



# U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT

## Report of an Independent Task Force

MARCH 2009

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The American Society of International Law

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### Foreword

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The Rome Statute establishing the International Criminal Court (ICC or Court) entered into force on July 1, 2002. With the Court now established and developing a track record of engagement in situations, such as Darfur, that are of great interest to the United States, it seemed that there might be important ways in which the United States might engage and support the Court, whether joining it or short of joining it. The American Society of International Law (ASIL) considered that a Task Force could effectively advance the examination of such policy options and bring dispassion to the debate about the Court.

In the autumn of 2008, ASIL convened a Task Force to examine the U.S. relationship with the ICC. The Task Force on U.S. Policy Toward the ICC studied the Court's work to date, reviewed current U.S. policy on the Court and developed recommendations to inform that policy. The advent of the new administration in 2009 and the ICC Review Conference in 2010 gives the Task Force's work added significance and timeliness.

As a membership organization of international composition, providing a forum for the exchange of wide-ranging views, ASIL does not normally take positions on substantive issues, including the ones addressed by this Task Force on U.S. Policy Toward the International Criminal Court. Accordingly, the analysis and the recommendations contained in this report are those of the Task Force members and do not necessarily represent those of the ASIL membership or the Society itself.

I purposefully appointed a Task Force that reflected the diversity of views in ASIL and the U.S. policy community at large. I am delighted that the Task Force reached general consensus on this report and recommendations. As in any consensus-building exercise, I am sure that this required give and take by all members of the Task Force, and I am grateful for their efforts to that end.

On behalf of ASIL, I wish to thank the Task Force Chairs, William H. Taft IV and Patricia M. Wald, for their considerable expertise and unwavering commitment to the project. ASIL is also grateful to the Task Force members for their time, efforts, and insights critical to the success of this undertaking. Appreciation is more than due to ASIL's Executive Director Elizabeth Andersen, Project Director Laura M. Olson, and the ASIL staff, who launched this project and skillfully brought it to fruition. ASIL is also grateful to the John D. and Catherine T. MacArthur Foundation and the Planethood Foundation for funding this project.



**Lucy F. Reed**

*President*

*American Society of International Law*



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### Acknowledgments

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As co-chairs of this Task Force, we were privileged to work with an extraordinary group of Task Force members. The Report reflects their efforts as well as their diverse perspectives and experience.

The Task Force convened in person in Washington, D.C., six times between October 2008 and March 2009 in order to re-evaluate U.S. policy toward the Court and to develop recommendations for future policy. These meetings focused on key aspects of the U.S. relationship with the ICC from 1998 to the present and concentrated on opportunities for and constraints upon future U.S. cooperation with the Court. The Task Force discussed these issues with invited expert guests from the executive and congressional branches of the U.S. Government (including the U.S. military); officials of the ICC and the Assembly of States Parties; experts from Europe; as well as individuals holding U.S. non-governmental and advocacy perspectives. In addition, the Task Force solicited briefs on a variety of topics from distinguished scholars and specialists. The Task Force is grateful to all experts and officials to whom we turned for advice.

We wish to acknowledge the contributions of those individuals at ASIL upon whom we have relied for support. We are grateful to ASIL President Lucy Reed, ASIL Executive Director Elizabeth Andersen, and Project Director Laura Olson, who shepherded the process from beginning to end. Thanks also go to other ASIL colleagues, in particular Veronica Onorevole, Cody Oliphant, and Nasser Qadri, for handling the logistics of our meetings kindly hosted by ASIL at Tillar House and to Sheila Ward for support with external communications, as well as interns Diego Alcala and Solomon Shinerock, assisting the Project Director.

**William H. Taft IV**  
*Chair*

**Patricia M. Wald**  
*Chair*

## Executive Summary

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The United States has long promoted justice and the rule of law, as demonstrated by its critical role in the creation of the international military tribunals at Nuremberg and in Japan, as well as the modern-day International Criminal Tribunals for the former Yugoslavia and Rwanda. Holding accountable persons who commit the most serious crimes of concern to the international community is a longstanding policy priority of the United States. Seven years after the Rome Statute entered into force, the International Criminal Court (ICC or Court) is emerging as the leading forum in this sphere. Today, 108 States are members of the ICC, and, although the United States has not joined the Court, it has in recent years assumed an increasingly positive attitude toward the Court, in particular supporting its efforts in Darfur. The United States will necessarily continue to evaluate the Court and explore ways in which it can support and shape the development of this institution.

The Court is in the **early stage of development, now convening its first trial.** And yet, it has an **emerging track record of engagement in situations of great interest to the United States.** In 2010, the Assembly of States Parties to the Rome Statute will convene its first Review Conference to consider the future direction of the Court. Among the issues to be addressed at the Review Conference are defining the crime of aggression and setting out the conditions under which the Court shall exercise jurisdiction over allegations of aggression—steps that inevitably implicate U.S. interests. The time is ripe for a review of U.S. policy toward the Court, to assess its performance to date and identify ways in which the United States might, in its own interests as well as those of the international community, more effectively contribute to the development of the Court.

This Task Force has undertaken such a review, hearing from more than a dozen experts and officials representing a variety of perspectives on the ICC. Our conclusion—detailed in the recommendations in this report—is that the United States should announce a policy of positive engagement with the Court, and that this policy should be reflected in concrete support for the Court's efforts and the elimination of legal and other obstacles to such support. The Task Force does not recommend U.S. ratification of the Rome Statute at this time. But it **urges engagement with the ICC and the Assembly of States Parties in a manner that enables the United States to help further shape the Court into an effective accountability mechanism.** The Task Force believes that such engagement will also facilitate future consideration of whether the United States should join the Court.

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### The United States and the Rome Statute: From 1998 to Today

On entering the negotiations of the Rome Conference in June 1998, the United States had various important objectives, and, at the end of negotiations in Rome, the United States had achieved many of them. The United States was, however, less successful with regard to some of its critical concerns, including the Court's assertion of jurisdiction over nationals of non-party States, a prosecutor with *proprio motu* powers, and inclusion of the crime of aggression.

Despite voting against the adoption of the treaty creating the Court, the Rome Statute, and despite concerns in some quarters regarding the manner and atmosphere in which the Rome negotiations were conducted, the United States remained engaged with the ICC throughout the post-Rome negotiating process in 1999 and 2000 and, on June 30, 2000, joined consensus on the Court's Draft Elements of Crimes and the Draft Rules of Evidence and Procedure. Through these negotiations the United States was able to address some of its key concerns, including by placing constraints on the prosecutor and strengthening the application of complementarity—the principle that the Court is a court of last resort, whose jurisdiction is complementary and secondary to national jurisdiction. However, nothing directly addressed the United States' most serious concern—the exposure of non-party States' nationals to ICC jurisdiction.

On December 31, 2000, when the United States signed the treaty, President Clinton made clear that the United States retained reservations about the Rome Statute, stating that he would “not recommend that my successor submit the treaty to the Senate for ratification until our fundamental concerns are satisfied,”<sup>1</sup> but also noting that the United States had signed the treaty “to reaffirm [its] strong support for international accountability”<sup>2</sup> as well as to increase U.S. influence in ongoing negotiations, to influence appropriately the attitudes of judges and prosecutors, and to improve relations with ICC Member States with whom the United States would be seeking “Article 98 non-surrender agreements.” These efforts aimed to shape the Court in a manner that would alleviate U.S. concerns. Thus, the United States prepared to continue negotiations in 2001, with the aim, *inter alia*, of playing a part in the definition of the crime of aggression.

By early 2002, as the Rome Statute garnered the requisite number of ratifications and the Court prepared to come into existence in mid-2002, U.S. officials' concern about the Court had grown. Believing the ICC to be built on a flawed foundation, President Bush concluded

1 President Clinton, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001), reprinted in SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW, VOLUME 1: 1999-2001 384 (2002).

2 *Id.*

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“that the United States can no longer be a party to this process. In order to make [U.S.] objections clear, both in principle and philosophy, and so as not to create unwarranted expectations of U.S. involvement in the Court, [he] believe[d] that he ha[d] no choice but to inform the United Nations . . . of [the U.S.] intention not to become a party to the Rome Statute . . . .”<sup>3</sup> In **May 2002**, the United States sent a letter to the U.N. Secretary General, stating “that the United States does not intend to become a party to the treaty. Accordingly the United States has no legal obligations arising from its signature on December 31, 2000.”<sup>4</sup> The **United States participated no further in the multilateral discussions on the ICC and did not assume observer status within the Assembly of States Parties.**

Congress also approved legislation designed to insulate U.S. military personnel and others from ICC jurisdiction, the American Service-Members’ Protection Act of 2002 (ASPA). ASPA placed numerous restrictions on U.S. interaction with the ICC and its States Parties, including prohibiting military assistance to certain States co-operating with it. Consistent with ASPA, the United States began pursuing conclusion of the so-called “Article 98 agreements” with the aim of insulating all U.S. nationals from ICC proceedings. These agreements generated the criticism, from some quarters, of being inconsistent with a State Party’s obligations under the Rome Statute. Also in 2002, the United States sought a Security Council resolution to insulate permanently the U.S. troops and officials involved in U.N. peacekeeping or peace-enforcement missions from ICC jurisdiction. This resolution was required by ASPA if the United States were to participate in such operations where no exemption arrangement existed with the host government. Opponents objected that such a resolution would “rewrite” an international treaty—the Rome Statute—and argued that, despite Articles 25 and 103 of the U.N. Charter, the Security Council does not possess such authority. While the United States failed to get permanent exemption for all its peacekeepers, it did obtain such an exemption in country-specific U.N. resolutions. **Additional legislative action in 2004 further stimulated the U.S. Government’s pursuit of “Article 98 agreements.” For fiscal year 2005, Congress approved the “Nethercutt Amendment,” prohibiting assistance funds, with limited exceptions, to any State party to the Rome Statute. Similar to the waiver provisions included in ASPA, the Nethercutt Amendment permitted the President to waive this prohibition for those States that concluded “Article 98 agreements” with the United States. By May 23, 2005, the U.S. State Department reported that one hundred States had signed “Article 98 agreements” with the United States.**

3 Marc Grossman, Under Secretary of State for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002), available at <http://www.iccnw.org/documents/USUnsigningGrossman6May02.pdf>.

4 Letter from John R. Bolton, U.S. Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002) [hereinafter 2002 U.S. letter to the U.N. Secretary General], available at <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

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Even as these steps were taken to insulate U.S. personnel and others from the Court's jurisdiction, the pendulum on some aspects of U.S. policy toward the Court began to swing back for reasons based on American national interests. As the second term of the Bush Administration began, Department of State officials consciously pursued a more nuanced and pragmatic approach to the ICC. Beginning in 2005, State Department officials restated U.S. respect for other nations' decisions to join the Court and sought a *modus vivendi* between the United States and other States party to the Rome Statute, as evidenced in part by the annual statements of position on the ICC at the U.N. General Assembly sessions from 2005 to 2008. In March 2005, some officials in the Department of Defense had started to voice concerns that ASPA's restrictions were resulting in unintended, adverse consequences for U.S. security interests. And, in May 2006, Secretary of State Condoleezza Rice acknowledged that the military aid cuts to Latin American countries required by ASPA are "sort of the same as shooting ourselves in the foot."<sup>5</sup>

In 2006, the conclusion of additional "Article 98 agreements" slowed. In that same year as well as in 2008, Congress amended sections of ASPA, eliminating prohibitions on providing military assistance to ICC States Parties that had not signed an "Article 98 agreement." The Nethercutt Amendment was modified for fiscal year 2006, extending the available waiver beyond the few listed countries to other countries as determined by the President. President Bush made numerous waivers under ASPA and the Nethercutt Amendment to permit funding to ICC States Parties that had not signed an "Article 98 agreement." Today, the United States no longer actively pursues "Article 98 agreements."

In addition to changes in domestic legislation, the U.S. approach of resisting references to the Court in U.N. resolutions altered. On March 31, 2005, the United States decided not to block a crucial Security Council resolution referring the situation in the Darfur region of Sudan to the ICC prosecutor. Instead, the United States abstained on the resolution. It was a significant landmark in the evolution of U.S. attitudes toward the ICC. Further, on July 31, 2008, the United States opposed the efforts of various countries to invoke Article 16 of the Rome Statute to defer the investigation and prosecution of Sudanese President Al Bashir. Then-State Department Spokesperson Sean McCormick also publicly acknowledged U.S. receipt of a request of assistance from the ICC and indicated that the United States would review that request. The United States also supported the use by the Special Court of Sierra Leone of the ICC facilities in the Hague to try Charles Taylor. In recent years, there have been a number of meetings between the U.S. and ICC officials, as well as other official U.S. statements reflecting a greater willingness to cooperate with the Court, including possibly sharing information with the ICC as the United States does with other international tribunals.

5 Condoleezza Rice, U.S. Secretary of State, Trip Briefing: En Route to San Juan, Puerto Rico, (Mar. 10, 2006), <http://2001-2009.state.gov/secretary/rm/2006/63001.htm>.



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While the Obama Administration has only recently taken office, it has already indicated that it will further this constructive policy towards the Court. In her first speech to the U.N. Security Council, Ambassador Susan Rice stated that the ICC “looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda and Darfur.”<sup>6</sup> After the ICC issued the arrest warrant for Sudanese President Al Bashir on March 4, 2009, it was reported that President Obama has “launched a ‘high-level, urgent review’ of U.S. policy toward Sudan that will consider whether the U.S. should re-examine joining the International Criminal Court . . . . A policy decision should be ready ‘within weeks.’”<sup>7</sup>

### Developments at the ICC

The Court currently is investigating situations in four countries, and the Prosecutor has publicly announced that he is monitoring six other situations. The Court has not yet completed a full trial cycle, thus, an assessment of the Court is difficult to make at this stage. However, current investigations have led to criminal charges against at least thirteen alleged perpetrators and various judicial proceedings. These actions of the Office of the Prosecutor and the Court’s Chambers permit certain observations.

Of specific concern to the United States was how the Prosecutor would handle the allegations regarding conduct in Iraq by U.S. and allied nationals. While there was no basis for jurisdiction over U.S. personnel—as nationals of a non-party State operating on the territory of another non-party State (Iraq)—various personnel of the United Kingdom and other coalition partners who have joined the Court received close scrutiny. The Prosecutor determined, however, that for a variety of reasons including jurisdictional limitations, the Statute’s requirements to seek authorization to initiate an investigation in the situation in Iraq (in particular the admissibility requirement of gravity) had not been satisfied. The Prosecutor also appeared satisfied with efforts to investigate and prosecute war crimes in the domestic courts of the concerned States party to the Rome Statute. Equally telling about the Court has been the Pre-trial, Trial, and Appeals Chambers’ demonstrations that the Court will check prosecutorial actions and uphold due process rights. These examples of ICC practice are promising, although it must be acknowledged that the ICC is still at an early stage of development. **Yet another test for the ICC will be how it handles the declaration lodged, on January 22, 2009, by**

6 USUN Press Release #020(09), United States Mission to the United Nations, Office of Press and Public Diplomacy, Statement by Ambassador Susan E. Rice, U.S. Permanent Representative, on Respect for International Humanitarian Law, in the Security Council (Jan. 29, 2009), available at [http://www.usunnewyork.usmission.gov/press\\_releases/20090129\\_020.html](http://www.usunnewyork.usmission.gov/press_releases/20090129_020.html).

7 Jonathan Weisman, *Obama Starts ‘Urgent Review’ of U.S. Policy Toward Sudan*, WALL ST. J., Mar. 4, 2009, available at <http://online.wsj.com/article/SB123620918926234023.html#>.

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the Palestinian National Authority (PNA) pursuant to Article 12(3) of the Rome Statute with respect to “acts committed on the territory of Palestine since July 1, 2002.”<sup>8</sup> The matter raises issues about the authority of the Prosecutor, and of the ICC, to treat as a State an entity which is not generally recognized as a State and which is not a U.N. Member.

The ICC faces significant challenges in fulfilling its mandate. Like the *ad hoc* Tribunals, the Court depends upon the cooperation and support of States and international organizations. Necessary cooperation and support takes various forms, but by far the most critical area where the Court requires State support is in apprehending suspects. The number of outstanding arrest warrants poses the most significant operational challenge to the Court today.

The legislative and management/financial oversight body of the Court is the Assembly of States Parties (ASP), comprised of the Parties to the Rome Statute. Non-party States may attend meetings as observers and may speak during deliberations. They could also participate in the ASP Special Working Group on the Crime of Aggression. While other non-party States, such as Russia and China, have attended, the United States has participated in neither forum. Currently, the ASP is preparing for the first Review Conference on the Rome Statute to take place in 2010. While the agenda of the Review Conference remains to be completed, agenda items already confirmed include Article 124 of the Rome Statute, regarding the seven-year exemption of ICC jurisdiction for war crimes, and the definition of the crime of aggression. In 1998, the United States stated that both these matters were of critical concern.

Against this backdrop, the Task Force concludes that the United States should continue greater engagement with the Court. It is still too early for a comprehensive assessment of the Court, and how some issues of concern to the United States will be addressed remains in question. Thus the Task Force is not recommending that the United States now join as a State Party to the Rome Statute. At the same time, the Task Force finds that many U.S. concerns about the Court have not been borne out in practice. Moreover, the Court is engaged in investigation and prosecution of cases in which the United States has a keen interest, and the Court would benefit from additional U.S. support as it pursues cases in Sudan, the Democratic Republic of Congo, the Central African Republic, and Uganda. Finally, issues of vital interest to the United States are being addressed in the Assembly of States Parties as it prepares for the 2010 Review Conference, and it is in the United States interest to openly and effectively

8 Declaration recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009) from Ali Khashan, Minister of Justice, Palestinian National Authority, to ICC Registrar, available at <http://www2.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>. The ICC Registrar acknowledged receipt of the declaration on January 23, 2009 “without prejudice to a judicial determination on the applicability of Article 12 paragraph 3” to the declaration. Letter from Silvana Arbia, ICC Registrar, to Ali Khashan, Minister of Justice, Palestinian National Authority (Jan. 23, 2009), available at <http://www2.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf>.

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present its views in that forum. For all of these reasons, the Task Force recommends a policy of increasingly positive engagement with the Court.

### Selected Legal Issues Affecting U.S. Policy Toward the International Criminal Court

A number of important legal issues have been raised in regard to the further development of U.S. relations with the ICC. Accordingly, the Task Force undertook to study and assess some of these concerns, and suggest ways in which they might be addressed as U.S. policy continues to evolve. The Task Force has grouped the legal issues in three categories outlined below, specifically 1) consistency of the Rome Statute with international law; 2) legal issues affecting U.S. cooperation with the Court; and 3) U.S. constitutional issues raised with respect to joining the Court.

#### Consistency of the Rome Statute with International Law

The Rome Statute provides that the ICC may, under certain circumstances, exercise criminal jurisdiction over nationals of States not party to the Rome Statute. The ICC was accorded such jurisdiction in order to ensure that perpetrators of the most serious international crimes will be held accountable regardless of their nationality. While the United States supports accountability, the ICC's jurisdiction over nationals of non-Party States has been a persistent U.S. concern. The question has arisen as to whether jurisdiction over non-Party nationals is consistent with international law or rather an unlawful intrusion on State sovereignty.

The traditional international law rule is that a treaty “does not create either obligations or rights for a third State without its consent.”<sup>9</sup> As a criminal court, however, the ICC claims jurisdiction over individuals, not States. Thus, the Rome Statute, in establishing jurisdiction over nationals of non-Parties, technically does not bind the non-Party State—although neither did that State consent to ICC authority over its nationals.

The concern has been raised that “hearing cases in the official-acts category, [the ICC’s] function will resemble less that of a municipal criminal court than that of an international court for the adjudication of interstate legal disputes,”<sup>10</sup> but the Task Force agrees with the Nuremberg Tribunal. It concluded fifty years ago that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such

9 Vienna Convention on the Law of Treaties art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 341 [hereinafter VCLT].

10 Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States*, 64 LAW & CONTEMP. PROBS. 13, 15 (2001).

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crimes can the provisions of international law be enforced.”<sup>11</sup>

Under established international law, foreign States are entitled to prosecute nationals of other States under the principles of territoriality, passive personality, or protective jurisdiction. A national of the United States in the territory of a foreign State is subject to the jurisdiction of that State. The International Criminal Court constitutes an agreement by such States to pool their jurisdiction on these established principles. As at Nuremberg, States have “done together what any one of them might have done singly.”<sup>12</sup> Furthermore, the Rome Statute encompasses crimes already proscribed by international treaty or customary law most of which are prosecutable under territorial or treaty-based jurisdiction. And, as the United States is party to most of those treaties, U.S. nationals are already subject to the prohibitions and the possibility of extra-territorial prosecution for crimes over which the ICC has jurisdiction.

For those who remain concerned about ICC jurisdiction over third-party nationals, the complementarity principle is intended to protect affected sovereign interests. In light of these considerations, the Task Force does not consider the ICC’s jurisdiction over nationals of non-party States to be in conflict with principles of international law.

### Legal Issues Affecting U.S. Cooperation with the Court

#### ***Legal Effect of the U.S. Signature and the 2002 Letter to the U.N. Secretary General***<sup>13</sup>

Upon signing the Rome Statute on December 31, 2000—though with singular qualifications—the United States became eligible to consent to the treaty by ratification; signature ordinarily obligates the Signatory State “to refrain from acts which would defeat the object and purpose of [the] treaty” while ratification remains pending.<sup>14</sup> Two years later, however, the United States expressed its belief that the ICC was built on a flawed foundation, and transmitted a letter to the U.N. Secretary General declaring “that the United States does not intend to become a party to the treaty. Accordingly the United States has no legal obligations arising from its signature on December 31, 2000.”<sup>15</sup>

11 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948).

12 *Id.* at 461.

13 The following analysis is substantially based on a memorandum provided to the ASIL Task Force. Memorandum from Duncan Hollis, Associate Professor of Law, Temple University School of Law to the ASIL Task Force (Dec. 16, 2008) (on file with the ASIL Task Force).

14 VCLT, *supra* note 9, art. 18. See *infra* text of Report accompanying notes 33-36.

15 2002 U.S. letter the U.N. Secretary General, *supra* note 4.

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The 2002 letter has been popularly, though inaccurately, characterized as an “unsigned” of the Rome Statute. It was no such thing, but it raised questions whether the United States can participate as an observer in the Assembly of States Parties and whether, in order to join the Court, the United States would be required to re-sign the Statute—a legal impossibility given that the Statute was closed for signature in 2000.

In light of the text of Article 18 of the Vienna Convention on the Law of Treaties (VCLT), the Task Force understands the letter to have ended U.S. obligations as a Signatory to the Rome Statute, in conformity with the Convention. Although the United States no longer has any obligation to refrain from acts that would defeat the Rome Statute’s object and purpose, it remains a Signatory to that treaty. As a Signatory, the United States could assume its observer status within the Assembly of States Parties, proceed to ratify the treaty, or take other steps supportive of the Court, if it so decided. Put another way, the 2002 letter was a statement of U.S. policy that can be amended at any time, and a clear statement of a new policy of positive engagement with the Court would thus supersede the policy expressed in the 2002 letter. To clarify matters, the Task Force recommends that such a statement be made, that is, that the United States declares that the policy embodied in the 2002 letter does not remain the policy of the Government of the United States.

### ***Constraints of the American Service-Members’ Protection Act on U.S. Policy Toward the Court***

The American Service-Members’ Protection Act of 2002 (ASPA) prohibits U.S. cooperation with the ICC and mandates that funds not be used to support, directly or indirectly, the ICC. Forms of prohibited cooperation include responding to requests of cooperation from the Court, provision of support, extraditing any person from the United States to the ICC or transferring any U.S. citizen or permanent resident alien to the ICC, restrictions on funds to assist the Court, and permitting ICC investigations on U.S. territory. ASPA also prohibits direct or indirect transfer of classified national security information and law enforcement information to the Court.

If the United States decides to cooperate with the ICC, the President will have to provide a waiver under ASPA’s section 2003(c) or employ ASPA’s section 2015 in order to do so. While both options appear to grant significant latitude—at least in relation to “named individuals”—the extent of this latitude is, as yet, untested. It would appear that even with this waiver authority, the executive remains constrained by ASPA to go beyond case-specific cooperation with the Court and develop systematic institutional ties. Furthermore, it would appear that the United States could not become a State Party to the Rome Statute without significant amendment or repeal of ASPA. Even if the United States could become party to the treaty, ASPA restrictions would hinder it from fulfilling its obligations as a State Party, particularly

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to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>16</sup> Accordingly, the Task Force encourages thorough review of ASPA and its amendment or repeal to the extent necessary to provide the United States with the flexibility it requires to cooperate with the Court.

### “Article 98 Agreements”

The “Article 98 agreements,” which prohibit Signatory States from surrendering U.S. nationals to the ICC, have been considered by some to be inconsistent with Article 98 of the Rome Statute and contrary to States Parties’ obligations under the Rome Statute. Article 98 was intended chiefly to ensure that States Parties would not be forced to choose between their obligations under the Rome Statute and their obligations under Status of Forces Agreements, which extend non-surrender guarantees to armed forces stationed abroad.

The Task Force is concerned about the potentially broad scope of some of the Article 98 agreements concluded by the United States, which extend non-surrender protection not just to service-members and government officials, but to all U.S. citizens in the country and to foreign contractors with the United States. Accordingly, the Task Force urges re-examination of these agreements’ scope, applicability, and implementation. It recommends interpretation of them in a manner tailored to the original purpose of Article 98. Further de-linkage of such agreements from States’ receipt of U.S. military and economic assistance would contribute to reducing opposition to such agreements.

### *Domestic Primacy—Safeguarding State Sovereignty Through Complementarity*

The complementary jurisdiction established in the Rome Statute recognizes that domestic courts should have the primary authority to try the crimes included in the Rome Statute. Coupled with the Rome Statute’s other jurisdictional and admissibility requirements, complementarity places a check on the power of the ICC and the prosecutor. It protects as well the sovereignty of States—whether parties or not to the Treaty.

While the Rome Statute and Rules of Procedure provide significant guidance, how the Court functions in practice will determine the effectiveness of its complementarity regime in ensuring domestic primacy of jurisdiction. The current Prosecutor has generally exercised his authority judiciously, but some have questions about how the Prosecutor and Court will address amnesties and pardons, interpret the law of armed conflict,<sup>17</sup> and evaluate differences in charges for particular conduct between domestic law and the ICC—all of which could affect the extent to which the ICC defers to national proceedings under its complementarity regime.

16 Rome Statute of the International Criminal Court art. 86, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 139 (entered into force July 1, 2002).

17 See, in the Report, *infra* note 212 and accompanying text.

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In any event, as a threshold matter, States must have in place the appropriate domestic criminal legislation, in order to prosecute the range of offenses covered by the Rome Statute and to invoke the complementarity regime of the Rome Statute. Regardless of whether the United States eventually decides to join the Court, it makes sense to review the law in order to ensure that the United States is able to investigate and try the criminal acts that have been described in the Rome Statute. Concern has been raised that current U.S. criminal and military law is not sufficient to ensure, in all cases, the primacy of U.S. jurisdiction. **Without appropriate domestic criminal law, the United States cannot benefit from the complementarity regime, regardless of the Court's methods of implementation. Accordingly, the Task Force encourages review of U.S. law and consideration of appropriate amendments to ensure U.S. primacy over ICC jurisdiction.** As further support for the complementarity regime, the Task Force also recommends that the United States support other States in developing their capacity to exercise complementary jurisdiction. Such assistance should be a focus of U.S. development aid, particularly in countries subject to ongoing investigations by the ICC.

### U.S. Constitutional Issues Raised with Respect to Joining the Court

As noted above, the Task Force does not recommend U.S. ratification of the Rome Statute at this time. Rather, it suggests that the executive and legislative branches continue to monitor developments at the Court in order to inform future consideration of whether the United States should join the Court. In that connection, at some future time, the U.S. Government will need to address certain objections to the Court that have been raised on U.S. constitutional grounds. The Task Force has reached a preliminary conclusion that these issues do not present an insurmountable bar to eventual U.S. ratification of the Rome Statute; however, the Task Force recommends further review.

Two main constitutional objections to the Rome Statute have been raised: 1) the ICC does not offer the same due process rights as does the U.S. Constitution; and 2) ratification would contravene Article 1, Section 8 and Article III, Section 1 of the Constitution, dealing with the establishment of domestic courts.

Although the due process rights in the Rome Statute significantly parallel those in the U.S. Constitution, there are procedural differences that have been raised about a number of due process issues, in particular the lack of jury trial before the ICC and the ICC's understanding of the protection against double jeopardy. The ICC follows the practice of many countries as well as the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Nuremberg and Tokyo Tribunals. The ICC Statute authorizes a panel of judges to decide questions of law and fact and permits either the defense or the prosecution to appeal the verdict.

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The U.S. constitutional right to trial by jury is not unlimited. The U.S. extradites Americans, who committed crimes outside U.S. territory, to non-jury criminal trials before foreign courts in situations analogous to those where the ICC would likely claim jurisdiction. And, with regard to international courts, the United States has already participated, without raising concerns about constitutionality, in courts that could try—without jury—American citizens, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda.

The Rome Statute explicitly provides for the protection against double jeopardy, prohibiting trying a person before the ICC for conduct for which the person has been convicted or acquitted by the ICC or by another court. As in the case of other international tribunals and many other countries, the understanding of when the ICC has reached a final judgment for purposes of double jeopardy, however, differs from that in U.S. jurisprudence. In the ICC and other international tribunals as well as other countries, evidence may be adduced during the appellate proceedings, and the judgment at trial is not viewed as an end to the criminal proceedings. Thus, appeals by the prosecution are allowed, as they are simply seen as another step in the criminal proceedings, not as a challenge to a final judgment. Once a final judgment has been rendered (generally by the ICC Appeals Chamber), the person cannot be tried again for crimes for which he/she has been charged. The United States frequently extradites its citizens to countries, such as Germany, that take the same approach to the principle of double jeopardy as that taken by the ICC, and this has passed constitutional muster.

The important issue is whether the fundamental principles of a fair trial are present. The Task Force concludes that the ICC is compliant with the fundamental elements established in international norms, such as those set out in the International Covenant on Civil and Political Rights to which the United States is a party. Should concern about the compatibility of ICC procedures with the U.S. Constitution persist, the Task Force is reassured by the safeguards provided under the Court's complementarity regime, which should in practice, if functioning as intended, ensure respect for U.S. domestic processes.

A further constitutional concern is that, as Congress neither created the ICC nor promulgated its rules, ratification of the Rome Statute would be inconsistent with the provisions of the Constitution requiring that Congress establish federal courts. This concern is based on the conception of the ICC as an extension of U.S. jurisdiction, requiring the ICC be established in a manner consistent with the U.S. Constitution. However, the ICC is an independent international court separate from U.S. courts and exercises jurisdiction distinct from that enjoyed by U.S. courts.

In practice, any remaining constitutional concerns can also be alleviated through the Senate giving its advice and consent subject to a *provisio* or declaration specifying that nothing in the



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Statute requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States. Although the Rome Statute does not permit reservations to the treaty, other States have relied on such declarations. The Task Force suggests that such *provisos*, understandings, and declarations should be considered in connection with any future assessment of whether the United States should join the Court.

## Recommendations

The ASIL Task Force on U.S. Policy Toward the International Criminal Court takes note of the desirable evolution in the *de facto* policy of the United States toward the Court in the last few years. In light of the Court's record over the past seven years and its involvement in compelling situations—such as Darfur, Uganda, and the Democratic Republic of Congo—that are of great concern to the United States, there is an auspicious opportunity to put U.S. relations with the Court on an articulated course of positive engagement. The Task Force recommends that the President take prompt steps to announce a policy of continued positive engagement with the Court, including:

- a stated policy of the U.S. Government's intention, notwithstanding its letter of May 6, 2002 to the U.N. Secretary General, to support the object and purpose of the Rome Statute of the Court;
- examination of methods by which the United States can support important criminal investigations of the Court, including cooperation on the arrest of fugitive defendants, the provision of diplomatic support, and the sharing of information, as well as ways in which it can cooperate with the Court in the prevention and deterrence of genocide, war crimes, and crimes against humanity;
- examination of U.S. policy concerning the scope, applicability, and implementation of "Article 98 agreements" concerning the protections afforded to U.S. personnel and others in the territory of States that have joined the Court;
- U.S. participation as an observer in the Assembly of States Parties to the Rome Statute, including discussions on the crime of aggression and the 2010 Review Conference of the Rome Statute;
- the issuance of any presidential waivers in the interests of the United States that address restrictions on assistance to and cooperation with the Court contained in the American

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Service-Members' Protection Act of 2002 (ASPA) and advice to the Congress on the need for further amendments or repeal of ASPA;

- identification of a high-ranking official to serve as the focal point within the executive branch to coordinate U.S. cooperation with the Court and monitor ICC performance in order to inform the further development of U.S. policy in this area;
- U.S. development assistance focused on rule-of-law capacity building, including that which enables countries to exercise their complementary jurisdiction to the Court effectively;
- support for the continued development of contacts between the various branches of the U.S. Government and the Court;
- support for the legislative agenda detailed below; and
- an inter-agency policy review to re-examine whether, in light of the Court's further performance and the outcome of the 2010 Review Conference, to recommend to Congress that the United States become a party to the Rome Statute with any appropriate *provisos*, understandings, and declarations similar to those adopted by other States Parties.

The Task Force further recommends that Congress pursue a legislative agenda on the Court that includes:

- amendment or repeal of the American Service-Members' Protection Act and other applicable laws to the extent necessary to enhance flexibility in the U.S. Government's engagement with the Court and allies that are States Parties to the Rome Statute;
- consideration of amendment to U.S. law to permit full domestic U.S. prosecution of crimes within the jurisdiction of the Court so as to ensure the primacy of U.S. jurisdiction over the Court's jurisdiction under the complementarity regime; and
- hearings to review and monitor Court performance in order to identify means by which the United States can support the Court consistent with the interests of the United States and the international community and, at the appropriate time, to re-examine whether the U.S. should become a party to the Rome Statute with any appropriate *provisos*, understandings, and declarations similar to those adopted by other States Parties.





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### U.S. Policy Toward the Court

As part of its foreign policy the United States has long promoted justice and the rule of law. Through its involvement in the creation of the international military tribunals at Nuremberg and in Japan, as well as the modern-day International Criminal Tribunals for the former Yugoslavia and Rwanda,<sup>1</sup> the United States has been dedicated to holding accountable those who commit the most serious crimes of concern to the international community. U.S. policy toward the International Criminal Court (ICC or Court) should be considered in light of this broader U.S. policy to prevent serious crimes and promote accountability when prevention efforts fail.

Today, 108 States are members of the ICC, established upon the July 2002 entry into force of the Rome Statute. The Statute gives the Court jurisdiction to adjudicate war crimes, crimes against humanity, and genocide, as well as, potentially, the crime of aggression. While the United States has not joined the Court as a Party to the treaty, its attitude toward the Court has evolved from initial skepticism and concern at the end of the Clinton administration and hostility at the beginning of the Bush administration toward recognition that the Court is doing important work in investigating and prosecuting atrocities in Sudan, Uganda, the Democratic Republic of the Congo, and the Central African Republic.

### Rome and Its Results

The work of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda revived U.S. interest in a permanent court.<sup>2</sup> Indicating its support in principle for an international criminal court as well as articulating the desirable general characteristics of any future ICC,<sup>3</sup> the United

1 See Marc Grossman, Under Secretary of State for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002) [hereinafter Grossman remarks], available at <http://www.iccnw.org/documents/USUnsigningGrossman-6May02.pdf>.

2 *Is A U.N. International Criminal Court in the U.S. National Interest?: Hearing Before S. Subcomm. on International Relations, S. Comm. on Foreign Relations*, 105<sup>th</sup> Cong. 10, 11 (1998) (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation for the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court, U.S. Department of State) [hereinafter Scheffer 1998 Testimony], available at [http://www.state.gov/www/policy\\_remarks/1998/980723\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html). See also Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, 64 LAW & CONTEMP. PROBS. 3, 3-5 (2001) (discussing “tribunal fatigue”).

3 The Foreign Relations Authorization Act for Fiscal Years 1994 and 1995 contains the most detailed expression of Congressional views in the pre-Rome period. It provided that “the establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international rule of law; such a court would thereby serve the interests of the United States and the world community; and the United States delegation should make every effort to advance this proposal at the United Nations.” Foreign Rela-

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States worked through the 1990s at U.N. preparatory meetings to support the development of such a court.<sup>4</sup>

On entering the negotiations of the Rome Conference in June 1998, the United States had various important objectives. And, at the end of negotiations in Rome, the United States had achieved many of them.<sup>5</sup> These included, *inter alia*, a strong complementarity regime (ensuring that the Court's jurisdiction would be complementary and secondary to national jurisdiction),<sup>6</sup> protection of national security information,<sup>7</sup> recognition of national judicial procedures as a predicate for cooperation with the Court,<sup>8</sup> important due process protections (including rules of procedure and evidence),<sup>9</sup> viable definitions of crimes (including elements of crimes),<sup>10</sup> acceptable provisions on command responsibility and superior orders,<sup>11</sup> rigorous qualifications for judges,<sup>12</sup> an Assembly of States Parties to oversee management,<sup>13</sup> reasonable amendment procedures,<sup>14</sup> a high number of ratifications for entry into force of the treaty,<sup>15</sup> preservation of diplomatic immunity under international law,<sup>16</sup> and

tions Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 517(b), 108 Stat. 382, 469 (1994). It also included language stating that

The United States Senate will not consent to the ratification of any treaty providing for United States participation in an international criminal court with jurisdiction over crimes of an international character unless American citizens are guaranteed, in the terms establishing such a court, and in the court's operation, that the court will take no action infringing upon or diminishing their rights under the First and Fourth Amendments of the Constitution of the United States, as interpreted by the United States.

*Id.* § 519. See also Henry T. King and Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 70-76 (1999).

4 King & Theofrastous, *supra* note 3, at 77-79. See also David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 12-14 (1999).

5 Scheffer 1998 Testimony, *supra* note 2, at 12. See generally Scheffer, *supra* note 4.

6 Rome Statute of the International Criminal Court art. 18, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 139 (entered into force July 1, 2002) [hereinafter Rome Statute].

7 *Id.* art. 72.

8 *Id.* arts. 93, 96, 99. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 444-47 (2000).

9 Rome Statute, *supra* note 6, arts. 19, 51, 55, 63, & 66-69.

10 *Id.* arts. 6-9.

11 *Id.* arts. 28 & 33.

12 *Id.* art. 36.

13 *Id.* art. 112.

14 *Id.* arts. 121-122.

15 *Id.* art. 126.

16 *Id.* art. 98(1).

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the explicit right to negotiate bilateral or multilateral agreements to insulate U.S. personnel from ICC jurisdiction.<sup>17</sup>

With regard to some of its critical objectives,<sup>18</sup> however, the United States was less successful. Thus, when the Rome Statute was adopted on July 17, 1998 with a vote of 120 in favor, the United States joined six other States voting against the Statute's adoption.<sup>19</sup>

A primary objection of the United States was the Court's jurisdiction over non-party States' nationals. Before and at the Rome Conference the United States had maintained the position that the Statute should exclude non-party States' nationals from ICC jurisdiction except when a matter is referred by the Security Council or the non-party State gives consent. As a result of an amendment to the draft Statute added late in the conference, however, the final treaty contains language exposing non-party States' nationals to ICC jurisdiction in some circumstances.<sup>20</sup> The United States considered this "[n]ot only . . . contrary to the most fundamental principles of treaty law, [but] it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian intervention to save civilian lives."<sup>21</sup> It was also not clear whether non-party States could "opt-out" of the war crimes jurisdiction for seven years, as can States Parties.<sup>22</sup> Further, under the amendment procedures, States Parties can avoid jurisdiction for crimes amended or added to the Statute in the future; but it is not clear that non-party States can similarly exempt themselves.<sup>23</sup>

17 *Id.* art. 98(2).

18 These other U.S. objectives included establishing a proper definition and trigger mechanism for the crime of aggression, gaining the right to make reservations to the treaty, clarifying the war crime referring to the transfer of a population into occupied territories, and opposing the inclusion of crimes of terrorism and drug trafficking. Scheffer 1998 Testimony, *supra* note 2, at 12, 13-15. The U.S. had also wished for a transitional period, after a State becomes a party, during which the State could opt out of the ICC's jurisdiction for war crimes *and* crimes against humanity. *Id.* at 13-14. The U.S. opposed a resolution at the end of the Rome Conference indicating that crimes of terrorism, and drug trafficking should be included in the ICC's jurisdiction at a later date. *Id.* at 14-15. The U.S. objected to the provision prohibiting reservations to the treaty. "We believe that at a minimum there were certain provisions of the treaty, particularly in the field of state cooperation with the court, where domestic constitutional requirements and national judicial procedures might require a reasonable opportunity for reservations that did not defeat the intent or purpose of the treaty." *Id.* at 15. *See also* Sadat & Carden, *supra* note 8, at 447-58 (discussing six U.S. objections to the Treaty); King & Theofrastous, *supra* note 3, at 83-94.

19 Michael Scharf, Results of the Rome Conference for an International Criminal Court, ASIL Insights, Aug. 1998, available at <http://www.asil.org/insigh23.cfm> (noting that the final vote of the Statute was 120 in favor, 7 against, and 21 abstaining).

20 Rome Statute, *supra* note 6, art. 12.

21 Scheffer 1998 Testimony, *supra* note 2, at 13.

22 *See* Rome Statute, *supra* note 6, art. 124.

23 *See id.* art. 121(5).

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Over U.S. objection, the Statute also created a prosecutor with certain *proprio motu* powers, which permit the prosecutor to begin an investigation on his/her own authority or in response to information received from a State, independent citizen, or organizations.<sup>24</sup> This prosecutorial authority, which is subject to the supervision and approval of an ICC Chamber, raised concerns in some quarters of a prosecutor who was not sufficiently restrained and might be influenced by political factors.

While the United States had gained a role for the U.N. Security Council,<sup>25</sup> it was not the one the United States initially put forward. The United States had sought to have referrals to the future Court made only by the Security Council or by a State Party to the Rome Statute, with the *proviso* in the latter instance that, if the Security Council already was addressing the matter under Chapter 7 of the U.N. Charter, the Council's consent would have to be obtained before commencement of investigation by the Court.<sup>26</sup> When it was clear that the U.S. position on Security Council referrals to the ICC was not going to be accepted, the United States supported a compromise introduced by Singapore that resulted in affirming the Security Council's power to suspend the ICC's work by an affirmative vote—allowing any of the permanent members of the Security Council to block a suspension.<sup>27</sup> Concern about conflict with the role of the Security Council remained. Over U.S. opposition, the Statute included the crime of aggression—to be defined at a later date—but it provided no guarantee that any emergent definition of the crime aggression would require that there “be a direct linkage between a prior Security Council decision that a state had committed aggression and the conduct of an individual of that state.”<sup>28</sup>

24 See *id.* art. 15.

25 *Id.* arts. 13(b) & 16.

26 David Scheffer, *The Security Council's Struggle Over Darfur and International Justice*, JURIST, Aug. 20, 2008 [hereinafter Scheffer JURIST], <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>. See also Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Referrals and Resolution 1422*, 35 VAND. J. TRANSNAT'L L. 1503, 1509-10 (2002); Michael Bachrach, *The Permanent International Criminal Court: An Examination of the Statutory Debate*, 5 ILSA J. INT'L & COMP. L. 139, 145 (1998).

27 Scheffer JURIST, *supra* note 26; El Zeidy, *supra* note 26, at 1510-12; Bachrach, *supra* note 26, at 146. Article 16 of the Rome Statute provides that “[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” Rome Statute, *supra* note 6, art. 16.

28 Scheffer 1998 Testimony, *supra* note 2, at 14.



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### After Rome: U.S. Policy from 1998 to Today

Despite voting against the adoption of the Rome Statute and concerns in some quarters regarding the manner and atmosphere in which the Rome negotiations were conducted,<sup>29</sup> the United States remained engaged with the ICC throughout the post-Rome negotiating process in 1999 and 2000. The United States participated fully in the Preparatory Commissions that followed the Rome Conference and, on June 30, 2000, joined consensus on the Court's Draft Elements of Crimes and the Draft Rules of Evidence and Procedure.<sup>30</sup> Through these negotiations the United States was able to address some of its key concerns, including by strengthening the application of complementarity<sup>31</sup> and reducing the possibility of politically influenced prosecutions.<sup>32</sup> However, none of these documents directly addressed U.S. concerns about exposure of non-party States' nationals to ICC jurisdiction.

On December 31, 2000, the last day that the Rome Statute was open for signature, Ambassador David Scheffer, at the direction of President Clinton, signed the treaty. Upon signature, President Clinton made clear that the United States retained reservations about the Rome Statute:

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- 29 Sadat & Carden, *supra* note 8, at 393-94, 453-57 (discussing the six substantive U.S. objections to the Treaty). U.S. delegates in Rome asserted that the Statute was adopted "against a backdrop of antagonism toward the United States." Theodor Meron, *The Court We Want*, ASIL NEWSL. (Am. Soc'y of Int'l Law, Washington, D.C.), Nov.-Dec. 1998, at 9. See generally Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, 77 FOREIGN AFF. 20 (Nov./Dec. 1998) (describing the negotiations of the Rome Statute and the outcome) [hereinafter Wedgwood, *Fiddling in Rome*]; Ruth Wedgwood, *Ninety-three Countries Have Signed Off on the ICC. Why Isn't the U.S. One of Them?*, FOREIGN SERVICE J., March 2000, at 34.
- 30 Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 60 (2001). "Although the Rules are 'subordinate in all cases' to the Rome Statute, they are intended to facilitate the application of the statute in actual practice." *Id.*, citing *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000) (Explanatory Note). The U.S. joined consensus on the adoption of the Elements of Crimes, which serve as an interpretative aid but are not binding on judges. Newton, *supra* note 30, n.25. See *infra* note 212.
- 31 Rules of Procedure and Evidence, adopted by the Assembly of States Parties, 1st sess., Sept. 3-10, 2002, ICC-ASP/1/3 [hereinafter RPE], R. 51, 52(2) & 54(2).
- 32 See *id.* R. 44-84. In addition, Rules 51-56 were proposed or supported by the U.S. delegation to constrain the prosecutor's efforts to second-guess national efforts under Article 18(2) of the Rome Statute. See Ambassador David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 8, 10-11, 13 (2001); Memorandum from David Scheffer, Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, Chicago, IL, to the Co-Chairs of the ASIL Task Force 4 (Oct. 26, 2008) (on file with the ASIL Task Force). Other U.S. achievements in the Rules of Procedure and Evidence include Rule 195(2), which can be used to carve out a special agreement between the ICC and the U.S. *Id.* at 1. In the Elements of Crimes, the general introduction and the introductions to the specific crimes reflect key U.S. requirements, and footnote 44 clarifies the scope of the war crime on transfer of population into occupied territory. *Id.* at 5-6.

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In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not. . . . Given these concerns, I will not and do not recommend that my successor submit the treaty to the Senate for ratification until our fundamental concerns are satisfied.<sup>33</sup>

The United States signed the treaty “to reaffirm [its] strong support for international accountability”<sup>34</sup> and in order to be in a better position to influence ongoing negotiations regarding the Rules of Procedure and Evidence and the Elements of Crimes, as well as to shape the attitudes of judges and prosecutors, to sustain U.S. leadership on international justice issues, and to improve relations with ICC Member States with whom the United States would be seeking “Article 98 non-surrender agreements.”<sup>35</sup> It was believed that this engagement could ultimately help mold the Court and alleviate U.S. concerns. Thus, the United States prepared to continue negotiations in 2001, with the aim, *inter alia*, of maintaining influence over the development of the crime of aggression.<sup>36</sup>

In 2002, believing the ICC to be built on a flawed foundation, President Bush concluded “that the United States can no longer be a party to this process. In order to make [U.S.] objections clear, both in principle and philosophy, and so as not to create unwarranted expectations of U.S. involvement in the Court, the President believe[d] that he ha[d] no choice but to inform the United Nations . . . of [the U.S.] intention not to become a party to the Rome Statute . . .”<sup>37</sup> A letter sent to U.N. Secretary General Kofi Annan, just prior to entry into force of the Rome Statute, stated:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.<sup>38</sup>

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- 33 President Clinton, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001), reprinted in SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW, VOLUME 1: 1999-2001 384, 385 (2002).
- 34 *Id.* at 384.
- 35 See *id.* at 384-85. See also David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 58-60 (2000).
- 36 Scheffer, *supra* note 35, at 58. See, e.g., Preparatory Commission for the International Criminal Court, *Crime of Aggression: Statement by the United States*, Sept. 21, 2001, available at <http://www.state.gov/documents/organization/16461.pdf>.
- 37 Grossman remarks, *supra* note 1.
- 38 Letter from John R. Bolton, U.S. Under Secretary of State for Arms Control and International Security, to Kofi

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The United States participated no further in the multilateral discussions on the ICC and declined to make use of its right to take part as an observer in the Assembly of States Parties.

At the same time, Congress approved legislation prohibiting cooperation with the ICC and forbidding the use of U.S. funds, directly or indirectly, in support of the ICC. Originally presented as a way to insulate U.S. service-members from ICC jurisdiction,<sup>39</sup> the American Service-Members' Protection Act of 2002 (ASPA),<sup>40</sup> which became law one month after the Rome Statute entered into force, also placed five restrictions on U.S. interaction with the ICC and its States Parties. First, ASPA prohibited cooperation by any U.S. court or agency—federal, state, or local—with the ICC.<sup>41</sup> Forms of prohibited cooperation included responding to requests for cooperation from the Court, providing support, extraditing any person from the United States to the ICC or transferring any U.S. citizen or permanent resident alien to the ICC, providing funds to assist the Court, and permitting ICC investigations on U.S. territory.<sup>42</sup> Second, ASPA provided that the United States could participate in U.N. peacekeeping operations only where the U.N. mandate “permanently exempts, at a minimum, members of the [U.S.] Armed Forces . . . participating in such operation from . . . jurisdiction by the . . . Court . . .”<sup>43</sup> The only exceptions to this requirement are if no State in which U.S. troops will be present is a party to the Rome Statute; if the State Party has entered into an agreement with the United States, in accordance with Article 98 of the Rome Statute,<sup>44</sup> preventing the ICC from exercising jurisdiction over U.S. service-members;<sup>45</sup> or when U.S. national interests justify participation.<sup>46</sup> Third, ASPA also prohibited direct or indirect transfer of classified national security information

Annan, U.N. Secretary General (May 6, 2002) [hereinafter 2002 U.S. letter to the U.N. Secretary General], *available at* <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

39 See generally *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution: Hearing Before the S. Comm. on Foreign Relations*, 106<sup>th</sup> Cong. (2000) [hereinafter 2000 Hearing], *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_senate\\_hearings&docid=f:67980.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:67980.pdf).

40 American Service-Members' Protection Act of 2002, P.L. 107-206, 16 Stat. 899 (2002) (codified at 22 U.S.C. §§ 7421 *et seq.*) [hereinafter ASPA]. ASPA passed the U.S. Senate by a vote of 75-19.

41 *Id.* § 2004.

42 *Id.*

43 *Id.* § 2005 (a).

44 “The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.” Rome Statute, *supra* note 6, art. 98(2).

45 ASPA, *supra* note 40, § 2005 (c)(2).

46 *Id.* § 2005 (c)(3).

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and law enforcement information to the Court.<sup>47</sup> Fourth, ASPA prohibited military assistance to States party to the ICC,<sup>48</sup> unless the President deems it “important to the national interest of the United States to waive such prohibition”<sup>49</sup> or the concerned State has entered into an Article 98 agreement with the United States.<sup>50</sup> This provision does not, however, apply to NATO countries and major non-NATO allies.<sup>51</sup> Fifth, ASPA authorized the President to use “all means necessary and appropriate”<sup>52</sup> to free its service-members and others, including “allied persons”<sup>53</sup> detained or imprisoned by or on behalf of the ICC.<sup>54</sup>

In addition to the various waivers and exemptions found in the specific provisions of ASPA, section 2003<sup>55</sup> provided, under certain conditions, for the possibility of a general presidential waiver of the restrictions and prohibitions established under the Act. ASPA explicitly reiterated that it does not apply to actions taken by the President under his authority as Commander in Chief of the Armed Forces with regard to cooperation with the Court<sup>56</sup> and providing information to the Court,<sup>57</sup> in specific instances.<sup>58</sup> Finally, section 2015 clarified assistance to international accountability efforts, providing that “[n]othing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”<sup>59</sup>

47 *Id.* § 2006.

48 *Id.* § 2007 (a).

49 *Id.* § 2007 (b).

50 *Id.* § 2007 (c).

51 *Id.* § 2007 (d). Major non-NATO allies include Australia, Egypt, Israel, Jordan, Argentina, the Republic of Korea and New Zealand. *Id.* § 2007 (d)(2). Taiwan is also exempt. *Id.* § 2007 (d)(3).

52 *Id.* § 2008 (a).

53 “The term ‘covered allied persons’ means military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan, for 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 International Criminal Court.” *Id.* § 2013 (3).

54 *Id.* § 2008.

55 *Id.* § 2003.

56 *Id.* § 2004.

57 *Id.* § 2006.

58 *Id.* § 2011.

59 *Id.* § 2015 (emphasis added). Senator Christopher Dodd, a main opponent of ASPA, introduced this amendment to ASPA. Coalition for the International Criminal Court, Overview of the United States’ Opposition to the International Criminal Court, available at [http://www.iccnw.org/documents/CICCFUS\\_US\\_Opposition\\_to\\_ICC\\_11Dec06\\_final.pdf](http://www.iccnw.org/documents/CICCFUS_US_Opposition_to_ICC_11Dec06_final.pdf). See also John P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes Toward the*

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The United States began actively pursuing completion of the so-called “Article 98 agreements”<sup>60</sup> with foreign States, reaching its first such agreement in August 2002.<sup>61</sup> In the official policy speech of the Bush Administration, then Under Secretary of State for Political Affairs Marc Grossman said that “the United States respects the decisions of those states that have chosen to join the ICC,” and added that “we believe there is common ground and ask those nations who have decided to join the Rome Statute to meet us there.”<sup>62</sup> However, that tone of moderation was overshadowed by the international response to the antagonistic rhetoric of some U.S. officials and the widespread opposition to the pursuit of “Article 98 agreements.” Some of these agreements sought to exempt all U.S. nationals—not merely those on official business—as well as foreign contractors with the United States from ICC proceedings.<sup>63</sup> These agreements generated criticism from some quarters, including from European allies, that they were inconsistent with the partner State’s obligations under the Rome Statute.<sup>64</sup> The European Union (EU) established guidelines on acceptable terms for any “Article 98 agreement” that an EU Member State may conclude with the United States: 1) the agreement’s scope of coverage could extend only to government representatives on official business; 2) the United States had to pledge to prosecute any war crimes committed by Americans; and 3) the agreement could not contain a reciprocal promise preventing surrender of the EU Member State’s nationals to the ICC.<sup>65</sup>

The content of some of the “Article 98 agreements” was not the only source of controversy for the United States at the time. ASPA also required that U.S. military assistance be withheld unless an “Article 98 agreement” was concluded, and this was perceived in some quarters as

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*International Criminal Courts and Tribunals*, 18 EUR. J. INT’L L. 277, n.110 (2007).

60 The agreements are based upon Article 98(2) of the Rome Statute, thus, they are often referred to as “Article 98 Agreements” or sometimes non-surrender agreements.

61 East Timor signed the first “Article 98 agreement” on Aug. 23, 2002. Agreement Between the Government of the United States of America and the Government of the Democratic Republic of East Timor Regarding the Surrender of Persons to the International Criminal Court, U.S.-E. Timor, Aug. 23, 2002, Hein’s No. KAV 6339, Temp. State Dep’t No. 03-150, at 4 (entered into force Oct. 30, 2003).

62 Grossman remarks, *supra* note 1.

63 For agreements, see Georgetown Law Library, International Criminal Court – Article 98 Agreements Research Guide, available at [http://www.ll.georgetown.edu/guides/article\\_98.cfm](http://www.ll.georgetown.edu/guides/article_98.cfm).

64 See, e.g., Parliamentary Assembly of the Council of Europe, Risks for the Integrity of the Statute of the International Criminal Court, Res. 1300 (Sept. 25, 2002) [hereinafter Parliamentary Assembly Res. 1300]; Amnesty International, International Criminal Court: U.S. Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes, IOR 40/025/2002 (Sept. 2, 2002) (arguing that “Article 98 agreements” violate the Rome Statute and urging countries not to enter into these agreements with the United States), available at <http://www.amnesty.org/en/library/info/IOR40/025/2002>. See *infra* text accompanying notes 186-194.

65 Council of the European Union: Council Conclusions and EU Guiding Principles Concerning Arrangements Between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, 42 I.L.M. 240, 241 (2003) [hereinafter EU Guiding Principles].

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unduly coercive.<sup>66</sup> The United States sought to conclude the bilateral agreements not only with States party to the ICC but also with non-signatories as well as with those States exempted from ASPA sanctions.<sup>67</sup> This led some critics to conclude that these U.S. actions were aimed less at protecting U.S. service-members and more at directly undermining the ICC.<sup>68</sup>

Also in 2002, the United States sought a Security Council resolution to exempt permanently U.S. troops and officials involved in U.N. peacekeeping or peace-enforcement missions from ICC jurisdiction,<sup>69</sup> as stipulated in ASPA for U.S. participation in missions where there exists no exemption arrangement with the host government.<sup>70</sup> Opponents objected that such a resolution would “rewrite” an international treaty—the Rome Statute—and argued that, despite Articles 25 and 103 of the U.N. Charter,<sup>71</sup> the Security Council does not possess such authority.<sup>72</sup> Concerned that the United States would veto the extension

66 See, e.g., Parliamentary Assembly of the Council of Europe, Threats to the International Criminal Court, Res. 1336, ¶ 10 (June 25, 2003) [hereinafter Parliamentary Assembly Res. 1336]; Lilian V. Faulhaber, *American Servicemembers’ Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, 554 (2003) (discussing the “coercive nature” of ASPA and “Article 98 agreements”); Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 138 (2008) (citing the more than one hundred “Article 98 agreements” as an example of strong States promising foreign aid or enhanced trade access in return for cooperative behavior, or threatening sanctions or withdrawal of aid in return for uncooperative behavior).

67 Jennifer K. Elsea, CRS Report (RL31495), U.S. Policy Regarding the International Criminal Court (updated June 14, 2006) at 25.

68 See, e.g., Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98 Agreements* (Aug. 2, 2002) (contending that the agreements “violate the Rome Statute and must be opposed”), available at <http://www.amicc.org/docs/hrw20020802.pdf>; Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Impunity Agreements* (Sept. 4, 2002), available at <http://www.iccnw.org/documents/HRWArt98legalpaper.pdf>; Wedgwood, *Fiddling in Rome*, *supra* note 29, at 21 (referring to Senator Jesse Helm’s “declaration of war on the ICC for not giving ‘100 percent protection’ from prosecution to American GIs”).

69 El Zeidy, *supra* note 26, at 1505; Elsea, *supra* note 67, at 23.

70 ASPA, *supra* note 40, § 2005 (c).

71 “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” U.N. Charter art. 25. “In the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” *Id.* art. 103.

72 Letter from the Permanent Representatives of Brazil, Canada, New Zealand and South Africa to the President of the U.N. Security Council, U.N. Doc. S/2002/754 (Dec. 7, 2002); Press Release, Security Council, Security Council Requests International Criminal Court Not to Bring Cases Against Peacekeeping Personnel From States Not Party to Statute, U.N. Doc. SC/7450 (July 12, 2002), available at <http://www.un.org/News/Press/docs/2002/sc7450.doc.htm>. See also El Zeidy, *supra* note 26, at 1519-20; Elsea, *supra* note 67, at 23. See generally Ademola Abass, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 TEX. INT’L L.J. 263 (2005); Robert Cryer & Nigel D. White, *The Security Council and the International Criminal Court: Who’s Feeling Threatened?*, in 8 INTERNATIONAL PEACEKEEPING: THE YEARBOOK OF INTERNATIONAL PEACE OPERATIONS 143 (Harvey Langholtz, Boris Kondoch & Alan Wells eds., 2002).

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of the peacekeeping operations in Bosnia, the U.N. Security Council adopted Resolution 1422 as a compromise. Invoking Article 16 of the Rome Statute,<sup>73</sup> Resolution 1422 did not provide absolute exemption but deferred ICC investigation or prosecutions of contributing State personnel for one year.<sup>74</sup> This resolution was renewed once, extending the deferral for another year—until June 30, 2004.<sup>75</sup>

The United States also obtained immunity for its personnel and officials in the Security Council resolution authorizing the U.N. Mission in Liberia to enforce the cease-fire.<sup>76</sup> In order to comply with ASPA,<sup>77</sup> however, U.S. participation in missions lacking comparable resolutions, such as Haiti in 2004,<sup>78</sup> required the United States to conclude an “Article 98 agreement” with the host State.

Additional legislative action in 2004 further stimulated pursuit of “Article 98 agreements.” For fiscal year 2005, Congress approved a provision known as the Nethercutt Amendment.<sup>79</sup> This legislation, signed into law on Dec. 7, 2004, prohibited providing assistance funds under the Economic Support Fund to any State party to the Rome Statute, except for States eligible for assistance under the Millennium Challenge Act of 2003.<sup>80</sup> The President could waive this prohibition for those States that concluded “Article 98 agreements” with the United States or if the State were a NATO member or major non-NATO ally and if the waiver were in the national interest.<sup>81</sup> In response, the Council of the European Union

73 Rome Statute, *supra* note 6, art. 16.

74 “[I]f a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, [the ICC] shall for a twelve-month period starting on 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.” S.C. Res. 1422, ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002).

75 S.C. Res. 1487, ¶ 1, U.N. Doc. S/RES/1487 (June 12, 2003).

76 “Decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.” S.C. Res. 1497, ¶ 7, U.N. Doc. S/RES/1497 (Aug. 1, 2003).

77 ASPA, *supra* note 40, § 2005.

78 See S.C. Res. 1529, U.N. Doc. S/RES/1529 (Feb. 29, 2004); S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004). Memorandum from President George Bush on Certification Concerning U.S. Participation in the United Nations Stabilization Mission in Haiti Consistent with Section 2005 of the American Servicemembers’ Protection Act to the Secretary of State (June 14, 2004), 69 Fed. Reg. 34,043 (June 18, 2004) (certifying that U.S. service-members participating in the U.N. Stabilization Mission in Haiti are without risk of criminal prosecution or other assertion of jurisdiction by the ICC as Haiti had entered into an “Article 98” agreement).

79 Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 574, 118 Stat. 2809, 3037-38 (2004).

80 *Id.*

81 *Id.* § 574 (b), (c).

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called on President Bush to fully use his waiver authority and reiterated the European Union's position that "Article 98 agreements" "should, by respecting the legal obligations of sovereign nations party to the Rome Statute, preserve the integrity of the Rome Statute."<sup>82</sup> By mid-2005, the U.S. State Department reported that one hundred States had signed "Article 98 agreements" with the United States.<sup>83</sup>

By March 2005, however, some officials in the Department of Defense began to voice concerns that ASPA's restrictions were resulting in unintended, adverse consequences for U.S. security interests. Before the House Armed Services Committee, General Bantz J. Craddock, U.S. Southern Commander, stated that ASPA

has the unintended consequence of restricting our access to and interaction with many important partner nations. Sanctions enclosed in the ASPA statute prohibit International Military Education and Training (IMET) funds from going to certain countries that are parties to the Rome Statute . . . Of the 22 nations worldwide affected by these sanctions, 11 of them are in Latin America, hampering the engagement and professional contact that is an essential element of our regional security cooperation strategy. . . Extra-hemispheric actors are filling the void left by restricted U.S. military engagement with partner nations. We now risk losing contact and interoperability with a generation of military classmates in many nations of the region. . . An increasing presence of the People's Republic of China (PRC) in the region is an emerging dynamic that must not be ignored.<sup>84</sup>

General Craddock, joined by other U.S. military commanders and U.S. officials,<sup>85</sup> continued

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- 82 Press Release, Council of the European Union, Declaration by the Presidency on Behalf of the European Union on the Nethercutt Amendment, 15864/1/04 REV 1 (Presse 353) P 136/04, (Dec. 10, 2004).
- 83 Press Release, U.S. Department of State, U.S. Signs 100<sup>th</sup> Article 98 Agreement (May 3, 2005), available at <http://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm>. For agreements, see Georgetown Law Library, *supra* note 63.
- 84 *Fiscal Year 2006 National Defense Authorization Budget Request: Hearing Before the H. Armed Services Comm.*, 109th Cong. (2005) (statement of General Bantz J. Craddock, U.S. Army Commander, United States Southern Command), available at <http://www.ciponline.org/colombia/050309crad.htm>.
- 85 *Nominations Before S. Armed Services Comm.*, 109th Cong. (2006) (advance policy questions of Vice Admiral James G. Stravidis, Nominee for Commander, United States Southern Command), available at <http://armed-services.senate.gov/statemnt/2006/September/Stavidis%2009-19-06.pdf>; Department of Defense News Briefing with General James L. Jones, NATO Supreme Allied Commander (Europe) (Mar. 6, 2006), available at <http://www.globalsecurity.org/military/library/news/2006/03/mil-060306-dod01.htm>; *Counternarcotics Strategies in Latin America: Hearing Before the Subcomm. on the Western Hemisphere, H. International Relations Comm.*, 109th Cong. (2006) (statement by Anne W. Patterson, Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs, Department of State), available at <http://ciponline.org/colombia/060330patt.pdf>. For these and other comments on the impact of "Article 98 agreements," see Coalition for the International Criminal Court, Comments by U.S. Officials on the Negative Impact of Bilateral Immunity Agreements (BIAs) and the



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to describe these concerns to Congress throughout 2006.<sup>86</sup> And, in May 2006, Secretary of State Condoleezza Rice acknowledged that the military aid cuts to Latin American countries required by ASPA are “sort of the same as shooting ourselves in the foot.”<sup>87</sup>

By 2006, the conclusion of additional “Article 98 agreements” slowed. By December 2006, 102 “Article 98 agreements” were reported signed,<sup>88</sup> only two more than in May 2005.<sup>89</sup> On October 2, 2006, President Bush issued twenty-one waivers on IMET aid provisions to States that refused to sign “Article 98 agreements.”<sup>90</sup> On October 17, 2006, the President signed a law repealing the statutory restriction on IMET funding to ICC States Parties that lacked an “Article 98 agreement.”<sup>91</sup> Thus, no ICC States Parties are currently required to enter into or maintain an “Article 98 agreement” with the U.S. in order to receive IMET funds. While this amendment to ASPA did not affect the Nethercutt Amendment, the Nethercutt Amendment had already been modified for fiscal year 2006. Congress had extended the available waiver in the Nethercutt Amendment beyond the few listed countries to “such other country as [the President] may determine if he determines . . . that it is important to the national interests of the United States to waive such prohibition.”<sup>92</sup> On November 28, 2006, the President waived

American Servicemembers’ Protection Act, available at [http://www.iccnw.org/documents/CICCFS-CommentsUSOfficials\\_BIA-ASPA\\_current.pdf](http://www.iccnw.org/documents/CICCFS-CommentsUSOfficials_BIA-ASPA_current.pdf).

- 86 *Testimony from Combatant Commanders on their Military Strategy and Operational Requirements in Review of the Defense Authorization Request for Fiscal Year 2007 and the Future Years Defense Program: Hearing Before the S. Armed Services Comm.*, 109<sup>th</sup> Cong. (2006) (statement of General Bantz Craddock, U.S. Army Commander, U.S. Southern Command), available at <http://armed-services.senate.gov/statemnt/2006/March/Craddock%2003-14-06.pdf>; *Testimony on the Fiscal Year 2007 National Defense Authorization Budget Request from the U.S. Southern Command: Hearing Before the H. Armed Services Comm.*, 109<sup>th</sup> Cong. (2006) (statement of General Bantz Craddock, U.S. Army Commander, U.S. Southern Command), available at <http://ciponline.org/columbia/060316crad.pdf>; *Nominations Before S. Armed Services Comm.*, 109<sup>th</sup> Cong. (2006) (advance policy questions of General Bantz J. Craddock, Commander, United States European Command and Supreme Allied Commander, Europe), available at <http://armed-services.senate.gov/statemnt/2006/September/Craddock%2009-19-06.pdf>.
- 87 Condoleezza Rice, U.S. Secretary of State, Trip Briefing: En Route to San Juan, Puerto Rico, Department of State (Mar. 10, 2006), available at <http://2001-2009.state.gov/secretary/rm/2006/63001.htm>.
- 88 For an unofficial list, see Coalition for the International Criminal Court, Status of U.S. Bilateral Immunity Agreements (BIAs) (as of Dec. 11, 2006), available at [http://www.iccnw.org/documents/CICCFS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf) (reporting 102 agreements concluded).
- 89 Press Release, U.S. Department of State, *supra* note 83. See also Georgetown Law Library, *supra* note 63.
- 90 Memorandum from President George Bush on Waiving Prohibition on United States Military Assistance with Respect to Various Parties to the Rome Statute Establishing the International Criminal Court to the Secretary of State (Oct. 2, 2006), available at <http://www.amicc.org/docs/Bush%20ASPA%20Memo%202%20October%202006.pdf>.
- 91 John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1222, 120 Stat. 2083, 2423 (2006).
- 92 Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. No. 109-102, § 574 (b), 119 Stat. 2172, 2230 (2005). Congress did not pass a foreign operations appropriations bill or any other

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the Nethercutt Amendment to release Economic Support Funds to fourteen ICC States Parties that had not signed an “Article 98 agreement.”<sup>93</sup> In January 2008, Congress’ amendment to ASPA, eliminating restrictions on Foreign Military Financing to States unwilling to enter into “Article 98 agreements,” became law.<sup>94</sup> Today, the United States no longer actively pursues “Article 98 agreements.”<sup>95</sup>

In addition to changes in domestic legislation and waivers, there were other changes in policy. The U.S. opposition to references to the ICC in U.N. resolutions<sup>96</sup> began to alter. Even more significantly, on March 31, 2005, the United States decided not to block a crucial Security Council resolution referring the situation in the Darfur region of Sudan to the ICC Prosecutor.<sup>97</sup> Instead, the United States abstained on the resolution. While the United States insisted upon inclusion of language to protect U.S. nationals and other persons of non-party States outside Sudan from prosecution,<sup>98</sup> it was a significant landmark in the evolution of U.S. attitudes toward the ICC. As early as 2006, the more pragmatic approach to the ICC taken during the second term of the Bush presidency began to be noticed in the media, if not other capitals.<sup>99</sup> John Bellinger, then Legal Adviser of the Department of State said: “We don’t have a

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bill containing the Nethercutt provision for fiscal year 2007. However, the Nethercutt provision was reinstated for fiscal year 2008. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161 §671, 121 Stat. 1844, 2354 (2007).

- 93 Coalition for the International Criminal Court, Developments on U.S. Bilateral Immunity Agreements (BIAS): U.S. Removes Military Training Sanctions From BIA Campaign and Issues Economic Aid Waivers to Some ICC Member States (Dec. 2006), available at [http://www.iccnw.org/documents/CICCCFS-UpdateWaivers\\_11Dec06\\_final.pdf](http://www.iccnw.org/documents/CICCCFS-UpdateWaivers_11Dec06_final.pdf).
- 94 National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1212, 123 Stat. 3, 371 (2008).
- 95 Clint Williamson, Ambassador-at-Large for War Crimes Issues, U.S. Department of State, Remarks at the Century Foundation on Reassessing the International Criminal Court: Ten Years Past Rome (Jan. 13, 2009), transcript available at <http://www.tcf.org/publications/internationalaffairs/ICC%20Transcript.pdf>.
- 96 *Id.* For example, the United States refused to join U.N. Security Council Resolution 1502 on the protection of humanitarian personnel until language referring to the ICC was removed. The American Non-Governmental Organizations Coalition for the International Criminal Court, Chronology of U.S. Opposition to the International Criminal Court: From ‘Signature Suspension’ to Immunity Agreements to Darfur (Jan. 30, 2009), available at <http://www.amicc.org/docs/US%20Chronology.pdf>.
- 97 S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). See Press Release SC/8351, U.N. Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court (Mar. 31, 2005).
- 98 S.C. Res. 1593, *supra* note 97, ¶ 6. See Frederic L. Kirgis, U.N. Commission’s Report on Violations of International Humanitarian Law in Darfur, ASIL Insights, Feb. 2005, available at <http://www.asil.org/insight050204.cfm>.
- 99 See, e.g., Michele Kelemen, *Taylor War Crimes Trial Worries West Africa* (NPR radio broadcast, Morning Edition, Apr. 6, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5327167>; Jess Bravin, *U.S. Warms to Hague Tribunal*, WALL ST. J., June 14, 2006, available at <http://www.amicc.org/docs/6-14-06%20Wall%20Street%20Journal.pdf>; Nora Boustany, *Official Floats Possibility of Assistance to Hague Court*, WASH. POST, June 12, 2007, at A20, available at [http://www.washingtonpost.com/wp-dyn/content/article/2007/06/11/AR2007061102347\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/06/11/AR2007061102347_pf.html); Sue Pleming, *U.S. Takes More Pragmatic View of World Court*, REUTERS, May 7,

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general allergy to the ICC. . . . We see a role for the ICC in international criminal justice in the world.” Further, on July 31, 2008, the United States opposed the efforts of various countries to invoke Article 16 of the Rome Statute to defer the investigation and prosecution of Sudanese President Al Bashir.<sup>100</sup> Mr. Bellinger commented in this regard:

The irony of the United States’ support for the Court in opposing an Art. 16 deferral is often noted by the press; what I hope will get equal attention is the still-greater irony that some strong supporters of the Court seem so willing to consider interfering with the Court’s prosecution of an individual responsible for genocide.<sup>101</sup>

Also, in July 2008, State Department Spokesperson Sean McCormick publicly acknowledged U.S. receipt of a request of assistance from the ICC and indicated that the United States “had pledged to look at that request.”<sup>102</sup> The United States has also supported the use by the Special Court of Sierra Leone of the ICC facilities in the Hague to try Charles Taylor,<sup>103</sup> although the trial is being conducted under a bilateral agreement between the United Nations and Sierra Leone. There have been fairly frequent meetings between the United States and ICC officials,<sup>104</sup> as well as other official U.S. statements reflecting a greater willingness to cooperate with the Court, including possibly the sharing of information with the ICC as the United

2008, available at [http://www.amicc.org/docs/5-7-2008\\_Reuters.pdf](http://www.amicc.org/docs/5-7-2008_Reuters.pdf); Jess Bravin, *U.S. Accepts International Criminal Court*, WALL ST. J., Apr. 26, 2008, available at <http://www.amicc.org/docs/4-26-08%20Wall%20Street%20Journal.pdf>.

100 In explaining the U.S. abstention on the vote on resolution 1828, U.S. Deputy Permanent Representative to the U.N. Alejandro Wolf said his government strongly supports UNAMID but that the “language added to the resolution would send the wrong signal to the Sudanese President Al-Bashir and undermine efforts to bring him and others to justice. This Council cannot ignore the terrible crimes committed throughout the conflict in Darfur and the massive human destruction that the world has witnessed.” USUN Press Release #209(08), United States Mission to the United Nations, Office of Press and Public Diplomacy, Explanation of vote by Ambassador Alejandro Wolff, U.S. Deputy Permanent Representative, on the renewal of the UNAMID mandate, in the Security Council chamber (July 31, 2008), available at [http://www.usunnewyork.usmission.gov/press\\_releases/20080731\\_209.html](http://www.usunnewyork.usmission.gov/press_releases/20080731_209.html).

101 John B. Bellinger, III, Legal Adviser of the Department of State, U.S. Perspectives on International Criminal Justice, Remarks at the Fletcher School of Law and Diplomacy, Medford, MA (Nov. 14, 2008), available at <http://2001-2009.state.gov/s/l/rls/111859.htm>.

102 Daily Press Briefing, Transcript, U.S. Department of State, Sean McCormack, Spokesperson (July 14, 2008), available at <http://2001-2009.state.gov/r/pa/prs/dpb/2008/july/106986.htm>. See also Williamson, *supra* note 95.

103 S.C. Res. 1688, UN Doc. S/RES/1688 (June 6, 2006). “Last year saw the start of the trial of former Liberian President Charles Taylor in The Hague. This was a significant moment: Taylor is the first African president to be indicted by an international court for war crimes, crimes against humanity, and other serious international crimes. The United States went to extraordinary lengths to help locate Taylor, bring him to Liberia, and facilitate his trial. Secretary Rice was personally instrumental in these efforts, and I remember personally calling ICC President Philippe Kirsch to tell him we had no objection to the use of ICC facilities for the trial.” Bellinger, *supra* note 101.

104 Williamson, *supra* note 95.

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States does with other international tribunals.<sup>105</sup>

While the Obama administration has only recently taken office, it has already indicated that it will further this cooperative policy towards the Court. Senator Hillary Rodham Clinton's prepared responses for the January 2009 hearing on her confirmation as Secretary of State included references to U.S. policy toward the ICC.

Now, that it is operational, we are learning more about how the ICC functions. Thus far, the ICC has operated with professionalism and fairness—pursuing perpetrators of truly serious crimes, like genocide in Darfur, and atrocities in the Congo and Uganda. The President-Elect believes as do I that we should support the ICC's investigations, including its pursuit of perpetrators of genocide in Darfur. Along these lines, the Bush administration has indicated a willingness to cooperate with the ICC in the Darfur investigation, a position which the new Administration will support.

But at the same time, we must also keep in mind that the U.S. has more troops deployed overseas than any nation. As Commander-in-Chief, the President-Elect will want to make sure they continue to have maximum protection. Therefore, we intend to consult thoroughly within the government, including the military, as well as non-governmental experts, and examine the full track record of the ICC before reaching decisions on how to move forward. I also look forward to working closely with the Members of the Committee. Whether we work toward joining or not, we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.<sup>106</sup>

105 *Id.* John B. Bellinger, III, Legal Adviser of the Department of State, The United States and International Law, Remarks at the Hague, Netherlands (June 6, 2007), available at <http://2001-2009.state.gov/s/l/rls/86123.htm>.

I believe the United States has made genuine efforts to address these issues in recent years. As I noted earlier, we've emphasized as a core principle of our policy our respect for the decisions of other States to join the ICC. Moreover, the Administration has acknowledged that the Court has a valuable role to play in certain cases. In 2005, in one of the first major policy decisions of Secretary Rice's tenure at the State Department, the United States accepted the decision of the U.N. Security Council to refer the Darfur situation to the ICC. We have said that we want to see the ICC's Darfur work succeed and that if the ICC were to make a request for appropriate assistance from the United States in connection with the Darfur matter, we would be prepared to consider it consistent with applicable U.S. law. We have also waived restrictions under U.S. law on assistance to a number of countries that have not signed Article 98 agreements with the United States and we've made clear that we do not seek to prevent other countries from deciding to become parties to the Rome Statute.

John. B. Bellinger, III, Legal Adviser of the Department of State, The United States and the International Criminal Court: Where We've Been and Where We're Going, Remarks to the DePaul University College of Law, Chicago, IL (Apr. 25, 2008), available at <http://2001-2009.state.gov/s/l/rls/104053.htm>.

106 Questions for the Record, Hearing on the Nomination of Hillary Rodham Clinton, of New York, to be Secretary of State Before the S. Comm. on Foreign Relations, 111<sup>th</sup> Cong., § 118 (Jan. 13, 2009) [hereinafter Hillary Rod-

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In her first speech to the U.N. Security Council in late January 2009, Ambassador Susan Rice stated that the ICC “looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda and Darfur.”<sup>107</sup> After the ICC issued the arrest warrant for Sudanese President Al Bashir on March 4, 2009, it was reported that President Obama has “launched a ‘high-level, urgent review’ of U.S. policy toward Sudan that will consider whether the U.S. should re-examine joining the International Criminal Court . . . . A policy decision should be ready ‘within weeks.’”<sup>108</sup>

### The Way Ahead

There has been a clear evolution in the *de facto* policy of the United States toward the Court in the last few years, creating an auspicious opportunity to put U.S. relations with the Court on an articulated course of positive engagement. **The President should take prompt steps to announce such a policy of continued positive engagement with the Court.** In that regard, it is appropriate to indicate that the May 6, 2002 letter to the U.N. Secretary General no longer represents U.S. policy and that the United States embraces its Signatory rights and responsibilities. **This should be done through a stated policy of the U.S. Government’s intention, notwithstanding its letter of May 6, 2002 to the U.N. Secretary General, to support the object and purpose of the Rome Statute of the Court.**

Mechanisms should be in place to facilitate and to ensure consistent implementation of the U.S. policy of positive engagement with the ICC. Unlike for other international tribunals, such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda, no focal point within the U.S. Government exists with regard to the ICC. **A high-ranking official should be identified by the President to serve as the focal point within the executive branch to coordinate U.S. cooperation with the Court and monitor ICC performance in order to inform the further development of U.S. policy in this area.**

In order to promote American interests, make known U.S. concerns, and to determine future U.S. policy toward the Court, the United States should communicate with the ICC and develop multilayered official contacts with the Court. In recent years, there have been limited contacts between the United States and the ICC, but increases in such contacts have been

ham Clinton: Questions for the Record], available at <http://www.foreignpolicy.com/files/KerryClintonQFRs.pdf>.

107 USUN Press Release #020(09), United States Mission to the United Nations, Office of Press and Public Diplomacy, Statement by Ambassador Susan E. Rice, U.S. Permanent Representative, on Respect for International Humanitarian Law, in the Security Council (Jan. 29, 2009), available at [http://www.usunewyork.usmission.gov/press\\_releases/20090129\\_020.html](http://www.usunewyork.usmission.gov/press_releases/20090129_020.html).

108 Jonathan Weisman, *Obama Starts ‘Urgent Review’ of U.S. Policy Toward Sudan*, WALL ST. J., Mar. 4, 2009, available at <http://online.wsj.com/article/SB123620918926234023.html#>.

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constrained by ASPA. **The President should support the continued development of contacts between the various branches of the U.S. Government and the Court.** Through such contacts, the United States will gain a better understanding of the Court's functioning as well as its assistance needs. This, in turn, will contribute to the U.S. ability to assess and influence the Court, as the United States pursues its policy of positive engagement.

### The International Criminal Court

#### The Court's Performance

The Court is currently engaged with four matters, as the Prosecutor has opened investigations in the Democratic Republic of Congo, northern Uganda, the Darfur region of Sudan, and the Central African Republic. All situations were referrals to the Court—three by consent of the affected States and one by decision of the Security Council. The Prosecutor has publicly announced that he is monitoring situations in Kenya, Cote-d'Ivoire, Colombia, Afghanistan, Chad, and Georgia.<sup>109</sup>

The Court has yet to complete a full trial cycle, thus, making difficult a comprehensive assessment of the Court at this stage. However, current investigations have led to criminal charges against at least thirteen alleged perpetrators<sup>110</sup> and various judicial proceedings. These actions of the Office of the Prosecutor and the Court's Chambers permit certain observations of particular relevance to U.S. concerns about the Court. They are the Prosecutor's possible use of his *proprio motu* power and guarantees in practice of the rights of the accused.

As of February 2006, the Office of the Prosecutor (OTP) had received 1732 communications<sup>111</sup> from individuals or groups in at least 103 different countries; the communications include reports alleging crimes in 139 countries in all regions of the world.<sup>112</sup> Eighty percent of

109 Press Release, International Criminal Court, Office of the Prosecutor, ICC-OTP-20080820-PR346 ENG, ICC Prosecutor Confirms Situation in Georgia Under Analysis (Aug. 20, 2008), available at [http://www2.icc-cpi.int/NetApp/App/MCMSTemplates/Content.aspx?NRMODE=Published&NRNODEGUID={6FA7A68D-6D82-4327-A366-CF0846CB57CD}&NRORIGINALURL=/menus/icc/press%2520and%2520media/press%2520releases/press%2520releases%2520\(2008\)/icc%2520prosecutor%2520confirms%2520situation%2520in%2520georgia%2520under%2520analysis&NRCACHEHINT=Guest#](http://www2.icc-cpi.int/NetApp/App/MCMSTemplates/Content.aspx?NRMODE=Published&NRNODEGUID={6FA7A68D-6D82-4327-A366-CF0846CB57CD}&NRORIGINALURL=/menus/icc/press%2520and%2520media/press%2520releases/press%2520releases%2520(2008)/icc%2520prosecutor%2520confirms%2520situation%2520in%2520georgia%2520under%2520analysis&NRCACHEHINT=Guest#).

110 See ICC, Situations and Case, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>; Press Release, International Criminal Court (ICC-CPI-20090304-PR394), ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan, (Mar. 4, 2006), available at <http://www.icc-cpi.int/NR/exeres/0EF62173-05ED-403A-80C8-F15EE1D25BB3.htm>.

111 Rome Statute, *supra* note 6, art. 15.

112 The Office of the Prosecutor, Update on Communications Received by the Office of the Prosecutor of the ICC (Feb. 10, 2006) [hereinafter Update on Communications], available at [http://www.iccnw.org/documents/OTP\\_](http://www.iccnw.org/documents/OTP_)

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these communications were found by the OTP to be manifestly outside the jurisdiction of the Court.<sup>113</sup> Of that eighty percent, the OTP determined thirty-eight percent to be manifestly ill-founded.<sup>114</sup> By the end of January 2009, the OTP had received 7832 communications, determining that 3490 of them “manifestly do not provide any basis for the Office of the Prosecutor to take further action.”<sup>115</sup>

Of specific interest to the United States was the Prosecutor’s handling of various allegations regarding the conduct of the war in Iraq. The Prosecutor received over 240 communications on the situation in Iraq, expressing concern about the launching of military operations and civilian deaths.<sup>116</sup> The Prosecutor declined to initiate an investigation and explained the strict criteria of the Rome Statute that limit any decision to open an investigation: 1) available information must provide a reasonable basis to believe a crime within ICC jurisdiction has been or is being committed; 2) the matter must satisfy admissibility considerations relating to the gravity of the conduct and complementarity with national proceedings; and 3) consideration must be given to the interests of justice.<sup>117</sup>

The Prosecutor determined, for a variety of reasons, including jurisdictional limitations, that the “Statute requirements to seek authorization to initiate an investigation in the situation in Iraq have not been satisfied.”<sup>118</sup> With respect to U.S. nationals, the Prosecutor determined that the ICC does not have jurisdiction over actions of non-party States’ nationals on the territory of Iraq, itself a non-party State.<sup>119</sup>

He also clarified that to initiate an investigation it is not sufficient simply to determine that there is a reasonable basis to believe that a crime has been committed by a suspect over whom

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Update\_on\_Communications\_10\_February\_2006.pdf.

113 *Id.*

114 *Id.*

115 Communication from Olivia Swaak-Goldman, International Cooperation Adviser, Jurisdiction, Complementarity and Cooperation Division, Office of the Prosecutor - ICC, to the ASIL Task Force Project Director (Feb. 2, 2009) (on file with the ASIL Task Force) (noting that these numbers reflect information sent to the Prosecutor for his consideration when deciding whether to open an investigation on his own initiative under Article 15 of the Rome Statute and do not reflect the multitude of additional materials which the Office has collected from open sources for this purpose).

116 The Office of the Prosecutor, Iraq Response 1 (Feb. 9, 2006), Annex to Update on Communications, *supra* note 112 [hereinafter Iraq Response], available at [http://www.iccnw.org/documents/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

117 *Id.*

118 *Id.*

119 *Id.*

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the Court has personal or territorial jurisdiction. In addition, the gravity of the crimes and complementarity with national systems must be considered. The Prosecutor noted that “[t]he number of potential victims of crimes within the jurisdiction of the Court in [Iraq] . . . was of a different order than the number of victims found in other situations under investigation or analysis by the Office.”<sup>120</sup> He observed that the situations under investigation in the Democratic Republic of Congo, Uganda, and Sudan involve thousands of deliberate killings as well as large-scale sexual violence and abductions, and three of the situations collectively result in more than five million people displaced.<sup>121</sup> The Prosecutor also appeared satisfied with national efforts to investigate and prosecute war crimes. He wrote:

In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity. It may be observed, however, that the Office has collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.<sup>122</sup>

The investigations opened by the Prosecutor were all initiated pursuant to referrals by the States involved or by the Security Council. And, while the Prosecutor stated that he “remains ready to exercise his *proprio motu* power with firmness and responsibility,”<sup>123</sup> his actions to date demonstrate that he employs a high threshold in selecting “situations in accordance with the criteria of the Statute, of which gravity is a very important consideration.”<sup>124</sup>

Furthermore, the actions of the Trial<sup>125</sup> and Appeals<sup>126</sup> Chambers in the Court’s first case sug-

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* See also Update on Communications, *supra* note 112.

<sup>122</sup> Iraq Response, *supra* note 116.

<sup>123</sup> Update on Communications, *supra* note 112.

<sup>124</sup> *Id.* In making an assessment on the gravity, the Prosecutor “considers various factors, including the number of victims of particularly grave crimes. Even in situations involving clear crimes in national law crimes [sic] or human rights violations, the violations may not amount to ICC crimes or may not satisfy the gravity threshold.” *Id.*

<sup>125</sup> Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber 1: Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Doc. No.: ICC-01/04-01/06-1401, June 13, 2008, available at <http://www/ic-cpi.int/iccdocs/doc/doc511249.PDF> (staying the proceedings against Thomas Lubanga because of the Prosecutor’s failure to disclose certain exculpatory information to the defense collected under the Rome Statute’s confidentiality provision, Article 54(3)(e)).

<sup>126</sup> Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,” Doc. No.: ICC-01/04-01/06-1486, Oct. 21, 2008, available at <http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf> (affirming the Trial Chamber’s finding



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gest that the Court will check the Prosecutor's actions and evidence the Court's determination to uphold due process rights. Although the ICC is in an early stage of its development, these examples of ICC practice are promising.

Yet another test for the ICC will be how it handles the declaration lodged, on January 22, 2009, by the Palestinian National Authority (PNA) pursuant to Article 12(3) of the Rome Statute with respect to "acts committed on the territory of Palestine since July 1, 2002."<sup>127</sup> Article 12(3)<sup>128</sup> of the Statute relates to the Court's jurisdiction; it does not trigger an investigation. The Article provides that alleged crimes within the Court's jurisdiction can come under investigation and prosecution before the ICC if a relevant non-party State voluntarily accepts the jurisdiction of the Court on an *ad hoc* basis. A judicial determination will need to be made regarding the applicability of Article 12(3) to the PNA declaration. Since December 27, 2008, the Office of the Prosecutor has received 213 communications under Article 15 by individuals and non-governmental organizations related to Israel and the Palestinian Territories.<sup>129</sup> The Prosecutor has stated that his office "will carefully examine all relevant issues, including on jurisdiction."<sup>130</sup> The matter raises issues about the authority of the Prosecutor, and of the ICC, to treat as a State an entity which is not generally recognized as a State and which is not a U.N. Member.

The ICC faces significant challenges in fulfilling its mandate. To date, all investigations opened by the Prosecutor have been conducted in situations of instability and ongoing conflict, such as the Democratic Republic of the Congo and the Darfur region of Sudan. This poses enormous operational obstacles, including security concerns limiting access

that the Prosecutor had misused Article 54(3)(e) to the extent that a fair trial would not be possible under the circumstances).

127 Declaration recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009) from Ali Khashan, Minister of Justice, Palestinian National Authority, to ICC Registrar, *available at* <http://www2.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>. The ICC Registrar acknowledged receipt of the declaration on January 23, 2009 "without prejudice to a judicial determination on the applicability of Article 12 paragraph 3" to the declaration. Letter from Silvana Arbia, ICC Registrar, to Ali Khashan, Minister of Justice, Palestinian National Authority (Jan. 23, 2009), *available at* <http://www2.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf>.

128 "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crimes in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9. Rome Statute, *supra* note 6, art. 12(3).

129 Office of the Prosecutor, *Visit of the Minister of Justice of the Palestinian National Authority, Mr. Ali Khashan, to the ICC (22 January 2009)* (last updated Feb. 6, 2009), *available at* <http://www2.icc-cpi.int/NR/rdonlyres/4F8D4963-EBE6-489D-9F6F-1B3C1057EA0A/279794/ICCOTP20090122Palestine.pdf>.

130 *ICC Checks Israel War Crimes Charges in Gaza*, WORLD BULL., Feb. 4, 2009, *available at* [http://www.worldbulletin.net/news\\_detail.php?id=36077](http://www.worldbulletin.net/news_detail.php?id=36077).

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to evidence and witnesses and increases the burden on the Court to protect victims and witnesses.<sup>131</sup>

The ICC cannot address these challenges alone. Judge Philippe Kirsch, former President of the ICC, has pointed out that “[t]he ICC is founded on two pillars. The Court is the judicial pillar. The operational pillar belongs to States.”<sup>132</sup> Like the *ad hoc* Tribunals, the Court depends upon the cooperation and support of States and international organizations for the fulfillment of its mandate. Necessary cooperation and support takes various forms, including, *inter alia*, providing consistent political and diplomatic backing to the ICC,<sup>133</sup> supporting investigations through information sharing, assisting in relocating witnesses, enforcing sentences of convicted persons, and supporting public outreach.

By far the most critical area where the Court requires State support is in apprehending suspects.<sup>134</sup> To date, four arrest warrants issued for the situation in Uganda have been outstanding since 2005; in the situation in the Democratic Republic of the Congo, one warrant has not been executed despite the passage of almost two years; and two arrest warrants have been outstanding for over a year in the Darfur situation.<sup>135</sup> On March 4, 2009, the ICC issued its first arrest warrant for a sitting head of state, Sudanese President Al Bashir. The Court depends upon States to enforce its decisions, but to date too little operational support has been offered to permit the necessary arrests.<sup>136</sup>

131 Philippe Kirsch, President of the ICC, Current Challenges to International Criminal Justice—ICC Ten Years after Adoption of the Rome Statute, Remarks made at Seminar organized by the Finnish Institute for International Affairs in cooperation with the Ministry of Foreign Affairs (June 12, 2008). See also Human Rights Watch, *Court-ing History: The Landmark International Criminal Court’s First Years* (July 2008) 150, available at [http://www.hrw.org/sites/default/files/reports/icc0708\\_1.pdf](http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf).

132 Kirsch, *supra* note 131.

133 Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005) (Dec. 3, 2008) [hereinafter Ocampo on the Situation in Darfur], available at [http://www.icc-cpi.int/NR/rdonlyres/6C7146E3-F993-4D3F-BA07-B06BAE324BEC/279082/20081203\\_unsc\\_statementENG1.pdf](http://www.icc-cpi.int/NR/rdonlyres/6C7146E3-F993-4D3F-BA07-B06BAE324BEC/279082/20081203_unsc_statementENG1.pdf). Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Address to Assembly of States Parties (Nov. 14, 2008) [hereinafter Ocampo Address to ASP], available at [http://www.iccnw.org/documents/Kopie\\_van\\_Statement\\_Prosecutor\\_Ocampo\\_7\\_ASP\\_Eng.pdf](http://www.iccnw.org/documents/Kopie_van_Statement_Prosecutor_Ocampo_7_ASP_Eng.pdf).

134 See Ocampo on the Situation in Darfur, *supra* note 133; Ocampo Address to ASP, *supra* note 133; Kirsch, *supra* note 131; Human Rights Watch, *supra* note 131, at 224.

135 Kirsch, *supra* note 131.

136 “There has, however, been a silver lining to operating in conflict situations. . . . [T]he deterrent effect of the ICC is being noticed much earlier than expected. When you operate in situations of conflict, potential perpetrators of serious crimes see the risk of arrest and prosecution by the ICC is a real and immediate prospect. That perception has altered their conduct in several cases and led to a reduction in the commission of crimes.” *Id.*

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### The Way Ahead

The United States has declared that those who perpetrate war crimes, crimes against humanity, and genocide must be held accountable.<sup>137</sup> The United States played and continues to play a crucial supportive role in other international tribunals. In order to “look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice,”<sup>138</sup> **the U.S. President should undertake an examination of methods by which the United States can support important criminal investigations of the Court, including cooperation on the arrest of fugitive defendants, the provision of diplomatic support, and the sharing of information, as well as ways in which it can cooperate with the Court in the prevention and deterrence of genocide, war crimes, and crimes against humanity.** Previous provisions of U.S. support to *ad hoc* tribunals have carefully balanced U.S. interests in protecting sources and methods with the parallel interest of facilitating trials that balance the due process rights of perpetrators with the imperative for justice. Discussion should begin with the ICC with the goal of reaching a similar *modus vivendi*.

Since the United States articulated its concerns regarding the Rome Statute after its adoption in 1998, circumstances have evolved, as has U.S. policy toward the Court. ICC practice is available for review, as the Rome Statute has been in force since 2002. Through consideration of the Court’s performance over the past seven years and the outcome of the 2010 Review Conference, which will address several issues of particular interest to the United States, including the crime of aggression, the United States can evaluate its initial concerns as well as assess its current policy. **The President should initiate an inter-agency policy review to re-examine whether, in light of the Court’s further performance and the outcome of the 2010 Review Conference, to recommend that the United States become a party to the Rome Statute with any appropriate *provisos*, understandings, and declarations similar to those adopted by other States Parties.** Involvement of all concerned agencies in this process will strengthen the resulting recommendation on the advisability of United States ratification of the Rome Statute.

In addition, **Congress should hold hearings to review and monitor Court performance in order to identify means by which the United States can support the Court consistent with the interests of the United States and the international community and to re-examine, at the appropriate time, whether the United States should become a party to the Rome Statute with any appropriate *provisos*, understandings, and declarations similar to those adopted by other States Parties.** Congressional hearings provide an important means by which to identify the most appropriate ways for the United States to support the Court. Hearings

137 Grossman remarks, *supra* note 1.

138 Hillary Rodham Clinton: Questions for the Record, *supra* note 106, ¶ 118.

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also grant a forum to publicly review and monitor Court performance, to assess U.S. concerns and interests, and, ultimately, to consider the advisability of U.S. ratification of the Treaty.

### The Assembly of States Parties

#### The Work of the Assembly

The States Parties of the Rome Statute meet in the Assembly of States Parties (ASP), which is the legislative and management/financial oversight body of the Court. The Assembly of States Parties decides on various items, such as the adoption of resolutions and of the budget, the election of the judges, the prosecutor, and the deputy prosecutor(s). Non-party States may attend as observers and may speak during the deliberations.<sup>139</sup>

Currently, the ASP is undertaking preparations for the first Review Conference on the Rome Statute, scheduled to take place in Kampala, Uganda in Spring 2010. While the agenda of the Review Conference remains to be finalized, agenda items already confirmed include consideration of Article 124 of the Rome Statute, regarding the seven-year exemption of ICC jurisdiction for war crimes, and the definition of the crime of aggression. In 1998, the United States stated that both these matters were of critical concern.<sup>140</sup>

The Special Working Group on the Crime of Aggression formed by the ASP has explored a definition of the crime of aggression to see whether consensus can be reached. The Special Working Group was open to all States equally, whether party or non-party to the Rome Statute. Russia and China, both non-party States, participated in the Working Group sessions. The United States did not. Hence the United States has not contributed to the discussion on the complex structure of this crime, including the interplay between the definition of the crime and general principles of international criminal law, the analytical distinctions between State and individual conduct, the substantive elements of a definition of the crime, and the role of the Security Council,<sup>141</sup> as well as how the definition could affect States that are not party to the Rome Statute.<sup>142</sup>

139 Observers may participate in the deliberations of the ASP and any subsidiary body it establishes, including by contributing to debates, as well as proffering and responding to proposals. Observers may not suggest agenda items or make motions during debate. For the rules setting forth the role of observers, see *Assembly of States Parties to the Rome Statute of the International Criminal Court*, 1st Sess., Official Records, U.N. Doc. ICC ASP/1/3 (2003).

140 See discussion *supra* accompanying notes 18-28. See also Scheffer 1998 Testimony, *supra* note 2.

141 Claus Kress, *The Crime of Aggression before the First Review of the ICC Statute*, 20 LEIDEN J. INT'L L. 851, 851 (2007). See generally Garth Schofield, *The Empty U.S. Chair: United States Nonparticipation in the Negotiations on the Definition of Aggression*, 15 HUM. RTS. BR. 20 (2007).

142 Rome Statute, *supra* note 6, art. 121(5). A key issue in the negotiations is whether this provision permitting opt-out of the Court's jurisdiction over new crimes is restricted to States Parties or also can apply to non-party States.

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Particularly given the unique role of the United States in providing global security, these issues have serious implications for the United States and are best examined and scrutinized by having a U.S. representative at the discussions.

The Working Group held its final formal meeting in February 2009. However, additional work on the crime of aggression will be undertaken at an informal, inter-sessional meeting scheduled to take place in June 2009 and at the eighth session of the ASP in November 2009 in order to refine the proposals on the crime aggression that will be submitted for consideration at the Review Conference in 2010. The key remaining issues for discussion are the conditions for the exercise of jurisdiction, focusing on the Security Council's role.

### The Way Ahead

**The United States should engage in these discussions and participate as an observer in the Assembly of States Parties to the Rome Statute, including in discussions on the crime of aggression and the 2010 Review Conference of the Rome Statute.** While the Working Group on the Crime of Aggression concluded its final formal session in February 2009, an informal meeting will be held in June 2009 and additional work on the crime of aggression will be undertaken at the session of ASP in November 2009 to refine proposals for consideration at the 2010 Review Conference. Given clear U.S. interests in whether and how the crime of aggression is defined, the United States should participate in order to make known its views on the issues, including as to the role of the Security Council and how the crime of aggression affects non-Parties to the Treaty.

The United States should also assume its observer status within the ASP with the immediate intention of participating in the ASP preparatory meeting for the Review Conference in November 2009 and, ultimately, at the Review Conference in 2010. As an observer the United States is not able to vote in the Assembly, but through diplomacy it can make its views known on issues that remain of concern to it and influence discussion on other issues.

While the agenda of the Review Conference remains to be completed, the confirmed items (Article 124 regarding the seven-year exemption of ICC jurisdiction for war crimes and the definition of the crime of aggression) were identified by the United States, in 1998, as matters of key concern to it.<sup>143</sup> Other items of interest to the United States may also be included on the agenda, such as the inclusion of the crimes of drug trafficking or terrorism, as well as expansion of the list of prohibited weapons in Article 8 of the Statute. It is important that the United States state its position on these issues and become involved in discussions so as to gain acceptance for the changes that it would like to see in the Statute.

<sup>143</sup> See discussion *supra* accompanying notes 18, 23, 28. Scheffer 1998 Testimony, *supra* note 2.

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### Selected Legal Issues Affecting U.S. Policy Toward the International Criminal Court

A number of important legal issues affecting U.S. posture towards the ICC are often raised in policy debates on this subject. The Task Force has made some of these legal issues a focus of its research and analysis, undertaking to propose resolution of them or to highlight those in need of further examination as the United States develops a closer relationship with the ICC. For this purpose, the Task Force has grouped the legal issues in three categories outlined below, specifically 1) consistency of the Rome Statute with international law; 2) legal issues affecting U.S. cooperation with the Court; and 3) U.S. constitutional issues raised with respect to joining the Court.

#### Consistency of the Rome Statute with International Law

The Rome Statute provides that when the basic requisites for ICC jurisdiction under Part 2 of the Statute have been met, the ICC may exercise criminal jurisdiction over nationals of States not party to the Rome Statute.<sup>144</sup> The ICC was accorded such jurisdiction in order to ensure that perpetrators of the most serious international crimes, which come under the jurisdiction of the Court, will be held accountable regardless of their nationality. While the United States supports accountability, the ICC's jurisdiction over nationals of non-party States has been a persistent U.S. concern.<sup>145</sup> The question has arisen as to whether such broad jurisdiction is consistent with international law or rather an unlawful intrusion on State sovereignty.

The traditional international law rule is that a treaty “does not create either obligations or rights for a third State without its consent.”<sup>146</sup> As a technical matter, it should be observed that the ICC, as a criminal court, claims jurisdiction over individuals, not States. Thus, the Rome Statute, in establishing jurisdiction over nationals of non-Parties, does not bind the non-party State—although neither did that State consent to ICC authority over its nationals. The Statute places no obligation on the non-party State; however, that State “may cooperate or defend [its] own interests that may be affected by a pending case.”<sup>147</sup>

The concern has been raised that, on “hearing cases in the official-acts category, [the ICC’s] function will resemble less that of a municipal criminal court than that of an international

144 Rome Statute, *supra* note 6, art. 12.

145 See, e.g., William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 125-30 (2001).

146 Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 34, 1155 U.N.T.S. 331, 341 [hereinafter VCLT]. Furthermore, a non-ratifying, third State may only be bound by a provision of a treaty if “the third State expressly accepts that obligation in writing.” *Id.* art. 35.

147 Elsea, *supra* note 67, at 5.

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court for the adjudication of interstate legal disputes,”<sup>148</sup> and thus the traditional treaty-based ban on non-consensual jurisdiction applies, if a State does not consent to jurisdiction over its nationals. The Task Force does not subscribe to this contention, which blurs the distinction between the State and its nationals. The Task Force agrees with the Nuremberg Tribunal’s conclusion fifty years ago that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>149</sup>

The Rome Statute encompasses crimes already proscribed by international treaty or customary law and most of these can be prosecuted under applicable national laws and/or the principle of territorial or treaty-based jurisdiction in any national court.<sup>150</sup> And, as the United States is party to most of those treaties,<sup>151</sup> U.S. nationals are already subject to the prohibitions and the possibility of extra-territorial prosecution for crimes over which the ICC has jurisdiction. In the exercise of its jurisdiction, the ICC does not rely on universal jurisdiction but the consent of either the State on whose territory the crime occurred or the State of nationality of the accused, unless the situation is referred by the Security Council.<sup>152</sup>

148 Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States*, 64 LAW & CONTEMP. PROBS. 13, 15 (2001) (contending that “[t]he shortcomings of the ICC jurisdictional structure and of the arguments that have been advanced in support of that structure stem from the fact that this second aspect of the ICC’s character, that of a court for interstate dispute adjudication, is not adequately taken into account”).

149 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

150 See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49(2), Aug. 12, 1949, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 50(2), Aug. 12, 1949, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War art. 129(2), Aug. 12, 1949, 6 U.S.T. 3316, 3418, 75 U.N.T.S. 135, 236; Geneva Convention Relative to the Protection of Civilians in Time of War art. 146(2), Aug. 12, 1949, 6 U.S.T. 3516, 3616, 75 U.N.T.S. 287, 386; Convention on the Prevention and Punishment of the Crime of Genocide art. VI, Dec. 9, 1948, 78 U.N.T.S. 277, 280-81, Hein’s No. KAV 2303. “[I]nternational law today justifies universal jurisdiction for any state to adjudicate the crimes of genocide, crimes against humanity and serious war crimes.” Newton, *supra* note 30, at 35 (citation omitted). “No one at the Rome Diplomatic Conference disputed that the core crimes within the ICC’s jurisdiction . . . were crimes of universal jurisdiction under customary international law (although there were debates about the scope and definitions of those crimes).” Michael Scharf, *The ICC’s Jurisdiction Over the Nationals of Non-party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 77 (2001) (citation omitted). Given differences in views regarding the definitions of crimes in the Rome Statute, the Elements of Crimes were drafted, see *infra* note 212.

151 The U.S. is not party to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

152 Rome Statute, *supra* note 6, art. 12.

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In the context of ordinary criminal law, States often exert jurisdiction over nationals of other States without the latter State's authorization under the principles of territoriality, passive personality, or protective jurisdiction. This does not require the consent of the State of nationality. The United States is Party or Signatory to a number of treaties containing provisions that do not require jurisdiction to be tied to the nationality of the offender.<sup>153</sup> It is, however, contended that exercise of jurisdiction by a national court is different from having a State's national turned over to an international institution, the ICC, in which it chose not to participate.<sup>154</sup> The issue is "whether the international community may exercise jurisdiction in lieu of the territorial State."<sup>155</sup> Yet this issue is not new. At Nuremberg, such international jurisdiction was accepted, recognizing that States had "done together what any one of them might have done singly."<sup>156</sup>

For those who remain concerned about ICC jurisdiction over third-party nationals, the complementarity principle is intended to protect affected sovereign interests. To address doubt on this

153 See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 150; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 150, art. VI (providing that persons charged with genocide may also be tried "by such *international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction*") (emphasis added). "It is noteworthy that none of these treaties purport to limit their application to offenses committed by the nationals of parties; nor do the United States criminal statutes implementing these treaties limit prosecution to nationals of the treaty parties." Scharf, *supra* note 150, at 100 (citations omitted). See also Sadat & Carden, *supra* note 8, n.423.

154 Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 199 (2001) (pointing out that 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"). See also David Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Department of State, Deterrence of War Crimes in the 21<sup>st</sup> Century, Speech at the Twelfth Annual U.S. Pacific Command, International Military Operations and Law Conference, Honolulu, HI (Feb. 23, 1999) (asserting that it contravened "fundamental principles of treaty law" for a treaty to provide a basis for jurisdiction with respect to nationals of States that are not party to that treaty), available at <http://www.iccnw.org/documents/USScheffer23Feb99.pdf>.

155 Sadat & Carden, *supra* note 8, at 449.

156 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 149, at 461. See also Scharf, *supra* note 150, at 103-111 (discussing the precedents of Nuremberg and the International Criminal Tribunals of the Former Yugoslavia and Rwanda). "States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of national jurisdiction of the States parties to the London Agreement setting up that Tribunal." Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), P 73, U.N. Doc. S/25274 (1993), cited in Scharf, *supra* note 150, at 105.



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point, it is also important to note that under the Rome Statute, the exercise of complementarity can be undertaken by any State whose nationals are involved—not just the State where the arrest was effected. Thus, if the national of a non-party State were arrested abroad, the non-party State could offer to investigate and prosecute the matter itself. A *bona fide* investigation and prosecutorial decision by the State of nationality would satisfy the test of complementarity and preclude ICC prosecution. In light of these considerations, the Task Force does not consider the ICC's jurisdiction over nationals of non-party States to be in conflict with principles of international law.

As negotiations on the definition of the crime of aggression are still underway, it will simply be noted here that the resulting definition could pose issues of international law. For example, depending upon the mechanism adopted to trigger ICC jurisdiction over allegations of aggression, it may be argued that the ICC would dilute the role of the U.N. Security Council in determining the existence of and taking action with respect to acts of aggression,<sup>157</sup> as provided by Article 39 of the U.N. Charter.<sup>158</sup>

### Legal Issues Affecting U.S. Cooperation with the Court

The Task Force finds that short of joining the Court, there is much that the United States can do to support this institution in its pursuit of accountability for the worst offenders against the laws of nations. It is consistent with longstanding U.S. interests that it engage the Court in this manner, and the Task Force recommends that a number of legal issues be addressed to clear the way for such engagement.

#### ***Legal Effect of the U.S. Signature and the 2002 Letter to the U.N. Secretary General***<sup>159</sup>

Upon signing the Rome Statute on December 31, 2000—though with singular qualifications—the United States became eligible to consent to the Treaty by ratification.<sup>160</sup> Signature ordinarily obligates the Signatory State “to refrain from acts which would defeat the object and purpose of [the] treaty.”<sup>161</sup> However, in his signing statement President Clinton expressed

<sup>157</sup> Rome Statute, *supra* note 6, art. 5(2) (providing that “[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations”). See Grossman remarks, *supra* note 1.

<sup>158</sup> “The Security Council shall determine the existence of any threat to international peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.

<sup>159</sup> The following analysis is substantially based on a memorandum provided to the ASIL Task Force. Memorandum from Duncan Hollis, Associate Professor of Law, Temple University School of Law, to the ASIL Task Force (Dec. 16, 2008) (on file with the ASIL Task Force).

<sup>160</sup> Rome Statute, *supra* note 6, art. 125.

<sup>161</sup> VCLT, *supra* note 146, art. 18. While the U.S. is not party to the Vienna Convention on the Law of Treaties, the U.S. has long recognized the VCLT as generally declaratory of customary international law. See, e.g., S. Exec. Doc. L, 92-1, at i (1971) [hereinafter VCLT Transmittal] (Letter from Secretary of State Rogers to President Nixon transmitting the VCLT and emphasizing how it “is already generally recognized as the authoritative guide to

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continuing concerns about the Court and recommended that the Treaty not be submitted for ratification until these concerns are satisfied.<sup>162</sup> Two years later, the United States submitted a letter to Kofi Annan, U.N. Secretary General, declaring:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.<sup>163</sup>

This letter, inaccurately characterized as “unsigned,” raised questions about the current state of U.S. rights and obligations vis-à-vis the Court, the Treaty's object and purpose, and whether the United States remains capable of joining through ratification.

Article 18 of the Vienna Convention on the Law of Treaties (VCLT), establishes the obligations of a Signatory State to a treaty. It provides:

A State is obliged to refrain from acts which would defeat the object and purpose when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.<sup>164</sup>

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current treaty law and practice”). The U.S. Department of State and U.S. government officials have long assumed Article 18 to constitute customary international law binding the United States. When the International Law Commission considered an early draft of Article 18 (then labeled Article 15) the United States regarded the provision as “reflecting generally accepted norms of international law.” 2 Y.B. INT'L L. COMM'N 44 (1965). In submitting the VCLT to President Nixon, the State Department described Article 18 as “widely recognized in customary international law.” VCLT Transmittal, *supra* note 161, at 2. In a 1979 letter, Ambassador Elliot Richardson informed various U.S. Senators that the VCLT “provisions, including Article 18, are for the most part codifications of customary international law.” 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW §1, at 692. In his confirmation hearings for Secretary of State, Colin Powell reaffirmed the State Department's view of Article 18 as customary international law. 2001 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 212-13. See also CRS, TREATIES & OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE: A STUDY PREPARED FOR THE S. COMM. ON FOREIGN RELATIONS, S. PRT. 106-71, at 113 (2001) (characterizing Article 18 as an international law obligation).

162 President Clinton, Statement on the Rome Treaty on the International Criminal Court, *supra* note 33, at 385.

163 2002 U.S. letter to the U.N. Secretary General, *supra* note 38.

164 VCLT, *supra* note 146, art. 18.

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Although the 2002 letter of the United States to the U.N. Secretary General does not mention Article 18, it is cast in Article 18's terms, giving direct notification of the U.S. intention not to become a party and thereby relieving the United States of its Article 18 obligations to refrain from acts that defeat the Rome Statute's object and purpose.<sup>165</sup>

The letter relieved the United States of its Signatory obligations, but contrary to popular understanding, the letter did not result in the United States "unsigned" the Rome Statute.<sup>166</sup> Neither the VCLT nor State practice provides any support for such a possibility. This is not a case where the U.S. signatory lacked authority to sign for the United States. Nor do the provisions for invalidating treaties or withdrawing ratification instruments apply; these only operate with respect to a State's consent to be bound by the treaty.<sup>167</sup> And Article 18 itself speaks in terms of indications of intent not to ratify; it says nothing about a State's original signature. Indeed, there appears to exist no support for the proposition that declaring an intent not to ratify voids or otherwise undoes a State's earlier signature. On the contrary, the practice of depositaries—who are charged by VCLT Article 77 with receiving treaty signatures and related texts—favors continuing Signatory status even after a State indicates an intent not to ratify. The International Committee of the Red Cross still lists the United States as a Signatory to Protocol I to the Geneva Conventions notwithstanding President Reagan's disavowal

<sup>165</sup> Serious questions remain over Article 18's scope, *i.e.*, how to interpret a treaty's "object and purpose" and the acts that would "defeat" it. A wide range of views exist, from narrow readings that Article 18 bars a State only from acts making treaty performance impossible, to broader conceptions that require States to comply with "core" treaty provisions. *See, e.g.*, Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 308 (2007) (suggesting Article 18 should preclude only "actions that would substantially undermine the ability of the parties to comply with, or benefit from, the treaty after ratification"); Jan Klabbbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 331 (2001) (rejecting provision-centered approach for Article 18 in favor of barring States from morally obnoxious behavior given what the agreement itself represents); Paul V. McDade, *The Interim Obligation between Signature & Ratification of a Treaty*, 32 NETH. INT'L L. REV. 5, 44-45 (1985) (reading Article 18 to require acts consistent with major treaty provisions); Martin A. Rogoff, *The International Law Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263, 297-99 (1980) (contending Article 18 obligation imposes no affirmative duty on States "to do certain acts or to carry out specific provisions of the treaty," but rather prevents signatories from claiming treaty benefits while at the same time engaging in acts that materially reduce benefits for other signatories).

<sup>166</sup> Larry D. Johnson, Columbia Law School, U.S. and ICC: Time for Limited Engagement (Feb. 1, 2009) (unpublished manuscript, on file with the ASIL Task Force).

<sup>167</sup> *See* VCLT, *supra* note 146, art. 8 ("An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State"). The United Nations recognizes signature as an act relating to a treaty's conclusion. *See* SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES, ST/LEG/7/Rev. 1, 31 (1999). Of course, these provisions do not afford States an opportunity to undo existing legally effective acts, but rather deprive acts of their original legal effect in the absence of State confirmation. That approach bears little resemblance to the unsigned concept. On the withdrawal of ratification instruments, *see id.* at 46.

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of that treaty.<sup>168</sup> Similarly, the United Nations Treaty Collection continues to list the United States as a Signatory to the Rome Statute, albeit with a footnote reproducing the text of the 2002 letter.<sup>169</sup>

Thus, although the United States no longer has any obligation to refrain from acts that would defeat the Rome Statute's object and purpose, it remains a Signatory to that treaty. As a Signatory, the United States could proceed to ratify the treaty, if it so decided. Re-embracing Signatory rights and responsibilities requires only that the United States make a clear articulation of its current policy. The Task Force accordingly believes that, as part of its articulation of a policy of positive engagement with the Court, **the President should announce the U.S. Government's intention, notwithstanding its prior letter of May 6, 2002 to the U.N. Secretary-General, to support the object and purpose of the Rome Statute of the Court.**

### *Constraints of the American Service-Members' Protection Act on U.S. Policy Toward the Court*

The American Service-Members' Protection Act of 2002 (ASPA) places restrictions on U.S. interaction with the ICC.<sup>170</sup> ASPA prohibits cooperation with the ICC and mandates that funds not be used to support, directly or indirectly, the ICC. ASPA prohibits cooperation by any U.S. court or agency—federal, state or local—with the ICC.<sup>171</sup> Forms of prohibited cooperation include responding to requests of cooperation from the Court, provision of support, extraditing any person from the United States to the ICC or transferring any U.S. citizen or permanent resident alien to the ICC, restrictions on funds to assist the Court, and permitting ICC investigations on U.S. territory.<sup>172</sup> ASPA also prohibits direct or indirect transfer of classified national security information and law enforcement information to the Court.<sup>173</sup> Finally, ASPA authorizes the President to use “all means necessary and appropriate”<sup>174</sup> to free its service-members and others, including “allied persons,”<sup>175</sup> detained

168 See State Signatories to Protocol I to the Geneva Conventions, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S>.

169 See Rome Statute, U.N. Treaty Collection, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=373&chapter=18&lang=en>.

170 See discussion *supra* accompanying notes 39-54.

171 ASPA, *supra* note 40, § 2004.

172 *Id.* § 2004.

173 *Id.* § 2006.

174 *Id.* § 2008 (a).

175 “The term ‘covered allied persons’ means military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan,

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or imprisoned by or on behalf of the ICC.<sup>176</sup>

Section 2003(c) of ASPA<sup>177</sup> provides for the possibility of presidential waiver of these restrictions and prohibitions established under the Act “to the degree such prohibitions and requirements would prevent United States cooperation with an investigation or prosecution of a *named* individual by the International Criminal Court.”<sup>178</sup> ASPA also explicitly reiterates that it does not apply to actions taken by the President under his authority as Commander in Chief of the Armed Forces with regard to cooperation with the Court<sup>179</sup> and providing information to the Court,<sup>180</sup> in specific instances.<sup>181</sup> Finally, Section 2015, the so-called Dodd Amendment, appears to grant leeway for cooperation with the Court; it states that “[n]othing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”<sup>182</sup>

The 2006 and 2008 amendments to ASPA only addressed restrictions on aid to States Parties. They left in place the broad ASPA prohibitions and restrictions on cooperation with and support to the Court.

Particularly with regard to Darfur, the United States has indicated that it will review requests by the Court to cooperate with it.<sup>183</sup> If it decides to cooperate, the President will have to provide a waiver under Section 2003 (c) or employ section 2015 in order to do so. While both options appear to grant significant latitude—at least in relation to “named individuals”—the extent of this latitude is, as yet, untested. Even if the waiver authority under ASPA permits cooperation with the ICC in specific cases, ASPA remains an impediment to a more systematic or institutionalized program of cooperation with or support of the Court. The development of U.S. relations with the Court along these lines would thus require further amendment or repeal of ASPA.

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for 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 International Criminal Court.” *Id.* § 2013 (3).

176 *Id.* § 2008.

177 *Id.* § 2003 (c).

178 *Id.* § 2003 (c) (emphasis added).

179 *Id.* § 2004.

180 *Id.* § 2006.

181 *Id.* § 2011.

182 *Id.* § 2005 (emphasis added).

183 See comments by U.S. Department of State Spokesperson Sean McCormack, *supra* note 102.

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It would also appear that the United States could not become a State Party to the Rome Statute without significant amendment or repeal of ASPA, given States Parties obligations to cooperate with and provide judicial assistance to the Court.<sup>184</sup> Even if the United States could become party to the treaty, ASPA restrictions would hinder it from fulfilling its obligations as a State Party, particularly to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>185</sup> Also ASPA required “Article 98 agreements,” but, as discussed below, the overbreadth of some them may also be contrary to a State Party’s obligations under the Rome Statute, as well as a Signatory’s obligations under the Vienna Convention on the Law of Treaties.

**Thus, the Task Force recommends that in furtherance of a policy of continued positive engagement with the ICC, the President issue any presidential waivers in the interests of the United States that address restrictions on assistance to and cooperation with the Court contained in the American Service-Members’ Protection Act of 2002 and advise the Congress on the need for further amendments or repeal of ASPA.** To the fullest extent possible the President should make use of waivers permitted by ASPA to by-pass its restrictions. However, to enable the development of more systematic institutional ties to and cooperation with the Court, rather than addressing discreet cases individually, the President should propose amendment or repeal of ASPA eliminating these restrictions. Elimination of these prohibitions and restrictions would also ensure that, if at a later date the United States decides to become a Party to the Statute, ASPA would not prevent it from carrying out its obligations under the Statute. For the reasons mentioned above, it is further recommended that **Congress pursue a legislative agenda on the Court that includes amendment or repeal of the American Service-Members’ Protection Act and other applicable laws to the extent necessary to enhance flexibility in the U.S. Government’s engagement with the Court and allies that are State Parties to the Rome Statute.**

### “Article 98 Agreements”

In 2002, the United States began concluding agreements with States to protect U.S. nationals from the assertion of ICC jurisdiction by prohibiting the Signatory State from surrendering U.S. nationals to the ICC. These agreements are often referred to as “Article 98 agreements,” as they made use of Article 98(2) of the Rome Statute. Article 98(2) states:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent of the surrender.<sup>186</sup>

<sup>184</sup> See Rome Statute, *supra* note 6, Part 9. International Cooperation and Judicial Assistance.

<sup>185</sup> *Id.* art. 86. See generally *id.* Part 9. International Cooperation and Judicial Assistance.

<sup>186</sup> *Id.* art. 98.

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The U.S. Government’s “Article 98 agreements” have been assailed as contrary to the Rome Statute and as evidence of an effort to undermine the ICC. Opposition to the U.S. agreements became particularly acute when pursuant to ASPA and the Nethercutt Amendment the United States conditioned military and economic assistance on conclusion of “Article 98 agreements.”

These “Article 98 agreements” have been considered by some to be inconsistent in two ways with the text of Article 98(2). Some have declared “Article 98 agreements” *per se* contrary to the Rome Statute and, thus, inconsistent with States Parties’ obligations under the Statute.<sup>187</sup> Others have accepted “Article 98 agreements” but only under limited conditions.

First, it is disputed that Article 98(2) of the Rome Statute permits the conclusion of *new* agreements. Rather, opponents of the U.S. Government’s “Article 98 agreements” argue that Article 98(2) was included in the Statute to avoid possible legal conflicts that might arise with agreements existing at the time the Statute came into force or renewals of them;<sup>188</sup> critics contend that reading this Article to permit new agreements insulating individuals from ICC jurisdiction would place it in direct contradiction to Article 27 of the Rome Statute which stipulates that no one is immune from crimes under the ICC’s jurisdiction.<sup>189</sup> The Task Force does not find this argument persuasive. In 2002, the nineteen-member International Security Assistance Force (ISAF)—consisting of numerous European States party to the Rome Statute—proceeded to conclude such an agreement with the Interim Administration of Afghanistan. The Military Technical Agreement provided 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.”<sup>190</sup>

187 For example, the Parliamentary Assembly of the Council of Europe declared that these agreements were “not admissible under the international law governing treaties, in particular the Vienna Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and the purpose of a treaty. . . . States Parties to the ICC Treaty have the general obligation to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction (Article 86) and that the Treaty applies equally to all persons without any distinction based on official capacity (Article 27).” Parliamentary Assembly Res. 1300, *supra* note 64, ¶¶ 9-10.

188 See, e.g., Coalition for the International Criminal Court, Questions & Answers, U.S. Bilateral Immunity Agreements or So-Called “Article 98” Agreements, available at [http://www.iccnw.org/documents/FS-BIAs\\_Q&A\\_current.pdf](http://www.iccnw.org/documents/FS-BIAs_Q&A_current.pdf). This is, however, contrary to Ambassador Scheffer’s conclusions that Article 98(2) provides for new agreements. Scheffer, *supra* note 35, at 59.

189 Coalition for the International Criminal Court, *supra* note 188.

190 The Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (‘Interim Administration’), Jan. 4, 2002, Annex A, sec. 1.4, available at [http://www.reliefweb.int/rw/RWFFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64BV7F-unsc-afg-25jan.pdf/\\$File/unsc-afg-25jan.pdf](http://www.reliefweb.int/rw/RWFFiles2002.nsf/FilesByRWDocUNIDFileName/OCHA-64BV7F-unsc-afg-25jan.pdf/$File/unsc-afg-25jan.pdf).

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A second objection to the U.S. “Article 98 agreements” rests on the use of the term “sending State” in Article 98(2). It is argued on this basis that Article 98 is only intended to cover agreements, such as the fairly routine status-of-forces-agreements (SOFAs) concluded with States where the United States stations troops. These SOFAs reallocate jurisdiction for U.S. service-members from foreign to U.S. courts. Some of the U.S. Government’s “Article 98 agreements” generated the criticism that they go beyond the typical SOFA, which covers a limited class of persons deliberately sent from one country to another. The scope of some “Article 98 agreements” extends not only to U.S. nationals on official business but also to U.S. citizens present in that State for business or personal reasons, as well as employees, including contractors regardless of nationality.<sup>191</sup> Guidelines issued by the European Union<sup>192</sup> to its member countries on acceptable terms for “Article 98 agreements” set parameters in order to “preserve the integrity of the Rome Statute . . . and . . . ensure respect for the obligations of States Parties under the Statute.”<sup>193</sup> The guidelines provide that the scope be limited to government representatives on official business; that they do not contain a reciprocal promise to prevent the surrender of nationals of an ICC State Party; and that the United States expressly pledge to investigate, and, where appropriate, prosecute its nationals for ICC crimes.<sup>194</sup>

**The President should examine U.S. policy concerning the scope, applicability, and implementation of “Article 98 Agreements” concerning the protections afforded to U.S. personnel and others in the territory of States that have joined the Court.** As opposition to “Article 98 agreements” arose in large part due to the connection between concluding “Article 98 agreements” and a State’s receipt of certain U.S. assistance (as per ASPA and the Nethercutt Amendment), the receipt of such assistance should be further de-linked from any such agreements.

### *Domestic Primacy—Safeguarding State Sovereignty Through Complementarity*

The complementary jurisdiction established by the Rome Statute<sup>195</sup> affords domestic courts the primary authority to try the crimes under the jurisdiction of the ICC. The relevant provision of the Rome Statute provides:

191 See, e.g., Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Alb., May 2, 2003, 2003 U.S.T. LEXIS 61 (entered into force July 7, 2003), available at <http://www.state.gov/documents/organization/97155.pdf>.

192 EU Guiding Principles, *supra* note 65, at 241. See also Parliamentary Assembly Res. 1336, *supra* note 66. The European Union initially opposed any such agreements. See Phillip Shiskin and Jesse Bravin, *EU Offers Deal on U.S. Immunity from Tribunal*, WALL ST. J., Sept. 13, 2002, at A8.

193 EU Guiding Principles, *supra* note 65, at 241.

194 *Id.*

195 Rome Statute, *supra* 6, arts. 17-20.



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An International Criminal Court . . . is hereby established, it shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, *and shall be complementary to national criminal jurisdictions*.<sup>196</sup>

Coupled with the Rome Statute's other jurisdictional and admissibility requirements (particularly the gravity threshold),<sup>197</sup> complementarity is intended to place a check on the power of the ICC and the prosecutor and protect the sovereignty of States—whether party or not to the Treaty.

The complementarity principle is layered throughout the procedural structure of the Rome Statute, including provisions on jurisdictional competence.<sup>198</sup> However, Article 17 “provides the most direct implementation of the complementarity principle in the Rome Statute”<sup>199</sup> by stipulating the criteria for evaluating whether domestic authority over a particular case limits ICC authority over the same. These provisions indicate that the ICC is a court of last resort. The Court has no jurisdiction to act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, due to the State's unwillingness or inability to carry out the investigation or prosecution, for example, if proceedings were undertaken only to shield a person from criminal responsibility.

The Statute's procedures to obtain preliminary rulings on admissibility<sup>200</sup> and to challenge the prosecutorial assertions of admissibility<sup>201</sup> provide the means to enforce the complementarity

196 *Id.* art. 1 (emphasis added). *See also id.* pmb. para. 10.

197 *Id.* arts. 12-16 (outlining preconditions for jurisdiction). In particular, the substantive jurisdiction of the ICC is limited to only “the most serious crimes of concern to the international community as a whole.” *Id.* pmb. para. 9 & art. 5(1). *See also id.* art. 17(1)(d). “As an initial hurdle to restrict jurisdiction, the ‘most serious crimes of concern’ threshold of Article 5 is a subtle, yet distinct and powerful, limit on the reach of the ICC vis à vis sovereign forums.” Newton, *supra* note 30, at 40. For the Prosecutor's view on who should be prosecuted, *see* ICC-Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, Sept. 2003, 6-7 [hereinafter OTP, *Paper on Some Policy Issues*], available at [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf). *See also* the discussion *supra* accompanying notes 120-121, regarding the Prosecutor's application of the admissibility requirement of gravity to the situation in Iraq, concluding that the situation there did not pass the gravity threshold.

198 Newton, *supra* note 30, at 47. *See* Rome Statute, *supra* note 6, arts. 12-16 (referencing jurisdictional competence, particularly art. 13(b) (limiting complementarity by granting the Security Council absolute authority to refer a case to the ICC)).

199 Newton, *supra* note 30, at 52.

200 Rome Statute, *supra* note 6, art. 18.

201 *Id.* art. 19. However, the mandatory language of Article 19(1) that the Court is required to “satisfy itself that it has jurisdiction in any case brought before it” is in contrast with the more permissive provision in that same article, providing that the “Court may, on its own motion, determine the admissibility of a case in accordance

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principle.<sup>202</sup> The Rules of Procedure contain explicit guidance for the Court on implementing complementarity,<sup>203</sup> albeit they are “subordinate in all cases” to the Rome Statute.<sup>204</sup> The Court’s role vis-à-vis national proceedings is also limited by the *ne bis in idem* principle,<sup>205</sup> “which protects perpetrators from repetitive trials, with some caveats based on the complementarity principle.”<sup>206</sup>

While the Rome Statute and Rules of Procedure provide significant guidance, how the Court functions in practice will determine the effectiveness of its complementarity regime in ensuring domestic primacy of jurisdiction, as interpretation and application of these provisions is left solely to the ICC.<sup>207</sup> The prosecutor is accountable to the trial chambers and to the appeals chamber, but “any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.”<sup>208</sup> The one exception, of course, is the Security Council’s authority under Article 16 of the Rome Statute to defer an investigation or prosecution for twelve months.<sup>209</sup> To implement complementarity, the Rome Statute requires a Court decision on, for example, a State’s “unwillingness” to carry out an investigation or prosecution.<sup>210</sup> How the prosecutor and Court address amnesties and pardons,<sup>211</sup> interpret the law of armed conflict (*inter alia*, such issues as the definition of military objective, proportionality, and military necessity),<sup>212</sup> and evaluate differences in charges for particular conduct between domestic

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with Article 17.” *Id.* art. 19(1). See Newton, *supra* note 30, n.109.

202 Newton, *supra* note 30, at 52.

203 RPE, *supra* note 31, R. 51-62 (Section III. Challenges and preliminary rulings under articles 17, 18, and 19).

204 *Report of the Preparatory Commission for the International Criminal Court*, *supra* note 30.

205 Rome Statute, *supra* note 6, art. 20. *Ne bis in idem* means “[n]ot twice for the same thing. The phrase usu[ally] referred to the law forbidding more than one trial for the same offense. It essentially refers to the double-jeopardy bar.” BLACK’S LAW DICTIONARY (8th ed. 2004).

206 Newton, *supra* note 30, at 48 (citation omitted).

207 John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS 41, 74 (Roy S. Lee ed., 1999).

208 Rome Statute, *supra* note 6, at 119(1). Newton, *supra* note 30, at 64. Cf. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT’L L. 73 (1995) (arguing that the lack of checks and balances does not fatally undermine ICC authority).

209 Rome Statute, *supra* note 6, art. 16.

210 See *id.* art. 17(2).

211 Newton, *supra* note 30, at 69-70. See ICC-Office of the Prosecutor, *Policy Paper on the Interests of Justice*, Sept. 2007, available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/IC-COTPIterestsOfJustice.pdf>.

212 The concern has also been raised that the principle of complementarity might fail as a sufficient safeguard in situations where the U.S. doctrine on, for example, *jus in bello* differs from the ICC views on how wars may be fought, as, in such cases, the United States could be considered “unwilling and unable” to prosecute war crimes as defined in the ICC Elements of Crimes. Differences in the scope and definitions of the crimes within the Rome Statute did arise during the negotiations in Rome. Michael Scharf, *supra* note 150, at 77. The United

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law and the ICC<sup>213</sup> will also affect the extent of the Court's jurisdiction in the face of complementary domestic proceedings. As noted above, these issues have not been tested yet in the Court's jurisprudence. It should be noted, however, that the current Prosecutor has generally exercised his authority judiciously, with his stated policy, at this initial phase of operations, being "to take action only where there is a clear case of failure to take national action."<sup>214</sup>

Of course, as a preliminary manner, States must have in place the appropriate domestic, implementing legislation, in order to take advantage of the complementarity regime of the Rome Statute. Therefore, the United States must be able to try the crimes within the Court's jurisdiction—genocide, crimes against humanity, and war crimes. Concern has been raised that current U.S. criminal and military law is not sufficient to ensure, in all cases, the primacy of U.S. jurisdiction.<sup>215</sup> That is, as the United States does not have the criminal laws on the books that parallel ICC crimes,

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States initiated and achieved inclusion in the Rome Statute of the requirement of Elements of Crimes to "assist the Court in the interpretation and application of articles 6, 7 and 8," providing clarity regarding the content of each crime. Rome Statute, *supra* note 6, art. 9(1). *Is A U.N. International Criminal Court in the U.S. National Interest?*, *supra* note 2, at 129-30 (1998) (Statement of the United States Delegation on Elements of Offenses), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105\\_senate\\_hearings&docid=f:50976.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:50976.wais). Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, 64 LAW & CONTEMP. PROBS. 3, 9 (2001); Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 383 (2002). The Elements of Crimes document provided a comprehensive framework of *mens rea* requirements as well as the conduct, consequences, and circumstances required for the prosecutor to prove for each of the crimes covered by the Rome Statute. The United States participated extensively in framing the substantive crimes covered under the Statute, which primarily reflect crimes to which the United States either subscribes via treaty obligations or accepts as reflective of customary international law. Because of the strong belief that good faith differences between nations in either Rules of Engagement or in the interpretation and application of *jus in bello* requirements should not lead to criminal accountability in the supranational forum, the United States led the effort to require Elements of Crimes during the Rome negotiations. After taking a leading role in the successful negotiation of the Elements, the United States joined consensus in the belief that they protect U.S. military equities so long as they are interpreted and applied in good faith by the Court, notwithstanding the fact that the Rome Statute states that their purpose is merely to "assist the Court in the interpretation and application" of the substantive crimes within ICC jurisdiction. Rome Statute, *supra* note 6, art. 9(1). See generally Michael Newton, *The International Criminal Court Preparatory Commission: The Way It Is & The Way Ahead*, 41 VA. J. INT'L L. 20 (2000).

213 Newton, *supra* note 30, at 70.

214 OTP, *Paper on Some Policy Issues* *supra* note 197, at 5. See also the discussion *supra* accompanying note 122, regarding the Prosecutor's review of the situation in Iraq and his satisfaction with the national proceedings.

215 *No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing Before the S. Subcomm. on Human Rights and the Law, S. Comm. on the Judiciary* (2007) (statement of David Scheffer, Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, Chicago, IL) [hereinafter Scheffer *No Safe Haven*], available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3028&wit\\_id=6778](http://judiciary.senate.gov/hearings/testimony.cfm?id=3028&wit_id=6778); Mydna G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1 (2005); Doug Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 436-47 (2001). See also Michael P. Hatchell, *Closing the Gaps in United States Law and Implementing the Rome Statute*, 12 ILSA J. INT'L & COMP. L. 183 (2005).

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the ICC could find U.S. domestic proceedings inadequate to bar ICC proceedings. Regardless of whether the United States eventually decides to join the Court, it makes sense to review the law in order to ensure that the United States is able to investigate and try the criminal acts that have been described in the Rome Statute. In 2007 testimony at a congressional hearing, Ambassador David Scheffer recommended, *inter alia*, that the United States amend the federal criminal code and the Uniform Code of Military Justice to provide unambiguously for the prosecution of crimes against humanity and war crimes that are already codified in the statutes of the international and hybrid criminal tribunals and are defined as part of customary international law.<sup>216</sup>

The Genocide Accountability Act of 2007<sup>217</sup> closed a key jurisdictional loophole in the Genocide Implementation Act of 1987 by granting the United States authority to prosecute alleged perpetrators of genocide committed anywhere in the world, so long as the suspect is physically present in the United States. The Child Soldiers Accountability Act of 2008<sup>218</sup> makes it a federal crime to recruit knowingly or to use soldiers under the age of fifteen and permits the United States to prosecute any individual on U.S. soil for the offense, even if the children were recruited or served as soldiers outside the United States. However, without appropriate domestic criminal law on all ICC crimes, the United States cannot benefit in all cases from the complementarity regime, regardless of the Court's implementation of it.

**Congress should consider amendments to U.S. law to permit full domestic U.S. prosecution of crimes within the jurisdiction of the Court so as to ensure the primacy of U.S. jurisdiction over the Court's jurisdiction under the complementarity regime.** The Genocide Accountability Act of 2007 and The Child Soldiers Accountability Act of 2008 were important steps, and Congress should continue its efforts to close any gaps in U.S. criminal and military law with regard to ICC crimes. No doubt should remain as to whether U.S. federal or military courts can exercise subject matter jurisdiction over these crimes. As former Under Secretary of State for Political Affairs Marc Grossman stated on May 6, 2002, “[w]e will take steps to ensure that gaps in United States’ law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice.”<sup>219</sup> The jurisdiction of federal criminal courts should extend to all U.S. nationals and any aliens on U.S. territory who commit these crimes anywhere in the world. In this way, the United States can ensure not only that its law sufficiently empowers U.S. courts with appropriate jurisdiction over these crimes and, thus, primacy over ICC jurisdiction, but also that the United States provides no safe haven for alleged perpetrators. Thus, Congress should

216 Scheffer *No Safe Haven*, *supra* note 215.

217 Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (2007).

218 Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735 (2008).

219 Grossman remarks, *supra* note 1.

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launch an effort to examine and, where appropriate, amend U.S. laws to ensure that there is no gap between them and ICC jurisdiction.

**Furthermore, the U.S. should provide development assistance focused on rule-of-law capacity building, including that which enables countries to exercise their complementary jurisdiction to the Court effectively.** The ICC is a court of last resort, as exemplified by its complementary regime. Given the ICC's jurisdictional and resource limitations, there will continue to be a need for domestic accountability measures to address the numerous cases that fall outside the ICC's purview. In 2006, then Under Secretary Grossman noted that "[e]nhancing the capacity of domestic judiciaries is an aim to which we can all agree,"<sup>220</sup> and committed the United States to "support politically, financially, technically, and logistically any post-conflict state that seeks to credibly pursue domestic humanitarian law."<sup>221</sup> Specific programs for consideration include those "that help to prevent crime, such as training militaries in professional standards and compliance with human rights, and training police and other security forces in effective means to prevent attacks on civilians [, and] . . . programs to train prosecutors and judges to improve the ability of judicial systems to investigate, prosecute, and adjudicate cases involving serious crimes."<sup>222</sup> This approach furthers the broader U.S. policy, of which the ICC is a part, to prevent serious international crimes and promote accountability when prevention efforts fail.

### U.S. Constitutional Issues Raised with Respect to Joining the Court

As previously noted, the Task Force does not recommend U.S. ratification of the ICC Statute at this time. Rather, it suggests that both the executive and legislative branches monitor closely developments at the ICC to inform future consideration of whether the United States should join, particularly in light of developments at the 2010 Review Conference. In that connection, policy makers will want to consider compatibility of the ICC Statute with the U.S. Constitution. While the Task Force's initial analysis suggests that these concerns do not present any insurmountable obstacles to joining the Court, such concerns should be further analyzed if the United States were to consider becoming a member of the Court in the future. They certainly do not prevent the United States from cooperating with or supporting the Court today.

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220 *Id.*

221 *Id.*

222 Discussion Paper from Michael J. Mattler, Minority Staff Counsel, Senate Foreign Relations Committee, and former Attorney Adviser responsible for ICC matters, Office of the Legal Adviser, U.S. Department of State, on U.S. Policy Toward the International Criminal Court, to the ASIL Task Force 8-9 (Oct. 23, 2008) (on file with the ASIL Task Force).

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It has been asked whether U.S. ratification of the Rome Statute would be consistent with the requirements of the U.S. Constitution.<sup>223</sup> Two main objections are raised: 1) the ICC does not offer the same due process rights, particularly trial by jury and protection against double jeopardy, guaranteed under the U.S. Constitution; and 2) ratification would contravene Article 1, Section 8 and Article III, Section 1 of the Constitution, dealing with the establishment of domestic courts.

Some legal experts assert that the Rome Statute contains “the most comprehensive list of due process protections which has so far been promulgated.”<sup>224</sup> Others maintain that the procedures still fall short of U.S. constitutional standards of due process.<sup>225</sup> The due process rights found in the Rome Statute and implemented through the Rules of Procedure and Evidence are: the right to remain silent and the guarantee against compulsory self-incrimination,<sup>226</sup> the presumption of innocence,<sup>227</sup> the right to confront accusers and cross-examine witnesses,<sup>228</sup> the right to have compulsory process to obtain witnesses,<sup>229</sup> the obligation on the prosecutor to disclose exculpatory evidence,<sup>230</sup> the right to a speedy and

223 See, e.g., Amann & Sellers, *supra* note 212; John R. Bolton, *The Risks and Weaknesses of International Criminal Court From America’s Perspective*, 64 LAW & CONTEMP. PROBS. 167 (2001); Brian Darling, Director of U.S. Senate Relations at The Heritage Foundation, U.S. Shouldn’t Be Supporting ICC, Oct. 22, 2008, available at <http://www.heritage.org/press/commentary/ed102108d.cfm>; Brett W. Johnson, *The Future Constitutional Battle if the United States Ratifies the International Criminal Court Treaty*, 3 CHI.-KENT J. INT’L & CONTEMP. L. 1 (2003); *The International Criminal Court: Hearing before the H. Comm. on International Relations*, 106th Cong. 92, 92-101 (2000) (statement of Monroe Leigh on behalf of the American Bar Association) [hereinafter Leigh Statement]; Marquardt, *supra* note 208; Ruth Wedgwood, *The Constitution and the ICC*, in THE U.S. AND THE ICC 119 (Sarah B. Sewall and Carl Kaysen eds., 2000).

224 Leigh Statement, *supra* note 223, at 96. See also Scheffer, *supra* note 35, at 94; Wedgwood, *supra* note 223, at 121, 123; Patricia M. Wald, *International Criminal Courts—A Stormy Adolescence*, 46 VA. J. INT’L L. 319, 345 (2006); David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1049-55 (2008) (determining that Constitutional due process rights are essentially replicated in the Rome Statute); American Bar Association, Res. 108A, Annual Meeting (2008), available at <http://abajournal.com/files/108A.pdf> (recommending that the United States become more involved with the ICC); Arthur W. Rovine, *Memorandum to Congress on the ICC from Current and Past Presidents of the ASIL*, 95 AMER. J. INT’L L. 967 (2001).

225 See Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT’L L.J. 840, 845-46 (2002); 2000 Hearing, *supra* note 39, at 29 (response of Ruth Wedgwood, Professor of Law, Yale Law School, New Haven, CT, and Senior Fellow and Director, Project on International Organizations and Law, Council of Foreign Relations).

226 Rome Statute, *supra* note 6, arts. 67(1)(g) & 54(1)(a).

227 *Id.* art. 66(1).

228 *Id.* art. 67(1)(e).

229 *Id.* art. 67(1)(e).

230 *Id.* art. 67(2).

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public trial,<sup>231</sup> the right to assistance of counsel of one's own choosing,<sup>232</sup> the right to a written statement of charges,<sup>233</sup> the prohibition of *ex post facto* crimes,<sup>234</sup> protection against double jeopardy,<sup>235</sup> freedom from warrantless arrests and searches,<sup>236</sup> the right to be present at trial and the prohibition of trials *in absentia*,<sup>237</sup> exclusion of illegally obtained evidence,<sup>238</sup> and the right to a "Miranda" warning<sup>239</sup>.

Given that the due process rights in the Rome Statute significantly parallel those in the U.S. Constitution, concern has focused on the lack of a jury trial before the ICC. The ICC follows the tradition of many countries as well as the International Tribunals for the former Yugoslavia and Rwanda, as well as those at Nuremberg and Tokyo, empanelling judges to decide questions of law and fact. A second area of concern has been the ICC's divergence from a common-law understanding of protection against double jeopardy.<sup>240</sup>

The U.S. constitutional right to trial by jury<sup>241</sup> is not unlimited.<sup>242</sup> The United States extradites

231 *Id.* arts. 67(1) & 67(1)(c).

232 *Id.* arts. 67(1)(b) & (d).

233 *Id.* art. 61(3).

234 *Id.* art. 22(1).

235 *Id.* art. 20(3).

236 *Id.* arts. 57(3)(a) & 58.

237 *Id.* art. 63.

238 *Id.* art. 69(7).

239 *Id.* art. 55(2). A "Miranda" warning must be given even earlier than under U.S. procedures. David Scheffer & John Hutson, Strategy for U.S. Engagement with the International Criminal Court 14 (The Century Foundation 2008).

240 "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

241 "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III § 2. "No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . ." U.S. CONST. amend. VI.

242 Recognizing that the foreign criminal jurisdiction would not afford the full panoply of U.S. constitutional rights to a U.S. citizen otherwise subject to territorial jurisdiction, the Supreme Court held that "[f]ederal district courts, however, may not exercise their habeas jurisdiction to enjoin the United States from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign to that sovereign for criminal prosecution." *Munaf v. Geren*, 128 S. Ct 2207, 171 L. Ed. 2d. 1, 7 (2008). *But see* *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144, 157 (D.D.C.1976) (holding that "the Constitution applies to actions by U.S. officials taken against American citizens overseas" in the context of warrantless surveillance of members of the Berlin-based recreational club for Americans). *See generally* Scheffer & Cox, *supra* note 224, at 1033-47. *See also* Amann & Sellers, *supra* note 212, at 396-98.

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Americans, who committed crimes outside U.S. territory, to non-jury criminal trials before foreign courts in situations analogous to those where the ICC would likely claim jurisdiction.<sup>243</sup> And, with regard to international courts, the United States has already participated, without raising concerns about constitutionality, in courts that could try—without jury—American citizens, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda. It must not be forgotten that a properly functioning complementarity regime ensures that the ICC only has jurisdiction to try Americans if the United States does not or cannot exercise its primary jurisdiction.

The Rome Statute explicitly provides for the protection against double jeopardy, prohibiting trying a person before the ICC for conduct for which the person has been convicted or acquitted by the ICC or by another court.<sup>244</sup> As in the case of other international tribunals and many other countries, the understanding of when the ICC has reached a final judgment for purposes of double jeopardy differs from that in U.S. jurisprudence.<sup>245</sup> In the ICC and other international tribunals as well as other countries, evidence may be adduced during the appellate proceedings, and the judgment at trial is not viewed as an end to the criminal proceedings. Thus, appeals by the prosecution are allowed,<sup>246</sup> as they are simply seen as another step in the criminal proceedings, not as a challenge to a final judgment. Once a final judgment has been rendered (generally by the Appeals Chamber), the person cannot be tried again for crimes for which he/she has been charged.

The question has been raised as to whether this approach is inconsistent<sup>247</sup> with the U.S. interpretation<sup>248</sup> of the scope of the protection against double jeopardy. However, as noted above,

243 Scheffer & Cox, *supra* note 224, at 1043. Wedgwood, *supra* note 223, at 122 (citing *Charlton v. Kelly*, 229 U.S. 447 (1913)). See generally M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: U.S. LAW AND PRACTICE* 738-45 (5th ed. 2007) (examining extradition of U.S. citizens to foreign courts). There remain possible constitutional questions that could arise in the unlikely case of a U.S. national who commits acts on U.S. territory that constitute crimes within ICC jurisdiction and the United States chooses not to exercise its primary jurisdiction under the complementarity regime.

244 Rome Statute, *supra* note 6, art. 20.

245 LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 187 & n.53 (2002).

246 Rome Statute, *supra* note 6, art. 81(1).

247 2000 Hearing, *supra* note 39, at 29 (response of Ruth Wedgwood, Professor of Law, Yale Law School, New Haven, CT, and Senior Fellow and Director, Project on International Organizations and Law, Council of Foreign Relations). Reference has sometimes been made to the *Tadic* case, in which the ICTY Appeals Chamber found that, due to misapplication of legal tests regarding the Geneva Convention and other legal doctrines, the accused had been erroneously acquitted of certain charges. A conviction was entered and the matter was then returned to the original Trial Court for re-sentencing. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, para. 327 (July 15, 1999). See Amann & Sellers, *supra* note 212, at 396-97.

248 In the United States, the Supreme Court settled this issue on double jeopardy grounds in *Kepner v. United States*,



## Report and Recommendations

the legal regime of the ICC, as well as the other international tribunals, differs significantly from that of the United States, as the Appeals Chamber can consider new evidence, including hearing testimony.<sup>249</sup> Thus, it can be argued that, if the verdict is appealed, the criminal proceeding is not complete until the Appeals Chamber issues a judgment and, therefore, that the prohibition of double jeopardy does not come into play until that judgment is rendered. Moreover, the United States frequently extradites its citizens to countries, such as Germany, that take the same approach to the principle of double jeopardy as that taken by the ICC, and this has passed constitutional muster.<sup>250</sup>

The important issue is whether the fundamental principles of a fair trial are present. The Task Force concludes that the ICC is compliant with the fundamental elements in established international norms, such as those set out in the International Covenant on Civil and Political Rights<sup>251</sup> to which the United States is party.

In addition to the right to a jury trial and double jeopardy, a further constitutional objection has been made to the ICC that, since Congress neither created the ICC nor promulgated its rules, ratification of the Rome Statute would be inconsistent with the provisions of the Constitution vesting in Congress the sole role of establishing federal courts. The Constitutional provisions at issue here are Article I, Section 8, empowering Congress with the authority to

195 U.S. 100 (1904) (deciding that only the defendant has the right of appeal). Canada is an exception among common law jurisdictions in allowing the prosecutor to appeal acquittals. *See, e.g.,* KENT ROACH, *CRIMINAL LAW* 26-27 (3d ed. 2004). “Clouding analysis here is the fact that even though many international law instruments guarantee a right to appeal, *e.g.,* International Covenant on Civil and Political Rights, art. 14(5) . . . , U.S. precedent holds that none is required by the Constitution. *See Smith v. Robbins*, 528 U.S. 259, 271 n.5 (2000) (restating holding of *McKane v. Durston*, 153 U.S. 684 (1894), that there is no constitutional right to an appeal.” Amann & Sellers, *supra* note 212, at n.106.

249 Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 845 & 867 (2005). Regarding the right to have one’s conviction reviewed on appeal, as provided in ICCPR Article 14(5), where contempt has occurred in appellate proceedings, the ICTY has provided for separately composed panels of Appeals Chambers to first try the accused for contempt and then to hear the appeal. *See* Contempt of Court Proceedings, Milan Vujin, Case No. IT-94-1-A-R77, Feb. 27, 2001, available at [http://secnet069.un.org/x/cases/contempt\\_vujin/cis/en/cis\\_vujin\\_en.pdf](http://secnet069.un.org/x/cases/contempt_vujin/cis/en/cis_vujin_en.pdf). *See generally* Rafael Nieto-Navia and Barbara Roche, *The Ambit of the Powers under Article 25 of the ICTY Statute: Three Issues of Recent Interest*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 473, 477 & 481 (Richard May, et al. eds., 2000) (concluding “that there is a dichotomy in practice of the main legal systems in the world, between those, which clearly accord a right to appeal against acquittals to the Prosecution, and those which do not” and that “it is quite clear that one cannot draw a general principle or rule of law from either domestic or international law in relation to the right (or prohibition) of the Prosecution to appeal against an acquittal.”); *Prosecutor v. Tadic*, *supra* note 247, Declaration of Judge Nieto-Navia, at 146-149.

250 Amann & Sellers, *supra* note 212, at 403.

251 International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, S. Treaty Doc. 95-20 (1978), 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

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“constitute tribunals inferior to the Supreme Court,”<sup>252</sup> and Article III, Section 1, which states that “judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>253</sup> This concern is based on a conception of the ICC as an extension of U.S. jurisdiction, requiring the ICC to be established in a manner consistent with the jurisdiction contemplated under the U.S. Constitution. However, the ICC is an independent international court separate from U.S. courts<sup>254</sup> and exercises jurisdiction distinct from that enjoyed by U.S. courts.

In practice, the existence of constitutional concerns need not necessarily preclude ratification of a treaty. For example, the Senate gave its advice and consent to ratification of the International Covenant of Civil and Political Rights<sup>255</sup> subject to the *proviso* that “[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”<sup>256</sup> The United States could employ such a *proviso* accompanying ratification to underscore that in joining the Court it does not undertake any obligations contrary to the Constitution.<sup>257</sup> Although the Rome Statute does not permit reservations to the treaty, other States have relied on such declarations. **The Task Force recommends that the executive and legislative branches consider *provisos*, understandings, and declarations similar to those adopted by other States Parties that may be deemed necessary, in connection with any future consideration of whether to join the Court.**

## Conclusion

The United States has a longstanding role as an advocate for the principle that there must be accountability for war crimes, crimes against humanity, and genocide. Continuing to develop its relationship with the ICC permits the United States to include the Court in its arsenal of tools to bring violators to justice wherever violations occur, and it allows the United States to contribute to the development of important principles of international criminal and humanitarian law in the primary judicial forum addressing that law. As the United States continues to play a leadership role in righting such wrongs and promoting the rule of law, it should build upon its common ground with the ICC and its States Parties in order to meet these objectives.

252 U.S. CONST. art. I § 8.

253 U.S. CONST. art. III § 1.

254 Scheffer & Cox, *supra* note 224, at 1005.

255 ICCPR, *supra* note 251.

256 U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992), available at <http://www1.umn.edu/humanrts/usdocs/civilres.html>.

257 See Scheffer & Hutson, *supra* note 239, at 16 (suggesting a *proviso* of similar content if the U.S. were to ratify the Rome Statute).

# U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT



MARCH 2009

## Report and Recommendations

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The ASIL Task Force on U.S. Policy Toward the International Criminal Court takes note of the desirable evolution in the *de facto* policy of the United States toward the Court in recent years. In light of the Court's record and its involvement in situations, such as Darfur, that are of great concern to the United States, there is an auspicious opportunity to put U.S. relations with the Court on an articulated course of continued positive engagement. The recommendations addressed to the President and Congress in this Report aim to assist the United States in implementing just such a policy.

## Task Force Members

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**Mickey Edwards** was a member of Congress for sixteen years and a senior member of the House Republican leadership (chairman of Republican Policy Committee). After leaving Congress he taught for eleven years at Harvard, at both the Kennedy School and Harvard Law School, and has taught for the past five years at Princeton's Woodrow Wilson School of Public and International Affairs. He is a Vice President of the Aspen Institute and a member of the Constitution Project Board of Directors. He has chaired or served on task forces for the Council on Foreign Relations, the Brookings Institution, and the American Bar Association and has testified frequently before congressional committees. Congressman Edwards has been a regular political columnist for the Chicago Tribune, Los Angeles Times, and Boston Globe, and broadcast a weekly commentary on National Public Radio's "All Things Considered." He is a former national chairman of the American Conservative Union, was a founding trustee of the Heritage Foundation, and directed the policy task forces for Ronald Reagan's presidential campaign.

**Michael A. Newton** is Professor of the Practice of Law at Vanderbilt University Law School. Professor Newton received his J.D. and LL.M. from the University of Virginia, a LL.M. from The Judge Advocate General's School, and B.S. from the United States Military Academy at West Point. He is an expert on accountability and conduct of hostilities issues. At Vanderbilt, he developed and teaches the International Law Practice Lab and develops internships for students interested in international legal issues. Professor Newton negotiated the Elements of Crimes document for the International Criminal Court as part of the U.S. delegation, and coordinated the interface between the FBI and the ICTY while deploying into Kosovo to do the forensics fieldwork to support the Milosevic indictment. As the senior advisor to the U.S. Ambassador-at-Large for War Crimes Issues from 1999-2002, Professor Newton implemented a wide range of legal and policy positions related to the law of armed conflict and U.S. support to accountability mechanisms worldwide. After assisting with the establishment of the Iraqi High Tribunal, he repeatedly taught Iraqi jurists, helped establish its academic consortium, and served as International Law Advisor to the Judicial Chambers. Among more than fifty published pieces, he co-authored the definitive historical and legal account of the Al-Dujail trial in *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN* (2008). He was the U.S. representative on the U.N. Planning Mission for the Sierra Leone Special Court, and founded its academic consortium. As an operational military attorney, he served with the U.S. Army Special Forces Command (Airborne) in support of units participating in Desert Storm. Following duty as the Chief of Operational Law, he served as the Group Judge Advocate for the 7th Special Forces Group (Airborne). He organized and led the human rights and rules of engagement education for all Multinational Forces and International Police deploying into Haiti, and was then appointed as a Professor of International and Operational Law at the Judge Advocate General's School in Charlottesville, Virginia. He taught on the law faculty at West Point before joining Vanderbilt's faculty in 2005.

## Task Force Members

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**Sandra Day O'Connor** (Retired), Associate Justice of the U.S. Supreme Court, was born in El Paso, Texas, March 26, 1930. She received her B.A. and LL.B. from Stanford University. She served as Deputy County Attorney of San Mateo County, California from 1952-1953 and as a civilian attorney for Quartermaster Market Center, Frankfurt, Germany from 1954-1957. From 1958-1960, she practiced law in Maryvale, Arizona, and served as Assistant Attorney General of Arizona from 1965-1969. She was appointed to the Arizona State Senate in 1969 and was subsequently re-elected to two two-year terms. In 1975, she was elected Judge of the Maricopa County Superior Court and served until 1979, when she was appointed to the Arizona Court of Appeals. President Reagan nominated her as an Associate Justice of the Supreme Court, and she took her seat September 25, 1981. Justice O'Connor retired from the Supreme Court on January 31, 2006.

**Stephen M. Schwebel** served as a judge of the International Court of Justice 1981-2000, and as President of the Court 1997-2000. He has been President of the Administrative Tribunal of the International Monetary Fund since 1994, and is a member of the World Bank Administrative Tribunal and the Permanent Court of Arbitration. He is an active international arbitrator in both intergovernmental and international commercial disputes, particularly investment disputes. The President of the World Bank in 2000 appointed him a member of the Panel of Arbitrators of the Bank's Center for the Settlement of Investment Disputes.

**William H. Taft IV** is the Warren Christopher Professor of International Law and Diplomacy at the Stanford Law School and Of Counsel in the Washington, D.C. office of Fried, Frank, Harris, Shriver & Jacobson LLP. He served as the Legal Advisor of the Department of State, 2001-2005. He served previously as the General Counsel of the Department of Health, Education and Welfare, 1976-1977; General Counsel of the Department of Defense, 1981-1984; Deputy Secretary of Defense, 1984-1989; and U.S. Ambassador to NATO, 1989-1992. From 1992 until 2001, Mr. Taft was a partner in Fried Frank's Washington Office. Mr. Taft is the Chair of Freedom House; the Chair of the American Bar Association's Rule of Law Initiative; a Member of the International Advisory Committee of the International Committee of the Red Cross; a Member of the Council of the Institute of International Humanitarian Law; and a Director of the Atlantic Council of the United States.

## Task Force Members

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**David Tolbert** is currently Jennings Randolph Senior Fellow at the United States Institute of Peace. He previously served as Assistant Secretary-General and Special Expert to the United Nations Secretary-General on United Nations Assistance to the Khmer Rouge Trials (UN-AKRT). From 2004-2008, Mr. Tolbert served as Deputy Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). He had previously been the Deputy Registrar of the ICTY. He also served as the Executive Director of the American Bar Association's Central European and Eurasian Law Initiative (ABA CEELI), which manages rule of law development programmes throughout Eastern Europe and the former Soviet Union. Prior to his work at ABA CEELI, Mr. Tolbert served at the ICTY as Chef de Cabinet to President Gabrielle Kirk McDonald during her presidency and as the Senior Legal Adviser, Registry. He previously held the position of Chief, General Legal Division of the United Nations Relief and Works Agency (UNRWA) in Vienna, Austria and Gaza. He has also taught international law and human rights at the post-graduate level in the United Kingdom and practiced law for many years in the United States. Mr. Tolbert has a number of publications regarding international criminal justice, the ICTY, and the International Criminal Court (ICC), including in the Harvard Journal of Human Rights, The Fletcher Forum of World Affairs and other journals and books. He also represented the ICTY in the discussions leading up to the creation of the ICC and at the Rome Conference.

**Patricia M. Wald** served as a Judge on the United States Court of Appeals for the District of Columbia circuit from 1979-1999. She was the Chief Judge from 1986-1991. Following her service in the U.S. Judiciary she was a judge on the International Criminal Tribunal for the former Yugoslavia from 1999-2001. Prior to judicial service Judge Wald was the Assistant Attorney General for Legislative Affairs in the U.S. Department of Justice (1977-1979), the Litigation Director of the Mental Health Law Project, a Legal Services Attorney and an associate at Arnold, Fortas & Porter. She is a Council member of the American Law Institute and its former Vice-President. In 2004-2005, she was a member of the President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. In 2008 she was the recipient of the American Bar Association's Medal of Honor.

## Task Force Members

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**Ruth Wedgwood** is the Edward B. Burling Professor of International Law and Diplomacy at the Johns Hopkins School of Advanced International Studies. She is the U.S. member of the United Nations Human Rights Committee, and serves on the U.S. Secretary of State's Advisory Committee on International Law, the U.S. Defense Policy Board, and the Historical Review Panel of the Central Intelligence Agency. Earlier in her career, she was a federal prosecutor in the Southern District of New York, handling grand jury investigations, trials, and appeals in cases of complex commercial fraud, violent crimes, illegal transfers of high technology, and espionage. She was law clerk to Judge Henry Friendly on the U.S. Court of Appeals for the Second Circuit, and to Justice Harry Blackmun on the U.S. Supreme Court, and executive editor of the Yale Law Journal. Dr. Wedgwood has chaired the Council on International Affairs and the Committee on Arms Control and International Security Affairs of the Association of the Bar of the City of New York, and currently serves as vice-chair of Freedom House, a human rights organization founded by Eleanor Roosevelt in 1941. On sabbatical from university teaching, she has been the Charles Stockton professor of international law at the U.S. Naval War College in Newport, Rhode Island, a Berlin Prize Fellow at the American Academy, and co-director of studies of The Hague Academy of International Law in the Netherlands on a study of international criminal law. She was appointed by the International Criminal Tribunal for the former Yugoslavia as an independent expert in the prosecution of Tihomir Blaskic. Dr. Wedgwood has also served as a vice president of the American Society of International Law and editorial board member of the American Journal of International Law. She is a member of the American Law Institute, the Council on Foreign Relations, the International Institute of Strategic Studies, and the San Remo Institute for International Humanitarian Law, and is former U.S. delegate to the Organization for Security and Cooperation in Europe and to the Munich Security Conference.

## Appendix A

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### Appendix A. Experts and Officials Consulted by the Task Force

Richard Dicker, Director, International Justice Program, Human Rights Watch

James A. Goldston, Executive Director, Open Society Justice Initiative, Open Society Institute  
– New York

Richard Goldstone, former Chief Prosecutor of the U.N. International Criminal Tribunals for the former Yugoslavia and Rwanda and former Justice of the Constitutional Court of South Africa.

Matthew Heaphy, Deputy Convener, American Non-Governmental Organizations Coalition for the ICC

Duncan B. Hollis, Associate Professor of Law, Temple University Law School

Philippe Kirsch, President, International Criminal Court

Beatrice Le Fraper du Hellen, Director of the Jurisdiction, Complementarity and Cooperation Division, International Criminal Court

Colonel William Lietzau\*, Commanding Officer, Henderson Hall, U.S. Marine Corps and former Staff Judge Advocate to U.S. European Command and Deputy Legal Counsel, Chairman Joint Chiefs of Staff

Michael Mattler, Minority Staff Counsel, Senate Foreign Relations Committee, and former Attorney Adviser responsible for ICC matters, Office of the Legal Adviser, U.S. Department of State

Luis Moreno-Ocampo, Prosecutor, International Criminal Court

Stephen Rickard\*, Executive Director, Open Society Institute – Washington, D.C.

David Scheffer, Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law and former Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court



## Appendix A

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Milbert D. Shin, Deputy, Office of War Crimes Issues, U.S. Department of State

John Washburn, Convener, American Non-Governmental Organizations Coalition for the ICC

Christian Wenaweser, Permanent Representative of the Principality of Liechtenstein to the United Nations and President of the ICC Assembly of States Parties

Clint Williamson, Ambassador-at-Large for War Crimes Issues, U.S. Department of State

Edwin Williamson\*, Senior Counsel, Sullivan and Cromwell and former Legal Adviser of the U.S. Department of State

Elizabeth Wilmshurst\*, Fellow of the Royal Institute of International Affairs at Chatham House and former Deputy Legal Adviser, U.K. Foreign and Commonwealth Office

*\*Comments to the Task Force were provided in his/her personal capacity.*

## Appendix B

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### Appendix B. Agendas of the Task Force Meetings

#### TASK FORCE ON U.S. POLICY TOWARD THE ICC

##### What should be the U.S. relationship to the ICC?

Oct. 23, 2008  
Tillar House, Washington, D.C.

##### AGENDA

10:00—10:30 *Welcome and Introduction*

10:30—11:30 *Review of U.S. Policy 1998 to the Present*

David Scheffer, Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law and former Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court

11:45—12:45 *Current U.S. Policy*

Milbert D. Shin, Deputy, Office of War Crimes Issues, U.S. Department of State  
and

Michael Mattler, Minority Staff Counsel, Senate Foreign Relations Committee, and former Attorney Adviser responsible for ICC matters, Office of the Legal Adviser, U.S. Department of State

12:45—1:45 *Lunch and Task Force discussion*

## Appendix B

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1:45—2:45 *The Military Perspective*

Colonel William Lietzau\*, Commanding Officer, Henderson Hall, U.S. Marine Corps and former Staff Judge Advocate to U.S. European Command

3:00—4:00 *Task Force discussion*

*\*Comments to the Task Force were provided in his personal capacity.*



## Appendix B

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### TASK FORCE ON U.S. POLICY TOWARD THE ICC

#### TELECONFERENCE with Ms. Elizabeth Wilmshurst\*

December 6, 2008

#### AGENDA

8:00—9:30      *Discussion with Ms. Elizabeth Wilmshurst, Fellow of the Royal Institute of International Affairs at Chatham House and former Deputy Legal Adviser, U.K. Foreign and Commonwealth Office*

*\*Comments to the Task Force were provided in her personal capacity.*

## Appendix B

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### TASK FORCE ON U.S. POLICY TOWARD THE ICC

#### MEETING with Prosecutor Luis Moreno-Ocampo and Beatrice Le Fraper du Hellen

December 6, 2008  
Tillar House, Washington, D.C.

#### AGENDA

- 1:00—1:45     *Lunch and discussion with Luis Moreno-Ocampo, Prosecutor, ICC, and Ms. Beatrice Le Fraper du Hellen, Director of the Jurisdiction, Complementarity and Cooperation Division, ICC*
- 1:45—3:30     *Discussion (continued)*

## Appendix B

### TASK FORCE ON U.S. POLICY TOWARD THE ICC

#### What are the opportunities for and constraints on future U.S. cooperation with the ICC?

December 16-17, 2008  
Tillar House, Washington, D.C.

#### AGENDA

Tuesday, December 16, 2008

10:00—11:15 *Updates*

- Report of meeting with Luis Moreno-Ocampo, Prosecutor, ICC, and Beatrice Le Fraper du Hellen, Director of the Jurisdiction, Complementarity and Cooperation Division, ICC
- Report of meeting with Elizabeth Wilmshurst, Fellow of the Royal Institute of International Affairs at Chatham House and former Deputy Legal Adviser, U.K. Foreign and Commonwealth Office
- Other organizations

#### *Review of Task Force Process*

11:30—12:30 *Current U.S. Policy*

Clint Williamson, Ambassador-at-Large for War Crimes Issues,  
U.S. Department of State

12:45—1:45 *Lunch and Task Force discussion*

1:45—2:45 *ICC Review Conference Issues*

Ambassador Christian Wenaweser, Permanent Representative of  
the Principality of Liechtenstein to the UN and President of the  
ICC Assembly of States Parties

## Appendix B

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3:00—4:30 *Contrasting Non-governmental Views*

Richard Dicker, Director, International Justice Program,  
Human Rights Watch

and

Edwin Williamson\*, Senior Counsel, Sullivan and Cromwell and former  
Legal Adviser of the U.S. Department of State

Wednesday, December 17, 2008

9:00—10:00 *The ICC: The President's Perspective*

Philippe Kirsch, President, ICC

10:00—12:00 *Task Force discussion*

*\*Comments to the Task Force were provided in his personal capacity.*



## Appendix B

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### TASK FORCE ON U.S. POLICY TOWARD THE ICC

#### Discussion on Draft Report

January 31, 2009  
Tillar House, Washington, D.C.

#### AGENDA

10:00—12:45 *Draft Report*

- Discussion of Draft Report
- Next steps to finalize Report

12:45—1:30 *Lunch and Task Force discussion on Report continued*

1:30—2:00 *Discussion on Roll-out of Report*



## Appendix B

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### TASK FORCE ON U.S. POLICY TOWARD THE ICC

#### Discussion on Draft Report

March 6, 2009  
Tillar House, Washington, D.C.

#### AGENDA

- 10:00—12:00 *Draft Report*
- Discussion of Draft Report
  - Next steps to finalize Report
- 12:00—1:00 *Lunch and Task Force Discussion on Roll-out of Report*
- 1:00—2:00 *Discussion continued (if needed)*

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