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

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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 the American Servicemembers' Protection Act (ASPA), which limits U.S. government support and assistance to the ICC; curtails certain military assistance to many countries that have ratified the Rome Statute establishing the ICC; regulates U.S. participation in United Nations (U.N.) peacekeeping missions commenced after July 1, 2003; 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. The provision withholding military assistance under the programs for Foreign Military Financing (FMF) and International Military Education and Training (IMET) from certain States Parties to the Rome Statute came into effect on July 1, 2003. The 109<sup>th</sup> Congress reauthorized the Nethercutt Amendment as part of the FY2006 Consolidated Appropriations Act (H.R. 3057/P.L. 109-102). Unless waived by the President, it bars Economic Support Funds (ESF) assistance to countries that have not agreed to protect U.S. citizens from being turned over to the ICC for prosecution. H.R. 5522, as passed by the House of Representatives, would continue the ESF restriction for FY2007. The Senate passed a measure as part of the 2007 National Defense Authorization Act (H.R. 5122, S. 2766) that would modify ASPA to end the ban on IMET assistance.

The ICC is the first permanent world court with nearly universal jurisdiction to try individuals accused of war crimes, crimes against humanity, genocide, and possibly aggression. While most U.S. allies support the ICC, the Bush Administration firmly opposes it and has renounced any U.S. obligations under the treaty. After the Bush Administration threatened to veto a United Nations Security Council resolution to extend the peacekeeping mission in Bosnia on the ground that it did not contain sufficient guarantees that U.S. participants would be immune to prosecution by the ICC, the Security Council adopted a resolution that would defer for one year any prosecution of participants in missions established or authorized by the U.N. whose home countries have not ratified the Rome Statute. That resolution was renewed through July 1, 2004, but was not subsequently renewed. In addition, the United States is pursuing bilateral "Article 98" agreements to preclude extradition by other countries of U.S. citizens to the ICC. However, in what some view as a sign that the Administration is softening its stance with respect to the ICC, the United States did not exercise its veto power at the Security Council to prevent the referral of a case against Sudan's leaders for the alleged genocide in Darfur.

This report outlines the main objections the United States has raised with respect to the ICC and analyzes ASPA and other relevant legislation enacted or proposed to regulate 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 begins to take shape, as well as the Administration's efforts to win immunity from the ICC's jurisdiction for Americans. A description of the ICC's background and a more detailed analysis of the ICC organization, jurisdiction, and procedural rules may be found in CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea.

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# U.S. Policy Regarding the International Criminal Court

## Introduction<sup>1</sup>

July 1, 2002, marked 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. The ICC is the first global permanent international court with jurisdiction to prosecute individuals for “the most serious crimes of concern to the international community.”<sup>2</sup> Since its creation, the ICC has received three referrals by States Parties, which involved allegations of war crimes in the Republic of Uganda, the Democratic Republic of Congo, and the Central African Republic.<sup>3</sup> The United Nations Security Council has also referred a situation to the Prosecutor — allegations of atrocities occurring in Darfur, Sudan.<sup>4</sup> The Chief Prosecutor subsequently decided to open investigations into three of the referred cases: Democratic Republic of the Congo,<sup>5</sup> Republic of Uganda,<sup>6</sup> and Darfur,

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<sup>1</sup> Emily Cowley, Law Clerk, contributed research assistance to this report.

<sup>2</sup> See Rome Statute of the International Criminal Court, Preamble, U.N. Doc. A/CONF.183/9 (1998) (“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). See generally International Criminal Court, *How Does the Court Work?* [<http://www.icc-cpi.int/ataglance/whatistheicc/howdoesthecourtwork.html>], (hereinafter *How the ICC Works*) (last visited June 8, 2006), explaining the two ways investigations are initiated in the ICC: (1) a situation may be referred to the Prosecutor by States Parties or the United Nations Security Council or (2) the Prosecutor may independently initiate investigations on the basis of information received from reliable sources, if, after examining the information, he determines that there is a reasonable basis to proceed with an investigation.

<sup>3</sup> See International Criminal Court, Situations and Cases, [<http://www.icc-cpi.int/cases.html>] (last visited June 9, 2006); see also American University War Crimes Research Office, International Criminal Court Status Update, [<http://www.wcl.american.edu/warcrimes/icc.status.cfm>] (June 9, 2006) (providing a time line of significant events at the ICC).

<sup>4</sup> SC Res. 1593, U.N. Doc S/RES/1593 (2005); see *infra* note 106 and accompanying text; *How the ICC Works*, *supra* note 2.

<sup>5</sup> Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004) *available at* [[http://www.icc-cpi.int/pressrelease\\_details&id=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html)] (last visited June 14, 2006).

<sup>6</sup> See Press Release, International Criminal Court, The Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (July 29, 2004) *available at* [[http://www.icc-cpi.int/pressrelease\\_details&id=33&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html)] (last visited June 14, 2006).

Sudan.<sup>7</sup> Currently, five arrest warrants have been issued by the Court, all in connection to the situation in Northern Uganda.<sup>8</sup>

The United Nations, many human rights organizations, and most democratic nations have expressed support for the ICC.<sup>9</sup> The Bush Administration, however, opposes it and in May, 2002, formally renounced any U.S. obligations under the treaty,<sup>10</sup> to the dismay of the European Union.<sup>11</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

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<sup>7</sup> See Press Release, International Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2006) available at [[http://www.icc-cpi.int/pressrelease\\_details&id=107&1=en.html](http://www.icc-cpi.int/pressrelease_details&id=107&1=en.html)](last visited June 14, 2006).

<sup>8</sup> See Situation in Uganda, Case No. ICC-02/04-01-05, Warrant of Arrest for Joseph Kony Issued on July 2005 as Amended on 27 September 2005, ¶ 42 (Sept. 27, 2005) available at [[http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf)](last visited June 14, 2006) (charging Joseph Kony, the founder and leader of the Lord's Resistance Army (LRA), with 33 counts of war crimes and crimes against humanity); see also *Court Seeks Arrests of Ugandan Rebels*, N.Y. TIMES, Oct. 15, 2005, at A10 (reporting that warrants were issued for the arrest of four other senior leaders in addition to Joseph Kony).

<sup>9</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 Nov. 15, 2005, 100 nations have ratified the Rome Statute. For the current status of signatures, ratifications and reservations, visit [<http://www.icc-cpi.int/asp/statesparties.html>](last visited June 14, 2006).

<sup>10</sup> See Jonathon Wright, *U.S. Renounces Obligations to International Court*, REUTERS, May 6, 2002. Although some in the media described the act as an “unsigned” of the treaty, it may be more accurately described as a notification of intent not to ratify. The U.S. letter to the U.N. Secretary General stated:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

See U.N. Treaty Database, Rome Statute of the International Criminal Court, available at [<http://untreaty.un.org/>].

<sup>11</sup> The EU issued a statement at the Preparatory Commission for the International Criminal Court expressing “disappointment and regret,” noting the “potentially negative effect that this particular action by the United States may have on the development and reinforcement of recent trends towards Individual accountability for the most serious crimes of concern to the international community and to which the United States shows itself strongly committed.” See Statement of the European Union on the position of the United States of America towards the International Criminal Court, U.N. Doc. PCNICC/2002/INF/7, May 20, 2002.

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>12</sup>

While the United States initially supported the idea of creating an international criminal court<sup>13</sup> and was a major participant at the Rome Conference,<sup>14</sup> in the end, the United States voted against the Statute.<sup>15</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>16</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

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<sup>12</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/9949.htm>](last visited June 13, 2006). 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.

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>13</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>14</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>15</sup> See Wedgwood *et al.*, *supra* note 13, at 124 (noting that the final vote for the Statute was 120 in favor to seven against).

<sup>16</sup> See Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES DOC 4 (Dec. 31, 2000).

the treaty.<sup>17</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 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>18</sup>

On June 30, 2002, the United States threatened to veto 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>19</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.<sup>20</sup> The compromise reached by the Security Council did not provide permanent immunity for U.S. soldiers and officials from prosecution by the ICC; rather, it invoked article 16 of the Rome Statute<sup>21</sup> to defer potential prosecutions for one year. Some States Parties to the Rome Statute and other supporters have argued that article 16 was meant only to apply to specific cases and was not intended to permit a blanket waiver for citizens of a specific country. The U.N. Security Council adopted another resolution extending the deferral to July 1, 2004.<sup>22</sup> However, during the summer of 2004, opposition to extending the deferral through 2005 eventually led the Administration to drop its pursuit. The United States continues to pursue 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)<sup>23</sup> enacted to regulate U.S. cooperation with the ICC. The report discusses the implications for the United States, as a non-ratifying country, as the ICC begins

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<sup>17</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.*

<sup>18</sup> *See Grossman, supra* note 12.

<sup>19</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.*

<sup>20</sup> SC Res. 1422, U.N. Doc. S/RES/1422 (2002).

<sup>21</sup> *See infra* note 100, and accompanying text.

<sup>22</sup> SC Res. 1487, U.N. Doc. S/RES/1487 (2003). The vote was 12-0, with France, Germany and Syria abstaining.

<sup>23</sup> P.L. 107-206, title II, 116 Stat. 889 (2002), *codified at* 22 U.S.C. §§ 7421 *et seq.*



to take shape, as well as the Administration's efforts to win immunity from ICC jurisdiction for Americans. A description of the ICC's background and a more detailed analysis of the ICC's organization, jurisdiction, and procedural rules may be found in 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 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>24</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>25</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>26</sup>

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<sup>24</sup> For a more in-depth analysis of these issues, see CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea.

<sup>25</sup> See Fact Sheet: The International Criminal Court, U.S. Department of State Office of War Crimes Issues, May 6, 2002; Grossman, *supra* note 12 (asserting "the United States has never recognized the right of an international organization to [detain and try American citizens] absent consent or a U.N. Security Council mandate").

<sup>26</sup> See Ruth Wedgwood, *The United States and the International Criminal Court: The* (continued...)

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 may assert 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>27</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>28</sup> However, ICC supporters note, the 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>29</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.

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<sup>26</sup> (...continued)

*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>27</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>28</sup> See Wedgwood, *supra* note 26, at 199 (pointing out there is “no ordinary precedent for delegating national criminal jurisdiction to another tribunal, international or national, 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>29</sup> Rome Statute, *supra* note 2, art. 12. See generally CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer Elsea, at 21-26, (summarizing jurisdictional requirements). There is no consent requirement in cases referred by the Security Council.

## **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>30</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.

A recent determination by the ICC’s Chief Prosecutor seems to demonstrate a reluctance to launch an investigation against the United States based on allegations regarding its conduct in Iraq. On February 9, 2006, the Chief Prosecutor issued a letter explaining his reasons for declining to launch an investigation despite multiple submissions by private groups urging action against the United States.<sup>31</sup> In addition to acknowledging the limits of the Court’s jurisdiction, which he noted precluded pursuing charges based on the legality of the decision to invade,<sup>32</sup> the Prosecutor noted that the allegations about U.S. nationals’ behavior during the Iraq occupation were “of a different order than the number of victims found in other situations under investigation,” and concluded that the allegations were of insufficient gravity to warrant an investigation.<sup>33</sup>

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<sup>30</sup> See Grossman, *supra* note 12.

<sup>31</sup> Letter from Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court, (Feb. 9, 2006) available at [[http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf)]

<sup>32</sup> See *id.* at 3-4 (explaining that the ICC does not have personal jurisdiction over non-State Party nationals who performed the alleged crimes in a non-State Party territory).

<sup>33</sup> See *id.* at 9. The Prosecutor also seemed satisfied with U.S. efforts to investigate and prosecute possible war crimes:

In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity. It may be observed, however, that the Office also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents. *Id.*

### **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>34</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>35</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>36</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>37</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>38</sup> The U.N.

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<sup>34</sup> See Grossman, *supra* note 12.

<sup>35</sup> Rome Statute, *supra* note 2, 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>36</sup> See Grossman, *supra* note 12.

<sup>37</sup> See CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer Elsea, at 20-21 (summarizing issues relevant to the definition of “aggression”).

<sup>38</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

General Assembly adopted a resolution in 1974<sup>39</sup> addressing the definition of aggression, but it has only been invoked once by the Security Council.<sup>40</sup> The definition contains an enumeration of offenses included as possible aggression,<sup>41</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>42</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

<sup>38</sup> (...continued)

of and take action with respect to any act of aggression, but does not provide a definition.

<sup>39</sup> G.A. Res. 3314, U.N. GAOR, 29<sup>th</sup> Sess., Supp. No. 19, U.N. Doc A/9615 (1974).

<sup>40</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>41</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>42</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).

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.

## Congressional Action

Congress has passed several riders effectively precluding the use of funds to support the ICC.<sup>43</sup> The 107<sup>th</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>44</sup> The 108<sup>th</sup> Congress included a provision in the Consolidated Appropriations Act, P.L. 108-447, to prohibit the use of funds made available under the Economic Support Fund heading to provide assistance to countries who are members of the ICC and who have not entered into a so-called "Article 98" agreement with the United States. This provision, known as the Nethercutt Amendment, was reauthorized by the 109<sup>th</sup> Congress as part of the FY2006 Consolidated Appropriations Act (H.R. 3057/P.L. 109-102). A substantially identical provision is included in H.R. 5522, The Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2007, as passed by the House of Representatives (§ 572).

### 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, 107<sup>th</sup> Congress. The conferees adopted the Senate version of the bill, which included 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>45</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

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<sup>43</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; 22 U.S.C. § 7401 (prohibiting appropriated funds from obligation for use by the ICC or to assist the ICC unless the United States becomes a party to the Rome Statute).

<sup>44</sup> P.L. 107-206, title II, 16 Stat. 899 (2002), *codified at* 22 U.S.C. §§ 7421 *et seq.*

<sup>45</sup> See H.R. REP. NO. 107-593 (2002).

Foreign Relations held hearings<sup>46</sup> the same day the bill was introduced but did not report it.

**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,<sup>47</sup> seizure of property, asset forfeiture, service of warrants, searches, taking of evidence, and similar matters.<sup>48</sup> 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 U.S. government 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.<sup>49</sup>

**Restrictions on Participation in Peacekeeping Missions.** Unless subject to a blanket waiver under section 2003,<sup>50</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>51</sup> or because each other country in which U.S. personnel will participate 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>52</sup> The latter option may not provide as much

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<sup>46</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).*

<sup>47</sup> The expenditure of funds for the extradition or transfer of U.S. citizens to countries that are obligated to surrender persons to the ICC is prohibited by 22 U.S.C. § 7402 unless the receiving country provides assurances that such citizen will not be surrendered to the ICC. The same prohibition applies with respect to giving consent to other countries to transfer or extradite U.S. citizens to States Parties of the ICC.

<sup>48</sup> 22 U.S.C. § 7423.

<sup>49</sup> 22 U.S.C. § 7425.

<sup>50</sup> 22 U.S.C. § 7422; *see infra* page 14.

<sup>51</sup> The compromise reached by the U.N. Security Council in Resolution 1422 (2002) provided for a one-year deferral, thus providing neither immunity nor permanent protection, which would not appear to meet this criterion. *See infra* note 100.

<sup>52</sup> 22 U.S.C. § 7424. The Rome Statute, *supra* note 2, 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 somewhat inconsistent (continued...)

assurance as the first; an Article 98 agreement would prevent the surrender of certain persons to the ICC by parties to the Article 98 agreement,<sup>53</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>54</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>55</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>56</sup> unless the President waives the restriction (section 2007) or a blanket waiver is in effect under section 2003. Military assistance, as defined in the ASPA, includes foreign assistance under

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<sup>52</sup> (...continued)

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].”

<sup>53</sup> Article 98 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. *See infra* note 113.

<sup>54</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>55</sup> 22 U.S.C. § 7424(b).

<sup>56</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. The President may designate other nations as major non-NATO allies under 22 U.S.C. § 2321k, by notifying Congress 30 days in advance.



chapters 2 and 5 of Part II of the Foreign Assistance Act of 1961, as amended,<sup>57</sup> and defense articles and services financed by the government, including loans and guarantees, under section 23 of the Arms Export Control Act.<sup>58</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 restriction does not appear to apply to any regional organizations that may receive military assistance. The restrictions on military assistance will no longer apply to these countries if they agree to sign Article 98 agreements with the United States, or if the President waives the restrictions as he deems justified with respect to a particular country in accordance with national interests.

One hundred countries are reported to have signed Article 98 agreements with the United States as of May 3, 2005.<sup>59</sup> It is not clear whether all of the agreements have been ratified by their respective governments so as to be effective at present.

**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>60</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

<sup>57</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>58</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>59</sup> See Press Release, U.S. Department of State, U.S. Signs 100<sup>th</sup> Article 98 Agreement, May 3, 2005, *available at* [<http://www.state.gov/r/pa/prs/ps/2005/45573.htm>](last visited June 14, 2006). For an unofficial list of signators, see Coalition for the ICC, Status of Bilateral Immunity Agreements (April 14, 2006), *available at* [[http://www.iccnw.org/documents/CICCFBS\\_BIAstatusCurrent.pdf](http://www.iccnw.org/documents/CICCFBS_BIAstatusCurrent.pdf)] (last visited June 14, 2006). For information regarding the application of the policy with respect to Latin American countries, see CRS Report RL33337, *Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America*, by Clare M. Ribando.

<sup>60</sup> 22 U.S.C. § 7427. “Covered allied persons” include 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].” 22 U.S.C. § 7432(3). Covered allies currently could include persons from the Czech Republic, Turkey, Egypt, Israel, Japan, the Republic of Korea, and Taiwan. All of these exempted countries are members of the ICC except the Czech Republic, Israel, Egypt, Turkey, Taiwan, and Japan. The Czech Republic, Egypt, and Israel signed the Rome Statute but have not ratified it. In August of 2002, Israel notified the U.N. Secretary General that it does not intend to ratify the Rome Statute.

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 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.<sup>61</sup> 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 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 present in such country.”<sup>62</sup> NATO and major non-NATO allies are excepted from the prohibition in section 2007.<sup>63</sup>

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

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<sup>61</sup> 22 U.S.C. § 7424.

<sup>62</sup> 22 U.S.C. § 7426(c). “United States personnel” is not defined. Presumably it is limited to officials representing the government in some capacity, similar to “covered U.S. persons” as defined in §7432(4).

<sup>63</sup> 22 U.S.C. § 7426(e).

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>64</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."<sup>65</sup> Section 2012 prohibits delegation of the authorities vested in the President by sections 2003 (waiver provision) and 2011(a) (constitutional exception).<sup>66</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>67</sup>

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<sup>64</sup> 22 U.S.C. § 7430.

<sup>65</sup> 22 U.S.C. § 7430(a).

<sup>66</sup> 22 U.S.C. § 7431. It is unclear what authority is meant with respect to section 2011(a) (22 U.S.C. § 7430(a)), since section 2011 does not vest any authority in the President. *See* 22 U.S.C. § 7430(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>67</sup> Section 2004 (22 U.S.C. § 7423) restricts the conduct of federal and state agencies and courts. Therefore, the exception in section 2011 could not be invoked with respect to state (continued...)

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:

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.<sup>68</sup>

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, although the United States may be obligated to deny such assistance in the case of an accused foreign national who is a national of a country with which the United States has entered into a reciprocal Article 98 agreement. The provision 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 (22 U.S.C. § 7423) 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, by February 2, 2003, 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>69</sup> No later than August 2, 2003, the President was encouraged to submit a report

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<sup>67</sup> (...continued)

courts and other non-federal entities. Section 2006 (22 U.S.C. § 7425) 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.

<sup>68</sup> 22 U.S.C. § 7433(a).

<sup>69</sup> 22 U.S.C. § 7428. No such report was made public, but the report may have been submitted in classified form pursuant to subsection (c).

describing possible modifications to such alliance command arrangements that would reduce the risks to U.S. servicemembers identified in the first report.<sup>70</sup>

## **The Nethercutt Amendment**

Section 574 of the FY2005 Consolidated Appropriations Act (H.R. 4818/P.L. 108-447) prohibited Economic Support Funds (ESF) assistance to the government of any country that is a party to the ICC that has not entered into an Article 98 agreement with the United States, except for countries eligible for assistance under the Millennium Challenge Act of 2003. It authorized the President to waive the prohibition with respect to NATO members and major non-NATO allies without prior notice to Congress, if he determined and reported to the appropriate committees that a waiver was in the U.S. national security interest. The President could also waive the prohibition on economic assistance for countries that entered into Article 98 agreements with the United States. (Presumably, this provision would have applied to countries that later agreed to enter into such an Article 98 agreement, to ensure congressional notification).

The Nethercutt Amendment was re-enacted by the 109<sup>th</sup> Congress as part of the FY2006 Consolidated Appropriations Act (H.R. 3057/P.L. 109-102). The FY2006 measure, however, requires that the President give Congress notice before he invokes a waiver, but he may grant a waiver not only with respect to any NATO or major non-NATO ally, but also to “such other country as he may determine if he determines and reports to the appropriate congressional committees that it is important to the national interests of the United States to waive such prohibition.” The Foreign Operations Appropriations bill for FY2007 (H.R. 5522), recently passed by the House of Representatives, would continue these prohibitions (§ 572). As with prior years’ legislation, the bill would not affect the funding for the Millennium Challenge Corporation. The Senate Appropriations Committee reported its version of the bill without any similar prohibition.<sup>71</sup>

## **National Defense Authorization Act for FY2007**

The Senate passed a measure as part of the 2007 National Defense Authorization Act, S. 2766, that would modify ASPA to end the ban on International Military Education and Training (IMET) assistance to countries that are members of the ICC and that have not implemented Article 98 agreements (§ 1210). The House version of the FY2007 Defense Authorization bill, H.R. 5122, does not contain such a provision; however, after hearing testimony from several combatant commands regarding the perceived negative consequences flowing from the cut-off of IMET assistance to affected allies, the House Armed Services Committee reported its view that the President’s authority to waive ASPA funding restrictions can and should be invoked where necessary to “impede undue influence on U.S. partner nations” by

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<sup>70</sup> *Id.*

<sup>71</sup> S. REP. NO. 109-277 (2006).

third-party governments that might occur in the absence of U.S. engagement efforts made possible through IMET.<sup>72</sup>

## Prospective Legislation

Some observers have suggested that Congress should 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>73</sup> The War Crimes Act of 1996,<sup>74</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>75</sup> Some observers have expressed concern that war criminals or perpetrators of genocide from other countries could seek refuge in the United States from 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>76</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

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<sup>72</sup> H. REP. NO. 109-452, at 389-90 (2006). The Committee praised IMET programs, stating that such programs

create opportunities for military-to-military engagement between U.S. armed forces and the militaries of developing nations. Such interactions are critical to advancing the understanding of, and respect for, civil-military relations; enhancing the understanding of U.S. military principles and values; bridging cultural differences; and developing important long-term relationships with future military and civilian leaders. Generally, such engagement has positively affected U.S. armed forces’ global access and influence and has proved helpful in the global war on terrorism.

<sup>73</sup> See Grossman, *supra* note 12.

<sup>74</sup> 18 U.S.C. § 2441.

<sup>75</sup> Genocide Convention Implementation Act of 1987, P.L. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. §§ 1091-93).

<sup>76</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).

within the United States or by military personnel.<sup>77</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>78</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**

As a member of the Preparatory Commission established by the Rome Statute, the United States played a significant role during the drafting of rules of procedure, elements of crimes, and other documents detailing how the ICC will operate. Now that the Rome Statute has entered into force, the Preparatory Commission has been replaced by the Assembly of States Parties (“Assembly”) as the governing body to oversee the implementation of the Rome Statute. The Assembly held its first conference September 3 - 10, 2002, during which it adopted rules of evidence and procedure and a host of other regulations, including the methods for nominating and electing its officials. During its subsequent session in February, the Assembly elected 18 judges, who later elected Canadian jurist Philippe Kirsch to be their president. In April of 2003, the Assembly elected Argentinian lawyer Luis Moreno Ocampo to be the ICC’s first prosecutor.

The first Review Conference, an alternative forum for considering amendments to the Statute, is to be convened in July of 2009, seven years after the Statute has entered into effect.<sup>79</sup> Thereafter, Review Conferences may be convened from time to time by the U.N. Secretary-General upon request by a majority of the States Parties.<sup>80</sup> As a non-party, the United States has no vote in either body. However, it will remain eligible to participate in both the Assembly and in Review Conferences as an observer.<sup>81</sup>

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<sup>77</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>78</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>79</sup> Rome Statute, *supra* note 2, art. 123.

<sup>80</sup> *Id.* art. 23.

<sup>81</sup> *Id.* arts. 112 and 123. States that 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  
(continued...)

## Observer Role

The Assembly of States Parties adopted procedural rules for its activities at its first conference, including rules setting forth the role of observers and other participants.<sup>82</sup> Observers are 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 never becomes a party to the Statute.<sup>83</sup> The United States may also use its position at the United Nations to communicate to the Assembly of States Parties.<sup>84</sup>

As noted, the United States is not able to vote in these bodies so long as it does not ratify the Rome Statute. It may not nominate U.S. nationals to serve as judges or cast a vote in elections for judges or the Prosecutor (or for their removal), or vote on the ICC's budget. It will not be able to 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, unless it ratifies 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, however, it could seek to influence referrals by the Security Council.<sup>85</sup> Similarly, it may participate in Security Council requests to the Prosecutor to defer an investigation or prosecution<sup>86</sup> and to the Pre-Trial Chamber to review a decision of

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<sup>81</sup> (...continued)  
participation as an observer.

<sup>82</sup> See Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, Official Records, U.N. Doc ICC ASP/1/3 (2003). The Rules of Procedure of the Assembly of States Parties ["Assembly Rules"] are reprinted in part IIC of the conference report.

<sup>83</sup> Unlike the previous administration, the Bush Administration did not participate 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>84</sup> The United Nations has a standing invitation to participate as an observer. Assembly Rule 35. It may also propose items for the agenda. 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 2, art. 115; *see also* U.N. Doc., PCNICC/2001/1/Add. 1, Draft Relationship Agreement between the Court and the United Nations.

<sup>85</sup> Rome Statute, *supra* note 2, 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>86</sup> *Id.* art. 16.



the Prosecutor not to investigate or prosecute.<sup>87</sup> As a non-party to the treaty, the United States is eligible, but not obligated, to cooperate with any ICC investigation and prosecution;<sup>88</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>89</sup> The United States also retains the right not to provide information or documents the disclosure of which would prejudice its national security interests<sup>90</sup> and to refuse to consent to the disclosure by a state party of information or documents provided to that state in confidence.<sup>91</sup> Finally, as a non-party, the United States is not under any obligation to contribute to the budget for the ICC, except, perhaps indirectly, to the extent that the U.N. General Assembly regular budget might include ICC support.<sup>92</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>93</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 created 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>94</sup> While opponents of the ICC interpret 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 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

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<sup>87</sup> *Id.* art. 53.

<sup>88</sup> *Id.* arts. 86, 87, and 93.

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

<sup>90</sup> *Id.* art. 72.

<sup>91</sup> *Id.* art. 73.

<sup>92</sup> *Id.* art. 115.

<sup>93</sup> See Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 849-50 (2002).

<sup>94</sup> See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *available at* [<http://www.un.org/icty/pressreal/nato061300.htm>](last visited June 14, 2006).

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.<sup>95</sup> 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>96</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 and other economic aid 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 seemingly demanding special treatment in the form of immunity from the ICC, the United States may bolster 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 and operations in Iraq, as well as future international endeavors.<sup>97</sup>

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>98</sup> Under this view, the establishment of the ICC might have the unintended effect of hardening the resolve of ruthless tyrants who may feel they have nothing to gain by giving up their power

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<sup>95</sup> See, e.g., Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 392 (2000) (suggesting that the refusal of the United States to participate in the ICC could bring about its demise, just as the U.S.' failure to join the League of Nations contributed to the failure of that institution).

<sup>96</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>97</sup> An example might be the impact the U.S. policy has had on U.S. relations with Europe. See CRS Report RS21612, *East Central Europe: Status of International Criminal Court (ICC) Exemption Agreements and U.S. Military Assistance*, by Julie Kim.

<sup>98</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).

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**

ASPA § 2005 prohibits U.S. participation in peacekeeping and peace-enforcing missions established by the Security Council unless the President certifies and reports to the appropriate committees of Congress that U.S. personnel are not placed at risk of prosecution by the ICC because they are guaranteed immunity by the U.N. Resolution or because of arrangements with the host government.<sup>99</sup> The Bush Administration has pursued efforts in the U.N. Security Council and with individual States to prevent the possibility that American citizens could be prosecuted before the ICC. This effort has met with some success but also some resistance.

**Agreement with the U.N. Security Council.** 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>100</sup>

The resolution, which was renewed for another year under Security Council Resolution 1487, appeared 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.

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<sup>99</sup> *See supra* note 50.

<sup>100</sup> SC Res. 1422, U.N. Doc. S/Res/1422 (2002), *available at* [<http://daccessdds.un.org>].

Security Council does not have the authority to “rewrite” international treaties. The compromise invoked 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, Resolutions 1422 and 1487 appear to be consistent with the Rome Statute. The language deferred ICC action for one year; it does not provide absolute immunity for actions occurring during the deferral period. Because the Security Council did not extend the deferral past July 2004, it appears that the ICC may 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.

**Other U.N. Missions.** U.S. military personnel were able to participate in the United Nations Mission in Liberia (UNMIL) because, in authorizing the multinational force to enforce the cease-fire, the Security Council decided that

current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.<sup>101</sup>

Unlike the previous arrangement with respect to the U.N. mission in Bosnia, the authorization for operations in Liberia appears to provide permanent immunity to U.S. participants from the jurisdiction of the ICC with respect to conduct linked to the U.N. mission. Accordingly, President Bush made the appropriate certification to Congress under ASPA § 2005 (22 U.S.C. § 7424).<sup>102</sup> Liberia had signed the Rome Statute in 1998 but did not ratify it until September of 2004.

The United States also sent troops to participate in the U.N. mission to establish peace in Haiti in 2004.<sup>103</sup> In April of 2004, the U.N. Security Council established the United Nations Stabilization Mission in Haiti (MINUSTAH).<sup>104</sup> In June of that year,

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<sup>101</sup> SC Res. 1497, U.N. Doc. S/RES/1497, Para. 7 (Aug. 1, 2003).

<sup>102</sup> Certification Concerning U.S. Participation in the U.N. Mission in Liberia Consistent With Section 2005 of the American Servicemembers’ Protection Act, 68 Fed. Reg. 63,975 (2003).

<sup>103</sup> SC Res. 1529, U.N. Doc. S/RES/1529 (2004) (authorizing multinational interim force to deploy to Haiti).

<sup>104</sup> SC Res. 1542, U.N. Doc. S/RES/1542 (2004).

President Bush certified that U.S. servicemembers could safely participate because Haiti had signed an Article 98 agreement.<sup>105</sup>

**U.N. Action Regarding the Situation in Darfur.** On March 31, 2005, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, adopted Resolution 1593 (2005) which refers reports about the situation in Darfur, Sudan (dating back to July 1, 2002), to the ICC Prosecutor, Luis Moreno-Ocampo.<sup>106</sup> This is the first time such a referral from the U.N. Security Council has been made. As Sudan is not a party to the ICC, and has not consented to its jurisdiction, the ICC jurisdiction over the case could only be established by means of a U.N.S.C. referral. Under the ICC Statute, the ICC is authorized, but not required, to take such a case.<sup>107</sup> The Resolution, which is binding on all U.N. member states, was adopted by a vote of 11 in favor, none against and with 4 abstentions — the United States, China, Algeria, and Brazil.<sup>108</sup>

U.S. foreign policy respecting action to address the situation in Darfur was complicated by its position regarding the ICC and its jurisdiction over non-member states. In September 2004, the United States concluded that genocide had taken place in Darfur. According to the State Department, it supported the formation of the International Commission of Inquiry<sup>109</sup> but preferred a tribunal in Africa to be the mechanism of accountability for those who committed crimes in Darfur. After these proposals failed to garner sufficient support, the United States agreed to abstain from voting on the Resolution (which is not equivalent to a veto in the U.N. Security Council) once language was introduced into the Resolution that dealt with the sovereignty questions of concern and essentially protected U.S. nationals and other persons of non-party States outside Sudan from prosecution.<sup>110</sup>

The abstention did not change the fundamental objections of the United States to the ICC. Although some view the decision as a sign that the Administration is softening its stance with respect to the ICC,<sup>111</sup> it may also be seen as consistent with the U.S. support of a version of the Rome Statute that would have allowed the U.N.

<sup>105</sup> 69 Fed. Reg. 34,043 (June 14, 2004).

<sup>106</sup> See “Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court,” Press Release, SC/8351; “Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan to International Criminal Court Prosecutor,” March 31, 2005, Press Release SG/SM/9797 AFR/1132. For background, see “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,” S/2005/60, January 25, 2005

<sup>107</sup> See “U.N. Commission’s Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court,” Frederic L. Kirgis, *Am. Soc’y Int’l L Insight (Addendum)*, April 5, 2005.

<sup>108</sup> United Nations Security Council Resolution 1593 was adopted by the Security Council at its 518<sup>th</sup> meeting on 31 March 2005, U.N. Doc. S/RES/1593 (2005).

<sup>109</sup> See SC Res. 1564, U.N. Doc. S.RES/1564(2004) (requesting the establishment of an International Commission of Inquiry).

<sup>110</sup> See SC Res. 1593, Para. 6; *see also* Kirgis, *supra* note 107.

<sup>111</sup> See Jess Bravin, *U.S. Warm To Hague Tribunal*, WALL ST. J., June 14, 2006, at A4.

Security Council to refer cases involving non-States Parties to the ICC, but would not have allowed other states to refer cases. At the same time, the compromise allowed the United States to show support for the need for the international community to come together and take action on the atrocities occurring in Darfur.<sup>112</sup>

**Article 98 Agreements.** The United States is also pursuing bilateral 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 100 bilateral agreements 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.<sup>113</sup> The Department of State is seeking to conclude these agreements with as many states as possible, even those who are not parties to the ICC and others who would not be subject to the sanctions under ASPA.

The agreements are intended to make use of Article 98 of the Rome Statute, which states:

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.<sup>114</sup>

Paragraph 1 of Article 98 appears intended to retain diplomatic immunity and immunity for heads of state, while paragraph 2 seems to contemplate typical SOFA arrangements, in which countries hosting members or units of the armed forces of allies agree to forego certain types of jurisdiction over the soldiers and other government officers stationed there. The use of the term “sending state” in the second paragraph appears to indicate that it is meant to cover only persons who are sent to accomplish government business, and not citizens present in the country for personal or business reasons. The State Department reportedly sought broader

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<sup>112</sup> United States Mission to the United Nations, “Statement on the Sudan Accountability Resolution,” Ambassador Anne W. Patterson, March 31, 2005. See CRS Report RL33574, *Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and U.S. Policy*, by Ted Dagne.

<sup>113</sup> See DOS Press Release, *supra* note 59. For the text of one such agreement, see Agreement Between the Government of the United States of America and the Republic of Uzbekistan Regarding the Surrender of Persons to the International Criminal Court, September 18, 2002, T.I.A.S. No. \_\_\_\_\_, *reprinted in* 42 I.L.M. 39 (2003).

<sup>114</sup> Rome Statute, *supra* note 2, art. 98.

application for the bilateral agreements. In 2002, the European Council argued that parties to the ICC who signed such agreements with the United States would be acting inconsistently with their obligations under the Rome Statute.<sup>115</sup> The European Union (EU), all of whose members are parties to the Rome Statute, initially opposed the agreements altogether, but its members reached a compromise to allow member countries to sign.<sup>116</sup> The EU issued guidelines for member countries for the acceptable terms of Article 98 agreements, specifying that coverage would be limited to government representatives on official business, the United States would expressly pledge to prosecute any war crimes committed by Americans, and the agreements would not contain a reciprocal promise to prevent the surrender of European citizens to the ICC.<sup>117</sup> In response to the Nethercutt Amendment, the European Council released a statement calling on President Bush to make “full use of his waiver authority” and reiterated the EU stand with respect to Article 98 agreements, referring to the 2002 guidelines.<sup>118</sup>

Despite the EU compromise, the U.S. pursuit of “immunity” has been criticized by some as unnecessary or as an outright effort to undermine the ICC.<sup>119</sup> Supporters of the policy note that agreements, such as SOFAs, that provide immunity for soldiers from prosecution in foreign courts are not unusual. For example, the 19-member International Security Assistance Force (ISAF), a joint force authorized by the U.N. Security Council to provide assistance to the interim government in Afghanistan,<sup>120</sup> included a clause providing immunity for participants in its Military Technical Agreement with the interim government.<sup>121</sup> Furthermore, supporters point

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<sup>115</sup> Risks for the Integrity of the Statute of the International Criminal Court, Resolution 1300 of the Parliamentary Assembly of the Council of Europe (September 25, 2002).

<sup>116</sup> See Phillip Shiskin and Jesse Bravin, *EU Offers Deal on U.S. Immunity from Tribunal*, WALL ST. J., Sep. 13, 2002, at A8.

<sup>117</sup> See Council of the European Union: Council Conclusions and EU Guiding Principles, 42 I.L.M. 240 (2003); see also Council of the European Union, Threats to the International Criminal Court, Resolution 1336 (2003).

<sup>118</sup> Press Release, Council of the European Union, 15864/1/04 REV 1 (Presse 353) P 136/04, Dec. 10, 2004.

<sup>119</sup> See, e.g. Coalition for the International Criminal Court, Overview of the United States’ Opposition to the International Criminal Court (Nov. 1, 2005), available at [[http://www.iccnw.org/documents/CICCFUS\\_US%20Opposition%20toICC\\_FINAL\\_eng%20\\_2\\_.pdf](http://www.iccnw.org/documents/CICCFUS_US%20Opposition%20toICC_FINAL_eng%20_2_.pdf)] (last visited June 14, 2006); Human Rights Watch, United States Efforts to Undermine the International Criminal Court, (Sep. 4, 2002), available at [<http://hrw.org/campaigns/icc/docs/art98analysis.htm>](last visited June 14, 2006).

<sup>120</sup> Relevant U.N. Security Council Resolutions are S/RES/1386 (2001), S/RES/1413 (2002), S/RES/1444 (2002), S/RES/1510 (2003), S/RES/1563 (2004), and S/RES/1623 (2005). None of these resolutions makes provisions regarding immunity for participating troops.

<sup>121</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

(continued...)

out, the agreements are based on and consistent with Article 98 of the Rome Statute, and therefore cannot be said to undermine the ICC.

The practical effect of the Article 98 agreements is as of yet uncertain. 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>122</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 Article 98 agreements 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.

**Options.** Though the Administration continues to seek to conclude Article 98 agreements with relevant countries, it is not clear how many more such agreements are likely to be forthcoming. To strengthen the Administration's pursuit of these agreements, Congress could make more forms of aid contingent on the recipient country's agreement to protect U.S. troops from surrender to the ICC, or it could enact legislation to restrict the President's discretion to grant waivers. If further negotiations fail to garner necessary support, or in case the agreements should turn out to be less effective than desired or counterproductive for other reasons, policymakers may seek alternative avenues. One 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

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<sup>121</sup> (...continued)

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 U.K. ISAF website at [<http://www.operations.mod.uk/isafmta.doc>](last visited June 14, 2006).

<sup>122</sup> See Rome Statute, *supra* note 2, arts. 97 & 98.



“the most serious crimes of concern to the international community”<sup>123</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>123</sup> *Id.* art. 5(1).