

# Report for Congress

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

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## Summary

As the International Criminal Court (ICC) comes into existence on July 1, 2002, the United States may perceive itself under more intense pressure to formulate and implement a policy to address its relationship with the new court. While most U.S. allies support the ICC, the Bush Administration firmly opposes it and has renounced any U.S. obligations under the treaty. The Administration stated that the United States does not intend to take any action to undermine the ICC, but its veto of a United Nations resolution to extend the peacekeeping mission in Bosnia for reasons related to the ICC has sparked considerable international debate. Unless the Security Council and the U.S. delegation are able to reach a compromise, the U.N. mission in Bosnia will cease to exist, and other U.N. missions may meet a similar fate when their mandates come up for renewal.

This report outlines the main objections the United States has raised with respect to the ICC and discusses the implications for the United States, as a non-ratifying country, as the ICC comes into force, as well as the Administration's apparent strategy with regard to the ICC. The report concludes with a review and analysis of some legislation enacted and proposed to regulate U.S. relations with the ICC. This report is intended to serve as an update to the fifth and sixth parts of CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*.

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# U.S. Policy Regarding the International Criminal Court

## Introduction

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

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<sup>1</sup> 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. Rome Statute art. 5(1).

<sup>2</sup> See Barbara Crossette, *World Criminal Court is Ratified – Praised by U.N., Opposed by U.S.*, N.Y. TIMES Apr. 12, 2002, available at 2002 WL-NYT 0210200003. As of July 1, 2002, 75 nations have ratified the Rome Statute. For the current status of signatures, ratifications and reservations, visit <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

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

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

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

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

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.

In a move that has provoked strong opposition from ICC supporters concerned with the viability of that institution, and raised concerns about the future of United Nations peacekeeping, the United States has vetoed a U.N. resolution to extend the peacekeeping mission in Bosnia because the Security Council refused to add a guarantee of full immunity for U.S. personnel from the jurisdiction of the ICC.<sup>5</sup> However, The United States has since voted with the rest of the Security Council to approve an extension for the mission until July 15, in order to give the Security Council members an opportunity to negotiate an agreement. Unless the Security Council and the U.S. delegation are able to reach a compromise by that date, the U.N. mission in Bosnia will cease to exist, its mission to be taken over by a contingent from the European Union six months prior to a scheduled handover.<sup>6</sup> The Administration has reportedly indicated that other U.N. missions may meet a similar fate when their mandates come up for renewal.<sup>7</sup> The NATO peacekeeping forces in Bosnia may continue their presence for the time being, although Germany has asserted it would not support the NATO force without a U.N. mandate.<sup>8</sup>

While the United States initially supported the idea of creating an international criminal court<sup>9</sup> and was a major participant at the Rome Conference,<sup>10</sup> in the end, the United States voted against the Statute.<sup>11</sup> Nevertheless, President Clinton signed the

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<sup>5</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>6</sup>See Jess Bravin, *U.S. Fails to Solve ICC Dispute Over Peacekeeping Forces*, WALL ST. J., Jul. 5, 2002, at A8.

<sup>7</sup>See Ben Barber and Betsy Pisik, *U.S. Threatens to Kill a Dozen Peace Missions*, WASH. TIMES, Jul. 2, 2002, at A1 (listing missions in Bosnia, Lebanon, Ethiopia, Sierra Leone, Cyprus, the Golan Heights, Iraq, and India and Pakistan as possible casualties).

<sup>8</sup>See Serge Schmemmann, *U.S. Vetoes Bosnia Mission, then Allows 3-Day Reprieve*, NY TIMES, Jul. 1, 2002, at A3.

<sup>9</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>10</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>11</sup>See Wedgwood, *et al.*, *supra* note 9, at 124 (noting that the final vote for the Statute was (continued...))

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>12</sup> The Bush Administration has likewise declined to submit the Rome Statute to the Senate for ratification, and has notified the depositary of the United Nations of the U.S. intent not to ratify the treaty.<sup>13</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>14</sup> The main issue faced by the Congress is the level of cooperation that should be permitted between the United States and the ICC: to withhold all cooperation from the ICC and its member nations in order to prevent the ICC from becoming effective, to continue contributing to the development of the ICC in order to improve it, or to adopt a pragmatic approach based solely on U.S. interests.<sup>15</sup>

This report outlines the main objections the United States has raised with respect to the ICC and discusses the implications for the United States, as a non-ratifying country, as the ICC comes into force, as well as the Administration’s apparent strategy for opposing the ICC. The report concludes with a review and analysis of some legislation enacted and proposed to regulate U.S. relations with the ICC. This report is intended to serve as an update to the fifth and sixth parts of CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*.

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<sup>11</sup>(...continued)  
120 in favor to seven against).

<sup>12</sup>See Statement on the Rome Treaty on the International Criminal Court, Dec. 31, 2000, 37(1) Weekly Compilation of Presidential Documents 4 (2001).

<sup>13</sup>Because the United States signed the Rome Statute, it had been obligated under international law to refrain from conducting activity in contravention of the object and purpose of the treaty. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 18, 1155 U.N.T.S. 335. However, this obligation ends once a signatory state has indicated an intent *not* to ratify the treaty. *Id.* Some press reports initially indicated the Administration was also planning to renounce the Vienna Convention. See Neil A. Lewis, *U.S. to ‘Unsign’ Treaty, Disavow World Tribunal*, SAN DIEGO UNION & TRIB., May 5, 2002 at A1. The report was apparently based on a misunderstanding of the Administration’s statement explaining the intent behind its action, which was reportedly to avoid any obligations on the part of the United States that may have been incurred through its signature of the Rome Statute, in accordance with article 18 of the Vienna Convention.

<sup>14</sup>See Grossman, *supra* note 4.

<sup>15</sup>See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47 (2000) (arguing the United States could most effectively influence the shape of the ICC through cooperating with it rather than impeding it).

## 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 its military actions and foreign policy initiatives.

Below, in bold type, are summarized some of the main objections voiced by U.S. officials. 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 short discussion of the issue. 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-signatory nations.** *Counterposition:* 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. *Discussion:* Critics of this counterposition 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>16</sup> After all, it is arguably the policy decision and not the individual conduct that is actually at issue. The threat of prosecution, however, could inhibit the conduct of U.S. officials in implementing U.S. foreign policy. In this way, it is argued, the ICC may be seen to infringe U.S. sovereignty.

*Counterposition:* The crimes covered by the Rome Statute, it has been asserted, are already prohibited under international law either by treaty or under the concept of "universal jurisdiction," or both; therefore, all nations have jurisdiction to try persons for these crimes. The ICC 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>17</sup> *Discussion:* The existence of "universal jurisdiction" has been disputed by some academics, who argue that actual state

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<sup>16</sup>See Ruth Wedgwood, *The United States and the International Criminal Court: The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 199 (2001) (arguing the state whose national is charged remains a "party in interest" to the prosecution).

<sup>17</sup>See Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1, 3-4 (2000).

practice does not provide as much support for the concept as many ICC supporters may claim.<sup>18</sup> However, 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>19</sup> The United States is already party to 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.

*Counterposition:* 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. *Discussion:* The United States had proposed to resolve this problem by creating a mandatory role for the U.N. Security Council in deciding when the ICC should assert jurisdiction, but the majority of other countries refused to adopt such a rule on the stated grounds that it would mirror the uneven prosecution of war crimes and crimes against humanity under the present system of *ad hoc* tribunals.

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

**The ICC’s flaws may allow it to be used by some countries to bring trumped-up charges against American citizens, who, due to the prominent role played by the United States in world affairs, may have greater exposure to such charges than citizens of other nations.** *Counterposition:* 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. *Discussion:* Many U.S. opponents of the ICC express concern that the ICC will be able to second-guess a valid determination by U.S. prosecutors to terminate an investigation or decline to prosecute a person. It is not uncommon for unfriendly countries to characterize U.S. foreign policy decisions as “criminal.” The ICC could provide a forum for such charges. Some ICC supporters dispute the likelihood of such an occurrence, and express confidence that unfounded charges would be dismissed.

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<sup>18</sup>See Wedgewood, *supra* note 16, 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>19</sup>Rome Statute art. 12. *See generally* International Criminal Court: Overview and Selected Legal Issues 21-26, CRS Report RL31437 (summarizing jurisdictional requirements). There is no consent requirement in cases referred by the Security Council.



### **Issue #3 The Unaccountable Prosecutor.**

**The Office of the Prosecutor, a branch of the ICC that is not controlled by any separate political authority, has unchecked discretion to initiate cases, which could lead to “politicized prosecutions.”** *Counterposition:* ICC supporters will likely counter that the ICC statute does contain some checks on the Prosecutor, including a provision that the Prosecutor must seek permission from a pre-trial chamber to carry out a self-initiated prosecution. The independence of the prosecutor is vital in order to ensure just results, free from political control. *Discussion:* The United States had wanted 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.** *Counterposition:* All member states 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>20</sup> The ICC, supporters may argue, is merely providing a forum for trying persons accused of committing “aggression” under international law. *Discussion:* 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*.

### **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.** *Counterposition:* The Rome Statute contains a comprehensive set of procedural safeguards that offers substantially similar protections to the U.S. constitution.<sup>21</sup> Some also note that the U.S. Constitution does not always afford American citizens the same procedural rights. For example, Americans may be tried overseas, where foreign governments are not bound to observe the Constitution. Moreover, cases arising in the armed services are tried by court-martial, which is exempt from the requirement for a jury trial. *Discussion:* The current U.S. policy about the use of military tribunals in the war against terrorism could lead to suggestions of a double

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

<sup>21</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).

standard on the part of the United States with respect to procedural safeguards in war crimes trials.

## Implications for the United States as Non-member

Now that the Rome Statute has entered into force, the Preparatory Commission will cease to exist after the first meeting of the Assembly of States Parties. U.S. eligibility to participate on an equal basis with other states in setting some of the ground rules for the ICC will have ended. The Assembly of States Parties will take over as the governing body to oversee the implementation and possible amendment of the Rome Statute. Review Conferences are an alternative forum for considering amendments to the Statute; an initial Review Conference will be convened seven years after the Statute enters into effect, now expected to be July 2002. 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>22</sup> As a non-party, the United States will have no vote in either body. However, it will remain eligible to participate in both the Assembly and in Review Conferences as an observer.<sup>23</sup>

### Observer Role

The role of observers ultimately will be defined by the rules of procedure adopted for the two bodies.<sup>24</sup> If the current finalized draft rules are adopted, observers will be entitled to participate in the deliberations of the Assembly and any subsidiary bodies that might be established. Observer states will receive notifications of all meetings and records of Assembly proceedings on the same basis as states parties. They will not, however, be permitted to suggest items for the agenda or to make motions during debate, such as points of order or motions for adjournment. Thus, the United States may be able to participate substantially in Assembly debates as well as proffer and respond to proposals, even if it does not become a party to the Statute. The United States may also use its influence at the United Nations as a way to be heard by the Assembly of States Parties.<sup>25</sup>

As noted, the United States will not be able to vote in these bodies if it does not ratify the Rome Statute. It could not nominate U.S. nationals to serve as judges or cast a vote in elections for judges or the Prosecutor (or for their removal). It could not vote on the ICC's budget. It could not vote on the definition of the crime of

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<sup>22</sup> Rome Statute of the International Criminal Court art. 23, U.N. Doc. A/CONF.183/9 (1988) ("Rome Statute").

<sup>23</sup> *Id.* arts. 112 and 123. States which have signed the Statute or the Final Act are eligible to participate as observers in both bodies. The Administration's notification of intent not to ratify the Statute should have no effect on eligibility, although it may signal an intent not to participate.

<sup>24</sup> U.N. Doc., PCNICC/2001/1/Add.4, Draft Rules of Procedure of the Assembly of States Parties Jan. 8 (2002) (hereinafter "Draft Assembly Rules").

<sup>25</sup> The United Nations has a standing invitation to participate as an observer. Draft Assembly Rule 35. It may also propose items for the agenda. Draft Assembly Rule 11.

aggression or its inclusion within the jurisdiction of the ICC, when the matter is considered at first Review Conference, or on any other amendment to the Rome Statute.

The United States, as a non-party, will have no right itself to refer situations to the Prosecutor for investigation; as a Permanent Member of the Security Council, however, it could participate as part of a Security Council referral.<sup>26</sup> Similarly, it could still participate in Security Council requests to the Prosecutor to defer an investigation or prosecution<sup>27</sup> and to the Pre-Trial Chamber to review a decision of the Prosecutor not to investigate or prosecute.<sup>28</sup> As a non-party to the treaty, the United States could, but would not be obligated to, cooperate with the ICC in its investigation and prosecution of crimes within its jurisdiction;<sup>29</sup> and under the Statute, it 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>30</sup> The U.S. would also retain the right not to provide information or documents the disclosure of which would prejudice its national security interests<sup>31</sup> and to refuse to consent to the disclosure by a state party of information or documents provided to that state in confidence.<sup>32</sup> Finally, as a non-party, the U.S. would not be under any obligation to contribute to the budget for the ICC, except, perhaps indirectly, to the extent that the U.N. General Assembly contributes to its support.<sup>33</sup>

## Foreign Policy Implications

Perspectives differ on the impact of the ICC on U.S. interests, once it begins operation. 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>34</sup> Others see it as a valuable foreign policy tool for defining and deterring crimes against humanity, a step forward in the decades-long U.S. effort to end impunity for egregious mass crimes. Debate over the ICC has brought out a tension between enhancing the international legal justice system and encroaching on what some countries perceive as their legitimate use of force. The review by the International Criminal Tribunal for the Former Yugoslavia (ICTY) of allegations that NATO bombing in Kosovo might be deemed a war crime is illustrative of this tension. Many opponents of the

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<sup>26</sup>Rome Statute 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>27</sup>*Id.* art. 16.

<sup>28</sup>*Id.* art. 53.

<sup>29</sup>*Id.* arts. 86, 87, and 93.

<sup>30</sup>*Id.* arts. 59 and 89.

<sup>31</sup>*Id.* art. 72.

<sup>32</sup>*Id.* art. 73.

<sup>33</sup>*Id.* art. 115.

<sup>34</sup>See Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 849-50 (2002).

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>35</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 unfounded allegations would be dismissed by the ICC Prosecutor.

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>36</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. By demanding special treatment in the form of immunity from the ICC, the United States may be seen as bolstering the perception of its unilateral approach to world affairs.

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>37</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 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.

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<sup>35</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.html>.

<sup>36</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>37</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).

## Strategy for Achieving Immunity for U.S. Troops

Having failed to achieve immunity from the ICC through negotiations for the Rome Statute, the United States appears to have turned its attention to methods for achieving immunity for its soldiers and officials as a price for providing continued support for peacekeeping operations. There are several options for attempting to achieve immunity for U.S. troops. The first option would be to negotiate bilateral treaties with countries on whose territories the U.N. missions are established, similar to the status-of-forces agreements (SOFA) routinely negotiated where U.S. troops are stationed abroad. For example, the 19-member International Security Assistance Force (ISAF), a joint police force headed by the U.K. to provide assistance to the interim government in Afghanistan, included a clause providing immunity for participants in its Military Technical Agreement with the interim government.<sup>38</sup>

However, the use of such agreements with host countries does not provide absolute immunity from the ICC. They would bind only countries that sign, and would have the effect of preventing the host nation from turning an accused over 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>39</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 SOFA. Therefore, states parties to the Rome Statute are not precluded from entering into SOFAs that provide for immunity of foreign troops, but if the ICC were nevertheless to gain custody over the accused through other means, its jurisdiction may not be affected by the agreement.

A second option would be for the United States simply to decline to participate in peacekeeping missions, thereby limiting the exposure of U.S. troops but also possibly constricting U.S. influence over the conduct of the missions. This tactic could be applied in conjunction with the first option – by refusing to participate in U.N. or other missions unless the host country agrees not to surrender U.S. personnel to the ICC. Such an approach could be balanced with other foreign policy interests.

A third approach is the use of the U.S. veto in the Security Council to extract blanket immunity from the ICC for U.S. personnel, as is occurring with respect to the

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<sup>38</sup>See Colum Lynch, *Deal Gave Europe's Troops Immunity*, INT'L HERALD TRIB., June 20, 2002, at A1. Section 1.4 of Annex A to the MTA provides:

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

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

<sup>39</sup>See Rome Statute art. 98.

mission in Bosnia. The United States has so far failed to get a Security Council resolution providing immunity for all participation in U.N. peacekeeping operations, raising the prospect of using its veto to scuttle U.N. missions as their mandates come up for renewal.<sup>40</sup> Other members of the U.N. Security Council have not supported the United States in this effort, arguing that the Security Council does not have the authority to rewrite international treaties. Some have objected to the strategy as a coercive measure designed to undermine the new ICC before it has begun to function. U.S. critics believe this policy could damage U.S. efforts to gain or maintain the support of allies in the war against terrorism, and that if neither side backs down, the impact on U.N. peacekeeping efforts could be profound. Under this view, the United States could conceivably be subordinating its foreign policy to the narrower interest of opposing the ICC.

## Congressional Action

Congress has passed several riders effectively precluding the use of funds to support the ICC.<sup>41</sup> The fundamental issue for Congress is whether to pass legislation to actively oppose the ICC, or whether to adopt a more benign approach aimed at encouraging the ICC to develop in a manner conducive to U.S. policy aims. There are currently two bills in Congress adopting the first approach, and one taking the second tack. The House of Representative added a rider to the Bob Stump National Defense Authorization Act for Fiscal Year 2003, H.R. 4546, expressing the sense of the Congress that “none of the funds appropriated pursuant to authorizations of appropriations in this Act should be used for any assistance to, or to cooperate with or to provide any support for, the International Criminal Court.”<sup>42</sup> Additionally, the Administration may ask Congress to pass legislation to close jurisdictional gaps in U.S. criminal law in order to ensure U.S. territory does not become a safe haven for those accused of genocide, war crimes, and crimes against humanity.<sup>43</sup>

### American Servicemembers’ Protection Act of 2001

Both the House of Representatives and the Senate added the American Servicemembers’ Protection Act (ASPA) to the supplemental appropriations bill for the fiscal year ending September 30, 2002, H.R. 4775. The primary difference between the two versions is that the Senate version includes a statement that the

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<sup>40</sup>See Barber and Pisik, *supra* note 7.

<sup>41</sup>See Department of Defense Appropriations for 2002, P.L. 107-117.

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

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

<sup>42</sup>H.R. 4546 § 1034.

<sup>43</sup>See Grossman, *supra* note 4.

ASPA will not prevent the United States from cooperating with the ICC if it prosecutes persons such as Saddam Hussein.

Originally introduced in the 106<sup>th</sup> Congress as S. 2726, the ASPA is intended to shield members of the United States Armed Forces and other covered persons from the jurisdiction of the ICC. The Senate Committee on Foreign Relations held hearings<sup>44</sup> the same day the bill was introduced but did not report it. The ASPA was reintroduced in the 107<sup>th</sup> Congress as S. 857 on May 9, 2001, and an amended version was introduced as S. 1610 on November 1, 2001. The House of Representatives also passed a version of ASPA in the Foreign Relations Authorization Act, Fiscal Years 2002 and 2003, H.R.1646, Title VI, subtitle B. The Senate amended version of H.R. 1646 does not include the ASPA. H.R. 1646 is in conference at the time of this writing. The Senate passed a version of the ASPA, as part of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, HR 3338, but it was replaced in the enacted law with language prohibiting spending to support the ICC.<sup>45</sup>

Title II of H.R. 4775 (Title III in the Senate version) is substantially similar to S. 857 (H.R. 1794), and would repeal the provision passed as part of H.R. 3338. The House and Senate versions are summarized and compared below. For ease of comparison, the section numbers 1 through 14 will be used, in lieu of sections 2001-2014 and 3001-3014, respectively.

The ASPA would prohibit cooperation with the ICC by any agency or entity of the federal government, or any state or local government. (Section 4) Covered entities are prohibited from responding to a request for cooperation by the ICC or providing specific assistance, including arrest, extradition, seizure of property, asset forfeiture, service of warrants, searches, taking of evidence, and similar matters. It prohibits agents of the ICC from conducting any investigative activity on U.S. soil related to matters of the ICC. Section 4(d) states that the United States “shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters ... to prevent ... use by the [ICC of such assistance].” It does not ban the communication to the ICC of U.S. policy or assistance to defendants. Section 6 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.

The ASPA would further restrict 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, or because each other country participating in the mission is either not a party to the ICC and does not consent to its jurisdiction, or has entered into an agreement “in

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<sup>44</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>45</sup>P.L. 107-117 § 8173. *See supra* note 41.

accordance with article 98" of the Rome Statute.<sup>46</sup> It also prohibits military assistance to any non-NATO country that is a member of the ICC, unless the President waives the restriction (Section 7).

Section 8 authorizes the President to use "all means necessary and appropriate" to bring about the release of covered United States and allied persons,<sup>47</sup> upon the request of the detainee's government, who are being detained or imprisoned by or on behalf of the ICC. The Act does not provide a definition of "necessary and appropriate means" to bring about the release of covered persons, other than to exclude bribes and the provision of other such incentives.

The President may waive the restrictions on participation in peacekeeping operations and providing military assistance for a renewable period of one year after notifying appropriate congressional committees of his intent to do so and reporting that the ICC has entered into a binding agreement that prohibits it from exercising jurisdiction over covered U.S. and allied persons (from certain countries for so long as those countries have not ratified the treaty). (Section 3) The President may also waive some requirements with respect to a specific "named individual," if there is reason to believe the named individual is guilty of the charge; it is in the national interest of the United States for the ICC to prosecute the person; and that during the investigation, no covered U.S. or allied person will be arrested, detained, prosecuted, or imprisoned by or on behalf of the ICC with regard actions taken in their official capacities.

H.R. 4775 contains an exception at section 11 that was not included in some earlier versions of the bill, including H.R. 1646, stating that the restrictions on cooperation with the ICC (section 4) and protecting classified information (section 6) 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>48</sup> The section would require the President to notify Congress within 15 days of the action, unless such notification would jeopardize national security. It further clarifies that "nothing in [the] section shall be construed as a grant of statutory authority to the President to take any action." Section 12 prohibits delegation of the authorities vested in the President by sections 3 (waiver provision) and 11(a) (constitutional exception).

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<sup>46</sup>Rome Statute art. 98 prohibits the ICC from pursuing requests for assistance or surrender that would require the requested state to act inconsistently with its international obligations.

<sup>47</sup>"Covered allied persons" includes military personnel, elected or appointed officials, and other persons working for a NATO country or a major non-NATO ally, which includes Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand, or Taiwan, "so long as that government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the [ICC]." Section 642(3). Covered allies currently could include persons from the Czech Republic, Turkey, Egypt, Israel, Japan, the Republic of Korea, and Taiwan. (Of these countries, only Turkey, Taiwan, and Japan have not signed the Rome Statute.)

<sup>48</sup>H.R. 4775 § 2011; *see also* S. 1610 § 11.



Inasmuch as sections 4 and 6 are already subject to presidential waiver under section 3(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 4 and 6 infringe upon his constitutional authority in certain cases, he might assert that Congress has no power even to require a waiver under section 3. Section 11 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 4 and 6 impinge his constitutional authority.

The effect of section 11 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 4 and 6, as well as the waiver provision of section 3(c), superfluous. 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 4 and 6. The language could be construed by a court to imply a waiver authority apart from the restrictions outlined in section 3.

Section 15, which only exists in the Senate version 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.

Opponents of this measure argue it is unnecessary inasmuch as the ASPA already contains multiple waiver provisions for the President to invoke in cases such as these. The amended language would appear to have the effect of limiting the prohibitions in section 4 to cases in which the ICC prosecutes non-U.S. citizens for the crimes currently under the jurisdiction of the ICC. It could also eliminate the restrictions on participation in peacekeeping missions or provision of military assistance where such participation or aid could be interpreted to further an international effort to prosecute the named crimes. There is no definition of “foreign national” in the ASPA; its use in section 15 could lead to a conflict with sub-sections (d) and (f) of section 4 as they apply to permanent resident aliens.

## **The American Servicemember and Citizen Protection Act of 2002**

The American Servicemember and Citizen Protection Act of 2002, H.R.4169, introduced April 11, 2002, issues findings that under the U.S. Constitution and international law, the President’s signature on a treaty without ratification by the Senate is not binding on the United States, and that therefore the ICC Statute has no

validity with respect to U.S. The bill proclaims the Rome Statute to be “ultra vires” (section 2(9)) and in violation of international law, the American Declaration of Independence, and the Constitution (section 2(12)). It also urges the President to rescind the U.S. signature and take steps (section 3) to prevent the establishment of the ICC. Section 4 prohibits the expenditure of funds for use in any manner for the “establishment or operation of the [ICC]” (with a penalty of 5 years or \$50,000 for violations, section 6). Section 5 provides that actions against U.S. soldiers shall be considered to be an act of aggression, and actions against other U.S. persons shall be considered “to be an offense against the law of nations.”

## **The American Citizens’ Protection and War Criminal Prosecution Act of 2001**

This bill, S.1296 (H.R. 2699), seeks a more conciliatory approach to the ICC, providing that the President should certify that the ICC “has established a demonstrated record of fair and impartial prosecution of genocide, war crimes, and crimes against humanity” before the Rome Statute is submitted to the Senate for its advice and consent. (Section 10). Section 4 provides a sense of the Congress that the United States should “maintain a policy of fully supporting the due process rights of all United States citizens before foreign tribunals, including the [ICC]”. It recommends the U.S. government participate as an observer in the Assembly of States Parties in order to protect and further U.S. interests. Section 8 requires the President to ensure appropriate procedures are in place to protect national security information.

Section 5 prohibits the United States from taking any action to extradite U.S. citizens and servicemembers to the ICC if the accused is investigated or prosecuted in a U.S. court, and urges the United States to exercise its right to assert jurisdiction over such persons (to invoke complementarity), unless the President determines it is not in the national interest. If a U.S. citizen is prosecuted by the ICC, the President “shall use appropriate diplomatic and legal resources to ensure that such person receives due process ...” and provide whatever exculpatory evidence may be available to assist the accused. Section 7 authorizes support to the ICC on a case-by-case basis if such support would serve important U.S. interests, particularly if the victims of the crimes alleged are citizens of the United States or friendly countries.

The bill contains a number of reporting requirements for assessments of the operation of the ICC and its effects on U.S. interests. Section 6 outlines reporting procedures, requiring the President to compare due process protections afforded to persons before the ICC to those afforded U.S. servicemembers under status of forces agreements, and to bilateral or multilateral extradition treaties. Section 5 requires the Administration to conduct a study to determine what statutory amendments may be necessary to close jurisdictional gaps in the criminal code or Uniform Code of Military Justice. Section 9 requires a report on command arrangements that could place U.S. servicemembers at risk of prosecution by the ICC and measures taken to mitigate the risks.