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The Counterproductive Bush Administration Policy Toward the International Criminal Court

Anne K. Heindel

Despite a long history of U.S. leadership in promoting international justice mechanisms, the Bush administration terminated all U.S. participation in the formation of the International Criminal Court (ICC or Court) shortly after taking office. Like the current administration, the Clinton administration was critical of the ICC and never supported immediate U.S. membership. However, while the Clinton administration believed that American concerns could be effectively addressed by remaining engaged in the process of building the Court, the Bush administration instead directs its efforts at preventing the Court's effective operation. This policy has caused acrimony between the United States and many of its closest allies and is repeatedly invoked as an example of strident American unilateralism. It has also become a flash point for those who oppose U.S. commitments and obligations to international institutions.

Unfortunately, the intensity of feeling surrounding the Court in the United States has not led to trenchant discussion, but has instead turned the ICC into a powerful but largely unexamined symbol. For some, U.S. policy toward it conjures up the menace of American hegemony; for others, it represents a welcome repudiation of constraints on American sovereignty. Nonetheless, despite the fact that the Court is now poised to begin its first investigations, so far there has been no real exchange of views on how the U.S. should address the Court's existence.

Consequently, most Americans have never heard of the ICC, and those who have are much more likely to be familiar with the views of the administration.¹ Nevertheless, in polls over the past several years, around 65 percent of Americans have consistently supported U.S. participation in

the ICC when its purpose and aims are explained to them, even when the administration's concerns are identified.² Despite serious questions about how the Court will work in practice, Americans see potential benefits from the Court to the United States in decreasing the likelihood of war, lessening the global police burden on the United States, preventing atrocities, and providing justice to victims.³

These kinds of benefits do not accrue immediately, but build over time. For this reason it will be years before the Court's record of accomplishments can be meaningfully evaluated. But those in the administration leading the charge against the Court are not willing to wait. They are not willing even to keep a watchful eye on the Court to see whether or not it can grow into a respected and effective institution. They are ideologically opposed to its very existence and—at more cost to U.S. influence and credibility than to the Court—are doing their best to see that it fails in its mission.

This article argues that the Bush administration's ICC policy is not only needlessly hostile, but also impedes U.S. foreign policy goals, which would be best served by a more pragmatic approach toward the Court. It looks at the benefits the ICC can bring to efforts to promote peace and the rule of law, as well as to specific U.S. interests. It examines the administration's objections and the ideology behind its campaign against the Court, and argues that the current policy is in fact counterproductive to U.S. national interests. It concludes with a discussion of ways in which the United States could work cooperatively with the Court to address its concerns.

I. THE ORIGIN AND OPERATION OF THE INTERNATIONAL CRIMINAL COURT

The desire to prevent the repetition of the horrors of World War II led to a rapid criminalization of human rights violations as expressed in treaties such as the Genocide Convention⁴ and the Geneva Conventions.⁵ It was hoped that the promotion of universal individual accountability for atrocity

crimes⁶ would provide a firm basis on which states could act to prevent a new “Hitler” from carrying out a policy of systematic human rights violations.

The U.S.-backed trials of the Nazi leadership at Nuremberg provided a model for and the impetus to create a permanent court to implement this newly codified law. Consequently, the Genocide Convention, the first human rights treaty promulgated by the United Nations, envisioned the creation of an international court to try persons accused of this new crime.⁷ Accordingly, in its resolution approving the convention, the General Assembly asked the International Law Commission to study the desirability and possibility of creating such a tribunal.⁸

Despite the Commission’s conclusion that an international court was both desirable and possible and the General Assembly’s periodic reconsideration of the issue, the tensions of the Cold War prevented the proposal from moving forward for fifty years. In the meantime, sustained efforts went into promoting the acceptance of stricter human rights standards. Additional landmark treaties came into force, including the Torture Convention,⁹ the Convention on the Suppression and Punishment of the Crime of Apartheid,¹⁰ and the Geneva Convention’s Optional Protocols.¹¹ It was not until the ethnic cleansing in the former Yugoslavia and the genocide in Rwanda in the early 1990s—and the creation by the Security Council of ad hoc courts to try the perpetrators of those atrocities¹²—that nations found the will to begin building a permanent court with the capacity try persons who devise such crimes.

On July 1, 2002, the Rome Statute of the International Criminal Court¹³ came into force, giving jurisdiction to the Court to try individuals for the most serious international crimes: genocide, war crimes, and crimes against humanity. As of May 2004, the Statute had ninety-four states parties.¹⁴ Many commentators believe that the establishment of the Court is no less important than the adoption of the United Nations Charter itself. Its

creation was hailed by UN Secretary-General Kofi Annan as “a giant step forward in the march toward universal human rights and the rule of law.”¹⁵

A. ICC Jurisdiction

The ICC is a permanent and highly specialized court. It is not a United Nations body. It can only investigate individuals, not states or corporations.¹⁶ Absent Security Council authorization, the Court is restricted by its Statute to investigating two types of situations: (1) crimes occurring in the territory of a state that is either a party to the Rome Statute or accepts the Court’s jurisdiction, and (2) crimes committed by the national of a state party.¹⁷ For example, because the United Kingdom is a state party, the Court may investigate UK citizens no matter where in the world they commit their crimes. Alternatively, the Court may investigate anyone who commits an ICC crime in the UK, including citizens of non-state parties like the United States.

In addition to the need for a state to consent to ICC jurisdiction, there are two other major limitations on the Court’s authority: the types of crimes it may pursue and its obligation to defer to national criminal jurisdictions. First, the Court may only exercise jurisdiction over “the most serious crimes of international concern.”¹⁸ Therefore, not only is the ICC restricted to examining atrocity crimes, it is directed to adjudicate only those that are planned, systematic, or occur on a large scale.¹⁹ For this reason, the Office of the Prosecutor will not investigate all war crimes, but only those that are committed intentionally,²⁰ and for the most part, as part of an organizational or government policy.²¹ It will likewise pursue only those persons who bear the greatest responsibility for such crimes.²² The drafters of the Rome Statute established this high threshold to ensure that the Court would only investigate and try individuals whose actions are without a doubt massive, calculated, and consequently, of grave concern internationally.

Second, the Court’s jurisdiction is complementary to national criminal jurisdiction and was never intended to be applicable in all situations.²³ It is

a court of last resort that can only operate when a state with jurisdiction cannot or will not act.²⁴ This may occur when a state has become so lawless that it no longer has a functioning justice system.²⁵ Alternatively, it may occur when those in charge prevent an investigation or rig the results of a trial.²⁶ However, when a case is being genuinely investigated or prosecuted by a national body, the ICC cannot proceed with its review.²⁷ Furthermore, if a case has been investigated in good faith by a national authority, and that authority has decided not to prosecute, the ICC still cannot take up the investigation.²⁸ For this reason, the Court is both fully compatible with and supportive of domestic criminal investigations. The Court is not designed to occupy the field, but to fill the gaps to ensure that those most responsible for atrocity crimes will not avoid accountability.

B. Start Up of the Court

Despite continuing U.S. opposition to the Court, in the year 2003 the ICC's eighteen judges and its prosecutor were elected and sworn into office. As of January 2004, the prosecutor had received over 700 communications from individuals, non-governmental organizations, victims, and states.²⁹ Many of these did not provide specific information about a criminal situation. Many more fell outside the jurisdiction of the Court because, for example, they provided evidence of a crime of aggression (that is, the crime of illegally initiating an armed conflict), which is not yet within the mandate of the Court because an agreement on its definition has not been reached.³⁰ Other communications fell outside the Court's jurisdiction because they occurred before the Court's temporal jurisdiction began on July 1, 2002.³¹ Finally, many communications were rejected because they did not occur in the territory of a state party and were not committed by the national of a state party. Such inapplicable situations included allegations about the behavior of U.S. forces in Iraq.³²

The prosecutor is at present evaluating whether his office should begin formal investigations into two situations.³³ The first is in the Ituri region of

the Democratic Republic of the Congo, where despite an ongoing peace process to end its six-year war, thousands of civilians continue to be targeted for execution, torture, abduction and rape. The second is in the northern region of Uganda, where the Lord's Resistance Army (a rebel group made up primarily of abducted child soldiers), and some government forces have been accused of committing systematic atrocities against civilians during an 18-year conflict. Both countries are ICC state parties whose governments have referred these situations to the Court. The prosecutor is expected to announce as early as June 2004 his decision to undertake both investigations.

II. THE NEED FOR AN INTERNATIONAL CRIMINAL COURT

Despite the existence of numerous treaties prohibiting mass atrocity crimes, without consistent enforcement it has been impossible to either deter or punish those responsible. History shows that domestic courts are frequently unable or unwilling to tackle these types of crimes, especially when they involve powerful government officials. This is because atrocities often arise out of the disintegration state institutions of law and order.

Moreover, war-torn countries cannot rely on the mere "good will" of the big powers, including the United States, to help them seek justice. The political will and financial resources simply do not exist to strengthen or rebuild national courts—or to set up special courts—each time they are needed.³⁴ Nor is the creation of more ad hoc tribunals by the Security Council a practical alternative. It is often said that the Council has "tribunal fatigue"³⁵—a reality that impelled the creation of the ICC in the first place.

Even with international assistance, states that are technically able to try offenders sometimes prefer not to do so. For example, in expressing his country's support for the establishment of the ICC, the Deputy Permanent Representative of Sierra Leone to the UN said:

[t]he point here is that if the International Criminal Court had begun to function, Sierra Leone would not have requested the setting up of a Special Court. The perpetrators of those heinous crimes committed in my country would have been handed to the Jurisdiction of the Court.³⁶

No one doubts that domestic trials are the best way of addressing these situations. The ICC prosecutor has said that “[n]ational investigations and prosecutions, where they can be properly undertaken, will normally be the most effective and efficient means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses.”³⁷ For this reason, he has said that “the absence of trials by the ICC as a consequence of effective functioning of national systems would be a major success.”³⁸ This is the ideal. But no one seriously believes that the ICC will have no work to do.

A. Benefits of a “Court of Last Resort”

Most of history’s worst killers have been individuals whose monopoly of state political and coercive authority has placed them above the law. The ICC, as a permanent international court with the mandate to prosecute such persons, will help to close this impunity gap. Trials are not a panacea. For instance, no criminal justice system can deal effectively or efficiently with large numbers of culpable individuals. But, trials of the upper echelon are an essential component of community reconciliation. Holding them to account discredits their entire criminal enterprise from top to bottom. In discussing the advantages of prosecutions, Alex Boraine, Deputy Chairperson of the South African Truth and Reconciliation Commission, has pointed out that “prosecution establishes . . . that perpetrators cannot be allowed to get away with their actions, that there is a price to be paid, and that is not only fair but right that accounts must be settled.”³⁹

Trials of leaders who plan and foment mass atrocities can thus promote closure. Working alongside national and regional courts and truth

commissions, they can provide a forum for a community to acknowledge and condemn the suffering of victims and survivors, and for victims to tell their stories and have it mean something, to have it be part of a reckoning. Such stories create a collective historical record of past events that help a community to stop denying the past and begin building a stable future.

Trials can also help start building the conditions under which the rule of law will be respected and thus help prevent a return to conflict. For instance, if amnesties are easily and widely granted, they will not be perceived as a process ending the violence but as a free pass to continue it. Moreover, international trials provide an opportunity for the international community to facilitate the rebuilding of local legal systems so that lower-level offenders can also be held accountable. Trials of those who plan atrocities can furthermore counter attempts to blame nations or ethnic, religious, or other groups as a whole for the crimes of individuals. This is the kind of cyclical violence witnessed in Yugoslavia, where brutality was encouraged through references to unresolved prior conflicts.

Finally, trials can isolate and incapacitate criminal leaders so that they can be removed from active political participation. For instance, the transfer of Slobodan Milosevic from Serbia to the International Criminal Tribunal for Yugoslavia has provided some much needed breathing space for its fragile democracy to take root. Even if tyrants cannot be immediately brought to justice because they remain securely in power, their mere indictment may benefit the promotion of long-term peace. For instance, if Saddam Hussein had been charged by an international court after his genocide against the Kurds in 1988, he would likely have lost both domestic and international legitimacy. Many Iraqis might have turned against him as they did when he appeared weak in 1991. And countries such as the United States would not have been able or willing to continue working with him as long as they did. Perhaps both Gulf wars could then have been averted.

B. Benefits from the Mere Existence of the ICC

It is often noted that the creation of the ICC has advanced the rule of law whether or not the Court ever takes a case. The existence of the Court is educating people around the world about international justice and encouraging their resolve that such crimes must be punished, whether by the ICC or in their own courts. The growing belief that there is no sovereign or security justification for mass crimes, combined with the need and desire of states to cooperate with the Court and to prosecute ICC crimes themselves, is leading states to amend their criminal codes to include substantive and procedural law compatible to the Rome Statute.⁴⁰ The mere establishment of the ICC is thus promoting adherence to the Statute's high legal standards. This in turn will assist the promotion of democracy and the amelioration of lawless and chaotic conditions that incubate terrorism and other global threats.

III. U.S. INTERESTS ALIGNED WITH PARTICIPATION IN THE COURT

In addition to its inherent value in promoting the rule of law, peace, accountability, and justice for victims, the ICC can directly benefit the United States. The Court will serve U.S. national interests in protecting American servicemembers, furthering U.S. policy objectives, and maintaining U.S. leadership in the development of international law.

A. Benefits to the American Military

Opponents of the ICC often say that the United States has more to fear from the Court than other countries because its military is deployed more widely around the globe and therefore is especially vulnerable to politically motivated prosecutions. However, it is exactly because the U.S. armed forces are continuously involved in conflicts that they can uniquely benefit from increased enforcement of international humanitarian law. Well-developed standards for war crimes prosecutions are not a danger to the U.S. military, which is extremely serious and diligent about incorporating

legal considerations into its operations. General Wesley Clark has commented:

I was subject to a war crimes investigation in my role as NATO commander. It didn't bother me a bit. We had a full integration of lawyers in all of our activities. We never did anything that was the remotest bit beyond the shade of the law. We would never want to do that.⁴¹

On the other hand, many of the groups the U.S. military confronts do not apply the rules of war to the same degree. By promoting widespread adherence to the same legal standards followed by the U.S. military, the ICC will help protect American servicemembers from inhumane conduct on the battlefield, and also from abuse if they become prisoners of war.

Moreover, leaders such as Saddam Hussein, who commit mass human rights violations against their own citizens, often go on to cause regional instability and use illegal methods to conduct their wars. As discussed above, the ICC can help rein in such leaders by undercutting their legitimacy, thus preventing wars that result in the deaths of American soldiers.

B. Benefits for the Promotion of U.S. Policy Objectives

The United States could also benefit from involvement in the ICC if it made good use of its unique ability to influence the Court's agenda. If it were to work with the Court on common objectives by sharing information about atrocity crimes, providing political support, and offering material assistance, the ICC could be a vehicle for U.S. efforts to promote the rule of law and democratic governance. The ICC's governing body, the Assembly of States Parties (ASP) (where the United States is presently entitled to participate as an observer⁴²) provides a ready-made forum for the United States to build legitimacy and credibility for its foreign policy objectives. For example, if in the future the United States wanted to encourage "regime change" in a "rogue" nation, it could supply evidence of atrocities to the

prosecutor, and begin to build an international consensus recognizing and supporting the legitimacy of its goal. In the same way, the United States could work with the Court to pursue those responsible for mass terrorist crimes.

Although the United States has the military capability to act alone, now more than ever it is apparent that it needs international support to win its political battles.⁴³ In the past the United States derived great influence from its ability to provide leadership in the United Nations. It could benefit in the same way from participation in the ASP.

C. Benefits in Maintaining U.S. Influence over Developing International Criminal Law Standards

A U.S. presence at the ASP would ensure that the United States continues to hold sway over developing international standards. The ICC now exists as a permanent Court of which close to half the world's states are members. Most other states participate in its work. For this reason, the Court will inevitably become the central forum where international criminal law is refined and developed. To maintain its leadership in this field, the United States has an interest in participating in meetings of the ASP.

For example, any member of the United Nations can take part in the ongoing attempts to define the crime of aggression. U.S. views on this topic carry great weight. It is also obviously an issue of tremendous importance to the United States, as evidenced by the fact that it was one of only two working groups to which the Bush administration sent delegates before withdrawing entirely from the ICC negotiations. Good faith and constructive participation by the United States at meetings of the aggression committee would go a long way toward ensuring that its continuing concerns on this topic are heard and addressed.

Participation in the ASP is also important for continued U.S. influence in the evolution of the law of war. It is vital to U.S. interests that the jurisprudence of the Rome Statute remains compatible with U.S. military

views and standards. This will be of particular concern as the 2009 review conference approaches,⁴⁴ which will provide the first opportunity for ASP members to amend the Rome Statute.

IV. U.S. OPPOSITION TO THE ICC

ICC opponents in the government either do not believe that the Court can provide benefits to the United States or believe that they are substantially outweighed by the costs. This skeptical attitude is a new position for the United States, and is no longer confined to the ICC.⁴⁵ In the past, the U.S. government was the primary proponent of efforts to achieve international justice through trials. It was an early advocate of the Nuremberg Tribunal, the ad hoc courts for Rwanda and Yugoslavia, and (at first) a permanent international criminal court.⁴⁶

In fact, the Clinton administration made major contributions to the development of the ICC. For example, it pressed for the inclusion in the Rome Statute of crimes committed during internal armed conflicts. It also took the initiative in drafting a code that explains the precise actions and intent that must be proved for each of the crimes in the Statute.⁴⁷ This document was drafted primarily by the U.S. delegation⁴⁸ and was approved by the Defense Department.⁴⁹

However, the Clinton administration, like the current administration, never supported U.S. ratification of the Court's Rome Statute. From the beginning, it sought formal control over the ICC to ensure that no American would ever come before it. Its primary concern, originating in the Joint Chiefs of Staff, was that the Court would be used politically to target Americans generally, and servicemembers in particular. For this reason, during negotiations the Clinton administration argued that the UN Security Council should have the exclusive authority to approve the referral of most situations⁵⁰ and contended that the Court should only be able to try the nationals of a state party.⁵¹

Other states rejected these demands because they wanted the Court to be independent from political pressures. Also, a primary reason for the creation of the Court was to ensure that all persons accused of committing atrocity crimes would be treated equally, regardless of their nationality or political position.⁵² Nevertheless, U.S. concerns were addressed through compromise solutions, most importantly including the decision to design the Court to complement and not preempt domestic courts. A seven-year opt out was also provided for so that states with active militaries could join the Court without immediately subjecting their troops to the Court's war crimes jurisdiction.⁵³ Moreover, the drafters intentionally did not reserve the Office of the Prosecutor for individuals from state parties in the expectation that an American prosecutor could act as a bridge to full U.S. participation in the Court.⁵⁴

These compromises were not enough to override U.S. concerns, which have only increased with the change in administration. The most frequently recited objection to the Court by the U.S. government continues to be that the Court will act politically against the United States. Other often mentioned criticisms include perceived infringement of U.S. sovereignty because it is possible for an American to be brought before the Court without United States consent, the fear of an "unaccountable" prosecutor, and a belief that the law the Court will apply is "vague." Standing above all of these concerns, but also partially underlying them, is an ideological opposition to the Court deeply rooted in American exceptionalism. Each of these objections will be addressed in turn.

A. Fear of Politically Motivated Prosecutions

The core argument raised by opponents is the fear that the Court will be politically motivated against U.S. officials and servicemembers. Connected with this is the concern that the Court's indictments will second-guess U.S. foreign policy decisions and put a chilling effect on the United States' ability to take action around the world. Underlying much of this concern is

the independence of the Court from Security Council oversight, and therefore from the power of the United States in the Council.

There is no simple answer for these serious and important apprehensions. The Court is just now getting started and has no record of fair adjudication to which to point. It is only possible to highlight the stellar credentials and reputations of the Court's new judges, the long experience and excellent record of its prosecutor,⁵⁵ and the fact that the Court's first investigations demonstrate that it is thus far functioning as intended.

Nevertheless, there cannot be an absolute immunity from the Court's jurisdiction for American nationals. That would violate the equal application of the law and the sovereign rights of states to exercise their criminal enforcement powers jointly through the Court. Instead of providing a blanket exemption for Americans, the Statute includes interacting checks and balances that severely limit the Court's power and effectively safeguard against political prosecutions.

For example, since the Court can only investigate a few kinds of crimes with an extremely high threshold of gravity, it will not be able to pursue U.S. officials or servicemembers for negligent or isolated criminal acts. The Court has jurisdiction over individuals who orchestrate mass atrocities, such as Pol Pot and Osama bin Laden, not over ordinary soldiers who make mistakes in the heat of battle. It is also not a political forum for airing criticisms of U.S. policy,⁵⁶ but a court of law that can only try individuals for whom there is proof that they have deliberately intended to cause or commit atrocities.

Moreover, the Court is monitored and controlled by its governing body, the Assembly of States Parties. The ASP represents member states⁵⁷ and, by its very nature, is made up of countries committed to the principles of transparency and democracy. Dictators and tyrants will not want to make their actions accountable to the ICC by joining the Court. Ratifying states are primarily U.S. friends and allies whose interests would not be served by

unfair prosecution of Americans, and do not include “rogue” states seeking to further their own political agendas.⁵⁸

The primary safeguard against politically motivated prosecutions is the principle of complementarity in the very foundation of the Court. In practice, this means that the ICC must defer to domestic investigations and courts whenever a state has a functioning legal system and acts “genuinely” to investigate or prosecute.⁵⁹ Thus, the United States, even as a non-party state, has the right to take over any investigation of a U.S. national and remove it from the Court’s jurisdiction.

Critics argue that ICC judges will be capricious in determining the genuineness of national proceedings.⁶⁰ The Statute does not address this concern in great detail, but provides two important standards that must guide the Court’s considerations. It says that in determining unwillingness, the Court shall make reference to “the principles of due process recognized by international law.”⁶¹ It also makes the demonstration of an intent to obstruct justice a requirement of showing “unwillingness.”⁶²

It is extremely unlikely that a country with a legal system as professional and respected as that of the United States would be accused of inadequate proceedings unless there was actual evidence of corruption in a specific case. This view is supported by remarks made by Judge Philippe Kirsch, the President of the ICC. In discussing complementarity, he said:

In the case of democratic countries that have systems that function perfectly well, there is no reason why any issue should come before the ICC, because . . . a determination of how a proceeding is conducted does not depend on its outcomes. It does not require a prosecution. It could require an acquittal or even a decision not to prosecute. All that is required is that proceedings are conducted normally.⁶³

Ultimately, if a misuse of power occurs and remains unchecked, the ICC itself will lose its greatest asset: its appearance of impartiality. A young

court with no independent enforcement powers would not survive long under these circumstances.

B. Sovereignty Concerns

The second major U.S. government objection is that the Court is capable of investigating and trying Americans without U.S. acquiescence. However, the Court does not, as is commonly claimed, have jurisdiction over non-state parties. The Court does not have jurisdiction over states or governments at all, but only over individuals. States have no obligation to cooperate with the Court unless they have chosen to exercise their sovereignty by ratifying the Statute or by accepting its jurisdiction over a particular criminal situation. Thus, until the United States chooses to ratify the Statute, the Court will not be able to reach or prosecute accused persons who remain in the United States, and the United States does not have to make them available to the Court.

Sovereignty concerns sometimes arise from a misunderstanding about the ICC's jurisdictional reach. Unlike ad hoc tribunals, the Court's jurisdiction is not limited to crimes occurring in any particular territory; nonetheless the ICC does not have global or "universal" jurisdiction.⁶⁴ The Court may only examine crimes that are committed by a national of a state party or which occur within a state party's territory.⁶⁵ These are the two most traditional bases of jurisdiction, not a legal innovation. For example, it has always been the case that if an American commits a crime in the United Kingdom, the UK can try him or her under UK law and procedure. Its right to do so is incontestable under U.S. and international law.⁶⁶ Now that the ICC is at work, the UK may instead choose to defer to an ICC investigation. Like all other member states, the UK has made a sovereign decision to share with the ICC its jurisdiction over especially grave international crimes. Consequently, the Court has no more power to try U.S. nationals, or anyone else, than that already possessed by its constituent members pursuant to well-established law.

C. “Accountability” Concerns

Another criticism often raised is that the Court, and especially the prosecutor, is “unaccountable.”⁶⁷ It is argued that, because the Court is not integrated into a legal and governance system that includes an executive and a legislature, it has a “democratic deficit” and therefore lacks accountability.⁶⁸ This argument disregards the governing and monitoring of the Court by the ASP, a body made up of member state representatives. ASP oversight responsibilities include hiring and firing the judges and the prosecutor, controlling the Court’s budget, and amending the Rome Statute when necessary. This criticism also ignores the right of the Security Council to prevent or suspend an investigation or prosecution for a year when it would conflict with the maintenance of peace and security.⁶⁹

Regarding the powers of the prosecutor in particular, there are a number of safeguards in the Statute that ensure his accountability. For instance, while he can evaluate complaints at his desk using information he receives from any source,⁷⁰ he can only initiate an investigation on that basis if, after reviewing his presentation of the supporting material, the pre-trial chamber concludes that there is a reasonable basis to proceed.⁷¹ The prosecutor also must immediately notify a state if one of its nationals is under investigation.⁷² Both the state and the accused can then challenge both the jurisdiction of the Court and the admissibility of the crime.⁷³ A state can also decide to conduct its own investigation and ask the prosecutor to defer his inquiry.⁷⁴ Finally, if the prosecutor or any other Court official is found to have acted improperly, the ASP may remove him or her from office.⁷⁵

D. Concern That the Standards the ICC Will Apply Are “Vague”

Some opponents raise the specter of foreign judges with different cultural values and legal systems applying a vague body of war crimes law unacceptable to the United States.⁷⁶ This criticism is entirely unfounded. First, the jurisprudence of the Court is based on well-established treaty law developed over the past fifty years, which the United States accepts.

Second, as previously discussed, the U.S. delegation had a major hand in drafting the war crimes provisions and led the effort to draft the Elements of Crimes, which defines the specific acts and intent required for prosecution of each charge.⁷⁷ Third, the United States twice during ICC negotiations joined on instructions in consensus votes adopting the sections of the Rome Statute containing the jurisprudence of the Court. Finally, the United States recently incorporated that very same jurisprudence—taken almost verbatim from the ICC Statute—into the new Statute of the Iraqi Special Tribunal,⁷⁸ which was signed into law by Ambassador Paul Bremer on behalf of the Coalition Provisional Authority in December 2003. Clearly, this action demonstrates that the Bush administration has no serious objections to the law the Court will apply and in fact considers it to be a reliable restatement of the current status of international law in a form suitable for use by a tribunal.

E. Ideological Opposition to the Court

Although some members of the government may be worried that they or other Americans will be vulnerable to prosecution by the Court, administration objections do not, for the most part, stem from genuine fears about the vulnerability of individual American servicemembers or officials. They primarily originate in a concern that the Court is independent from existing political constraints and may interfere with the U.S. ability to act. This perception originates in a belief that the U.S. government should be free to take whatever actions it believes are necessary to preserve and project its power. In doing so, opponents believe that the United States government should be able at will to work with whomever it wants without being potentially subject to allegations that its policies are either connected with atrocities in other countries or to questions about why it is doing nothing to stop them.

Court opponents are primarily motivated by two different but overlapping perspectives on this point. Each has, at its foundation, a deeply

rooted suspicion of international institutions. The first is characterized by the aggressively ideological stance taken by the head of the administration's ICC policy team, Undersecretary of State for Arms Control and International Security John Bolton. His vehemence toward the Court stems from his conviction that it is a threat "to the independence and flexibility that America's military forces need to defend U.S. national interests around the world."⁷⁹ In his view, international law is not law at all⁸⁰ because it is not part of "a coherent 'constitutional' design,"⁸¹ and also because (contrary to U.S. legal precedent⁸²) he does not believe that it is binding on the United States under the U.S. Constitution.⁸³ For this reason, he sees the promotion of international law and the ICC as "a stealth approach to erode [U.S.] constitutionalism"⁸⁴ and a strategy to assert supremacy over the United States.⁸⁵ His dominance over U.S. policy towards the ICC is the primary reason the anti-ICC campaign has remained largely unmediated by its real-world effects on American interests.

The second approach runs parallel with the first but is rooted in realist notions of maintaining and projecting American power that recognizes the value of multilateral relations and institutions. Therefore, while this group of opponents is equally concerned about the impact of the ICC on the preeminence of the U.S. Constitution and on U.S. discretion to act, it acknowledges and is concerned about the international perception and consequences of the U.S. campaign against the Court. A prime example of this group is Senator Robert Bennett, who felt compelled to explain his uneasiness with the Court in response to "angst among our friends and allies around the world."⁸⁶ After a long critique of the Court and its inferiority to the U.S. constitutional model, he stated that he nevertheless believes "the United States should stay engaged and involved in discussions about [the Court]" and does not think that "we should turn our backs and walk away and say we will never have anything to do with it or be involved in it."⁸⁷

There are many serious and genuinely felt concerns about the Court. It is a new and unknown institution. The U.S. government's hesitancy to join the Court is in line with a long history of U.S. wariness toward international entanglements. It is not unexpected that a country that took forty years to join the Genocide Convention would not be a founding member of the first permanent international criminal court able to prosecute that crime. As with previous international developments, one would expect the United States to bide its time, keep an eye on the Court, and do what it can to ensure that the Court acts appropriately. Instead, the Bush administration's ideological obsessions are driving a war on the ICC that is endangering U.S. interests around the world.

V. CURRENT U.S. POLICY TOWARD THE COURT

Despite their similar reluctance to accept an independent ICC, the Clinton and Bush administrations' respective approaches toward the Court have been vastly different. The Clinton administration was somewhat well-disposed toward the Court. It participated fully in all negotiating sessions and signed the Rome Statute at the last possible date in an effort to retain U.S. influence over the final completion of the Court.⁸⁸ Nevertheless, President Clinton also recommended that his successor not ratify the treaty, which he called "flawed."⁸⁹ The Bush administration, however, has from the beginning taken a much more absolute stance. It completely cut off all negotiations regarding the Court shortly after taking office, nullified the Clinton administration's signature on the Statute in May 2002, and for two years has conducted an active campaign to undermine the Court.

Bush administration officials have often said that they respect the rights of other states to be a party to the ICC and merely want their decision not to join respected.⁹⁰ However, in practice, U.S. policy has been more in line with the advice of Undersecretary John Bolton, who as previously mentioned is the architect of the government's campaign against the Court. In 1998 he said:

We should isolate and ignore the ICC. Specifically, I propose for United States policy—I have got a title for it . . . I call it the Three Noes: no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the Statute. . . . This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective.⁹¹

To implement this goal, the administration is waging an uncompromising campaign against the Court with bilateral agreements and aggressive action at the United Nations. The aim of both prongs of its attack is not only, or even primarily, to keep Americans from coming before the Court, but to weaken or destroy it by whittling away at its statutory authority and undermining its legitimacy.

A. Bilateral Immunity Agreements

Since the Bush administration announced its intention to withdraw its signature from the Rome Statute, it has been pressuring states to conclude bilateral agreements that would prevent the surrender to the Court of any American or U.S. employee. States parties that have refused to sign the U.S. text have lost U.S.-funded military training and assistance. The administration has justified this campaign by saying that it is mandated by the American Servicemembers Protection Act (ASPA),⁹² which, among its other provisions,⁹³ requires these cuts for any ICC state party that has not signed an agreement pursuant to Article 98 of the Rome Statute.⁹⁴ However, it is widely agreed that the U.S. text does not accurately reflect the requirements of that article. Furthermore, at the administration's insistence,⁹⁵ the ASPA includes broad authority for the president to waive cuts to any or all affected states.⁹⁶ Moreover, administration threats have reportedly gone beyond military funding to include assistance for projects such as airport repairs and hurricane disaster relief.⁹⁷

Since cuts were first threatened in July 2002, eighty-two countries have reportedly signed the bilateral agreement with the United States, including thirty-four ICC states parties.⁹⁸ Many of these agreements are not yet

binding because of opposition by the national parliaments that must adopt them before they can enter into force. Originally thirty-four countries lost funding; as of March 2004, over twenty states that are parties to the ICC and have continued to refuse to sign the agreement have been cut off from millions of dollars.⁹⁹

The administration claims that its bilateral agreements are compatible with the Rome Statute because they meet the requirements of Article 98(2). That article provides:

[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The language in the U.S. agreement, however, goes beyond the wording of that article. It has been widely noted that Article 98(2)'s explicit requirement of a "sending state" relationship would only include agreements pertaining to persons sent abroad on official government business. For example, this could include Status of Forces or Status of Mission agreements that require U.S. military or civilian personnel accused of a crime to be returned to the United States for prosecution. The U.S. text, however, applies to a much wider group of persons, including all U.S. nationals and contractors who could even be citizens of an ICC-member state.¹⁰⁰ Commenting on the controversy over the U.S. text, David Scheffer, the chief ICC negotiator for the Clinton administration has said:

[t]he negotiating objective never was to protect American mercenaries or any other citizen engaged in unofficial actions. . . . Rogue citizens act at their own risk. . . . It is worth recalling that the original intent of Article 98 agreements was to ensure that Status of Forces Agreements (SOFAs) between the United States and scores of countries would not be compromised and that Americans on official duty could be specially covered by

agreements that fit Article 98's terms. I first put that requirement on the table in early 1995 in Madrid."¹⁰¹

It is almost universally agreed that joining one of these agreements would violate a state party's obligations to the Rome Statute.¹⁰² However, the Bush administration has as of yet refused to amend its text to address this concern. Nor has it responded to legal criticisms of it. In September 2003, Assistant Secretary for Political-Military Affairs Lincoln Bloomfield made the only known attempt to do so. He said that U.S. legal experts "find support in the usage found in other conventions such as the Vienna Convention on Consular Relations, whose use of the term sending state refers to all persons who are nationals of the sending state."¹⁰³ However, this argument is unconvincing because the Vienna Convention in fact goes against the U.S. interpretation. Contrary to Mr. Bloomfield's reading, the term "sending state" is used throughout that convention in the context of consular relations solely to indicate the state that sends government officials abroad on official business—in this case as consular staff or officials. Without more detailed legal analysis from the administration, it is difficult to understand why it believes that the convention lends support to its position.

B. U.S. Attacks at the United Nations

The first indication that the Bush administration intended to conduct a campaign in the Security Council to undermine the Court was in June 2002, when the United States stood alone in vetoing the Bosnian peacekeeping mission mandate, a critical part of the international community's multi-billion dollar commitment to ensure long-term peace in the region. Bush administration officials said that the United States would not approve an extension of the Bosnian or any other mission unless international peacekeepers on the ground were given permanent blanket immunity from arrest and prosecution by the ICC.¹⁰⁴

Several factors indicated that this maneuver was not a genuine effort to protect American troops but was a direct attack on the Court. First, while the United States is one of the largest financial donors to UN peacekeeping, it does not contribute a large number of troops. At the time of its veto it had only forty-six personnel in Bosnia pursuant to the UN mandate, and these were all part of the unarmed police force.¹⁰⁵ Since the European Union was already scheduled to take full control of the mission in a few months time, some Security Council members suggested that the United States pull out its affected troops and turn the mission over to the EU. The administration refused. Second, U.S. urgency seemed misplaced since the ICC would not be fully functioning for at least another year. Finally, as was pointed out at the time by UN Secretary-General Annan, U.S. forces operating in the former Yugoslavia had been under the jurisdiction of the International Criminal Tribunal for Yugoslavia (ICTY) since 1993 and none had ever been indicted.¹⁰⁶

Resolution 1422, a compromise text, was adopted unanimously after many drafts and weeks of negotiation. Its operative language requests the ICC not to investigate or seek the surrender of peacekeepers from non-state parties for one year.¹⁰⁷ The resolution attempts to track the requirements of Article 16 of the Rome Statute, which authorizes the Security Council to act under its Chapter VII peace and security authority to suspend any ICC proceeding on a case-by-case basis for 12-month periods.¹⁰⁸ However, while that article merely authorizes the Security Council to stop an active investigation or prosecution against a specific individual, Resolution 1422 seeks to prospectively prevent the ICC from taking up any case against an entire class of person—all peacekeepers from non-states parties. It has been argued that in addition to undermining the delicate balance of power between the Court and the Council that was carefully negotiated in Article 16, the resolution also contravenes Article 27, which makes official capacity irrelevant in the determination of criminal responsibility.¹⁰⁹

The United States position is that it is “consistent both with the terms of Article 16 and with the primary responsibility of the Security Council for maintaining peace and security for the Council to adopt such a resolution with regard to the operations it authorizes or establishes.”¹¹⁰ The United States’ UN Ambassador John Negroponte has said that it was “a practical solution to both [U.S.] concerns and those of ICC States Parties.”¹¹¹

When Resolution 1422 was adopted, member states such as Canada, Brazil, New Zealand, and South Africa stated before the Security Council that they believed it was unnecessary and contravened the Rome Statute. They also said it may violate the UN Charter, since Security Council action under Chapter VII requires a determination that a specific threat to international peace and security exists.¹¹² Prince Zeid Al-Hussein, Jordan’s Permanent Representative to the UN and now the President of the ASP, asked, “[h]ow could the Security Council adopt a Chapter VII resolution on the Court, when the latter cannot, by any stretch of the imagination, be considered a threat to international peace and security?”¹¹³

In 2003, the Security Council passed—with three abstentions—Resolution 1487, which renewed Resolution 1422 for an additional year.¹¹⁴ The text of Resolution 1487¹¹⁵ is identical to 1422. Before the vote, the Secretary-General and representatives of close to sixty countries spoke out against renewal. The Secretary-General said that in his view the resolution was unnecessary and inappropriate, and that if it were to be continually renewed, it could undermine not only the authority of the ICC, but also the authority of the Security Council and the legitimacy of peacekeeping operations.¹¹⁶ The renewal of Resolution 1487 in June 2004 will undoubtedly be hotly contested once again.

A few months after the controversy over Resolution 1487, the United States held up the peacekeeping operation in Liberia until it secured a total permanent exemption for personnel from non-state parties, both from the ICC and from any foreign jurisdiction.¹¹⁷ Resolution 1497 both constricts ICC jurisdiction and permanently restricts the ability of national courts to

prosecute Liberian peacekeepers accused of committing atrocities against their citizens.¹¹⁸ Considering the region's long history of horrendous violence and impunity, Resolution 1497 sends an extremely troubling message about the equal application of the law.¹¹⁹

Similarly, in August 2003, the United States refused to support a resolution protecting humanitarian aid workers solely because it referred to the fact that the ICC has criminalized attacks against them as war crimes. The only express U.S. objection was that the language was “unnecessary.”¹²⁰ The U.S. opposition continued even after the bombing in Baghdad that killed twenty-two aid workers in the UN compound. The version that passed instead stated indirectly that “there are existing prohibitions under international law against attacks knowingly and intentionally directed against personnel involved in humanitarian assistance or peacekeeping mission[s]”¹²¹

The United States has used similar tactics in the UN General Assembly (GA). In August 2003, the United States circulated a diplomatic note to many UN delegations, asking them not to call for support of the ICC in GA resolutions, especially when they involve human rights issues. In the GA, however, where its intransigence cannot prevent an overwhelming number of votes in support of the Court, the United States has been willing—after ensuring that its objections are placed on the record—to allow formal consensus on ICC language.¹²²

VI. HOW THE BUSH POLICY HURTS U.S. INTERESTS

A. Harm to Allied Relations

Staunch allies of the United States are among the ICC's current ninety-four states parties, including all members of the European Union, all EU aspirants (with the exception of Turkey), Canada, Australia, New Zealand, South Korea, many African states, and most of South America. For many of them, the Court is a major foreign policy priority. Leading ICC

supporters such as Canada, which deploys many more peacekeepers around the world than the United States, think that administration concerns are overblown and that its war on the Court is disproportionate to any perceived danger.¹²³ Threats by the United States to end peacekeeping missions and arm twisting on bilateral agreements have not gone over well in foreign capitals and in many cases have renewed or exacerbated differences over unrelated issues, such as the U.S. war in Iraq, the “war on terrorism,” and trade policy.

In both Europe and in the Caribbean, where countries have been working hard to establish regional foreign policies, the U.S. “divide and conquer” approach has generated much bitterness. While the EU has remained formally united against the bilateral agreement campaign, in the Caribbean, favors for some countries and penalties for others have undermined unity among CARICOM members.¹²⁴ The United States has refused to acknowledge these countries’ right to establish a common approach to the Court and has in fact accused the EU of acting inappropriately in making support for the Court and the integrity of the Rome Statute a requirement for its member states.¹²⁵ Frustrated by the the EU common policy opposing bilateral agreements and its continued difficulties in convincing countries to sign on, in June 2003 the administration took the extraordinary step of warning that the impact on U.S.–EU relations would be “very damaging” if the EU did not stop lobbying against the agreement.¹²⁶

For many countries, the contradiction between the administration’s policy toward the Court and the prominent U.S. role in pressuring the Balkan countries to turn over indicted persons to the ICTY has not gone unnoted. As a case in point, two weeks after requiring Serbia and Montenegro to show that they were fully cooperating with the ICTY as a prerequisite to receiving further U.S. assistance, Serbia’s military aid was suspended because it refused to sign a bilateral agreement with the United States. Serbian Prime Minister Zoran Zivkovic commented, “I think it would be very difficult to explain to our people that on the one hand we

will sign a bilateral agreement with the United States in which we agree to protect their citizens, while at the same time we are arresting and extraditing our citizens for trial at [the ICTY].”¹²⁷ This contradictory approach has encouraged a widespread perception that the United States is engaging in blatant hypocrisy: that the administration believes international justice is fine for others, but not for Americans.¹²⁸

B. Harm to International Law and Justice

U.S. attacks on the Court are considered detrimental to both international justice and international law. This is true both regarding specific actions taken by the United States against the Court, and in the pattern of disregard the administration has displayed for international obligations in general. For instance, attempts to carve out exceptions from the ICC’s jurisdiction are perceived as harmful because they raise questions about the equal application of the law. It is feared that such exemptions will create a double standard, whereby different categories of individuals are treated differently. Because, as discussed above, ICC jurisprudence is accepted by the U.S. government, a reasonable inference follows that U.S. demands for immunity seek to place Americans above the law. In effect, the United States is promoting the existence of “impunity gaps”—exactly what the ICC was designed to prevent. If the U.S. policy continues unchallenged, other states will expect to secure the same exemptions, and international justice will become an ineffective patchwork of exceptions instead of a uniform body of law.

The U.S. campaign has also raised questions about whether the Security Council exceeded its authority in passing Resolutions 1422/1478 in the first place. Some UN members view the adoption of those resolutions as a craven abuse of the exceptional authority entrusted to that body by UN member states. In addition to the Security Council’s failure to identify a threat to peace and security as required by Chapter VII, some have questioned whether the resolutions are an *ultra vires* attempt by that body to

amend a treaty. This could undermine state treaty-making authority, a fundamental attribute of sovereignty.

The negative reception of these resolutions has thus called into question the founding principle of the international legal order: the sovereign equality of states. This obviously raises concerns far beyond the resolutions' effect on ICC jurisdiction. If Council powers were misused in this instance, it could set a precedent for future abuse. As mentioned above, even the Secretary-General has expressed concern about the effect on that body's continued credibility.

Ultimately, the U.S. campaign is perceived by many as an attempt to reduce international law to an instrumentality instead of an obligation. This is supported by remarks by Lincoln Bloomfield, a leading member of the ICC policy team. In defending the U.S. policy he expressed his view that "legal institutions and positions derive their legitimacy from the fidelity with which they serve fundamentally political ends."¹²⁹

C. Harm to U.S. Foreign Policy Objectives

The dogmatism of the administration's campaign has not gone completely unnoticed in the United States. It has even generated some concern in Washington. This is because its single-minded nature has at times seemed self-defeating and more damaging to U.S. interests than to the Court. As mentioned above, the United States derives tremendous benefits from the existence of international law. It also benefits from its ability to convince other states to accept its leadership. Both Republican Senator Bennett and Democratic Senator Lieberman have commented on the fractures the ICC policy has caused in the U.S. relationship with its allies. Long before he began his campaign for president, Senator Lieberman pointed out that

[o]ur friends and allies have reacted negatively to a number of President Bush's pronouncements and policies, including rejection of . . . the International Criminal Court. . . . This vote [resulting in

a loss of its seat on the UN Human Rights Commission for the first time in over fifty years] clearly demonstrates that there can be unanticipated and damaging consequences to our actions on the world stage. The U.S. cannot take our friends for granted. . . .¹³⁰

In practice, Congress has done little to ameliorate the effects of the administration's campaign, except in one notable case. Due to the president's refusal to waive NATO aspirant countries from ASPA-mandated military assistance cuts, those countries suffered a six-month loss of military assistance. As a result, these important allies lacked the funding they needed to achieve the required preparedness to join NATO and to assist U.S. efforts in Afghanistan and Iraq.¹³¹ General Wesley Clark noted that

[i]n Eastern Europe, there is dismay. These were some of the first countries in the world to support the Bush Administration in Iraq. And what does this administration do to its friends? In July, it suspends all U.S. military assistance to Lithuania, Latvia, Estonia, Slovakia, and Bulgaria because they have not yet promised Americans blanket immunity from the International Criminal Court. We even took away money for night vision goggles for Baltic troops serving in Iraq alongside ours.¹³²

Ultimately, a bill to exempt these countries was introduced in both the House and the Senate.¹³³ When the Senate Foreign Relations Committee unanimously approved the bill in November 2003, a conflict arose in the State Department over how to handle the situation, since the uniform policy up until that point had been not to waive any country that would not sign a bilateral agreement. The issuance of Presidential Determination 2004-09,¹³⁴ partially waiving cuts to these countries, was an attempt to preempt the Congress on this issue. The situation is notable for being the first obvious disagreement within the State Department over the damaging political effects of the anti-ICC campaign, and for being the first and only time the hard-liners failed to prevail.

Despite this one narrow accommodation made to competing policy goals, the anti-ICC campaign's detrimental effects on U.S. interests continue unabated. In addition to NATO enlargement and preparedness and building cooperation for the "war" on terror and war in Iraq, significant objectives undercut by the campaign include combating drug trafficking and transnational crime, and strengthening local capacity to deploy peacekeepers (and thus reducing reliance on the United States).

For example, Colombia, the only South American country to support the war in Iraq and a major ally in the "drug war," lost \$5 million in funding in the summer of 2003. Although Colombia was willing to prohibit the extradition to the ICC of Americans in the country on official U.S. business (including private defense contractors) as long guaranteed under a 1962 agreement, the administration would not grant it a waiver until it finally capitulated and signed the U.S. text. At stake was over \$100 million, including money to supply an American-trained force designated to protect from sabotage a main oil pipeline operated by a U.S. company.¹³⁵

Even now, countries the United States directly relies on for the success of U.S. foreign policy priorities are going without the funds they need to do the job. Such countries include Brazil, Costa Rica, Ecuador, Paraguay, Peru, Tanzania, Uruguay, Benin, Central African Republic, Lesotho, Mali, Namibia, South Africa, Croatia, Barbados, Dominica, St. Vincent and the Grenadines, and Trinidad and Tobago. Crispin Gregoire, Dominica's ambassador to the UN, has said that the funding cuts will hurt the U.S. in the longer term. He questions, "[i]s the U.S. still committed to the war on drugs?"¹³⁶ If these shortsighted actions continue, vital strategic interests far more important than the phantom threat posed by the ICC may be irreparably harmed.

VII. THE POLICY ALTERNATIVES: A BALANCED APPROACH

Even if one accepts the legitimacy of U.S. concerns about the Court, there are better ways by which the government can promote and protect

U.S. national interests. First, the administration must accept that it can hinder, but cannot kill the Court. The ICC is too important to too many states that have lived for too long with those who foment atrocities and are never held to account. The U.S. government must accommodate itself to these motives and the institution they have created, face up to the existence of the Court, and formulate a constructive policy for dealing with it.

Now that the American Servicemembers' Protection Act is law and the Bush policy toward the Court has hardened, most in Washington think the ICC is a dead issue—at least until there is a new administration. At the moment it appears extremely unlikely that the United States would ever be willing to accept the existence of the ICC as long as Bush is president. But how likely is it that U.S. policy would change even if there was a change in administration? It is doubtful that any U.S. president would immediately call for ratification of the Rome Statute.¹³⁷ Too much skepticism exists throughout the political establishment, and too much opposition needs to be overcome in Congress. Before an administration could even decide to actively assist the Court, it would have to work with Congress to remove standing funding restrictions that prevent U.S. cooperation.

However, a policy of peaceful coexistence is not out of reach. To reassert U.S. influence and credibility at the Court, while at the same time protecting U.S. interests, it would not be necessary to make a noisy shift in policy. With little fanfare any administration could: (1) end the campaign to undermine the Court; (2) adopt a “constructive engagement” approach by participating as an observer in the work of the Assembly of States Parties; and (3) cooperate with the ICC on a case-by-case basis when doing so is in American interests.

A. Ending the Anti-ICC Campaign

A first step in the right direction would be to adopt a “neutral” policy toward the ICC. This would entail ending the high costs of the anti-ICC

campaign by terminating the relentless pursuit of bilateral agreements as well as efforts to obtain immunity through the Security Council.

Ideally, a new administration would recognize that the many safeguards in the ICC Statute make the bilateral agreement campaign unnecessary. However, if it were skeptical of the Court or felt compelled to continue the campaign for domestic political reasons, it could nevertheless take several steps that would substantially reduce friction with U.S. allies and increase the overall effectiveness of the campaign. First, it could end the aggressive policy of threatening states with a wide variety of sanctions for non-compliance. States that aid the United States in achieving important foreign policy goals could be given waivers from the ASPA in recognition of their assistance and friendship. Most importantly, the administration could allow negotiation on the text of the agreement so that states could address U.S. concerns about protecting U.S. officials and soldiers from political prosecutions, while at the same time upholding their obligations under the Rome Statute.

Fundamentally, this would mean reducing the scope of the agreements to persons sent by the United States to a country on official business. As a consequence, they would cover primarily U.S. officials and servicemembers. The administration should recognize and accept that it has no interest in protecting a wider group of persons than those serving abroad at its behest.

To ensure no immunity gap existed, all bilateral agreements would also need to establish an absolute obligation for the United States to investigate any persons who are returned to it in lieu of being surrendered to the Court. Only with this added safeguard can such agreements both ensure primary jurisdiction for the United States and uphold equality before the law. With these modifications, the administration would find that many ICC states parties would be more than happy to appease U.S. concerns by concluding a non-surrender agreement.

At the same time, the United States should stop pressing for Security Council resolutions providing immunity to peacekeepers. This effort has contributed little or nothing toward protecting Americans from the Court but has generated an immense amount of concern and resentment. Similarly, by no longer obstructing attempts to include language in resolutions that appropriately and beneficially recognizes the jurisprudence and authority of the ICC, the administration could regain credibility among many nations that see its obstructive tactics as an affront to their sovereignty and a threat to the UN's consensus based culture.

B. Participating As an Observer in the Assembly of States Parties

A second step in reasserting U.S. influence at the ICC would be for the United States to take up its seat as an observer in the Assembly of States Parties. It is entitled to do so at any time, with no legal obligation attaching. The United States regularly uses observer status to participate in treaty bodies that it has not joined, and often attends with one of the largest delegations. It is an important means whereby the administration could keep abreast of the activities of the Court. It could also participate in all debates and negotiations on the same basis as any state party. The only difference between this status and Court membership is that an observer is unable to vote. Consequently, if the United States regained its credibility in the field of international justice by ending its campaign to undermine the Court as discussed above, it could likely have a major impact on the shape and outcome of ASP discussions.

If the U.S. government is truly concerned that the ICC is a potential threat to U.S. interests, it is hard to understand what possible justification it has for not keeping engaged with the Court to ensure it does not veer off track. In this respect it is significant that the United States is the only major state not currently participating in the ASP as either a state party or an observer. Thus, observer states include China, India, Japan, and Russia. While Israel followed the U.S. lead in nullifying its signature on the Rome

Statute, it nevertheless stays involved in the Court's work by exercising its right to observer status.

C. Cooperating with the Court When It Is in U.S. Interests

Finally, an administration should remain ready to cooperate with the Court when it is U.S. national interests. This is not only pragmatic; it was the intent of the Congress when it incorporated the Dodd Amendment into the American Servicemembers' Protection Act. That section reads:

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.¹³⁸

This mandate can be fulfilled by staying involved in the work of the Court, turning over all atrocity evidence that is uniquely within the knowledge or control of the U.S. government, and encouraging the Security Council to refer cases to the Court that would otherwise be outside of its jurisdictional authority.

VIII. CONCLUSION

Since the Bush administration announced its policy on the ICC, serious debate on the Court in the United States has come to a screeching halt. During that time, the ICC has been staffed and begun operations. The first two investigations are poised to begin. Rules and regulations have been written, and procedures developed—all without the input of the U.S. government. These missed opportunities cannot be restored, yet new opportunities continue to be ignored. Partly, this is the fault of ICC supporters. They seem to have accepted the frame drawn by Court opponents, who view U.S. options in uncompromising terms: either ratification or complete disengagement; either the United States submits its citizens to the caprice of foreign judges, or it rejects the Court out of hand.

This narrow perspective forecloses much needed discussion on the value of the Court to the United States and the cost of the administration's policy. Furthermore, it disregards prudent policy options currently available to our government.

Slow and careful steps to build bridges between the United States and Court would add up to a marked and much welcome change in U.S. credibility and influence on this issue. Moreover, they could lay the foundation for an eventual active and supportive role in the work of the Court. This should be a goal supported by all Americans. Forgotten in the acrimony over the ICC is the uniform commitment by all U.S. administrations to end impunity for atrocities and maintain U.S. leadership in international justice.

The existence of the Court is compelling the Bush administration to repeatedly confront and justify its uncompromising policy toward the ICC. This is most apparent in the decisions that it is being forced to make about whether to cut the military funding of some of its closest allies. It is also apparent at the Security Council, where over a few short months last year the United States expended a great deal of time and effort by holding peacekeeping and humanitarian initiatives hostage to satisfy the narrow ideological concerns of a small minority in the government. For now, the administration remains willing to expend large amounts of limited political capital in its quixotic war on the Court. Instead of using its influence to ensure that the ICC grows into a fair and effective institution, the United States, alone among the great powers, has left its chair at the Court empty.

¹ WASH. WORKING GROUP ON THE ICC [hereinafter WICC], FACT SHEET: U.S. PUBLIC OPINION & THE ICC, at http://www.amicc.org/docs/WICC_USpublicOp.pdf (last visited May 15, 2004) (a collection of statistics from various sources).

² *Id.*

³ *Id.*

⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

⁵ See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁶ This paper follows the terminology for these crimes adopted by David J. Scheffer, former Ambassador-at-Large for War Crimes. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L. J. 47, 52 n.14 (2002) [hereinafter *Staying the Course*].

⁷ *Genocide Convention*, *supra* note 4, art. VI (requiring that “[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

⁸ G.A. Res. 260(III), U.N. GAOR, 3d Sess. § B (1948).

⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 23 I.L.M. 1027, *modified in* 24 I.L.M. 535 (entered into force June 26, 1987).

¹⁰ The International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976).

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.S.T.S. 3 (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

¹² The International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) are temporary courts that were created by the Security Council to deal only with conflicts in those countries. By contrast, the ICC is a permanent Court that was created by treaty. With appropriate state consent, it is able to examine any atrocity situation anywhere in the world.

¹³ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter *Rome Statute*], available at <http://www.un.org/law/icc/statute/romefra.htm>.

¹⁴ See *What's New with the ICC?*, AMICC (providing a regularly updated list of state parties), at http://www.amicc.org/new_icc.html#ratifications (last visited May 15, 2004).

¹⁵ Kofi Annan, Secretary-General of the United Nations, Statement at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court (July 18, 1998), at <http://www.un.org/icc/speeches/718sg.htm>.

¹⁶ Rome Statute, *supra* note 13, art. 25(1).

¹⁷ *Id.* art. 12.

¹⁸ *Id.* art. 1 & pmb1. ¶ 9.

¹⁹ See *Id.* arts. 6, 7 (acts of genocide and crimes against humanity include intent and scale requirements).

²⁰ *Id.* art. 30.

²¹ *Id.* art. 8(1) (“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”).

²² See COMMENTS AND CONCLUSIONS OF THE OFFICE OF THE PROSECUTOR, SUMMARY OF RECOMMENDATIONS RECEIVED DURING THE FIRST PUBLIC HEARING OF THE OFFICE OF THE PROSECUTOR, CONVENEED FROM 17–18 JUNE 2003 AT THE HAGUE, at http://www.icc-cpi.int/otp/otp_public_hearing.html (“[Prosecuting those who bear the most responsibility] clearly focuses on individual criminal responsibility for the most serious crimes known to the international community as a whole and weakens the perception that the Office is somehow passing judgment on the merits of State policy *per se*.”).

²³ Rome Statute, *supra* note 13, pmb. ¶ 10 (“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”).

²⁴ *Id.* art. 17.

²⁵ *Id.* art. 17(3).

²⁶ *Id.* art. 17(2)(a).

²⁷ *Id.* art. 17(1)(a).

²⁸ *Id.* art. 17(1)(b).

²⁹ Philippe Kirsch, President, International Criminal Court, Remarks on Accountability vs. Impunity: The Role of the International Criminal Court to the Council on Foreign Relations, Washington D.C. (Jan. 16, 2004), at <http://www.crf.org>.

³⁰ Rome Statute, *supra* note 13, art. 5(2) (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 . . .”).

³¹ *Id.* arts. 11, 126 (“the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.” Entry into force took place on July 1, 2002, “the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification . . .”).

³² *Court Rejects Anti-U.S. Petitions*, WASH. TIMES, July 17, 2003.

³³ See Luis Moreno-Ocampo, Prosecutor of the ICC, Statement Made at the First Meeting of the Assembly of its Second Session (Sept. 8, 2003), at <http://www.un.org/law/icc/asp/aspfra.htm>; Press Release, United Nations, President of Uganda Refers Situation Concerning Lord’s Resistance Army (LRA) to International Criminal Court (Jan. 29, 2004), at <http://www.un.org/News/Press/docs/2004/afr821.doc.htm>.

³⁴ For example, the Democratic Republic of the Congo has been trying unsuccessfully for some time to convince the Security Council to set up an ad hoc tribunal for crimes occurring in its territory. In December 2003, the DRC reiterated

its request to the Security Council to set up an international criminal court for the prosecution of any person, whether Congolese or of another nationality, responsible for serious international humanitarian law violations and human rights abuses committed in the territory of the Democratic Republic of the Congo on or after 28 August 1998.

Letter from Ileka Atoki, Permanent Representative of the Democratic Republic of the Congo to the United Nations, to the President of the UN Security Council, S/2003/1178 (Dec. 15, 2003), available at <http://www.reliefweb.int>. The DRC's failure to generate international assistance in ending its conflict has been cited by it as an important factor in its decision to join the ICC.

³⁵ See, e.g., Michael P. Scharf, *Comment: The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 169 (1995) (defining "tribunal fatigue" as "the process of reaching a consensus on the tribunal's statute, electing judges, selecting a prosecutor, and appropriating funds [that] has turned out to be extremely time consuming and politically exhausting for the members of the Security Council.").

³⁶ Allieu I. Kanu, Deputy Permanent Representative of Sierra Leone Delegation, Statement on the Establishment of an International Criminal Court (Oct. 18, 2000), available at <http://www.amicc.org/docs/sierraleone.pdf>.

³⁷ INTERNATIONAL CRIMINAL COURT—OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 2 (2003), at <http://www.icc-cpi.int/otp/policy.php>.

³⁸ *Id.* at 3.

³⁹ Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* 280 (2000).

⁴⁰ Countries that have or are in the process of drafting laws to implement ICC standards include, among others, Argentina, Democratic Republic of the Congo, Ecuador, Malta, Slovenia, South Africa, and Uruguay. See, e.g., Coalition for the International Criminal Court, *Legislation & Debates*, at <http://www.iccnw.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates.html> (last visited Mar. 26, 2004) (providing copies of drafts and enacted legislation).

⁴¹ See Interview with General Wesley Clark, *CNN Late Edition with Wolf Blitzer* (CNN television broadcast July 7, 2002) (transcript available at <http://www.cnn.com/TRANSCRIPTS/0207/07/le.00.html>) ("I know that the worst-case analysis of this is that American soldiers could be subject to whimsical or politically motivated charges, but the honest truth is, the United States intends to operate under international law. We helped build international law, we need international law.").

⁴² Rome Statute, *supra* note 13, art. 112(1). Observer states can participate in all deliberations but cannot vote.

⁴³ See generally Robin Wright, *Administration Split Over Role of U.N. in Iraq: How Much Control Will U.S. Cede?*, WASH. POST, Feb. 18, 2004 (discussing the administration's reliance on the United Nations to help restore legitimate government and order in Iraq).

⁴⁴ Rome Statute, *supra* note 13, art. 123.

⁴⁵ See, e.g., Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues United States Department of State, Statement Before the Committee on International Relations United States House of Representatives (Feb. 28, 2002). Since at least February 2002, the Bush administration has been advocating for the ad hoc tribunals for Yugoslavia and Rwanda to conclude their work even though several leading Serbian perpetrators remain at large. This new tact appears to derive from a recognition that there is an inconsistency in promoting the ad hoc courts while attacking the ICC.

⁴⁶ See, e.g., President William Clinton, *A Commitment to Human Dignity, Democracy and Peace, Issues of Democracy*, USIA ELECTRONIC JOURNAL, Vol. 1, No. 3, May 1996 (“And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.”), available at http://www.amicc.org/docs/Clinton_Dodd.pdf.

⁴⁷ See Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., ICC-ASP/1/3 108–56 (2002) [hereinafter *ASP Report*], available at <http://www.un.org/law/icc/asp/aspfra.htm> (listing ICC crimes and requisite elements).

⁴⁸ See William Lietzau, *A General Introduction to the General Introduction: Animating Principles Behind the International Criminal Court’s Elements of Crimes*, quoted in Scheffer, *Staying the Course*, *supra* note 6, at n.33:

[T]he United States was . . . the clear and almost singular proponent of an Elements of Crimes document for the International Criminal Court Statute. Moreover, equally relevant, though probably less openly admitted, is the fact that the United States is the only state to have attended each and every drafting and negotiating session that formulated the text currently found in the document.

⁴⁹ The U.S. delegation made it clear that it had received authorization to join the consensus, which had to be cleared by the Defense Department. See, e.g., Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 AM. J. INT’L L. 773, 788 (2000) (“Significantly, [U.S. delegate Lt. Col. William Leitzau] added that the United States was ‘happy to join consensus in agreeing that this elements of crimes correctly reflects international law.’”).

⁵⁰ David J. Scheffer, U.S. Ambassador at Large for War Crimes Issues, Address on U.S. Policy and the Proposed Permanent International Criminal Court before the Carter Center, Atlanta, Georgia (Nov. 13, 1997) (“However, if the situation referred by the State Party to the court concerns a dispute or situation pertaining to international peace and security that is being dealt with by the Security Council, then the Security Council should approve the referral of the entire situation to the court.”), at http://www.amicc.org/docs/Scheffer11_13_97.pdf. Since most situations reaching the gravity threshold for ICC jurisdiction would likely come to the attention of the Council, this proposal would have tremendously limited the ability of the Court to act.

⁵¹ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 61 (2001).

⁵² Rome Statute, *supra* note 13, art. 27(1) (“This Statute shall apply equally to all persons without any distinction based on official capacity.”).

⁵³ *Id.* art. 124:

[A] State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. . . .

It should be noted that invoking this article merely puts a country back into the position of a non-state party but does not exempt its nationals from war crimes prosecutions should they be accused of committing a crime in the territory of another state party.

⁵⁴ While the virulence of U.S. policy toward the Court under the Bush administration (discussed *infra*) made the election of an American as chief prosecutor a political impossibility, many Americans are already working at the Court. Most notably, in January 2004 it was announced that Christine Chung, a respected New York federal prosecutor, was one of three newly hired staff in the prosecutor's office. Ms. Chung is expected to take the lead in the evaluation of the situation in northern Uganda.

⁵⁵ See Alan M. Dershowitz, *Should U.S. War Criminals Like William Calley Be Tried by an International Court?*, PENTHOUSE, Dec. 2003, at 46 ("The appointment of Luis Moreno Ocampo is a significant first step toward assuring that the ICC is a credible institution deserving of our trust and support.").

⁵⁶ In the summer of 2003, the Athens Bar Association sent information to the Court alleging war crimes in Iraq by the coalition forces. See, e.g., Kerin Hope & Nikki Tait, *Greeks Try to Indict Blair for Iraq War*, FINANCIAL TIMES [London], July 29, 2003. Court opponents have latched on to the publicity surrounding this as evidence that the ICC will be misused for political purposes. In support, they claim that the Bar "filed a complaint with the Court." However, no one has the ability to file a complaint with the Court, only to send the prosecutor information. The prosecutor will then review that information to decide whether or not there is reason to believe a crime has occurred that is within the jurisdiction of the Court. Spurious charges can always be raised in the media and often are. The fact that they are does not reflect one way or another on the Court, which must be judged by its own actions.

⁵⁷ Rome Statute, *supra* note 13, art. 112.

⁵⁸ See FREEDOM HOUSE, FREEDOM IN THE WORLD COUNTRY RATINGS 1972–2003, at <http://www.freedomhouse.org/ratings/index.htm> (last visited Mar. 8, 2004). According to the non-profit organization Freedom House, which annually assesses countries as "Free," "Partly Free," or "Not Free," based on their level of political rights and civil liberties, 94.5% of ICC States Parties are either "Free" or "Partly Free." The five countries considered "Not Free," including Tajikistan, Cambodia, Afghanistan, Guinea, and the Democratic Republic of the Congo, are either in the midst of armed conflicts or beginning a democratic transition.

⁵⁹ Rome Statute, *supra* note 13, art. 17.

⁶⁰ See, e.g., LEE A. CASEY ET AL., THE U.S. & THE INTERNATIONAL CRIMINAL COURT: CONCERNS AND POSSIBLE COURSES OF ACTION 13 (2002), available at <http://www.fed-soc.org/Publications/Terrorism/ICC.pdf>.

Thus, the entire concept of complementarity will depend on the subjective judgment of the Court, and how aggressive it wishes to be in interpreting these vitally important terms. The vague and imprecise statutory language makes it all too possible that any State's exercise of the so-called primary jurisdiction that results in a decision not to prosecute or does not punish the accused harshly enough in the Court's eyes would not be respected. The Statute, therefore, cannot possibly be said to give significant and guaranteed respect for the primary jurisdiction of States.

⁶¹ Rome Statute, *supra* note 13, art. 17(2).

⁶² *Id.* art. 17(2)(b).

⁶³ Kirsch, *supra* note 29. Additionally, it appears that Prosecutor is putting the burden on those who make criminal allegations to show that national legal systems are not doing their job. He has said:

[t]he Office of the Prosecutor expects that future communications alleging the commission of crimes falling within the jurisdiction of the Court contain specific information concerning the ability or willingness of national authorities to deal with those crimes, as well as a description of the efforts undertaken, if any, to seek redress before those authorities where appropriate.

Press Release, International Criminal Court Prosecutor, Communications Received by the Office of the Prosecutor of the ICC (July 16, 2003), *at* <http://www.icc-cpi.int/php/news/details.php?id=18>.

⁶⁴ “Universal” jurisdiction is jurisdiction based on the type of crime committed rather than who committed it or where. It has developed from the notion that certain crimes, including genocide, crimes against humanity, and grave war crimes, are so heinous that the courts of every country have an interest in bringing the perpetrators to justice. While the ICC prosecutes “crimes of universal jurisdiction,” it is limited by its Statute to applying territorial and nationality jurisdiction.

⁶⁵ Rome Statute, *supra* note 13, art. 12.

⁶⁶ Some ICC opponents seem to believe that Americans carry their constitutional rights wherever they go. *See, e.g.*, Lincoln P. Bloomfield, Jr., Assistant Secretary for Political-Military Affairs, The U.S. Government and the International Criminal Court, Remarks to the Parliamentarians for Global Action, Consultative Assembly of Parliamentarians for the International Court and the Rule of Law (Sept. 12, 2003) (stating that “the U.S. is anything but indifferent about the prospect that Americans could be denied a trial by jury of their peers, guided by rules of evidence and definitions under American law, including the Constitution”), *at* http://www.amicc.org/docs/Bloomfield9_03.pdf. *Compare* *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”).

⁶⁷ *See, e.g.*, Marc Grossman, Undersecretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002) at 2–3 (announcing the Bush administration decision to nullify the U.S. signature on the Rome Statute), *available at* <http://www.amicc.org/docs/Grossman.pdf>.

⁶⁸ *Id.*; *see also* John R. Bolton, Undersecretary for Arms Control and International Security, The United States and the International Criminal Court, Remarks at the Aspen Institute, Berlin, Germany (Sept. 16, 2002) at 2–4, *available at* http://www.amicc.org/docs/Bolton9_16_02.pdf (highlighting differences between the iC and U.S. Constitutional protections); *see generally* Madeline Morris, *Democracy and Punishment: The Democratic Dilemma of the International Criminal Court*, 5 *BUFF. CRIM. L. R.* 591 (2002) (discussing the democratic legitimacy of the ICC and the human right to representative government).

⁶⁹ Rome Statute, *supra* note 13, art. 16.

⁷⁰ *Id.* art. 15(2).

⁷¹ *Id.* art. 15(3), (4).

⁷² *Id.* art. 18(1).

⁷³ *Id.* art. 19. See generally David Stoelting, *ICC Pretrial Proceedings: Avoiding Gridlock*, 9 ILSA J. INT'L & COMP. L. 413 (2003) (discussing the many procedural hurdles to the initiation of a prosecution).

⁷⁴ Rome Statute, *supra* note 13, art. 18(2).

⁷⁵ *Id.* art. 46.

⁷⁶ See, e.g., John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROB. 167, 170 (2001).

⁷⁷ *ASP Report*, *supra* note 47, at 125 (requiring that the war crimes provisions "shall be interpreted within the established framework of the international law of armed conflict").

⁷⁸ Coalition Provisional Authority, Statute of the Iraqi Special Tribunal (Dec. 10, 2003), at http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm.

⁷⁹ Bolton, *supra* note 76, at 169.

⁸⁰ *Id.* at 171–72.

⁸¹ *Id.* at 169.

⁸² See U.S. Const. art. VI, "[A]ll Treaties made . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby"; see also *Paquete Habana*, 175 U.S. 677, 700 (1900):

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or jurical decision, resort must be had to the customs and usages of civilized nations.

⁸³ Bolton, *supra* note 76, at 172.

⁸⁴ *Id.* at 169.

⁸⁵ *Id.* at 171.

⁸⁶ 148 Cong. Rec. S7844-47 (Aug. 1, 2002) (statement of Sen. Bennett).

⁸⁷ *Id.* at S7847.

⁸⁸ See President William J. Clinton, Statement on Signature of the International Criminal Court Treaty (Dec. 31, 2000) (transcript available at http://www.amicc.org/docs/Clinton_sign.pdf); see also Scheffer, *Staying the Course*, *supra* note 6, at 58.

⁸⁹ Clinton, *supra* note 88. In his statement he particularly highlighted the Court's ability to exercise authority over U.S. personnel before the U.S. becomes a party. He also mentioned the potential for political prosecutions.

⁹⁰ See, e.g., Grossman, *supra* note 67; Bloomfield, *supra* note 66.

⁹¹ *Is a UN International Criminal Court in the U.S. National Interest?: Hearing Before the Senate Subcomm. on Foreign Relations*, 105th Cong. 724 (1998) (statement of John Bolton, Senior Vice President, American Enterprise Institute, currently Undersecretary for Arms Control and International Security).

⁹² American Servicemembers' Protection Act of 2002 (ASPA), Pub. L. No. 107-206, 116 Stat. 820, tit. II (2002) (codified as amended at 22 U.S.C. §§ 7421–7433). The ASPA is a compromise between the desire of a small but powerful group of

congressional ICC opponents to make a strong statement of ideological hostility to the ICC, the administration's resolve to preserve in full the president's constitutional powers in international relations, and some congressional resistance to the Act—especially in the Senate. There is a general breakdown in opinion on the Court between Republicans and Democrats in the Congress. In general, Republicans are more likely to have reservations about or oppose the Court due to many of the same concerns expressed by the administration. Many congressional Democrats (for example, Senators Kerry and Edwards) voted for the ASPA, but most also supported an effort to postpone its adoption and an amendment to ameliorate its impact. (S.Amendment 2337 to S.Amendment 2336 to HR3338, 107th §§ 9001–9012 (2001) (introduced in Senate Dec. 7, 2001); S.Amendment 3787 to HR4775 (now ASPA § 2015).) Those who voted in this way are not necessarily hostile to the ICC, but likely saw the Court as a low priority.

⁹³ ASPA provisions include:

- Prohibition on cooperation with the International Criminal Court (§ 2004);
- Restrictions on U.S. participation in U.N. peacekeeping operations (§ 2005);
- Prohibition on direct or indirect transfer of classified national security information, including law enforcement information, to the International Criminal Court, even if no American is accused of a crime (§ 2006); and
- Preauthorized authority to free members of the Armed Forces of the U.S. and certain other persons detained or imprisoned by or on behalf of the international criminal court (§ 2008, known as the “Hague Invasion Clause”).

⁹⁴ ASPA, 22 U.S.C. § 2007. There is an exemption from this provision for NATO member countries, designated major non-NATO allies (Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, New Zealand, and the Philippines), and Taiwan.

⁹⁵ The administration only agreed to support ASPA after it was revised to recognize the president's discretionary authority in foreign relations. See Letter from Paul V. Kelly, Assistant Secretary for Legislative Affairs, to Senator Jesse Helms (Sept. 25, 2001), available at http://www.amicc.org/docs/SD_ASPA.pdf.

⁹⁶ ASPA, 22 U.S.C. § 2003(b). See State Department Regular Briefing with Philip Reeker, Deputy Department Spokesman (Aug. 12, 2002) (stating that “the [ASPA] does not prevent the United States from providing military assistance to any country when the president determines that such assistance is important to the national interests.”) It is notable that “military assistance” is defined under ASPA § 2013(13) as assistance provided under the Foreign Assistance Act of 1961 (22 U.S.C. § 2151 *et seq.*). Such assistance must be certified in the first place as necessary to “strengthen the security of the United States and promote world peace.” 22 U.S.C. § 2311(a).

⁹⁷ See Letter from Human Rights Watch to Secretary of State Colin Powell on “U.S. Bully Tactics Against International Criminal Court” (June 30, 2003), at <http://www.hrw.org/press/2003/06/usa063003ltr.htm>.

⁹⁸ See generally WICC, BUSH ADMINISTRATION DEMANDS IMPUNITY AGREEMENTS, SANCTIONS ALLIES, at

<http://www.wfa.org/issues/wicc/article98/article98home.html> (last visited Mar. 28, 2004); see also WORLD FEDERALIST ASSOCIATION, BILATERAL IMMUNITY AGREEMENTS: BREAKDOWN OF COUNTRIES (2004), at

<http://www.wfa.org/issues/wicc/article98/biatable.doc>.

⁹⁹ See WICC, *supra* note 98.

¹⁰⁰ Persons are defined in the agreements as, “[c]urrent or former Government officials, employees (including contractors), or military personnel or nationals of one Party.” For texts of available bilateral agreements, see *AMICC, Bilateral Immunity Agreements*, at http://www.amicc.org/usinfo/administration_policy_BIAs.html#text (last visited Mar. 26, 2004).

¹⁰¹ David J. Scheffer, *Original Intent at the Global Criminal Court*, WALL ST. J. EUR., Sept. 20, 2002, at A6.

¹⁰² See, e.g., Council of the European Union, Draft Council Conclusions on the ICC, at 4 (Sept. 30, 2002), available at <http://www.iccnw.org/documents/declarationsresolutions/intergovbodies/EUConclusions30Sept02.pdf> (stating that “Entering into U.S. agreements—as presently drafted—would be inconsistent with ICC States parties’ obligations with regard to the ICC Statute”); see also JAMES CRAWFORD SC ET AL., MATTER OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT & MATTER OF BILATERAL AGREEMENTS SOUGHT BY THE UNITED STATES UNDER ARTICLE 98(2) OF THE STATUTE (2003), at http://www.lchr.org/international_justice/Art98_061403.pdf (on file with *Seattle Journal for Social Justice*).

¹⁰³ Bloomfield, *supra* note 66.

¹⁰⁴ See generally Ambassador Richard S. Williamson, U.S. Alternate Representative to the United Nations, Remarks by on the situation in Bosnia and Herzegovina, at the Security Council Stake-Out (June 19, 2002), available at <http://www.amicc.org/docs/Williamson.pdf> (referring to U.S. draft resolution 6/19/02, available at http://www.amicc.org/docs/SC_res6_19_02.pdf).

¹⁰⁵ See UNITED NATIONS, MONTHLY SUMMARY OF TROOP CONTRIBUTION TO UNITED NATIONS OPERATIONS (June 30, 2002), at <http://www.un.org/Depts/dpko/dpko/contributors/30062002.pdf>.

¹⁰⁶ In a strongly worded letter to Secretary Powell, Secretary-General Annan suggested:
[i]n order to create additional time to solve the overarching issue, may I suggest that the United States at the present juncture relies on the fact that the jurisdiction of the ICC, as a matter of law, is overtaken by the jurisdiction of the International Tribunal for the former Yugoslavia. In reality, the situation with respect to international criminal jurisdiction in the territory of the former Socialist Federal Republic of Yugoslavia is the same after 1 July 2002, as before that date.

Letter from Kofi Annan, UN Secretary-General, to Secretary of State Colin Powell (July 3, 2002), at http://www.amicc.org/docs/SG_to_SS.pdf.

¹⁰⁷ S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg. at 1, U.N. Doc. S/RES/1422 (2002).

¹⁰⁸ Article 16 states:

No investigation or prosecution may be commenced or proceeding with under this Statute for a period of 12 months after the Security Council, in a resolution under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request maybe renewed by the Council under the same conditions.

¹⁰⁹ See, e.g., HUMAN RIGHTS WATCH, THE ICC AND THE SECURITY COUNCIL: RESOLUTION 1422—LEGAL AND POLICY ANALYSIS (May 2003), available at <http://www.hrw.org/campaigns/icc/docs/1422legal.htm>.

¹¹⁰ Press Release, Ambassador John D. Negroponte, United States Permanent Representative to the United Nations, on the Situation in Bosnia and Herzegovina (July 10, 2002), at http://www.amicc.org/docs/Negroponte7_10_02.pdf.

¹¹¹ *Id.*

¹¹² H.E. Mr. Paul Heinbecker, Ambassador and Permanent Representative of Canada to the United Nations, Statement before the U.N. Security Council Open Meeting on the Situation in Bosnia-Herzegovina (July 10, 2002), at

<http://www.amicc.org/docs/Canada.pdf>; His Excellency Ambassador Gelson Fonseca Jr., Permanent Representative of Brazil, Statement before the U.N. Security Council Open Meeting on the situation in Bosnia Herzegovina (July 10, 2002), at <http://www.amicc.org/docs/Brazil.pdf>; Mr. Don MacKay, Permanent Representative of New Zealand, Statement before the U.N. Security Council Open Meeting on the situation in Bosnia and Herzegovina (July 10, 2002), at

<http://www.amicc.org/docs/NewZealand.pdf>; H.E. Ambassador Dumisani Kumalo, Permanent Representative of South Africa, Statement before the U.N. Security Council Open Meeting on the Situation in Bosnia-Herzegovina (July 10, 2002), at <http://www.amicc.org/docs/SouthAfrica.pdf>.

¹¹³ H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini, Ambassador, Permanent Representative, Statement on the Agenda Item Pertaining to "The Situation in Bosnia and Herzegovina," before the Security Council (July 10, 2002), at <http://www.amicc.org/docs/Jordan.pdf>.

¹¹⁴ See Press Release, Security Council Requests One-Year Extension of UN Peacekeeper Immunity from International Criminal Court, SC/7789 (Dec. 6, 2003), at <http://www.un.org/News/Press/docs/2003/sc7789.doc.htm>. After the vote, eight Security Council members, plus the three that abstained in the vote (Germany, France, and Syria) expressed their support for the ICC and confidence in its work. Pakistan joined the U.S. in expressing reservations about the Court.

¹¹⁵ S.C. Res. 1487, U.N. SCOR, 58th Sess., 4772d mtg., U.N. Doc S/RES/1487 (2003).

¹¹⁶ Kofi Annan, Statement to UN Security Council (Dec. 6, 2003), in U.N. Doc. SC/7790, available at http://www.amicc.org/docs/AnnanSG1422_June03.pdf.

¹¹⁷ S.C. Res. 1497, U.N. SCOR, 58th Sess., 4803rd mtg., U.N. Doc S/RES/1497 (2003).

¹¹⁸ See generally HUMAN RIGHTS WATCH, THE ADOPTION OF SECURITY COUNCIL RESOLUTION 1497: A SETBACK FOR INTERNATIONAL JUSTICE (August 2003), at <http://www.amicc.org/docs/HRWPaperSCRes1497.pdf>.

¹¹⁹ See generally Barbara Crossette, *The Wrong Kind of American Exceptionalism*, U.N. WIRE, Aug. 18, 2003.

¹²⁰ Philip T. Reeker, Spokesman, Department of State, Daily Press Briefing (Aug. 25, 2003), available at http://www.amicc.org/docs/Reeker8_25_03.pdf.

¹²¹ S.C. Res. 1502, U.N. SCOR, 58th Sess., 4814th mtg., U.N. Doc S/RES/1502 (2003).

¹²² For example, in December 2003, the United States expressed its discontent with two ICC references in a GA resolution about attacks on the safety and security of humanitarian and UN personnel (G.A. Res. 58/122, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/122 (2003)). One recognizes that such attacks are war crimes under the ICC

Statute; the other calls for states to consider ratifying the Statute. The United States called for a separate vote on the two paragraphs and voted against their inclusion, explaining that it could only accept “neutral and factual references to the ICC” and that neither reference met this requirement. However, the delegate did make it clear that the United States would not block the consensus on the resolution as a whole. On another occasion after repeating its objections several times, the United States allowed the GA to reach consensus on an ICC-specific resolution (G.A. Res. 58/79, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/79 [2003]). It, among other things, calls for states to consider joining the Court without delay and invites the Secretary-General to conclude a relationship agreement between the Court and the United Nations.

¹²³ See, e.g., H.E. Paul Heinbecker, Ambassador and Permanent Representative of Canada to the United Nations, Statement to the United Nations Security Council Open Debate on the International Criminal Court, New York (June 12, 2003) available at <http://www.amicc.org/docs/Canada1422Stmt12June03>.

¹²⁴ See, e.g., Keva Lightbourne, *Bahamas May Be ‘Torn Between’ CARICOM, U.S.*, NASSAU GUARDIAN, Mar. 1, 2003; Elizabeth Becker, *European Union Urges Aspirants to Rebuff U.S. on World Court*, N.Y. TIMES, Aug. 14, 2002.

¹²⁵ Becker, *supra* note 124.

¹²⁶ Colum Lynch, *U.S. Confronts EU on War Crimes Court: Immunity Pact Issue Threatens Relations*, WASH. POST, June 10, 2003, at A17.

¹²⁷ *E.U. Candidates Resist U.S. Pressure over International Criminal Court*, AGENCE FRANCE PRESS, July 2, 2003.

¹²⁸ See, e.g., Charles Kiplagat, *Court Scares U.S. And Exposes Its Hypocrisy*, AFR. NEWS, May 28, 2002; see generally Abner Mikya & Anthony Lake, *What Rules Do We Play By?*, BOSTON GLOBE, July 22, 2002, at A11; Chris Patten, *Why Does America Fear this Court?*, WASH. POST, July 9, 2002, at A21.

¹²⁹ Bloomfield, *supra* note 66.

¹³⁰ 147 Cong. Rec. S4398 (May 4, 2001) (remarks by Sen. Lieberman). See also Bennett, *supra* note 86.

¹³¹ Presidential Determination No. 2004-09, 68 Fed. Reg. 66693 (Nov. 21, 2003) now waives Bulgaria, Estonia, Latvia, Lithuania, Slovakia, and Slovenia with respect to military assistance for “certain specific projects the President decides are needed to support the process of integrating these countries into NATO” and for “certain specific projects the President decides are needed to support Operation ENDURING FREEDOM or IRAQI FREEDOM.”

¹³² Gen. Wesley K. Clark, *Restoring America’s Alliances*, Remarks Before the Council on Foreign Relations (Nov. 20, 2003), at <http://www.cfr.org/publication.php?id=6545>.

¹³³ HR2550 and S1317, 108th Cong. (2003).

¹³⁴ Presidential Determination No. 2004-09, *supra* note 131.

¹³⁵ See *Plan Colombia—the Sequel*, ECONOMIST, Aug 23, 2003.

¹³⁶ See Ian James, *U.S. Decision to Reduce Military Aid to Caribbean Countries Could Handicap War on Drugs, Critics Say*, ASSOC. PRESS, Aug. 28, 2003.

¹³⁷ In light of the domestic controversy over the Court, it is notable that not one of the Democratic candidates came out against it. Representative Kucinich has made it part of his election platform and General Clark regularly mentioned the importance of U.S.

involvement in the Court in his foreign policy speeches. Governor Dean, Senator Lieberman, and Senator Edwards (with varying levels of support) all indicated that they believe that the U.S. should keep engaged in the work of the Court. Senator Kerry, whose voting record in the Congress has been mixed on this topic, has said that he supports the Court but with “severe reservations.” *See* candidate statements on the ICC *at* http://www.amicc.org/usinfo/administration_advocacy.html#remarks.

¹³⁸ ASPA, 22 U.S.C. § 2015.