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## American Servicemembers' Protection Act of 2002

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## AMERICAN SERVICEMEMBERS' PROTECTION ACT OF 2002

On July 1, 2002, the Rome Statute of the International Criminal Court ("ICC") entered into force, establishing the first permanent international criminal tribunal.<sup>1</sup> Although seventy-six countries had ratified the Rome Statute by that date, the United States was not among them.<sup>2</sup> Instead, Congress responded to the creation of the ICC by passing a bill sponsored by House Majority Whip Tom DeLay (R-Tex.) that Republican legislators had been trying to get through the House and Senate for several years.<sup>3</sup> On August 2, 2002, the American Servicemembers' Protection Act of 2002 ("ASPA") became law.<sup>4</sup> The Act was designed to prevent United States participation in the ICC and to discourage other members of the international community from participating in the Court or assisting it in any way.<sup>5</sup>

Even before the bill's passage, commentators, diplomats, and legislators had debated whether ASPA was a beneficial new tool of American diplomacy or a coercive element of American policy that could ultimately harm United States interests. Arguments on behalf of the Act focus on concerns about the ICC, which its detractors view as an illegitimate international body that could target American citizens for prosecution based on political motives and deprive them of their constitutional rights.<sup>6</sup> Critics of ASPA counter that these fears are unfounded and that the ICC's founding statute protects against any such outcome.<sup>7</sup> They also argue from a normative standpoint that, as the first permanent international tribunal with jurisdiction over the gravest international crimes, the ICC is a positive development in international law that the United States ought to support.<sup>8</sup> Once ASPA became law, these debates continued even as the Bush Administration used ASPA as a tool to compel other nations to join America in its opposition to the international tribunal.<sup>9</sup>

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<sup>1</sup> *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/9th (2002) [hereinafter *Rome Statute*]. See also U.N., 18 STATUS OF MULTILATERAL TREATIES DEPOSITED WITH SECRETARY-GENERAL 10, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty10.asp> (last visited Apr. 5, 2003).

<sup>2</sup> See Julia Preston, *U.S. Rift With Allies on World Court Widens*, N.Y. TIMES, Sept. 10, 2002, at A6.

<sup>3</sup> See *infra* text accompanying notes 49–62.

<sup>4</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001–2015, 116 Stat. 820, 899–909 (to be codified at 22 U.S.C. §§ 7421–7432). ASPA was passed as Title II of this legislation. See *id.* §§ 2001–2015.

<sup>5</sup> See generally *id.*

<sup>6</sup> See *infra* text accompanying notes 85–126.

<sup>7</sup> See *infra* text accompanying notes 85–126.

<sup>8</sup> See *infra* text accompanying notes 127–135.

<sup>9</sup> See *infra* text accompanying notes 136–138.

The vehement opposition expressed by ASPA appears to run counter to the current goals of United States foreign policy.<sup>10</sup> With America increasing its involvements overseas in the wake of September 11, 2001,<sup>11</sup> a bill that redefines military aid and antagonizes potential future allies is not in America's national interest. While most commentators admit that the ICC is far from perfect, ASPA seems to go to extreme and unnecessary lengths to assert American opposition to the court.

The Rome Statute that created the ICC was drafted at the Rome Diplomatic Conference of 1998.<sup>12</sup> After negotiations involving delegations from 160 countries and 250 non-governmental organizations,<sup>13</sup> the final vote on July 17, 1998 counted 120 countries voting for the Rome Statute, seven voting against it, and twenty-one abstentions.<sup>14</sup> The seven countries opposed to the Statute were Libya, Israel, Qatar, Yemen, Algeria, China, and the United States.<sup>15</sup> Almost all of the United States' traditional allies,<sup>16</sup> including all fifteen members of the European Union ("EU") and three of the five permanent members of the United Nations ("U.N.") Security Council, voted for the Statute.<sup>17</sup>

The Rome Statute established the ICC, which is composed of the following units:<sup>18</sup> the Presidency;<sup>19</sup> three Divisions (Appeals, Trial, and

<sup>10</sup> See *infra* text accompanying notes 145–148.

<sup>11</sup> These involvements include military engagements in Afghanistan and Iraq, as well as coordinated efforts with other countries as part of the Bush Administration's "War on Terror." See, e.g., Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 38 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001) ("Our war on terror begins with Al Qaeda, but it does not end there.").

<sup>12</sup> The creation of the ICC marks the culmination of a move toward international criminal justice that began after World War II. Four international criminal courts preceded the ICC: the tribunals established after World War II in Tokyo and Nuremberg, and the International Criminal Tribunals established in Yugoslavia and Rwanda in the 1990s. See generally John E. Noyes, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 224–25 (1999) (placing the ICC in a historical context). The jurisprudence of these courts helped to establish the idea of individual responsibility for crimes such as genocide, and the ICC follows in this tradition by focusing entirely on individual criminal responsibility. See *Rome Statute*, *supra* note 1, art. 24. The ICC differs from these predecessors in two key respects. First, whereas previous tribunals had geographically limited jurisdictions, the ICC is global in its scope. See Noyes, *supra*, at 225. Second, the ICC is a permanent court as opposed to an ad hoc tribunal of limited tenure. See *Rome Statute*, *supra* note 1, art. 1.

<sup>13</sup> Leila Sadat Wexler, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 242 (2002).

<sup>14</sup> See 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 2002, 116 Stat. 820, 900 (to be codified at 22 U.S.C. § 7421) (listing voting history).

<sup>15</sup> See Wexler, *supra* note 13, at 243. This grouping is striking given that the six countries joining the United States have been widely criticized for their human rights records.

<sup>16</sup> "Traditional allies" here refers to fellow members of the North Atlantic Treaty Organization, as well as countries perceived as sharing United States support for international *ius cogens*.

<sup>17</sup> See Wexler, *supra* note 13, at 243.

<sup>18</sup> See *Rome Statute*, *supra* note 1, art. 34.

<sup>19</sup> *Id.* art. 38. The Presidency is made up of the President and First and Second Vice-Presidents, and it is primarily responsible for the "proper administration of the Court, with

Pre-Trial);<sup>20</sup> the Office of the Prosecutor;<sup>21</sup> the Registry;<sup>22</sup> and an Assembly of States Parties made up of all member states.<sup>23</sup> The seat of the Court is at the Hague.<sup>24</sup>

Under the Rome Statute, the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>25</sup> This jurisdiction is based on the principles of nationality and territoriality<sup>26</sup> and can be exercised when either a state party or the U.N. Security Council refers a crime to the Prosecutor, or when the Prosecutor initiates an investigation *proprio motu* (on the Prosecutor's own initiative).<sup>27</sup> The Rome Statute nevertheless severely limits the Court's jurisdiction by holding it to the principle of complementarity, which does not permit the ICC to hear a case that has been, or is being, investigated or prosecuted by a state with jurisdiction over it.<sup>28</sup> The ICC can therefore only rule on cases that the state in whose jurisdiction they fall has chosen not to pursue.

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the exception of the Office of the Prosecutor." *Id.*

<sup>20</sup> *Id.* art. 39. The Pre-Trial and Trial Divisions are each composed of at least six judges, most of whom must have criminal trial experience. *Id.* The Appeals Division is composed of the President and four other judges. *Id.* These Divisions in turn make up the Chambers, which are responsible for the Court's judicial functions. *Id.* The Appeals Chambers is composed of all the judges in the Appeals Division, while the Pre-Trial and Trial Chambers are each composed of three of their respective judges (although the Pre-Trial Chamber can be composed of only one Pre-Trial Division judge in certain circumstances). *Id.*

<sup>21</sup> *Id.* art. 42. The Office of the Prosecutor is made up of the Prosecutor; Deputy Prosecutors, who must be of different nationalities than the Prosecutor; and advisers appointed by the Prosecutor with legal experience on specific issues. *Id.* The Prosecutor, who is entirely independent of the other organs of the Court, is responsible for initiating and pursuing investigations and charging suspects. *Id.* arts. 42, 53, 61.

<sup>22</sup> *Id.* art. 43. The Registry, made up of the Registrar and Deputy Registrar, is "responsible for the non-judicial aspects of the administration and servicing of the Court" and the maintenance of a Victims and Witnesses Unit. *Id.*

<sup>23</sup> *See id.* art. 112; *infra* text accompanying notes 32–35.

<sup>24</sup> *Rome Statute, supra* note 1, art. 3.

<sup>25</sup> *Id.* art. 5.

<sup>26</sup> *See id.* art. 12. The Court has jurisdiction when a state party (or a non-party state that has accepted the Court's jurisdiction) is either "the State on the territory of which the conduct in question occurred" or "the State of which the person accused of the crime is a national." *Id.* art. 12(2). While this means that territorial jurisdiction can be extended over the citizens of a non-party state, this is not universal jurisdiction, which was explicitly rejected at the Rome Conference. *See* Ambassador David Scheffer, International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999) (stating that Article Twelve "is not an article that grants the Court universal jurisdiction over the list of crimes in Article [Five]" because "[a] proposal to that effect was defeated at Rome"), available at <http://www.iccnw.org/documents/otherissues/DavidSchefferAddressOnICC.doc>. This jurisdiction can extend to the heads of state of non-party states. *See Rome Statute, supra* note 1, art. 27.

<sup>27</sup> *See Rome Statute, supra* note 1, arts. 13, 15. The Prosecutor's power to initiate investigations or prosecutions is limited, however. The Prosecutor first requires the authorization of the Pre-Trial Chamber to go forward with an investigation or prosecution. *See id.* art. 15. This in turn requires the Prosecutor to notify all state parties and all states that would normally exercise jurisdiction over the crimes concerned. *See id.* art. 18. The Prosecutor's independence is further limited by the provision that the U.N. Security Council can defer investigation or prosecution. *See id.* art. 16.

<sup>28</sup> *See id.* art. 17. The only exception to this principle is that the ICC can exercise ju-

The three Divisions of the ICC are made up of a total of eighteen judges, each of whom must be a national of a state party.<sup>29</sup> Judgeships on the Court are full-time positions, and judges are expected to be independent and impartial; the Rome Statute includes provisions for the disqualification of biased judges.<sup>30</sup> The Prosecutor is a separate organ of the Court, independent of the judges and all other organs.<sup>31</sup> Above these organs lies the Assembly of States Parties, which is made up of one representative from each state party.<sup>32</sup> This group oversees the administration of the Court, decides the Court's budget, determines the number of judges, and generally shapes the ICC as a whole.<sup>33</sup> After July 1, 2009, this Assembly may also consider amendments to the Rome Statute,<sup>34</sup> including proposals for a definition of the currently undefined crime of aggression.<sup>35</sup>

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jurisdiction over a case if the state that would otherwise be able to prosecute the case "is unwilling or unable genuinely to carry out the investigation or prosecution." *Id.* art. 17(1)(a). The Rome Statute defines "unwillingness" as when a state initiates proceedings for the purpose of shielding a person, engages in unjustified delay, or conducts proceedings that are not independent and impartial. *Id.* art. 17(2). It defines "inability" as when a state is unable to carry out its proceedings "due to a total or substantial collapse or unavailability of its national judicial system." *Id.* art. 17(3).

<sup>29</sup> *See id.* art. 36. These judges both decide the cases before the court and vote for the President and First and Second Vice-Presidents. *See id.* art. 38.

<sup>30</sup> *See id.* arts. 40–41. Impartiality is defined as judges "not engag[ing] in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence." *Id.* art. 40(2). The disqualification of a judge is determined by an absolute majority of the Court's other judges. *See id.* art. 41(2)(c).

<sup>31</sup> *See id.* art. 42.

<sup>32</sup> *See id.* art. 112. The Assembly also consists of a Bureau of a President, two Vice-Presidents, and eighteen elected members. *Id.* Each state party has one vote. *Id.* State parties that are significantly in arrears in their required financial contribution to the Court may not vote, nor may observers vote. *Id.* The Assembly may establish necessary subsidiary bodies such as an independent oversight mechanism. *Id.*

<sup>33</sup> *See id.* art. 112.

<sup>34</sup> *See id.* art. 121. After this date, amendments may be proposed by any state party. *Id.* The Assembly then votes on amendments, which require a two-thirds majority to pass. *Id.* Upon passage, amendments enter into force for all state parties one year after ratification. *Id.* Amendments regarding the crimes under the Court's jurisdiction, however, only enter into force for those state parties that have agreed to them. *Id.*

<sup>35</sup> *See id.* art. 5(2) (foreseeing the definition of the crime of aggression under Article 121). Before the Rome Statute entered into force, countries were already proposing various definitions of the crime of aggression. *See, e.g.,* Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/1999/INF/2 (1999) (compiling the proposed definitions of aggression before the Preparatory Commission for the International Criminal Court). Once the Court came into existence, the Assembly of States Parties began accepting proposals for definitions of the crime of aggression to be considered after July 1, 2009. *See* Assembly of States Parties to the Rome Statute, 1st Sess., U.N. Doc. ICC-ASP/1/L.4 (2003). Cuba proposed the following definition for the crime of aggression:

an act committed by a person who, being in the position of effectively controlling or directing the political, economic or military actions of a State, orders, permits or participates actively in the planning, preparation, initiation or execution of an act that directly or indirectly affects the sovereignty, the territorial integrity or the political or economic independence of another States, in a manner inconsistent with the Charter of the United Nations.

Since the ICC depends on international cooperation at all points during a case to ensure the just adjudication of a trial, the Rome Statute specifies provisions for requests for cooperation sent out by the Court.<sup>36</sup> Although state parties are generally required to comply with such requests, the Rome Statute provides for certain exceptions. If the disclosure of information or documents would threaten national security, for example, the Statute does not require disclosure.<sup>37</sup> Also, if requests for cooperation would require a state party either to act inconsistently with respect to the immunity of the person or property of a third state or to violate an agreement requiring a third state's consent for cooperation, Article 98 of the Rome Statute frees the state party from cooperating with the court.<sup>38</sup>

Once a case has reached the trial level, the Rome Statute provides for many procedural due process protections;<sup>39</sup> these do not include a right to a jury trial.<sup>40</sup> A criminal convicted by the ICC can be fined<sup>41</sup> or sentenced to imprisonment, including life imprisonment for crimes of

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*Id.*

<sup>36</sup> See *id.* art. 87. If state parties do not comply with such requests, the Court may refer the matter to the Assembly of States Parties, or to the Security Council if the Security Council referred the matter to the Court. See *id.* art. 87(7). The Court may also make requests to a non-party state if this state has entered into an ad hoc agreement with the Court. See *id.* art. 87(5). Such requests for cooperation can relate to the arrest and surrender of a person or other forms of cooperation such as the provision of documents, the protection of victims and witnesses, and the taking of evidence. See *id.* arts. 89–93.

<sup>37</sup> See *id.* art. 72. While the threat to national security is to be determined by the state itself, the Rome Statute calls for the ICC to request further consultations to determine the validity of the state's concern. See *id.* If this fear is found to be unwarranted, and the state is thus "not acting in accordance with its obligations," the Court may refer the matter to the Assembly of States Parties or to the Security Council if the Security Council referred the matter to the Court. *Id.*

<sup>38</sup> See *id.* art. 98 (prohibiting the Court from "proceed[ing] with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law," regarding both diplomatic immunity and agreements requiring the consent of a sending state).

<sup>39</sup> See generally *id.* Rights provided by the Rome Statute include: protection against double jeopardy, *id.* art. 20; protection from ex post facto crimes (here referred to as "nulum crimen sine lege"), *id.* art. 22; protection from warrantless search and seizure, *id.* arts. 57(3)(e), 58; protection against self-incrimination, *id.* arts. 55, 67(1)(g); right to a written statement of charges, *id.* art. 61(3); protection against trials in absentia, *id.* arts. 63, 67(1)(d); presumption of innocence, *id.* art. 66; speedy and public trials, *id.* arts. 67(1)(a), (c); right to counsel, *id.* arts. 67(1)(b), (d); right to cross-examination of witnesses at trial, *id.* art. 67(1)(e); right to remain silent, *id.* art. 67(1)(g); and exclusion of illegally obtained evidence, *id.* art. 69(7). See also Monroe Leigh, Editorial Comment, *The United States and the Statute of Rome*, 95 AM. J. INT'L. L. 124, 130–31 (2001) (cataloguing the above protections).

<sup>40</sup> See *infra* text accompanying notes 108–109. One of the many arguments for the United States joining the ICC is that United States negotiators contributed to the framing of these protections during the drafting of the Statute. See Christopher L. Blakesley, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 237–38 (1999) (arguing that the United States should take an active role in the creation of the ICC).

<sup>41</sup> *Id.* art. 77.

“extreme gravity.”<sup>42</sup> Appeals are permitted on any grounds affecting “the fairness or reliability of the proceedings or decision.”<sup>43</sup>

Although the Rome Statute creating the ICC was drafted at the Rome Diplomatic Conference in 1998, it could not enter into force for any signatories until it had been ratified by sixty countries,<sup>44</sup> a requirement that was met on July 1, 2002.<sup>45</sup> On September 3, 2002, with seventy-six members in attendance, Zeid bin Raad, Jordan’s envoy to the U.N., was elected to the Presidency, and the Court was expected to start operating in the spring of 2003.<sup>46</sup> The United States, though arguably the strongest potential member of the Court, remained outside the list of state participants.<sup>47</sup>

American opposition to the ICC goes back to the Rome Diplomatic Conference itself, when the United States delegation refused to sign the Rome Statute because it claimed that negotiations had not produced an institution with sufficient protections for United States interests.<sup>48</sup> When President Clinton eventually signed the Statute on December 31, 2000,<sup>49</sup> he qualified his position by stating, “I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.”<sup>50</sup> Senator Jesse Helms (R-N.C.), Chairman of the Committee on Foreign Relations, went even further in his opposition to the Rome Statute, arguing that the signature of the United States was “as outrageous as it is inexplicable,” and vowing that it “will not stand.”<sup>51</sup> Responding to this sentiment, President Bush

<sup>42</sup> *Id.* art. 77. For most crimes, sentences are limited to imprisonment of thirty years or less. *See id.*

<sup>43</sup> *Id.* art. 81.

<sup>44</sup> *See id.* art. 126.

<sup>45</sup> *See* U.N., *supra* note 1.

<sup>46</sup> *See World Briefing United Nations: Criminal Court Moves Ahead*, N.Y. TIMES, Sept. 4, 2002, at A5; Preston, *supra* note 2, at A6. The Court was inaugurated on March 11, 2003, when eighteen judges were sworn in. Ian Black, *International Criminal Court Sworn in*, GUARDIAN (LONDON), Mar. 12, 2003, at 16.

<sup>47</sup> *See* U.N., *supra* note 1.

<sup>48</sup> *See* Leigh, *supra* note 39, at 124–25. One of the Clinton Administration’s primary objections to the ICC at the time was the jurisdiction over citizens of non-party states permitted under Article 12 of the Rome Statute, which the United States opposes out of the belief that it could lead to the “unwarranted exposure of U.S. personnel to the ICC’s jurisdiction.” Scheffer, *supra* note 26. *See also* Barbara Crossette, *U.S. Accord Being Sought on U.N. Dues and on Court*, N.Y. TIMES, Dec. 7, 2000, at A6.

<sup>49</sup> Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 132 (2001). Clinton’s action made the United States a signatory to the treaty, but the United States must ratify the treaty in order to become a party. *See* U.N., *supra* note 1.

<sup>50</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 2002, 116 Stat. 820, 900 (to be codified at 22 U.S.C. § 7421).

<sup>51</sup> Diane Marie Amann & M.N.S. Sellers, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVth International Congress of Comparative Law: Section IV: The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 381 (2002).

strengthened American resistance to the ICC by retracting the signature of the United States on the Rome Statute on May 6, 2002.<sup>52</sup>

Even prior to this retraction, congressional opponents of the ICC had already devised numerous legislative responses to its imminent creation. Legislators such as Representatives Ron Paul (R-Tex.) and Henry Hyde (R-Ill.) proposed resolutions that recommended withdrawing the United States' signature<sup>53</sup> or offered more general recommendations for withholding support from the ICC.<sup>54</sup> While one bill prohibiting United States financial assistance to the ICC passed in 2001,<sup>55</sup> most of this proposed legislation was never voted into law.

As these legislative responses to the ICC were being debated, the American government was simultaneously turning to forceful diplomatic tactics to exempt itself from the reach of the ICC. After the Rome Statute came into effect in July 2002, the United States demanded that the U.N. Security Council grant it a renewable one-year provision for blanket immunity from the ICC.<sup>56</sup> When the other members of the Council balked, the United States threatened not to renew the mandates of two U.N. peacekeeping missions in Bosnia and Croatia.<sup>57</sup> On July 12, 2002, the Security

<sup>52</sup> See 148 CONG. REC. E775 (daily ed. May 9, 2002) (statement of Rep. Paul (R-Tex.)) (applauding President Bush's renunciation).

<sup>53</sup> See, e.g., H.R. Con. Res. 23, 107th Cong. (2001). House Concurrent Resolution Twenty-Three, "[e]xpressing the sense of the Congress that President George W. Bush should declare to all nations that the United States does not intend to assent to or ratify the International Criminal Court Treaty, also referred to as the Rome Statute of the International Criminal Court, and the signature of former President Clinton to that treaty should not be construed otherwise," was introduced in the House in February 2001, see 147 CONG. REC. H254 (daily ed. Feb. 8, 2001), but received no floor debate.

<sup>54</sup> See, e.g., H. Amdt. 408, 107th Cong. (2001); H.R. 4169, 107th Cong. (2002). House Amendment 408, an amendment sponsored by Representative Hyde to the Department of Defense Appropriations Act of 2002, H.R. 3338, 107th Cong. (2001), that would have prohibited "any funding to provide support or assistance to the United Nations International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court," was offered on November 28, 2001. 147 CONG. REC. H8441-03 (daily ed. Nov. 28, 2001). The amendment was agreed to in the House but not included in the final appropriations act. See Department of Defense Appropriations Act of 2002, Pub. L. No. 107-117, 115 Stat. 2229 (2002). House Bill 4169, introduced by Representative Paul on April 11, 2002 and forwarded to the House Committee on International Relations, advocated the formal rescission of the United States' signature to the Rome Statute, a prohibition on using United States government funds to assist the ICC, and the taking of "such steps as are necessary to prevent the establishment of the International Criminal Court." H.R. 4169, 107th Cong. § 3 (2002).

<sup>55</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-77, § 624, 115 Stat. 748, 803 (to be codified at 16 U.S.C. § 1856) ("None of the funds appropriated or otherwise made available by this Act shall be available for cooperation with, or assistance or other support to, the International Criminal Court or the Preparatory Commission"). This provision, which was added by amendment, was sponsored by Senator Larry E. Craig (R-Id.). See S. Amdt. 1536, 107th Cong. (2001).

<sup>56</sup> See Serge Schmemann, *U.S. Peacekeepers Given Year's Immunity From New Court*, N.Y. TIMES, July 13, 2002, at A3.

<sup>57</sup> See *Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L. 706, 726 (Sean D. Murphy ed., 2002) [hereinafter *Contemporary Practice*].



Council arrived at a compromise that granted a one-year exemption from the court's jurisdiction to U.N. peacekeeping personnel from non-party states to the ICC.<sup>58</sup>

Even as legislative responses to the Rome Statute aimed directly at the ICC were being considered, a new breed of proposed bills developed focusing instead on the other countries considering ratification of the Rome Statute. In 2000, 2001, and 2002, Congress considered withholding military aid from any country that signed on to the Court, thereby attempting to deprive the ICC of enough members to make it effective. The first of these bills, the American Servicemembers Protection Act of 2000,<sup>59</sup> was introduced by Senator Helms on June 14, 2000 but never made it into law.<sup>60</sup> In 2001, both Senator Helms and Representative DeLay proposed new versions of the American Servicemembers Protection Act,<sup>61</sup> but, again, neither attempt succeeded.<sup>62</sup>

In 2002, Representative DeLay again proposed the American Servicemembers Protection Act, this time as an amendment to the 2002 Supple-

<sup>58</sup> Resolution 1422, U.N. Security Council, 4572d Mtg., S/RES/1422 (2002). This compromise struck some members of the diplomatic community as unusual. See Schmemmann, *supra* note 56, at A3 (quoting the Canadian ambassador to the U.N. as being "extremely disappointed with the outcome" and an international justice specialist at Amnesty International who viewed the compromise as "an unlawful Security Council resolution"). Nevertheless, this was not the first time a country had negotiated immunity from the ICC. In 1998, even before the Court came into effect, France used a provision of the Rome Statute to arrange for immunity for its soldiers on U.N. peacekeeping missions for seven years. See U.N., *supra* note 1. Article 124 permits parties to the ICC not to accept the Court's jurisdiction for war crimes for seven years after the Rome Statute enters into force for those states. See Rome Statute, *supra* note 1, art. 124. See also John Tagliabue, *More Nations Said to Back World Court Exemptions*, N.Y. TIMES, Sept. 1, 2002, § 1, at 16. The French compromise was based on an agreement to ratify the Rome Statute in the future. See Crossette, *supra* note 48, at A6. The American agreement, by contrast, was based on a threat to block future U.N. peacekeeping missions. See *Contemporary Practice*, *supra* note 57, at 726.

<sup>59</sup> S. 2726, 106th Cong. (2000).

<sup>60</sup> Leigh, *supra* note 39, at 130. The 2000 version of the American Servicemembers Protection Act, which was sent to the Senate Committee on Foreign Relations, prohibited any cooperation either with the ICC, see S. 2726, 106th Cong. § 4 (2000), or with U.N. peacekeeping missions that would put United States military personnel at risk of ICC prosecution, see *id.* § 5; prohibited transfer of national security information to the ICC, see *id.* § 6; forbade military assistance to ICC state parties (except allies), see *id.* § 7; and permitted the United States to free "persons held captive by or on behalf of the International Criminal Court," *id.* § 8.

<sup>61</sup> See S. Amdt. 1690 to National Defense Authorization Act for Fiscal Year 2002, S. 1438, 107th Cong. (2001); H. Amdt. 31 to Foreign Relations Authorization Act, H.R. 1646, 107th Cong. (2002).

<sup>62</sup> See *Respect for a World Court*, BOSTON GLOBE, Dec. 21, 2001, at A22; Adam Clymer, *House Panel Approves Measures to Oppose New Global Court*, N.Y. TIMES, May 11, 2002, at A3. Senator Helms' proposal for the American Servicemembers Protection Act of 2001 passed both houses of Congress but was then removed in conference before final passage into law. See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1011 (2002). The DeLay amendment was agreed to in the House, but was not included in the final bill. See Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1349 (2002).

mental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States.<sup>63</sup> On August 2, 2002, the appropriations bill became law, and, in Title II of the Act, after two years of trying, Congress had finally passed ASPA.<sup>64</sup> Only one month after the ICC came into being, the United States had passed a strong legislative response.

Following the lead of many of the earlier proposed bills, ASPA forbids any United States government entity from providing support for the ICC. Specifically, this bill prohibits any such body from cooperating with a request for cooperation from the ICC, including transmitting any letters rogatory from the ICC, aiding in the transfer of a United States citizen or permanent resident alien to the ICC, or assisting in the extradition of any person to the ICC.<sup>65</sup> Furthermore, no federal funds may be used to assist in any actions against a United States citizen or permanent resident alien before the Court,<sup>66</sup> and the President must establish appropriate safeguards to prevent national security information from being transferred, either directly or indirectly, to the ICC.<sup>67</sup> In order to ensure that these provisions are met, United States courts and government bodies may limit their interpretation of any mutual legal assistance treaties to comply with ASPA.<sup>68</sup>

ASPA further expresses American opposition to the ICC by restricting American actions abroad. Members of the United States Armed Forces are prohibited under the Act from participating in any U.N. peacekeeping or peace enforcement operation unless such an operation permanently

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<sup>63</sup> 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001–2015, 116 Stat. 820, 899–909 (to be codified at 22 U.S.C. §§ 7421–7432).

<sup>64</sup> *See id.* As an amendment to an appropriations bill, the legislation went through the Appropriations Committee rather than the International Relations Committee, which would most likely have had a greater understanding of the foreign policy implications of both ASPA and the ICC. *See* Clymer, *supra* note 62, at A3.

<sup>65</sup> 2002 Supplemental Appropriations Act § 2004.

<sup>66</sup> *See id.* § 2004(f).

<sup>67</sup> *See id.* § 2006 (requiring the President to “ensure that appropriate procedures are in place to prevent the transfer of classified national security information and law enforcement information to the International Criminal Court” or a party to the ICC).

<sup>68</sup> *See id.* § 2004(g) (requiring the United States to “exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance . . . to which the United States is a party”). The President is permitted to waive Sections 2004 and 2006, and thereby permit cooperation with the ICC, if he or she determines that the investigation or prosecution is in the United States’ national interest and that the person charged is not a current or former “covered” United States or allied person. *See id.* A covered United States person is defined as a member of the United States Armed Forces, an elected or appointed official of the United States government, or any other person employed by or working on behalf of the United States government. *Id.* § 2013. Covered allied persons are military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a North Atlantic Treaty Organization (“NATO”) member country, a major non-NATO ally, or Taiwan as long as that government is not a party to the ICC. *Id.* §§ 2003(c), 2013. *See infra* note 75 (listing countries defined as major non-NATO allies).

exempts participating Americans from any assertion of jurisdiction by the ICC.<sup>69</sup> For other joint command operations, where a member of the United States Armed Forces could be under the control of allied states that are under the jurisdiction of the ICC, ASPA requires the President to suggest modifications to reduce the risk of Americans being subjected to this jurisdiction.<sup>70</sup> Effective July 1, 2003, ASPA also forbids the United States from granting military assistance to the government of an ICC state party.<sup>71</sup> While this provision could theoretically end United States military aid to dozens of countries,<sup>72</sup> ASPA exempts many countries from this harsh prohibition: waivers are permitted if the President deems assistance to be in the national interest;<sup>73</sup> if the country receiving assistance has signed an Article 98 agreement preventing the country from aiding in the investigation or prosecution of United States citizens and permanent resident aliens;<sup>74</sup> or if the country receiving assistance is a North Atlantic Treaty Organization (“NATO”) member country, a major non-NATO ally, or Taiwan.<sup>75</sup>

Moreover, if any covered United States or allied person is detained or imprisoned by the ICC, ASPA authorizes the President to use “all means necessary and appropriate” to bring about that person’s release.<sup>76</sup> Despite the fact that this provision earned ASPA the nickname the “Hague Invasion Act,”<sup>77</sup> such means are not limited to military actions but can also include the provision of legal assistance.<sup>78</sup>

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<sup>69</sup> See *id.* § 2005. One exception to this provision is ASPA’s grant to the President of permission to assign forces to a U.N. mission that does not provide for such an exemption if United States national interest would justify participation in the operation. See *id.* § 2005(c). Additionally, if the ICC enters into a binding agreement not to assert jurisdiction over any current or former covered United States or allied person, ASPA permits a waiver on its prohibition against participation in U.N. peacekeeping missions. See *id.* § 2003(a).

<sup>70</sup> See *id.* § 2009 (referring to all “military alliance[s] to which the United States is party”).

<sup>71</sup> See *id.* § 2007. This provision is a break from many of the previous proposed bills opposing the ICC. See *supra* notes 54–55 and accompanying text.

<sup>72</sup> See BUREAU OF THE CENSUS, DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 797 tbl.1293 (2001) (calculating United States economic and military aid to foreign countries as \$15.987 billion in 1999).

<sup>73</sup> See 2002 Supplemental Appropriations Act § 2007(b) (permitting the President to waive the prohibition of military assistance “if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition”).

<sup>74</sup> See *id.* § 2007(c). See also *supra* note 38 and accompanying text.

<sup>75</sup> See 2002 Supplemental Appropriations Act § 2007(d). ASPA defines major non-NATO allies to include Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand. *Id.*

<sup>76</sup> *Id.* § 2008.

<sup>77</sup> See *The Hague Invasion Act*, ST. LOUIS POST-DISPATCH, Oct. 24, 2001, at B6 (describing European fears of American aggression in defiance of international legal institutions).

<sup>78</sup> See 2002 Supplemental Appropriations Act § 2008(c).

Along with provisions for waivers of and exemptions from particular provisions, ASPA also provides a general exemption, specifying that none of its provisions should act to prohibit the United States from participating in any way in international efforts to bring foreign nationals accused of genocide, war crimes, or crimes against humanity to justice.<sup>79</sup> The section providing this exemption expressly refers to Saddam Hussein, Slobodon Milosevic, Osama bin Laden, other members of Al Qaeda, and leaders of Islamic Jihad as such foreign nationals.<sup>80</sup>

Now that ASPA has passed into law, the ability of the United States to coerce other countries into Article 98 agreements, and thereby partially insulate itself from the Court's jurisdiction, increases significantly.<sup>81</sup> The Act allows the United States to threaten to withhold military assistance from ICC state parties,<sup>82</sup> giving American officials a new statutory tool to wield in their efforts to exempt their country from the Court's reach.<sup>83</sup> Although ASPA limits the countries from which the United States can withhold military aid,<sup>84</sup> its passage still served as a warning to much of the international community since American military aid, in the form of education, training, and monetary aid, is sent to a wide range of countries.<sup>85</sup>

Much of the domestic support for ASPA grows out of general opposition to the ICC.<sup>86</sup> In the text of the Act itself, President Clinton's United States Ambassador at Large for War Crimes Issues, David Scheffer, is quoted as describing the Rome Statute as leaving the United States "with consequences that do not serve the cause of international justice."<sup>87</sup> Legislators such as Senator Helms have referred to the ICC as an "inter-

<sup>79</sup> *Id.* § 2015.

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

<sup>81</sup> See *supra* note 38 and accompanying text. For more on the United States exercising this ability, see *infra* notes 136–138 and accompanying text.

<sup>82</sup> See 2002 Supplemental Appropriations Act § 2007. See also *supra* text accompanying notes 71–75.

<sup>83</sup> See Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers' Immunity*, N.Y. TIMES, Aug. 10, 2002, at A1 (reporting United States threats to withhold military aid from countries that do not agree to shield United States peacekeepers from the ICC).

<sup>84</sup> See *supra* text accompanying notes 71–75.

<sup>85</sup> See *supra* note 72.

<sup>86</sup> See, e.g., John R. Bolton, *Unsign That Treaty*, WASH. POST, Jan. 4, 2001, at A21 (responding to President Clinton's signing of the Rome Statute). John R. Bolton is now the Bush Administration's Undersecretary of State for Arms Control and International Security. American opposition to the ICC was succinctly explained by Marc Grossman, United States Undersecretary of State for Political Affairs, in the notice that the Bush Administration sent to the U.N. regarding its intention not to make the United States a state party. See *Contemporary Practice*, *supra* note 57, at 724. The notice gave several arguments against joining the ICC: "(1) it undermined the role of the U.N. Security Council in maintaining international peace and security; (2) it created a prosecutorial system that is an unchecked power; (3) it purports to assert jurisdiction over nationals of states that have not ratified the treaty; and (4) it is therefore built on a 'flawed foundation.'" *Id.*

<sup>87</sup> 2002 Supplemental Appropriations Act § 2002.

tional kangaroo court,”<sup>88</sup> and New York Times columnist William Safire dubbed it a “globocourt.”<sup>89</sup>

One of the primary concerns driving American opposition to the ICC is the fear that the Rome Statute will lead to Americans being brought before the Court, despite American non-participation in the institution.<sup>90</sup> Given that the ICC’s jurisdiction is not limited to any specific set of individuals, however, the ICC could also exercise jurisdiction over American civilians abroad.<sup>91</sup> This general concern about Americans being prosecuted before the ICC is based on a belief that the Court will pursue politically motivated prosecutions and treat citizens of a global superpower differently than other suspects due to the political motives of parties to the Court.<sup>92</sup> Opponents of the Court argue that the Prosecutor can easily act on such motivations because of his or her ability to initiate investigations independently.<sup>93</sup>

As reflected in the references within the Act to protecting “senior officials of the United States government,”<sup>94</sup> ASPA supporters particularly fear that high-ranking government officials could be brought before the ICC. Threatened legal actions against former Secretary of State Henry Kissinger regarding his involvement in the 1973 Chilean coup that led to Augusto Pinochet’s rise to power have helped to highlight this concern.<sup>95</sup>

<sup>88</sup> Amann & Sellers, *supra* note 51, at 385.

<sup>89</sup> William Safire, *Enter the Globocourt*, N.Y. TIMES, June 20, 2002, at A25.

<sup>90</sup> See 2002 Supplemental Appropriations Act § 2002(8) (“Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court.”). This concern applies most directly to American soldiers abroad, either in combat or conducting a peace-keeping mission. See Press Release, Office of the House Majority Whip, DeLay Calls ICC “Threat to America’s Soldiers and Leaders”; Those Who Protect Us Deserve Protection (May 14, 2002) [hereinafter DeLay Threat Press Release] (“Under the ICC, our soldiers fighting in terrible conditions at far corners of the globe will now be at a risk of politically motivated prosecutions and imprisonment by a rogue court.”), available at [http://www.tomdelay.com/html/prelease.cfm?release\\_id=244](http://www.tomdelay.com/html/prelease.cfm?release_id=244).

<sup>91</sup> See Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 24–33 (2001) (foreseeing the prosecution of non-combatant civilian employees working alongside the military). Commentators have also voiced concern regarding former military combatants later being brought under the ICC’s jurisdiction when traveling abroad as civilians. See Guillory, *supra* note 49, at 132.

<sup>92</sup> See Amann & Sellers, *supra* note 51, at 389 (“Opponents have maintained that because a majority of the Assembly of States Parties will select and may fire the prosecutor, the character and motivations of the prosecutor will reflect the character and motivations of a majority of states parties.”).

<sup>93</sup> See *Rome Statute*, *supra* note 1, arts. 13(c), 15 (granting Prosecutor authority to conduct investigations *proprio motu*).

<sup>94</sup> 2002 Supplemental Appropriations Act § 2002(9). The Rome Statute makes explicit provisions for trying both members of government and civilians as individuals with criminal responsibility, which highlights the recent move away from head of state immunity. See *Rome Statute*, *supra* note 1, art. 27 (“This Statute shall apply equally to all persons without any distinction based on official capacity.”). For a discussion of the shift away from head of state immunity, see Gilbert Sison, Recent Development, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L.Q. 1583 (2000).

<sup>95</sup> See generally CHRISTOPHER HITCHENS, TRIAL OF HENRY KISSINGER (2001) (detail-

The text of the Rome Statute, however, reveals many of these fears to be unfounded. First, it is unlikely that any United States personnel would be subject to politically motivated prosecutions given the limited types of crimes covered by the Statute.<sup>96</sup> Second, the principle of complementarity protects against the specter of politically motivated prosecutions.<sup>97</sup> Since a case will only come before the ICC if the national courts of the defendant are unwilling or unable to prosecute it, an American would only be brought before the ICC if not tried by American prosecutors before an American court. Thus, the ICC can be seen as a default jurisdiction, taking cases only when other possible courts have refused them.<sup>98</sup> Third, the Rome Statute requires that biased judges be excused<sup>99</sup> and restricts the Prosecutor's ability to initiate investigations.<sup>100</sup> The Prosecutor has no independent power to begin an investigation or legal process<sup>101</sup> and can be barred from continuing with an investigation or prosecution throughout the process.<sup>102</sup> Since the ICC Prosecutor arguably has less authority than a United States district attorney or county prosecutor,<sup>103</sup> the claim that the ICC will pursue politically motivated prosecutions appears quite weak.

A further concern of ASPA supporters focuses on specific provisions of the Rome Statute that the American government finds particularly offensive. First on this list is the lack of rights provided to defendants before the Court. Members of Congress and other public officials who oppose the Court have repeatedly voiced their fears of Americans being denied a jury trial, the right to cross-examine witnesses, and protection from

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ing the crimes against humanity with which Kissinger could potentially be charged were universal jurisdiction asserted over his official acts); Michael J. Kelly, *Kissinger's World: A Cautionary Tale Through a Cold War Lens*, 3 SAN DIEGO INT'L. L.J. 133, 142-43 (2002) (stating that Kissinger has been served with orders to appear in courts in France, Argentina, and Chile to testify regarding his involvement in such crimes).

<sup>96</sup> See *supra* text accompanying note 25 (describing the four crimes over which the ICC exercises jurisdiction). See also John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 101-02 (quoting a member of the United States delegation to the Rome Conference as saying that "politically motivated international prosecutions . . . of U.S. military personnel would be quite improbable").

<sup>97</sup> See *supra* note 28 and accompanying text. The principle of complementarity was first implemented at the Nuremberg tribunal. Wexler, *supra* note 12, at 249. Since the Nuremberg tribunal only tried major war criminals, minor offenders were tried where their crimes had occurred. *Id.*

<sup>98</sup> See *id.* at 250.

<sup>99</sup> See *Rome Statute*, *supra* note 1, art. 41. Judges can either be excused at their own or the Prosecutor's request or disqualified from a case if their "impartiality might reasonably be doubted on any ground." *Id.*

<sup>100</sup> See *supra* note 27 (describing limits on investigations proprio motu). See also Leigh, *supra* note 39, at 129-30; Amann & Sellers, *supra* note 51, at 389 (emphasizing limits on Prosecutor's independence).

<sup>101</sup> See *supra* note 27.

<sup>102</sup> See *supra* note 27.

<sup>103</sup> Leigh, *supra* note 39, at 128.

self-incrimination.<sup>104</sup> As Senator Robert F. Bennett (R-Utah) stated, one common reaction to the ICC is a fear of Americans losing “any rights [they] currently have under the U.S. Constitution.”<sup>105</sup>

Despite these claims, however, the ICC protects many rights equivalent to those found in the federal Constitution, with the Rome Statute delineating a list of rights more detailed than that in the American Bill of Rights.<sup>106</sup> Moreover, while ASPA supporters are correct that the ICC does not provide for trial by jury, Fifth and Sixth Amendment rights would not be permitted under the American military justice system in any case.<sup>107</sup>

A further weakness envisioned by opponents of the ICC is the Court’s lack of accountability to individual nations. American opponents of the Court fear that the power of the United States on the world stage will not be enough to sway this “unaccountable new international legal bureaucracy,”<sup>108</sup> making strong countermeasures such as ASPA necessary to tame this uncontrollable new entity. Not only are judges nominated from different member states,<sup>109</sup> but the United States will not be able to veto whatever decision these international judges hand down.<sup>110</sup>

<sup>104</sup> See, e.g., Press Release, Office of the House Majority Whip, DeLay Amendment to Protect American Service Members Passes Overwhelmingly (May 10, 2001) [hereinafter DeLay Amendment Press Release] (on file with author). According to Representative DeLay, “[Americans] could be denied a jury trial. They could be denied cross-examination of hostile witnesses. Americans could even be forced to give self-incriminating testimony.” *Id.*

<sup>105</sup> 148 CONG. REC. S7847 (daily ed. Aug. 1, 2002) (statement of Sen. Bennett). This rights-based argument is closely tied to the fear of politically motivated prosecutions. Although all constitutional rights may not be provided for Americans currently tried overseas, ICC opponents fear that Americans whose rights were not protected would be particularly susceptible to differential treatment before the ICC. See DeLay Amendment Press Release, *supra* note 104. For further discussion of the underlying concern about politically motivated prosecutions, see *supra* text accompanying notes 96–97.

<sup>106</sup> See *supra* note 39. Legal scholars have argued that these rights are “in general very similar to, and to some extent can be traced back to, those required by the U.S. Constitution, and arguably are even somewhat superior to those.” Paul C. Szasz, *The United States Should Join the International Criminal Court*, 9 USAFA J. LEG. STUD. 1, 15 (1998–99).

<sup>107</sup> See Leigh, *supra* note 39, at 130 (“Trial by jury . . . is not available to service members under the Fifth Amendment. They are excepted from coverage by the test of the Fifth Amendment. And the same exception is generally assumed to be applicable under the Sixth Amendment.”). See also United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955) (upholding distinction between military tribunals and civilian courts and guaranteeing jury trials only for the latter). This rebuttal does not, however, address the concerns of civilians being deprived of a jury trial by the Court. See *supra* notes 91, 94–95 and accompanying text.

<sup>108</sup> DeLay Threat Press Release, *supra* note 90.

<sup>109</sup> See *Rome Statute*, *supra* note 1, art. 36(4)(b) (“Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.”).

<sup>110</sup> See Turner, *supra* note 91, at 33 (noting that the United States will not have the power to veto the rulings of the ICC, as it can do with decisions made by the U.N. Security Council). This argument is again closely tied to the fear of America having no remedy if its citizens are targeted by the Court.

This argument, however, supports the United States joining the ICC. Since the Rome Statute permits each state party to nominate a judge,<sup>111</sup> one way for the United States to render the court more accountable would be to ratify the Rome Statute and nominate its own judge. In addition, were the United States a party to the ICC, it would become party to the Assembly of States Parties, thereby acquiring a voice in shaping the Court more to its liking.<sup>112</sup> By not ratifying the Rome Statute, the United States may be missing an important opportunity to influence the development of the ICC in its formative stages.

A further line of criticism of the ICC is that the Statute of Rome is not compatible with international law. As legal scholars have pointed out, combining international law and criminal law is still a fairly new task.<sup>113</sup> The strongest argument against the international legal aspect of the statute is that a treaty should be binding on its parties only.<sup>114</sup> Since the jurisdiction of the ICC extends to citizens of states that are not members of the court,<sup>115</sup> members of the United States government have argued that the entire statute is unlawful.<sup>116</sup>

This claim is debatable, however. While international law may prevent a treaty from having jurisdiction over a non-party state, this prohibition does not extend to citizens of that non-party state who are charged with committing an offense within the territory of a party to the treaty.<sup>117</sup>

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<sup>111</sup> See *Rome Statute*, *supra* note 1, art. 36(4)(b).

<sup>112</sup> See Leigh, *supra* note 39, at 124–25 (arguing that United States' non-participation in the ICC means it "will not become a member of the Assembly of States Parties and thus will not participate in shaping the court in its early formative years"); *Overwrought on the Criminal Court*, N.Y. TIMES, Aug. 13, 2002, at A18 (advocating United States involvement in the Court).

<sup>113</sup> See Louise Arbour, J., *Access to Justice: The Prosecution of International Crimes: Prospects and Pitfalls*, 1 WASH. U. J.L. & POL'Y 13, 17 (1999) (arguing that it is of "critical importance that we define appropriately the role of international criminal justice, that we fully empower the courts to do what they are designed to do, and that we resist the temptation to use them as inadequate substitutes for the many other ways in which civil societies must be reconsidered after war and sustained in their search for peace"). Justice Arbour, who sits on the Ontario Court of Appeals, was appointed the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda by the U.N. Security Council in 1996. *Id.* at 13 n.1.

<sup>114</sup> See Scheffer, *supra* note 26 (arguing that the Rome Statute "runs counter to some serious norms of international law if it purports to empower the Court to exercise jurisdiction over non-party nationals").

<sup>115</sup> See *Rome Statute*, *supra* note 1, art. 12 (granting jurisdiction to the Court if either the state of which the accused is a national or the state in which the conduct occurred is a party to the ICC).

<sup>116</sup> See U.S. Department of Defense, Background Briefing on the International Criminal Court (July 2, 2002) (arguing that the Rome Statute "claims to apply even to countries that are not parties" and deeming that this is "a deviation from hundreds of years of international legal practice"), available at [http://www.defenselink.mil/news/Jul2002/t07022002\\_t0702icc.html](http://www.defenselink.mil/news/Jul2002/t07022002_t0702icc.html).

<sup>117</sup> See Leigh, *supra* note 39, at 127. According to one commentator, under customary international law,

the national who commits an offense within the territory of any state is subject to



Under territorial jurisdiction, American citizens can currently be tried in the court of a country in whose territory an alleged crime occurred.<sup>118</sup> While being sent to an international court for trial differs from being tried in the country in which an alleged offense was committed, this difference does not appear to render the ICC's jurisdiction invalid.<sup>119</sup> In fact, some legal scholars have suggested that the jurisdiction of the ICC, far from violating customary international law, is more advantageous to suspects than traditional territorial jurisdiction.<sup>120</sup> A court that is accountable to multiple countries and whose laws and administration are the result of multi-lateral negotiations would appear better situated to protect suspects' interests than would a national court.

Other legal concerns about the ICC focus on the crimes over which the Rome Statute authorizes the Court to exercise jurisdiction.<sup>121</sup> Critics have attacked the Statute for redefining genocide, crimes against humanity, and war crimes, whose definitions had been well-established in previous treaties, and for including the crime of aggression without defining it.<sup>122</sup> As the Statute cannot be amended to define the crime of aggression

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that state's territorial jurisdiction—and would be so subject if there were no treaty at all. No rule of customary international law prohibits the territorial sovereign from exercising its jurisdiction directly over the offender, even if acting under the direction of a nonparty state; nor from extraditing the offender to another country—even to a country of which the accused is not a national.

*Id.*

<sup>118</sup> See Research in International Law of the Harvard Law School, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L. 435, 445 (1935). The first of five general principles of jurisdiction is "the territorial principle, [which] determin[es] jurisdiction by reference to the place where the offence is committed, [and] is everywhere regarded as of primary importance and of fundamental character." *Id.*

<sup>119</sup> It is difficult to see how such jurisdiction could be invalid when even the broader principle of universal jurisdiction, based on the belief that certain crimes are so universally condemned that all states have a jurisdictional interest in them, is gaining more support in the international community. See RESTATEMENT (THIRD) OF INT'L L. § 402 (permitting universal jurisdiction over genocide and war crimes, among others). In fact, the United States itself has taken tentative steps toward accepting universal jurisdiction in certain areas. See Torture Convention Implementation Act of 1994, Pub. L. 103-236, § 506(a), 108 Stat. 382, 463 (codified at 18 U.S.C. § 2340 (1994)) (establishing jurisdiction over torture beyond United States borders if "(1) the alleged offender is a national of the United States, or (2) the alleged offender is present in the United States, regardless of the nationality of the victim or alleged offender").

<sup>120</sup> See Leigh, *supra* note 39, at 127 (positing that an offender extradited from an ICC state party to the court by the territorial sovereign "might receive a fairer trial than in the courts of the country where the offense was committed").

<sup>121</sup> See *supra* text accompanying note 25.

<sup>122</sup> See, e.g., Malvina Halberstam, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 233 (1999) (criticizing the definitions of Article 5 crimes). Given concerns about including the crime of aggression at all in the Rome Statute, the United States and others arranged a compromise at Rome such that aggression would be included as one of the Article Five core crimes, but would not be defined for seven years following ratification. See generally Benjamin B. Ferencz, *Getting Aggressive About Preventing Aggression*, 6 BROWN J. WORLD AFF. 87 (1999).

for seven more years,<sup>123</sup> the possibility still exists that this crime could be defined in opposition to the will of the United States.<sup>124</sup> Supporters of the ICC, however, argue that the crime of aggression, with its historical foundations in the International Military Tribunal at Nuremberg, is sufficiently important in an international criminal court to remain in the Rome Statute and, they hope, to be defined at the end of seven years.<sup>125</sup> Given that the Court can now only prosecute war crimes, genocide, and crimes against humanity, and that the principle of complementarity permits prosecutions only after no court in the defendant's state of nationality has exercised jurisdiction, many of the ICC abuses predicted by ASPA proponents, from asserting jurisdiction over Americans for purely political reasons to depriving Americans of their rights under both United States and international law,<sup>126</sup> seem effectively impossible.

Whereas supporters of ASPA focus on the negative elements of the ICC, opponents point to the positive aspects of the Court, as embodied in the goals laid out in the preamble to the Rome Statute, to question whether these supposed negatives truly justify ASPA.<sup>127</sup> The ICC is not only significant for what it will do in the future; the Court's mere existence has been celebrated as historically significant.<sup>128</sup> The Rome Statute itself establishes the ICC "for the sake of present and future generations,"<sup>129</sup> and observers have lauded the Court as a representation of a new step forward in international law.<sup>130</sup> Supporters of the ICC applaud its focus on individual responsibility,<sup>131</sup> which, in the words of one legal scholar, "would make it possible to bring to justice those who engage in the most heinous crimes—genocide, crimes against humanity, war crimes, and terrorism—even if the perpetrator is a national of a state that condones, encourages,

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<sup>123</sup> See *supra* note 34 and accompanying text.

<sup>124</sup> See Ferencz, *supra* note 122, at 92. The United States State Department argued that "with respect to individual culpability the crime of aggression should be excluded [from the Rome Statute] at this stage." *Id.*

<sup>125</sup> See *id.* (stating that the American prosecutors at Nuremberg "considered . . . the most important achievement of the Nuremberg trials [to be] the outlawry of aggressive war").

<sup>126</sup> See *supra* text accompanying notes 85–124.

<sup>127</sup> See *Rome Statute*, *supra* note 1, pmb1. The Rome Statute's preamble "[affirms] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," and "[resolves] to guarantee lasting respect for and the enforcement of international justice." *Id.*

<sup>128</sup> See, e.g., U.N., Secretary-General Says Establishment of International Criminal Court is Gift of Hope to Future Generations, U.N. Doc. SG/SM/6643/L/2891 (1998) (quoting U.N. Secretary General Kofi Annan calling the Rome Statute "a gift of hope to future generations"), cited in Arbour, *supra* note 113, at 17 n.13.

<sup>129</sup> *Id.*

<sup>130</sup> See Szasz, *supra* note 106, at 24 (arguing that the ICC "represents a major step in advancing international law, in particular international humanitarian law, in helping to implement laws and principles that the United States has always stood for").

<sup>131</sup> See *supra* notes 12, 94.

or supports the conduct.”<sup>132</sup> With the United States standing alone amongst its traditional allies in not signing the Rome Statute, one rationale for the United States becoming a party to the Court is that its underlying principle of international justice deserves strong international support.<sup>133</sup>

A further argument contesting ASPA focuses not on the ICC but rather on the coercive elements of the Act itself, which many opponents deem unnecessarily harsh. Some commentators have charged that ASPA is another element in a recent trend toward unilateralism and non-cooperation by the United States government.<sup>134</sup> Other commentators challenge specific provisions of the Act, particularly those prohibiting military aid or permitting the President to use any means necessary to retrieve Americans brought before the Court.<sup>135</sup>

The coercive nature of ASPA can best be seen in its use immediately after its passage. In the late summer of 2002, America used the threat of ASPA to encourage other nations to join it in bilateral Article 98 agreements, under which nations would not be permitted to extradite United States citizens to the ICC.<sup>136</sup> Article 98 agreements thus allow the United States to oppose the Court while still falling within the letter of the Rome Statute.<sup>137</sup> By mid-August, Romania and Israel had signed such agreements, and the Bush Administration was pushing for additional signatories.<sup>138</sup>

<sup>132</sup> Halberstam, *supra* note 122, at 232–33. As U.N. Secretary-General Kofi Annan stated, the entry into force of the Rome Statute marked “a great victory for justice and for world order . . . [and] a turn away from the rule of brute force, and towards the rule of law.” European Parliament Resolution on the Draft American Servicemembers’ Protection Act (ASPA), EUR. PARL. DOC. P5 TA-PROV 1367 (2002) [hereinafter European Parliament Resolution]. The ICC is “the first permanent body with international jurisdiction able to judge individuals . . . responsible for war crimes, genocide, and crimes against humanity.” *Id.*

<sup>133</sup> See Blakesley, *supra* note 40, at 237–38 (referring to the Rome Conference as “an opportunity to do something right—to create a tribunal that is fair and just,” and arguing that “[m]aybe there still is a chance to do so”).

<sup>134</sup> See, e.g., James Carroll, *US Should Back Tribunal*, BOSTON GLOBE, Sept. 12, 2000, at A23; European Parliament Resolution, *supra* note 132, at § 5 (calling “on the US Congress to reject the unilateralism which the ASPA represents, and to embrace in deeds as well as rhetoric the reality that only the common endeavour of the international community will bring to justice tyrants and perpetrators of genocide or other crimes against humanity, including terrorists”). Bush Administration officials such as Secretary of State Colin Powell, however, have rejected this accusation of unilateralism as overly simplistic. See Colin L. Powell, *Threats and Responses: Perspectives*, N.Y. TIMES, Sept. 8, 2002, § 1, at 26.

<sup>135</sup> See European Parliament Resolution, *supra* note 132, at § 4 (noting that ASPA “explicitly denies the US itself . . . military and intelligence cooperation” and referring to a resolution adopted by the Netherlands on June 13, 2002 “expressing its concern over ASPA, which would give the US President the right to authorise [sic] the use of force against the Netherlands to free members of the US armed forces, civilians and allies held captive by the ICC”). European opponents fear that ASPA could lead to the United States using force to free an American citizen from the Court. See Joshua Rozenberg, *Will Bush Invade Cambridgeshire?*, DAILY TELEGRAPH (London), Sept. 5, 2002, at 23.

<sup>136</sup> See *supra* note 38 and accompanying text. Christopher Marquis, *U.S. Is Seeking Pledges to Shield Its Peacekeepers From Tribunal*, N.Y. TIMES, Aug. 7, 2002, at A1.

<sup>137</sup> See *supra* note 38 and accompanying text.

<sup>138</sup> See Marquis, *supra* note 136, at A1.

In response to these American threats, the international community immediately charged the Bush Administration with heavy-handedness.<sup>139</sup> The EU warned its thirteen candidate countries<sup>140</sup> against signing coerced Article 98 agreements, charging that the agreements were inconsistent with international law and unnecessary for the countries signing them.<sup>141</sup> On August 13, 2002, Switzerland went further, announcing its refusal to sign any exemption agreement.<sup>142</sup> Other critics argued that these agreements were a misuse of Article 98.<sup>143</sup> The angry response sparked by its initial use bodes poorly for ASPA as a positive addition to the tools available to American diplomats.

The various arguments against the ICC do not justify the extremity of ASPA.<sup>144</sup> As shown by the international outrage that met the coercive use of ASPA, the ICC is a priority to many of the United States' allies.<sup>145</sup>

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<sup>139</sup> See Elizabeth Becker, *U.S. Presses for Total Exemption from War Crimes Court*, N.Y. TIMES, Oct. 9, 2002, at A6 (citing the frustration of European and Canadian officials at United States use of ASPA).

<sup>140</sup> These thirteen candidate countries, which are vying for accession to the EU in the future, are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey. See E.U., EUROPEAN UNION AT A GLANCE, at <http://europa.eu.int/abc-en.htm> (last visited Apr. 11, 2003) (listing the candidate countries).

<sup>141</sup> See Press Release, Coalition for the International Criminal Court, EU Council Approves Common Position Rejecting US Bilateral Agreements (Sept. 30, 2002), available at <http://www.iccnw.org/pressroom/ciccmmediastatements/2002/09.30.02EUAdoptsCP.pdf>.

<sup>142</sup> See Elizabeth Becker, *U.S. Issues Warning to Europeans in Dispute Over New Court*, N.Y. TIMES, Aug. 26, 2002, at A10. There were also charges that the United States had threatened the candidacy of prospective NATO countries who refused to sign such agreements, but this charge has been contested by the United States. See *id.*

<sup>143</sup> See Becker, *supra* note 142, at A6 (reporting the criticisms of senior Canadian and European officials); Elizabeth Becker, *U.S. Issues Warning to Europeans in Dispute Over New Court*, N.Y. TIMES, Aug. 26, 2002, at A10. In mid-October, the EU and the United States reached a compromise on the Article 98 agreements. See Becker, *supra* note 142, at A6. The EU granted permission to individual member states to sign bilateral agreements with the United States, but these agreements could exempt only American military personnel and diplomats from prosecution. See Becker, *supra* note 142, at A6. Following this allowance—which acted as an effective international acknowledgment, if not outright approval, of the Article 98 agreements—close to twenty countries have signed exemption agreements with the United States. Sanjay Suri, *Rights: A Brave New Court with Little Real Power*, INTER PRESS SERVICE, Mar. 12, 2003, LEXIS, Nexis Library, INPRES File.

<sup>144</sup> One further argument against the ICC not addressed here—or in much of the literature or debates surrounding the Court—is that perhaps the whole idea of a permanent international tribunal is misguided. As suggested in Hannah Arendt's study of trial of Adolf Eichmann after World War II, one danger of such a court is that it could perhaps excuse political responsibility by effectively transforming the few prosecuted individuals into scapegoats for the many who may have been involved in an offense. See generally HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Penguin Books, 1976) (1964).

<sup>145</sup> See Letter from Kofi Annan, U.N. Secretary-General, to Colin Powell, U.S. Secretary of State (July 3, 2002), available at <http://www.igc.org/ficc/html/SGlettertoSC3July2002.pdf>. According to Secretary-General Annan,

the establishment of the ICC is considered by many, including [America's] closest allies, as a major achievement in our efforts to address the impunity that is also a major concern for the United States . . . I fear that the reactions against any at-

Passed almost one year after September 11, 2001, ASPA exists in an international context in which the support of other countries is recognized as a necessary element in the war against terrorism,<sup>146</sup> yet the Act itself contradicts the goal of establishing allied support. By drafting a bill designed not only to oppose the ICC but to actively thwart it, America seems to be going in the exact opposite direction and alienating its allies just when it claims to need them most.<sup>147</sup>

From an analysis of the Rome Statute and the diplomacy surrounding the ICC and ASPA, it does not seem that the arguments against the ICC warrant blocking the Court as vehemently as the American government has done in passing ASPA. Instead, given American negotiating power, the United States should keep open the possibility of changing the ICC from within—or at least not bar this possibility entirely.<sup>148</sup> In becoming a party to the Court, the United States could have a say in, among other things, nominating judges, defining the crime of aggression, and determining which crimes are prosecuted. Although the United States has now missed the opportunity to be involved in the first round of judicial appointments and administrative decisions affecting the Court, it could still address many of its concerns as a party to the court rather than as the Court's strongest opponent. Such involvement better protects United States interests than does ASPA.

As the EU has highlighted, ASPA acts in opposition to American interests in that the United States is directly hindering its war against terrorism by “explicitly den[ying] itself two of the principal weapons—military and intelligence cooperation—of the global coalition against terrorism.”<sup>149</sup> Whereas military aid has traditionally been believed to be in America's interest, ASPA views it as a mere gratuity that can be revoked at will. Under ASPA, the education, training, and monetary aid that the United States provides is no longer seen as creating a more stable inter-

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tempts at, as they perceive it, undermining the Rome Statute will be very strong.

*Id.* See also European Parliament Resolution, *supra* note 132.

<sup>146</sup> See Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 38 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001) (requesting “the help of police forces, intelligence services, and banking systems around the world”).

<sup>147</sup> See European Parliament Resolution, *supra* note 132, § 2 (arguing that “ASPA goes well beyond the exercise of the US's sovereign right not to participate in the Court, since it contains provisions which could obstruct and undermine the Court and threatens to penalise [sic] countries which have chosen to support the Court”).

<sup>148</sup> Before ASPA was passed, Senator Christopher J. Dodd (D-Conn.) proposed a bill that exemplified such an approach. See American Citizens' Protection and War Criminal Prosecution Act of 2001, S. 1296, 107th Cong. (2001). Instead of advocating immediate ratification of the Rome Statute or barring all future involvement with the Court, this bill encouraged the United States to remain involved in setting up the ICC and foresaw the Senate ratifying the Rome Statute only after the Court had established a strong track record. See *id.*

<sup>149</sup> European Parliament Resolution, *supra* note 132, at § 4.

national community and thus providing greater safety for America itself. Instead, military aid is now viewed as something from which only other countries gain.<sup>150</sup> While ASPA permits the President to waive its ban on military aid to ICC members when such assistance is in the national interest,<sup>151</sup> this approach presumes that much of the military aid now provided by the United States would not fall under such a waiver provision. With the passage of ASPA and the implication that threatening to withhold such aid is in America's interests, the United States views its national interests as being such that opposition to the ICC outweighs all other security and diplomacy concerns. Given the current international climate and the minimal dangers currently posed by the ICC, this seems unlikely.

ASPA may have responded to many of the criticisms of the ICC within the United States, but its use after August 2, 2002 has led to international outcry. In the current international situation, where America's interests are not well-served by antagonizing potential allies and withholding military aid, such a coercive tool appears not only unnecessary but potentially harmful.

—Lilian V. Faulhaber

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<sup>150</sup> See 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 2007, 116 Stat. 820, 905 (to be codified at 22 U.S.C. § 7426) (prohibiting the United States from providing military aid to parties to the ICC).

<sup>151</sup> See *id.* § 2007(b).

