Rome Statute, *supra* note 1, art. 123.

Secretary-General upon request by a majority of the states parties.<sup>57</sup> As a non-party, the United States will have no vote in either body. However, it will remain eligible to participate in both the Assembly and in Review Conferences as an observer.<sup>58</sup>

## Observer Role

The role of observers ultimately will be defined by the rules of procedure adopted for the two bodies.<sup>59</sup> If the current finalized draft rules are adopted, observers will be entitled to participate in the deliberations of the Assembly and any subsidiary bodies that might be established. Observer states will receive notifications of all meetings and records of Assembly proceedings on the same basis as states parties. They will not, however, be permitted to suggest items for the agenda or to make motions during debate, such as points of order or motions for adjournment. Thus, the United States may be able to participate substantially in Assembly debates as well as proffer and respond to proposals, even if it does not become a party to the Statute.<sup>60</sup> The United States may also use its position at the United Nations to communicate to the Assembly of States Parties.<sup>61</sup>

As noted, the United States will not be able to vote in these bodies if it does not ratify the Rome Statute. It could not nominate U.S. nationals to serve as judges or cast a vote in elections for judges or the Prosecutor (or for their removal). It could not vote on the ICC's budget. It could not vote on the definition of the crime of aggression or its inclusion within the jurisdiction of the ICC, when the matter is considered at first Review Conference, or on any other amendment to the Rome Statute.

The United States, as a non-party, will have no right itself to refer situations to the Prosecutor for investigation; as a Permanent Member of the Security Council,

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<sup>57</sup>*Id.* art. 23.

<sup>58</sup> *Id.* arts. 112 and 123. States which have signed the Statute or the Final Act are eligible to participate as observers in both bodies. The Administration's notification of intent not to ratify the Statute should have no effect on eligibility, although it may signal an intent not to participate. The United States did not participate at the final meeting of the Preparatory Commission in early July, possibly signaling the intent of the Administration to forego participation as an observer.

<sup>59</sup>U.N. Doc., PCNICC/2001/1/Add.4, Draft Rules of Procedure of the Assembly of States Parties (2002) (hereinafter "Draft Assembly Rules").

<sup>60</sup>Unlike the previous administration, the Bush Administration has not participated actively in Preparatory Commission meetings, suggesting that the Administration does not envision playing an active role as observer at the Assembly of States Parties.

<sup>61</sup>The United Nations has a standing invitation to participate as an observer. Draft Assembly Rule 35. It may also propose items for the agenda. Draft Assembly Rule 11. Finally, the U.N. may provide funding for the ICC, in particular with respect to cases referred by the Security Council. Rome Statute, *supra* note 1, art. 115; *see also* U.N. Doc., PCNICC/2001/1/Add. 1, Draft Relationship Agreement between the Court and the United Nations.

however, it could seek to influence referrals by the Security Council.<sup>62</sup> Similarly, it could still participate in Security Council requests to the Prosecutor to defer an investigation or prosecution<sup>63</sup> and to the Pre-Trial Chamber to review a decision of the Prosecutor not to investigate or prosecute.<sup>64</sup> As a non-party to the treaty, the United States could, but would not be obligated to, cooperate with any ICC investigation and prosecution;<sup>65</sup> and under the Statute, the United States could, but would not be obligated to, arrest a person named in a request for provisional arrest or for arrest and surrender from the ICC.<sup>66</sup> The United States would also retain the right not to provide information or documents the disclosure of which would prejudice its national security interests<sup>67</sup> and to refuse to consent to the disclosure by a state party of information or documents provided to that state in confidence.<sup>68</sup> Finally, as a non-party, the United States would not be under any obligation to contribute to the budget for the ICC, except, perhaps indirectly, to the extent that the U.N. General Assembly U.N. regular budget might include ICC support.<sup>69</sup>

## Foreign Policy Implications

Perspectives differ on the impact of the ICC on U.S. interests, as it begins to operate. Some see the ICC as a fundamental threat to the U.S. armed forces, civilian policy makers, and U.S. defense and foreign policy.<sup>70</sup> Others see it as a valuable foreign policy tool for defining and deterring crimes against humanity, a step forward in the decades-long U.S. effort to end impunity for egregious mass crimes. Debate over the ICC has brought out a tension between enhancing the international legal justice system and encroaching on what some countries perceive as their legitimate use of force. The review by the International Criminal Tribunal for the Former Yugoslavia (ICTY) of allegations that NATO bombing in Kosovo might be deemed a war crime is illustrative of this tension. Many opponents of the ICC were outraged that the issue was even considered. They questioned the legitimacy of the tribunal's actions, and their anger was not assuaged by the Tribunal's ultimate decision that there was "no basis for opening an investigation into any of those allegations or into other incidents relating to NATO bombing."<sup>71</sup> While opponents of the ICC interpret

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<sup>62</sup>Rome Statute, *supra* note 1, art. 13. Non-parties might also be able to provide information to enable the Prosecutor to initiate a self-referred investigation, but would have no *official* role in advocating prosecution.

<sup>63</sup>*Id.* art. 16.

<sup>64</sup>*Id.* art. 53.

<sup>65</sup>*Id.* arts. 86, 87, and 93.

<sup>66</sup>*Id.* arts. 59 and 89.

<sup>67</sup>*Id.* art. 72.

<sup>68</sup>*Id.* art. 73.

<sup>69</sup>*Id.* art. 115.

<sup>70</sup>See Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 849-50 (2002).

<sup>71</sup>See Final Report to the Prosecutor by the Committee Established to Review the NATO (continued...)



this event as an indication that the ICC is likely to pursue spurious and politically motivated cases against U.S. citizens, proponents of the ICC see it as illustrating that similar unfounded allegations would be dismissed by the ICC Prosecutor.

Another consideration is the practical effect that the U.S. position will have on the ICC itself. Because the ICC relies largely on states parties to provide mechanisms and manpower for arresting suspects and enforcing verdicts of the ICC, it has been argued that the lack of U.S. participation in the ICC may seriously impair the ICC's ability to function. Those who believe the ICC is a fundamental threat to U.S. foreign and defense policy may welcome this outcome; while ICC supporters may argue that an ineffective court could serve the interests of human rights abusers, ensuring impunity and decreasing the likelihood of future *ad hoc* tribunals.

The United States has enjoyed a long reputation for leadership in the struggle against impunity and the quest for universal human rights and the rule of law. Human rights organizations have expressed concern that U.S. refusal to ratify the Rome Statute, coupled with any actions that might undermine the ICC, could cause the United States to lose the moral high ground and damage its influence world-wide, including its ability to influence the development of the law of war.<sup>72</sup> The perceived U.S. willingness to hold U.N. peacekeeping missions hostage to U.S. demands for immunity from the ICC may deepen the rift between the United States and allies that support the ICC. The withholding of military assistance to members of the ICC may also be seen as an effort to coerce countries to refuse to ratify the Rome Statute or to sign an article 98 agreement, which could appear to some as undermining the ICC and negating the Administration's stated intent to respect the decisions of other countries to join the ICC. By demanding special treatment in the form of immunity from the ICC, the United States may be seen as bolstering the perception of its unilateral approach to world affairs and its unwillingness to abide by the same laws that apply to other nations. This perception could undermine U.S. efforts at coalition-building to gain international support for the present war against terrorism as well as future international endeavors.

Others argue that the perception of U.S. commitment to the rule of law has little effect on countries where human rights abuses are most rampant. Despots like Cambodia's Pol Pot or Iraq's Saddam Hussein have not weighed possible future legal ramifications before committing massive crimes.<sup>73</sup> Under this view, the establishment of the ICC might have the unintended effect of hardening the resolve

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<sup>71</sup>(...continued)

Bombing Campaign Against the Federal Republic of Yugoslavia, *available at* <http://www.un.org/icty/pressreal/nato061300.htm>.

<sup>72</sup>See Major Eric S. Kraus and Major Mike O. Lacy, *Utilitarian vs. Humanitarian: The Battle over the Law of War*, PARAMETERS, Jul. 1, 2002, *available at* 2002 WL 18222339. (commenting that U.S. refusal to ratify Protocol I to the Geneva Conventions, the treaty banning antipersonnel landmines, and the Rome Statute appear to be diminishing U.S. influence on the development of customary international law).

<sup>73</sup>*The International Criminal Court: Hearing Before the House Committee on International Relations*, 106<sup>th</sup> Cong. 4 (2000) (prepared testimony of John Bolton, Senior Vice President, American Enterprise Institute).

of ruthless tyrants who may feel they have nothing to gain by giving up their power to more democratic regimes if they fear prosecution for the crimes they committed while in power. From this perspective, in terms of curbing human rights abuses, it does not matter whether the U.S. ratifies the Rome Statute, other than perhaps to provide support to an accused dictator's argument challenging the legitimacy of the ICC. According to this viewpoint, the costs to the United States appear to outweigh the benefits.

## **Strategy for Precluding ICC Prosecution of U.S. Troops and Officials**

On July 12, 2002, in response to the U.S. veto of the extension of peacekeeping operations in Bosnia, the U.N. Security Council adopted a resolution requesting a blanket deferral of prosecutions by the ICC of peacekeepers from states not parties to the Rome Statute for a period of one year. Resolution 1422 provides, in pertinent part:

*Acting under Chapter VII of the Charter of the United Nations,*

1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;
3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;
4. *Decides* to remain seized of the matter.<sup>74</sup>

The resolution appears to fall short of the President's original proposal, which would have provided permanent immunity for U.S. troops and officials from the jurisdiction of the ICC. Opponents of the original proposal objected that the U.N. Security Council does not have the authority to "rewrite" international treaties. The compromise invokes article 16 of the Rome Statute, which provides:

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.

Although some opponents of the U.S. position had argued that article 16 was intended to be invoked only on a case-by-case basis, the language of the article does not expressly state such a requirement. Therefore, Resolution 1422 appears to be

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<sup>74</sup>S/Res/1422 (2002), available at <http://www.un.org/Docs/scres/2002/res1422e.pdf>.

consistent with the Rome Statute. The resolution defers ICC action for one year; it does not provide absolute immunity for actions occurring during the deferral period. Therefore, should the Security Council choose not to extend the deferral in subsequent years, it appears that the ICC could then investigate and prosecute any purported crimes under its subject matter jurisdiction that occurred at any time after the Rome Statute's entry into force, subject to other provisions of the Rome Statute. In the event an American citizen is alleged to have committed a crime under the jurisdiction of the ICC, but whose prosecution has been deferred by the resolution, the United States may find itself in a somewhat weakened negotiating position at the Security Council, inasmuch as inaction by the Council would allow the deferral to expire. Also, it does not provide protection to U.S. persons engaging in peacekeeping or military operations not authorized or established by the U.N.

The United States may seek additional options for achieving protection for U.S. troops, within or outside U.N. peacekeeping arrangements, by concluding agreements similar to the status-of-forces agreements (SOFA) routinely negotiated where U.S. troops are stationed abroad. The United States has so far concluded bilateral agreements with Romania and Israel whereby each signatory promises that it will not surrender citizens of the other signatory to the ICC, unless both parties consent in advance to the surrender. The Department of State is seeking to conclude many such agreements.<sup>75</sup>

This tactic has been criticized by some as an effort to undermine the ICC,<sup>76</sup> but supporters of the policy note that such agreements providing for immunity in foreign and international courts are not unusual. For example, the 19-member International Security Assistance Force (ISAF), a joint force authorized by the U.N. Security Council currently headed by Turkey to provide assistance to the interim government in Afghanistan, included a clause providing immunity for participants in its Military Technical Agreement with the interim government.<sup>77</sup> Furthermore, supporters point out, the agreements are based on and consistent with article 98 of the Rome Statute, and therefore cannot be said to undermine the ICC.

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<sup>75</sup>See Press Release, United States Department of State, U.S. and Romania Sign Article 98 Agreement (Aug. 1, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002/12393.htm>.

<sup>76</sup>See Press Release, Human Rights Watch, United States Efforts to Undermine the International Criminal Court, *available at* <http://www.iccnw.org/html/hrw20020802.pdf>.

<sup>77</sup>See Colum Lynch, *Deal Gave Europe's Troops Immunity*, INT'L HERALD TRIB., June 20, 2002, at A1. Section 1.4 of Annex A to the MTA provides:

The ISAF and supporting personnel, including associated liaison personnel, will be immune from personal arrest or detention. ISAF and supporting personnel, including associated liaison personnel, mistakenly arrested or detained will be immediately handed over to ISAF authorities. The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation. ISAF Forces will respect the laws and culture of Afghanistan.

The text of the agreement may be downloaded from the ISAF website at <http://www.operations.mod.uk/fingal/index.htm>.

The use of such agreements with host countries does not provide absolute immunity from the ICC. They would bind only countries that choose to sign, and would have the effect only of preventing the host nation from surrendering an accused to the ICC for prosecution. While the Rome Statute gives some discretion to states parties to honor their international obligations applicable to extradition of persons who are identified in an ICC request for surrender,<sup>78</sup> there does not appear to be a provision for accused persons or their states of nationality to challenge the jurisdiction of the ICC based on the violation of a bilateral agreement. Therefore, states parties to the Rome Statute are not precluded from entering into SOFAs that provide for immunity of foreign troops from surrender, but if the ICC were nevertheless to gain custody over the accused through other means, its jurisdiction may not be affected by the agreement.

Another option might be to implement a policy of investigating, and if warranted, prosecuting, all crimes under the ICC jurisdiction alleged to be committed by a U.S. person, thus preempting the ICC through application of the complementarity principle. Such a policy, coupled with changes in U.S. statutes to broaden the jurisdiction of federal courts to cover all relevant crimes, could further insulate U.S. citizens from the reach of the ICC. The United States could seek to further enhance its reputation for conducting fair and credible investigations and trials of suspected war criminals, as well as perpetrators of crimes against humanity or genocide, through the use of consistent procedures that are as open as security considerations permit. Such a practice may help to overcome any charges that a U.S. investigation or prosecution of an accused is not “genuine” for the purposes of complementarity.

Finally, some have argued that a policy of cooperation with the ICC in the prosecution of persons accused of crimes that the United States agrees amount to “the most serious crimes of concern to the international community”<sup>79</sup> would enhance the reputation of the United States as a promoter of human rights and the rule of law. Such a policy could take the form of passive non-interference with the ICC to active assistance, including working from within the U.N. Security Council to refer cases to the ICC. By actively keeping the Security Council involved in the referral of cases, some of the predicted problems with referrals by states parties or by the prosecutor could be minimized. On the other hand, some argue a cooperative posture with respect to the ICC in the case of foreigners while pursuing immunity for U.S. citizens would be perceived as a double standard.

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<sup>78</sup>See Rome Statute, *supra* note 1, arts. 97 & 98.

<sup>79</sup>*Id.* art. 5(1).