



# The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy

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## Summary

The International Criminal Court (ICC) is the first permanent international court with jurisdiction to prosecute individuals for “the most serious crimes of concern to the international community.” Currently, 110 countries are States Parties to the ICC. Since its inception in 2002, the ICC has received three referrals for investigations by States Parties and one referral from the United Nations Security Council.

While the U.S. executive branch initially supported the idea of creating an international criminal court, the United States ultimately voted against the Statute of the ICC (the “Rome Statute”) and informed the United Nations that the United States did not intend to become a State Party to the Rome Statute. The United States’ primary objection to the treaty has been the potential for the ICC to assert jurisdiction over U.S. civilian policymakers and U.S. soldiers charged with “war crimes.”

This concern has been highlighted with recent preliminary investigations by the ICC’s Prosecutor into alleged war crimes in the Middle East and Afghanistan. In 2006, the ICC’s Office of the Prosecutor completed a preliminary investigation into alleged war crimes in Iraq, finding that the information did not establish sufficient grounds for the Prosecutor to launch a formal investigation into the situation. In 2009, the Office of the Prosecutor confirmed that it was conducting another preliminary investigation into possible war crimes committed by NATO soldiers, U.S. soldiers, and both Taliban and al Qaeda insurgents in Afghanistan. That same year, the Palestinian National Authority (PNA) sought the ICC’s jurisdiction over alleged crimes committed during the Gaza conflict of December 2008/January 2009, and the United Nations Commission of Inquiry on Gaza issued a report recommending that the Security Council refer the situation to the ICC Prosecutor if Israel and the PNA did not undertake appropriate national level investigations and prosecutions.

The United States has taken both diplomatic and domestic actions with the potential to affect the ICC’s authority over U.S. citizens. On a diplomatic level, the United States has concluded bilateral immunity agreements (BIAs) with many ICC States Parties to prevent other countries from surrendering U.S. citizens to the ICC without U.S. consent under Article 98 of the Rome Statute. These agreements have generated a vigorous debate over when and whether obligations in international agreements preempt an ICC request to a State Party for the arrest and surrender of a person in its territory. However, the ICC, in which the Rome Statute vests the sole responsibility for interpreting the Statute’s text, has remained silent on the question, neither validating nor refuting the U.S. position that BIAs or any agreement creating similar obligations preempt an ICC request to surrender.

Although remaining opposed to U.S. ratification of the Rome Statute, the Bush Administration in its second term took actions that suggested its support for some ICC activities. The Obama Administration has also taken a more supportive stance towards the ICC and has begun to engage directly with the Court. The Obama Administration is currently reviewing its ICC policy and is expected to announce its conclusions sometime in 2010. Similarly, actions by Congress have eliminated or chosen not to extend provisions affecting U.S. assistance for countries that are ICC States Parties. Although these actions seem to soften Congress’s position on the ICC, the changes might also be interpreted as a decision to reverse sanctions that were perceived as hurting U.S. interests.

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## Introduction

The International Criminal Court (“ICC” or “Court”) is the first permanent international court with jurisdiction to prosecute individuals for “the most serious crimes of concern to the international community.”<sup>1</sup> It sits at The Hague in the Netherlands but may hold proceedings anywhere in the world. It is funded primarily by States Parties. The Statute of the International Criminal Court (the “Rome Statute” or “Statute”), which created the ICC, established ICC jurisdiction over persons who, following the Statute’s entry into force on July 1, 2002, commit certain offenses.<sup>2</sup> One hundred and ten countries, not including the United States, are States Parties to the ICC.

Since its inception, the ICC has received referrals for investigations from three States Parties<sup>3</sup> and one referral from the United Nations Security Council.<sup>4</sup> After receiving referrals, the Chief Prosecutor carries out a preliminary analysis to determine whether to initiate an investigation. The Chief Prosecutor opened investigations into all four of these referred cases.<sup>5</sup> Additionally, in November 2009, the Prosecutor of the ICC requested authorization to investigate alleged post-election crimes in Kenya without a referral.<sup>6</sup> This marked the first time that the ICC Prosecutor has sought to open an investigation on his own initiative instead of by referral. To date, the Court has issued 12 arrest warrants, four of which have resulted in actual arrests.<sup>7</sup> The ICC currently has nine cases before it, although some of the defendants in these cases remain at large.<sup>8</sup> The ICC Prosecutor has also announced preliminary, but not formal, investigations into situations in Palestine and Afghanistan, both of which were ongoing at the date of this report’s publication. The Court may impose a period of imprisonment on persons convicted under the Rome Statute as well as a fine and forfeiture of proceeds, property, and other assets derived from the crime.<sup>9</sup>

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<sup>1</sup> See Rome Statute of the International Criminal Court, Preamble, U.N. Doc. A/CONF.183/9 (1998) (hereinafter “Rome Statute”). These include genocide, crimes against humanity, war crimes, and potentially the crime of aggression, if the Assembly of States Parties is able to reach an agreement defining it. *Id.* Art. 5(1).

<sup>2</sup> Rome Statute, Art. 24(1). Because there is no retroactivity, a crime committed before that date can not be tried before the ICC. *Id.*

<sup>3</sup> See International Criminal Court, Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases> (last visited Dec. 8, 2009). These referrals involved allegations of war crimes in three countries: the Republic of Uganda, the Democratic Republic of Congo, and the Central African Republic. Each referral was submitted by the country seeking investigation into possible war crimes committed within its territory.

<sup>4</sup> SC Res. 1593, U.N. Doc. S/RES/1593 (2005).

<sup>5</sup> Alina Ioana Apreotesei, *International Court at Work: First Cases and Situations*, 5 EYES ON THE ICC 1, 1 (2008).

<sup>6</sup> Press Conference by the Prosecutor of the International Criminal Court, International Criminal Court (Nov. 26, 2009), <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases> (follow “Press conference by ICC Prosecutor Luis Moreno-Ocampo related to the situation in Kenya”) (last visited Dec. 8, 2009).

<sup>7</sup> Judge Phillippe Kirsch, President of the ICC, Address at the Rayburn House Office Building (Feb. 13, 2009), [http://globalsolutions.org/files/general/Philippe\\_Kirsch\\_2-13-09.pdf](http://globalsolutions.org/files/general/Philippe_Kirsch_2-13-09.pdf); American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Work of the Prosecutor, ICC Activities, [http://www.amicc.org/icc\\_activities.html#pstatements](http://www.amicc.org/icc_activities.html#pstatements) (last visited Dec. 8, 2009). One of the suspects accused of committing international crimes in Uganda, Raska Lukwiya, died before he was taken into custody. International Criminal Court, Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases> (last visited Dec. 8, 2009). The case against him has since been terminated. International Criminal Court, Uganda, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204> (last visited Dec. 8, 2009).

<sup>8</sup> Situations and Cases, International Criminal Court *available at* <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases> (last visited Dec. 8, 2009).

<sup>9</sup> Rome Statute, Art. 77. Typically imprisonment must be for no longer than thirty years unless a term of life (continued...)

This report focuses first on the process by which the Office of the Prosecutor investigates allegations of war crimes and second on U.S. policy towards the ICC. In particular, this report seeks to address the concern that the ICC might assert jurisdiction over U.S. nationals by providing insight into (1) how the ICC and Prosecutor determine whether the ICC has jurisdiction over the situations under preliminary investigation; (2) how the Prosecutor and ICC determine whether a situation would be admissible as a case before the ICC; (3) the basis for concerns that the ICC has the authority to request the surrender of a U.S. national; and (4) steps taken by the United States to prevent or deter the ICC from exercising jurisdiction over U.S. nationals.

## The History of U.S. Policy Toward the ICC

While the U.S. executive branch initially supported the idea of creating an international criminal court<sup>10</sup> and was a major participant at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (“Rome Conference”), which produced the Statute,<sup>11</sup> the United States ultimately voted against the Statute.<sup>12</sup> President Clinton signed the treaty at the close of 2000 but declared that it contained “significant flaws” and would not be submitted to the Senate for ratification “until our fundamental concerns are satisfied.”<sup>13</sup> The United States stated that its primary objection to the treaty is the potential for the ICC to assert jurisdiction over both U.S. civilian policymakers and U.S. soldiers charged with “war crimes” even if the United States does not ratify the Rome Statute.

Following the Rome Statute’s entry into force in 2002, both President George W. Bush’s Administration and the U.S. Congress took several steps to weaken the ICC’s potential effect on U.S. citizens. First, the Bush Administration “unsigned” the Rome Statute by informing the United Nations that the United States did not intend to become a party to the Rome Statute.<sup>14</sup> This action released the United States from its treaty obligation to refrain from undermining the Rome Statute and enabled both Congress and the executive branch to take actions that could be perceived as undercutting the Rome Statute. Additionally, the United States secured a U.N. Security Council resolution deferring any potential ICC prosecution of U.S. personnel involved in

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(...continued)

imprisonment is justified by the extreme gravity of the crime and the circumstances of the convicted person. *Id.*

<sup>10</sup> See Ruth Wedgwood et. al., *The United States and the Statute of Rome*, 95 AM. J. INT’L L. 124 (2001) (commenting that the United States has “repeatedly and publicly declared its support in principle” for an international criminal court). Congress expressed its support for the ICC on the condition that its operation would not infringe upon the rights of U.S. citizens. See, e.g., Foreign Operations Appropriations Act § 599E, P.L. 101-513, 104 Stat. 2066-2067 (1990) (expressing the sense of the Congress that “the United States should explore the need for the establishment of an International Criminal Court” and that “the establishment of such a court or courts for the more effective prosecution of international criminals should not derogate from established standards of due process, the rights of the accused to a fair trial and the sovereignty of individual nations”).

<sup>11</sup> See U.N. International Criminal Court: Hearings before the Subcomm. on International Operations of the Senate Foreign Relations Committee, 105<sup>th</sup> Cong. (1998) (testimony of David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

<sup>12</sup> See Wedgwood, *supra* note 10, at 124 (noting that the final vote for the Statute was 120 in favor to 7 against). For a detailed history of the ICC and the negotiations of the Rome Statute, read CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea.

<sup>13</sup> See Statement on the Rome Treaty on the International Criminal Court, 37 Weekly Comp. Pres Doc 4 (December 31, 2000).

<sup>14</sup> Press Statement, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 26, 2002); International Criminal Law, 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, at 148.

international peacekeeping missions; concluded bilateral immunity agreements to prevent the ICC from being able to exercise jurisdiction over U.S. nationals; and enacted the American Servicemembers' Protection Act. A detailed explanation of each action is provided below.

## **U.S. Diplomatic Actions Affecting the ICC**

Concerned that U.S. participation in international peacekeeping would be imperiled if U.S. soldiers and employees were subject to ICC jurisdiction,<sup>15</sup> the United States reportedly threatened to veto a draft U.N. Security Council resolution to extend the peacekeeping mission in Bosnia and Herzegovina unless U.S. personnel were granted full immunity from the jurisdiction of the ICC.<sup>16</sup> Ultimately, the Security Council and the U.S. delegation compromised, adopting a resolution asking the ICC to defer, for an initial period of one year, any prosecution of persons who are both (1) participants in U.N.-established or authorized operations and (2) nationals of States not party to the Rome Statute.<sup>17</sup> The resulting resolution did not provide permanent immunity for U.S. soldiers and officials from prosecution by the ICC, but, in conjunction with Article 16 of the Rome Statute, it deferred potential prosecutions of U.S. soldiers and officials for one year.<sup>18</sup> Some criticized the resolution as a misapplication of Article 16, arguing that Article 16 was meant to apply only to specific *cases*, not to permit a blanket waiver for citizens of specific *countries*. Nevertheless, in a resolution adopted in 2003, the U.N. Security Council extended the deferral to July 1, 2004.<sup>19</sup> By 2005, however, sufficient opposition to the resolution had developed to deter the Bush Administration from seeking another extension. Consequently, the resolution expired, and the Security Council has not taken any action since to defer potential ICC prosecutions of American soldiers engaged in U.N. established or authorized operations.

In the wake of “unsigned” of the Rome Statute, the United States also began concluding bilateral immunity agreements (BIAs), which contain promises by one or both parties that no surrender of citizens of the other signatory would be made to the ICC absent both parties' consent.<sup>20</sup> These

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<sup>15</sup> See Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, D.C., (May 6, 2002), prepared remarks available at <http://www.mtholyoke.edu/acad/intrel/bush/rome.htm> (last visited Dec. 31, 2009).

<sup>16</sup> Bryan MacPherson, *Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings*, ASIL INSIGHTS (July 2002), available at <http://www.asil.org/insigh89.cfm>. See Colum Lynch, *Dispute Threatens U.N. Role in Bosnia; U.S. Wields Veto in Clash over War Crimes Court*, WASH. POST, July 1, 2002, at A1.

<sup>17</sup> SC Res. 1422, U.N. Doc. S/RES/1422 (2002). The resolution read, in part, “[C]onsistent with the provisions of Article 16 of the Rome Statute, [ ] the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.”

<sup>18</sup> Article 16 reads: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

<sup>19</sup> SC Res. 1487, U.N. Doc. S/RES/1487 (2003).

<sup>20</sup> E.g. Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Israel, Aug. 4, 2002, Temp. State Dep't No. 04-16, KAV 6368; Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Pak., July 21, 2003, Temp. State. Dep't No. 04-03, KAV 6356. Of particular interest given recent events is the reciprocal Bilateral Immunity Agreement between the Transitional Islamic State of Afghanistan and the United States. Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Afghanistan, Aug. 23, 2003, Temp. State Dep't No. 03-119, KAV 6308. To read the text of many Article 98 Agreements, visit the Georgetown Law Library's Article 98 Agreements Research Guide at [http://www.ll.georgetown.edu/guides/article\\_98.cfm](http://www.ll.georgetown.edu/guides/article_98.cfm) (last visited Dec. 19, 2009).

agreements are intended to fall within the provisions of Article 98 of the Rome Statute, which serve to limit the duty to surrender individuals to the ICC under circumstances where such surrender would force a country to violate its obligations under (1) international law concerning diplomatic immunity or (2) certain international agreements with another country. These BIAs provide that a contracting country may not surrender U.S. military personnel, as well as a number of other types of U.S. persons (including in many cases all U.S. nationals), to the ICC. The provisions are intended to create an obligation under an international agreement that would supersede the non-U.S. party's obligations under the Rome Statute to hand over suspects to the ICC, pursuant to Article 98.<sup>21</sup> The U.S. has occasionally used sanctions to induce countries to enter these BIAs.<sup>22</sup>

## **The American Servicemembers' Protection Act of 2002**

On August 2, 2002, President George W. Bush signed the American Servicemembers' Protection Act of 2002 (ASPA) into law (Title II of P.L. 107-206; 22 U.S.C. §§ 7421-7433). This act was designed to provide protections for members of the U.S. armed forces and certain other persons from ICC prosecution and detention or imprisonment arising therefrom. It generally prohibits U.S. government cooperation with the ICC by (1) restricting the use of appropriated funds to assist the ICC;<sup>23</sup> (2) restricting U.S. participation in certain U.N. peacekeeping operations due to possible ICC prosecution; and (3) authorizing the President to free members of the U.S. armed forces and other individuals detained or imprisoned by or on behalf of the ICC. Section 2015 of the act (22 U.S.C. § 7433) created an exception from the prohibition on assisting the ICC for assistance to bring to justice foreign nationals accused of genocide, war crimes, or crimes against humanity.<sup>24</sup> Until it was repealed under P.L. 110-181, Section 2007 of ASPA prohibited providing U.S. military assistance to ICC States Parties. Provisions enacted in the 2005, 2006, and 2008 Foreign Operations Appropriations bills (so-called "Nethercutt Amendment" provisions) contained similar funding prohibitions for Economic Support Fund (ESF) assistance to ICC States Parties.<sup>25</sup>

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<sup>21</sup> See Rome Statute, Art. 98(2); Ambassador Pierre-Richard Prosper, Remarks on the Foreign Affairs Consequences of America's Absence (March 7, 2003) in 8 UCLA J. INT'L L. & FOR. AFF. 17, at 20. There are two opposite perspectives on Article 98 agreements. The first is that these agreements are consistent with the spirit and text of the ICC because they merely ensure that the right of the United States not to be treated as a party to the Rome Statute is respected. *E.g. id.* at 20-21. The second is that these agreements are "at worst legally incompatible with, and at best a misuse of, article 98." *E.g.*, Max du Plessis, *South Africa's Response to American Hostility Towards the International Criminal Court*, 30 S. AFR. Y.B. INT'L L. 112, 123 (2005).

<sup>22</sup> See section VI(B), *infra*.

<sup>23</sup> Congress also enacted certain provisions restricting the use of funds to assist the ICC prior to the creation of the Court. Sections 705 and 706 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (H.R. 3427 (106<sup>th</sup> Cong.), enacted by reference in Section 1000(a)(7) of P.L. 106-113; 22 U.S.C. §§ 7401, 7402) prohibit the use of appropriated funds to support the ICC unless the United States has joined the Court pursuant to a treaty as set out in the U.S. Constitution, and prohibit the use of such funds to extradite or transfer U.S. citizens to the ICC.

<sup>24</sup> For a detailed discussion of ASPA, see CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court (ICC)*, by Jennifer K. Elsea.

<sup>25</sup> A detailed discussion of the Nethercutt Amendment provisions is provided in section VI(B), *infra*.

## Current Attitudes

Despite its early objections to the Rome Statute, the Bush Administration in its second term took actions that seemed to show acceptance of some ICC activities.<sup>26</sup> The Obama Administration seems to have continued this approach and has started engaging directly with the ICC.<sup>27</sup> Similarly, recent actions by Congress have eliminated sanctions provisions affecting U.S. assistance for countries that are ICC members.

## The International Criminal Court's Jurisdiction

### Article 12: Preconditions to the Exercise of Jurisdiction

The ICC is a treaty-based court, which means countries can decide whether to become a party to the Rome Statute.<sup>28</sup> As a result, the Court does not have universal jurisdiction.<sup>29</sup> Instead, the ICC can only exercise jurisdiction over crimes that were either (1) committed on the territory of a country that has accepted the ICC's jurisdiction; (2) committed by nationals of a country that has accepted jurisdiction; or (3) referred to the ICC by the United Nations Security Council.<sup>30</sup> The only exception to this rule permits ICC jurisdiction over situations when both (1) a non-State Party has accepted the exercise of jurisdiction by the ICC with respect to the crime in question; and (2) the alleged crime either took place in the consenting country's territory or was committed by a national of that country.<sup>31</sup> To obtain the Court's ad hoc jurisdiction, the country seeking it must lodge a declaration with the ICC Registrar and cooperate with the Court accordingly.<sup>32</sup>

### Article 17: Issues of Admissibility

Even if the ICC has jurisdiction over a case, it may be precluded from hearing it if the case is inadmissible under Article 17, which states:

the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.<sup>33</sup>

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<sup>26</sup> See U.S. Actions in the United Nations Concerning the ICC, *infra*.

<sup>27</sup> See U.S. Engagement with the ICC, *infra*.

<sup>28</sup> Kirsch, *supra* note 7.

<sup>29</sup> See Rome Statute, Art. 12.

<sup>30</sup> Rome Statute, Arts. 12(2), 13(b); Kirsch, *supra* note 7.

<sup>31</sup> Rome Statute, Art. 12(3).

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

<sup>33</sup> *Id.* at Art. 17. Notably, the ICC, like other judicial bodies, retains the power and duty to determine the boundaries of its jurisdiction. The Prosecutor v. Joseph Kony et. al., Case No. ICC-02/04-01/05, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ¶ 45 (March 10, 2009) available at <http://www.icc-cpi.int/Menu/ICC/> (continued...)

Once the jurisdiction of the Court is triggered, the Court's interpretation of the applicability of Article 17 to a given case is considered dispositive, at least so far as States Parties are concerned.<sup>34</sup>

Under Article 17, a case is inadmissible if it concerns conduct that is the subject of genuine legal proceedings brought by a country with jurisdiction.<sup>35</sup> The ICC's subordination to the criminal proceedings of sovereign nations is premised upon the principle of complementarity, which enables the ICC to maintain its role as the court of last resort and thereby support State justice systems.<sup>36</sup>

In determining whether complementarity prevents a case from being admitted to the ICC, the Court considers (1) the willingness of the investigating country to pursue "genuine" proceedings, and (2) the ability of that country to effectively investigate and prosecute the suspects. If the ICC feels that the country is either unwilling or unable to investigate, the principle of complementarity does not apply and the case may proceed at the ICC.<sup>37</sup>

To assess a State Party's willingness to investigate and prosecute an alleged crime, the Court conducts a three-part analysis, asking whether (1) the proceedings are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; (2) there has been an unjustified delay in the proceedings which is inconsistent with an intent to bring the person concerned to justice; and (3) the proceedings are being conducted independently or impartially rather than in a manner that is inconsistent with an intent to bring the person concerned to justice.<sup>38</sup> It appears from the case law that the key to this analysis is whether the country acts with good faith in investigating and prosecuting suspected war criminals.<sup>39</sup> This intent can be proved by reference to a country's express statement or, alternatively, it can be "inferred from unambiguous facts."<sup>40</sup>

As for the second factor in complementarity, whether a country has the ability to investigate and prosecute in a particular situation, the Court employs an arguably simpler standard: whether, due to a total or substantial collapse or unavailability of its national judicial system, the country is unable to apprehend the accused, obtain the necessary evidence or testimony, or otherwise carry out its proceedings.<sup>41</sup>

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(...continued)

Situations+and+Cases/Situations [follow hyperlinks for "Situation in Uganda" then "Related Cases," "Court Records," and "Pre-Trial Chamber II"].

<sup>34</sup> *Id.*

<sup>35</sup> See Rome Statute, Art. 1.

<sup>36</sup> See Kirsch, *supra* note 7.

<sup>37</sup> The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ¶ 75 (June 16, 2009). The Katanga case is an example of the necessary interaction between Articles 17 and 19 of the Rome Statute. The two articles are meant to work in concert as Article 19(1) permits the Court to determine, *sua sponte*, whether Article 17 bars a particular case, and Article 19(2) sets guidelines for challenges raised under Article 17 by defendants or States.

<sup>38</sup> Rome Statute, Art. 17(2).

<sup>39</sup> See The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ¶ 90 (June 16, 2009).

<sup>40</sup> *Id.*

<sup>41</sup> Rome Statute, Art. 17(3).

## The Office of the Prosecutor of the ICC

The ICC Office of the Prosecutor (the Office), which is headed by Prosecutor Luis Moreno-Ocampo, is composed of three divisions: the Prosecutions Division, the Jurisdiction Complementarity and Cooperation Division, and the Investigations Division. The Prosecutor is elected by secret ballot by an absolute majority of the members of the Assembly of States Parties.<sup>42</sup> The Prosecutor must have “high moral character,” competence and extensive practical experience in prosecuting or trying criminal cases, and fluency in one of the six working languages of the Court (Arabic, Chinese, English, French, Russian, and Spanish).<sup>43</sup> The Prosecutor holds office for a term of nine years and is not eligible for re-election.<sup>44</sup>

The Office of the Prosecutor is required to act as an independent and separate organ of the Court.<sup>45</sup> It is responsible for (1) receiving referrals about alleged war crimes and any substantiated information on crimes within the jurisdiction of the Court; (2) examining these referrals and conducting investigations; and (3) conducting prosecutions before the Court.<sup>46</sup> The Prosecutor must not participate in any matter in which his impartiality might reasonably be doubted, and he is disqualified from a case if he has previously been involved either in that case before the Court or in a case at the national level involving the person being investigated or prosecuted.<sup>47</sup>

## Article 98: Extradition to the ICC

If the ICC Prosecutor decides to prosecute someone, Article 89 of the Rome Statute permits the Court to request the arrest and surrender of that person from *any* country where that person may be found.<sup>48</sup> However, a country that is not a party to the Rome Statute is not mandated to comply with such a request.<sup>49</sup> In addition, Article 98 precludes the ICC from making a request for the surrender of a person when doing so would require the requested country to act inconsistently with its obligations under international law or international agreements.<sup>50</sup> Relying on this language in Article 98, the United States has frequently entered into international agreements,

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<sup>42</sup> Rome Statute, Art. 42(4). The Assembly of States Parties is comprised of a representative of each State Party. *Id.* at Art. 112. Non-Party States who have signed the Rome Statute may participate in the Assembly as observers but may not vote. *Id.* The Assembly assists the administration of the ICC by, for example, adopting the budget. *Id.* In addition, the Assembly may amend the Rome Statute if two-thirds of the Assembly vote in favor of the amendment. *Id.* at Art. 121. The Assembly convenes at least once a year at either The Hague or at the Headquarters of the United Nations in New York City. *Id.* at Art. 112(6).

<sup>43</sup> Rome Statute, Art. 42(3).

<sup>44</sup> Rome Statute, Art. 42(4).

<sup>45</sup> Rome Statute, Art. 42(1).

<sup>46</sup> *Id.*

<sup>47</sup> Rome Statute, Art. 42(7).

<sup>48</sup> Rome Statute, Art. 89(1).

<sup>49</sup> *See id.* Parties to the Rome Statute, on the other hand, must also ensure that there are procedures available under their national law for this kind of cooperation. Rome Statute, Art. 89(1); Art. 88.

<sup>50</sup> Rome Statute, Art. 98. *See also* International Criminal Court Rules of Procedure and Evidence, Rule 195.2 (“The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under [A]rticle 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.”)

often referred to as bilateral immunity agreements (BIAs) or Article 98 Agreements, with States Parties that create obligations designed to prevent the ICC from proceeding with a request to those States Parties for the surrender of a U.S. citizen. The proliferation of Article 98 Agreements has triggered a vigorous international debate over when and whether Article 98 prevents the ICC from requesting that a State Party arrest and surrender a person in its territory. This section of the report seeks to frame and explain that debate.

The Vienna Convention on the Law of Treaties (“VCLT” or “Vienna Convention”)<sup>51</sup> states that a treaty should be interpreted in accordance with the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>52</sup> However, the debate over the meaning of Article 98 in the context of BIAs suggests that there are conflicting interpretations of the “ordinary terms” of Article 98, and, more specifically, whether Article 98 permits ICC States Parties to enter agreements that protect the citizens of a particular country from being surrendered to the ICC.

According to some, the primary intention behind Article 98, and particularly its second paragraph, which explicitly discusses international agreements,<sup>53</sup> was to preserve certain prototypical provisions of Status of Forces Agreements (SOFAs).<sup>54</sup> SOFAs traditionally contain a guarantee that a nation deploying military forces on foreign soil retains primary criminal jurisdiction over its soldiers unless it consents to local prosecution.<sup>55</sup> Advancing that line of thought, the European Union (EU) has argued that Article 98(2) only protects from ICC interference those international treaty obligations that, like the obligations in traditional SOFAs, give immunity to persons who are present on the territory of a requested State because they have been sent on official business.<sup>56</sup> In addition to the negotiating history of Article 98, the EU also draws support from (1) the Vienna Convention on the Law of Treaties, which obliges countries who have signed or otherwise accepted an international agreement pending ratification or formal approval to refrain from acts

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<sup>51</sup> 155 U.N.T.S. 331 (1969).

<sup>52</sup> Vienna Convention on the Law of Treaties, Art. 31.1. Although the United States is not a party to the Vienna Convention, it recognizes the VCLT as generally signifying customary international law. *See e.g.* *Fujitsu Ltd. v. Fed'l Exp. Corp.*, 247 F.3d 423 (2d. Cir. 2001) (describing U.S. recognition of the Vienna Convention “as, in large part, the authoritative guide to current treaty law and practice.”).

<sup>53</sup> Article 98(2) of the Rome Statute reads: “The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State ...” The first paragraph of Article 98 reads largely the same but refers to “obligations under international law” and “diplomatic immunity of a person or property” rather than to “international agreements.”

<sup>54</sup> du Plessis, *South Africa's Response to American Hostility Towards the ICC*, 30 S. AFR. Y. B. INT'L L. 112, 117 (2005); Kimberly Prost & Claus Kreß, *Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1615 (Otto Triffterer ed., Hart Publishing 2008) (1999) (writing that the negotiations on Article 98(2) were undertaken with a view towards preserving SOFAs, which confined the competence and jurisdiction of the sending country to acts perpetrated by that state's citizens in the performance of their official duty). *See* Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 41 (1999) (“[T]he main concern in [Article 98] is to respect the obligations of host States under status-of-forces agreements. Under these agreements, the forces of a sending state may remain under its jurisdiction for some or all matters, and not under that of the host state.”).

<sup>55</sup> For more on Status of Forces Agreements (SOFAs), read CRS Report RL34531, *Status of Forces Agreement (SOFAs): What Is It, and How Has It Been Utilized?*, by R. Chuck Mason.

<sup>56</sup> Kimberly Prost & Claus Kreß, *supra* note 54, at 1616.

that would defeat the object and purpose of that agreement,<sup>57</sup> and (2) the provisions in the Rome Statute that require States Parties to cooperate with and assist the Court.<sup>58</sup> Consequently, the EU has argued that, in deciding whether compliance with a request for surrender would conflict with a country's treaty obligations, the ICC may ignore any international treaty obligations that would prevent a member-country from surrendering a person who was not sent to the requested country on official business.<sup>59</sup> However, this position is potentially complicated by reports that, several years after the Rome Conference, the head of the U.S. delegation claimed the United States had contemplated the development of BIA-type agreements during negotiations on Article 98(2).<sup>60</sup>

A second position advanced by the EU and some scholars contends that Article 98 was only intended to permit States Parties to continue to adhere to obligations imposed by agreements that predated their entry into the ICC.<sup>61</sup> The EU maintains that Article 98(2) does not extend to agreements that the requested country entered into after signing the Rome Statute.<sup>62</sup> The EU Commission reached this conclusion largely on the grounds that the concern guiding the negotiations on Article 98 was the elimination of any obstacle to ratification that could result from already existing agreements.<sup>63</sup> Scholars who support this position have also pointed to language in an earlier draft of the Rome Statute that refers only to *existing* treaty obligations in its description of when an ICC request might be barred for conflicting with international obligations.<sup>64</sup> Critics of this position, on the other hand, argue that Article 98 applies to *all* agreements, whether pre or post-dating the Rome Statute, because the actual ratified language of Article 98(2) does not contain a limitation regarding the time of the conclusion of the international agreements in question.<sup>65</sup>

The ICC has yet to request the surrender of a U.S. citizen from a State Party that has entered a BIA with the United States. Accordingly, it is unclear whether the Court would interpret Article 98 of the Rome Statute as permitting the ICC to proceed with a request to surrender when the sending State has entered an agreement that forbids it from honoring the request.<sup>66</sup> Regardless of

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<sup>57</sup> Vienna Convention on the Law of Treaties, Art. 18 (“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”).

<sup>58</sup> du Plessis, *supra* note 54, at 125 (2005). *E.g.* Rome Statute, Arts. 86, 87(7) (requiring parties to the Rome Statute to cooperate with the ICC).

<sup>59</sup> Prost & Kreß, *supra* note 54, at 1616.

<sup>60</sup> *Id.* at 1603. Arguably, however, these contemplations should not be equated with the intent of the Article 98(2) drafters because, if the U.S. delegation disclosed these contemplations to other participants in the negotiations, that disclosure probably did not happen until very late in the day. *Id.*

<sup>61</sup> *Id.* at 1616.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1617.

<sup>64</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court 134 (1998), available at <http://www.un.org/law/n9810105.pdf>. See Prost & Kreß, *supra* note 54, at 1617.

<sup>65</sup> Prost & Kreß, *supra* note 54, at 1616.

<sup>66</sup> See *id.* at 1603. See also Rome Statute, Arts. 4(1) (stating that the Court has “such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purpose”), 19(1) (providing that “the Court shall satisfy itself that it has jurisdiction in any case brought before it”); *Joseph Kony*, *supra* note 33, at ¶ 45 (referring to its previous discussions of the “well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence.”). This suggests that (continued...)

international and scholarly opinion as to the proper interpretation of Article 98, the Rome Statute vests the ICC with the ultimate legal authority to interpret the requirements and obligations that the Statute imposes on States Parties.<sup>67</sup> However, at least one commentator has suggested that the Court's decision making does not take place in a vacuum, but, rather, may be affected by predictions about the implementation and practicality of its judgments.<sup>68</sup> If this is true, the Court may consider not only the text and history of the Rome Statute, but also non-textual concerns, such as whether a request to surrender in the context of a BIA would be worth the cost of requiring the sending State to upset its relations with another country and the possibility that the sending State might choose not to honor the ICC's request.<sup>69</sup> If considered, these practicalities could weigh in favor of the U.S. position on the purpose and effect of Article 98.

## The Preliminary Investigation of a Situation

### Article 53 of the Rome Statute: Initiation of a Formal Investigation

When the Office of the Prosecutor receives information about potential war crimes, it must take several steps before prosecuting the persons alleged to have committed these offenses. The first is a preliminary investigation, or preliminary analysis, in which the Prosecutor decides whether to launch a formal investigation. The second step is the actual initiation of a formal investigation.

The Office of the Prosecutor must consider three factors before deciding to initiate a formal investigation: (1) whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;<sup>70</sup> (2) whether a resulting case would meet Article 17's requirements for complementarity;<sup>71</sup> and (3) whether, given the gravity of the crime and the interests of the victims, there are substantial reasons to believe that an investigation would serve the interests of justice.<sup>72</sup>

In assessing the first factor, whether a reasonable basis exists to believe a crime occurred, the Prosecutor may seek additional information from countries, organs of the United Nations, intergovernmental or non-governmental organizations (NGOs), or other reliable sources that he or she deems appropriate.<sup>73</sup> The Prosecutor may also receive written or oral testimony on the matter.<sup>74</sup> To assess the second factor, whether a potential case satisfies Article 17's

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(...continued)

whether the ICC has the authority to issue a particular request for surrender will be determined by the Court, which does not need to consider how the requested country interprets its potentially conflicting international obligations. *Id.*

<sup>67</sup> Prost & Kreß, *supra* note 54, at 1616.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.* As Prost and Kreß describe the issue, "[A]ny determination by the Court that no conflicting international obligation exists will leave the requested State Party with the risk that the Court's determination of the international legal obligation is wrong."

<sup>70</sup> Rome Statute, Art. 53(1)(a).

<sup>71</sup> Rome Statute, Art. 53(1)(b); Art. 17. For a discussion of the requirements for complementarity, *see supra* notes 35-41 and accompanying text.

<sup>72</sup> Rome Statute, Art. 53(1)(c).

<sup>73</sup> Rome Statute, Art. 15(2).

<sup>74</sup> *Id.*

complementarity regime, the Prosecutor collects similar information on the initiation and progress of national proceedings.<sup>75</sup>

In assessing the third factor, the gravity of an alleged crime, the ICC has considered both whether an alleged offense falls under the scope of its subject matter jurisdiction, and also whether it satisfies an additional threshold of severity in comparison to the thousands of other crimes over which the ICC may exercise jurisdiction.<sup>76</sup> A key consideration in this comparison is the number of victims resulting from each crime.<sup>77</sup>

Although the Office of the Prosecutor has received a significant number of communications regarding alleged offenses, there have been relatively few occasions when the Office has examined these communications and concluded that the basic requirements for even an intensive preliminary examination have been satisfied.<sup>78</sup> Only if the information provided leads the Prosecutor to conclude that the three requirements (reasonable basis, complementarity, and gravity) are satisfied may he submit a request for authorization of an investigation to the Pre-Trial Chamber.<sup>79</sup> In turn, the Pre-Trial Chamber will grant the Prosecutor's request only if it too concludes that there is a reasonable basis to proceed with an investigation.<sup>80</sup> Where the Prosecutor believes the requirements for an investigation are not satisfied, the Prosecutor will inform those who provided the information of his decision not to initiate an investigation. However, a decision not to investigate a situation does not preclude the Prosecutor from considering further information regarding the same situation in light of new facts or evidence.<sup>81</sup>

Over the course of 2009, the Office of the Prosecutor has publicly acknowledged considering information concerning situations in the Republic of Georgia, Colombia, Afghanistan, Côte D'Ivoire, Palestine, and Guinea.<sup>82</sup> This kind of public acknowledgment is not necessarily the norm: the Office of the Prosecutor does not always announce or even admit when a situation is

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<sup>75</sup> OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, RESPONSE TO COMMUNICATIONS RECEIVED CONCERNING IRAQ 9 (2006), available at <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Iraq/>.

<sup>76</sup> See *id.* at 8. The Rome Statute provides a little clarification on the meaning of grave in Article 8(1)'s definition of war crimes, indicating that those that are committed "as part of a plan or policy or as part of a large-scale commission of such crimes" are perhaps more grave for Article 17's purposes than those that did not occur on a large-scale or as part of a plan or policy. See Rome Statute, Art. 8(1).

<sup>77</sup> See OFFICE OF THE PROSECUTOR, *supra* note 75, at 8-9. The Prosecutor has also hinted that some crimes, such as "willful killing or rape," are more serious than others, but has not elucidated a clear standard in that area. *Id.* at 9.

<sup>78</sup> *Id.* at 1; OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, VISIT OF THE MINISTER OF JUSTICE OF THE PALESTINIAN NATIONAL AUTHORITY, MR. ALI KHASHAN, TO THE ICC (Feb. 6, 2009), <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine> (follow "Visit of the Minister of Justice of the Palestinian National Authority"). Between July of 2002 and February 2006, the Office of the Prosecutor received 1,732 communications on situations in 139 countries, but only 10 of those situations were subject to an intensive preliminary examination, and even fewer resulted in a request for authority to investigate. OFFICE OF THE PROSECUTOR, *supra* note 75, at 1.

<sup>79</sup> Rome Statute, Art. 15(3).

<sup>80</sup> *Id.* at Art. 15(4).

<sup>81</sup> *Id.* at Art. 15(6).

<sup>82</sup> OFFICE OF THE PROSECUTOR, *supra* note 78; Press Release, Office of the Prosecutor, International Criminal Court (Oct. 14, 2009 <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor> (follow "Communications and Referrals" hyperlink and then "ICC Prosecutor confirms situation in Guinea under examination").

under analysis.<sup>83</sup> In general, the ICC's Rules of Procedure and Evidence require the Prosecutor to keep the analysis process confidential to preserve the privacy of the senders, the confidentiality of submitted information, and the integrity of the analysis and any resulting investigation.<sup>84</sup> However, Office policy permits the Prosecutor to publicly disclose the reasons for a decision to request, or not to request, an investigation if (1) the situation has warranted intensive analysis; (2) the situation has generated public interest and the fact of the analysis is in the public domain; and (3) the reasons can be provided without risk to the safety, well-being, and privacy of senders.<sup>85</sup>

## **Notable Examples of Preliminary Analyses by the Prosecutor**

The following examples of preliminary analyses undertaken by the Office of the Prosecutor are notable for the interest they garnered in the United States. Although not all of these analyses have been completed, to date, none of these analyses has resulted in the initiation of formal investigations or trials.

### **Iraq**

In 2006, the Office of the Prosecutor concluded its preliminary investigation into alleged offenses committed in Iraq.<sup>86</sup> The Prosecutor investigated two different categories of alleged crimes: (1) war crimes and (2) willful killing and inhumane treatment of civilians. The Office of the Prosecutor's published discussion of its analysis is instructive on how the Prosecutor approaches a preliminary analysis in light of the mandate to determine whether there is a reasonable basis to believe the alleged crimes occurred, whether a resulting case would satisfy the complementarity regime, and whether the crimes are sufficiently grave to warrant a case before the ICC.

### ***Jurisdiction***

The alleged crimes occurred in Iraq, which is not a State Party of the ICC.<sup>87</sup> Therefore, the Court lacked jurisdiction over offenses by nationals of non-ICC States Parties that were committed on Iraq soil.<sup>88</sup> However, some communications submitted to the Prosecutor argued that nationals of ICC States Parties were accessories to crimes committed by nationals of non-member countries.<sup>89</sup> Consequently, the Office's preliminary analysis focused on whether a formal investigation should be launched into the involvement of States Parties' citizens as accessories to either war crimes or crimes against civilians.<sup>90</sup>

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<sup>83</sup> See OFFICE OF THE PROSECUTOR, *supra* note 75, 4.

<sup>84</sup> *Id.* See also International Criminal Court's Rules of Procedure and Evidence, Rules 46, 49(1).

<sup>85</sup> OFFICE OF THE PROSECUTOR, *supra* note 75, at 4. Pursuant to this policy, the Office of the Prosecutor has released, and made available on its website, the reasons behind the Prosecutor's decisions not to initiate investigations on situations in Iraq and Venezuela. See *id.*

<sup>86</sup> See generally *id.*

<sup>87</sup> *Id.* at 3.

<sup>88</sup> *Id.*

<sup>89</sup> OFFICE OF THE PROSECUTOR, *supra* note 75, at 3.

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

## *Allegations of War Crimes*

In its analysis of war crimes allegedly committed by States Parties' nationals, the Office of the Prosecutor reviewed submitted communications, identified those containing substantiated information, examined relevant documentation and video-records, and purportedly conducted an exhaustive search of readily available open source information.<sup>91</sup> Some of the readily available open source information used was from non-governmental organizations including Amnesty International, Human Rights Watch, Iraq Body Count, and Spanish Brigades Against the War in Iraq.<sup>92</sup> The Office also stated that it sought and received additional information on the alleged crimes from other relevant countries and entities.<sup>93</sup>

The Office paid particularly close attention to allegations concerning the targeting of civilians or “clearly excessive” attacks.<sup>94</sup> In that context, a war crime, as defined by the Rome Statute, only occurs if there is an intentional attack directed against civilians or an attack is launched on a military objective with the knowledge that incidental civilian injuries would clearly be excessive relative to the anticipated military advantage.<sup>95</sup> The Office found that the available information established that a considerable number of civilians died or were injured during military operations.<sup>96</sup> However, it believed that the information failed to either sufficiently prove or disprove that (1) there were any *intentional* attacks on civilians; (2) the attacks were clearly excessive in relation to military objectives; and (3) nationals of States Parties were involved in the attacks.<sup>97</sup> These gaps in intelligence led the Office to seek out still more information about the alleged crimes.<sup>98</sup>

Additional information provided by the United Kingdom stated that lists of potential targets were identified in advance; commanders were aware of the need to comply with international humanitarian law; detailed computer modeling was used in assessing targets; target approval was subject to political and legal oversight; and collateral damage assessments were sent back to headquarters.<sup>99</sup> In addition, the United Kingdom claimed that nearly 85% of the weapons released by U.K. aircraft were precision-guided, which, to the Prosecutor, evinced an intent to minimize casualties.<sup>100</sup>

The Office continued to examine several incidents in detail until it felt it had exhausted all measures “appropriate during the analysis phase.”<sup>101</sup> Ultimately, the Prosecutor concluded that the available information did not provide a reasonable basis to believe that a crime within the

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<sup>91</sup> *Id.* at 2.

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

<sup>93</sup> *Id.* at 3.

<sup>94</sup> See OFFICE OF THE PROSECUTOR, *supra* note 75, at 4. See also Rome Statute, Art. 8(2) (defining war crimes to include “intentionally directing attacks against the civilian population” and “intentionally launching an attack with knowledge that such attack will cause incidental loss ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated).

<sup>95</sup> See *id.* See also Rome Statute, Arts. 8(2)(b)(i), 8(2)(b)(iv).

<sup>96</sup> OFFICE OF THE PROSECUTOR, *supra* note 75, at 6.

<sup>97</sup> *Id.*

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

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 7.

<sup>101</sup> OFFICE OF THE PROSECUTOR, *supra* note 75, at 7.

jurisdiction of the Court had been committed.<sup>102</sup> The Prosecutor noted, however, that many facts remained undetermined and its conclusion could be reviewed in light of new facts or evidence.<sup>103</sup>

### ***Allegations of Willful Killing and Inhumane Treatment***

After allegations came to light in media reports concerning incidents of mistreatment of detainees and willful killing of civilians in Iraq, the Prosecutor began collecting information on these incidents and on related criminal proceedings that were undertaken by the States Parties whose nationals were allegedly responsible.<sup>104</sup>

The Prosecutor concluded that, in light of the available information, there was a reasonable basis to believe that crimes within the jurisdiction of the ICC had been committed. However, the Prosecutor did not believe that these crimes satisfied the gravity prong of Article 53's standard for initiating a formal investigation.<sup>105</sup> Assessing the gravity of the offenses in light of the number of victims resulting from each crime, the Prosecutor found that there were at most 12 victims of willful killing and a "limited" number of victims of inhuman treatment within the jurisdiction of the Court.<sup>106</sup> Noting that the Office of the Prosecutor was investigating three other situations that each involved thousands of willful killings as well as intentional and large-scale sexual violence and abductions, the Prosecutor concluded that the incidents in Iraq reviewed by the Office did not meet the required threshold of the Rome Statute.<sup>107</sup>

Because the situation did not meet the gravity threshold, the Prosecutor wrote that it was "unnecessary" to assess whether the situation satisfied Article 53's other two prongs, including Article 17's complementarity requirements.<sup>108</sup>

## **Selected Situations Undergoing Preliminary Analysis by the Prosecutor**

### **Afghanistan**

#### ***Preliminary Analysis in Afghanistan***

On September 9, 2009, Prosecutor Moreno-Ocampo confirmed that his office was gathering information about possible war crimes committed by NATO soldiers, U.S. soldiers, and both Taliban and al Qaeda insurgents in Afghanistan.<sup>109</sup> The Prosecutor has declined since to provide

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 9.

<sup>106</sup> OFFICE OF THE PROSECUTOR, *supra* note 75, at 9.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Louis Charbonneau, *ICC Prosecutor Eyes Possible Afghanistan War Crimes*, REUTERS, Sept. 9, 2009, <http://www.reuters.com/article/idUSTRE58871K20090909>; LUCIA DiCICCO, THE AMERICAN NON-GOVERNMENTAL ORGANIZATION, COMMUNICATIONS TO THE ICC REGARDING THE SITUATION IN AFGHANISTAN 1 (Sept. 14, 2009), <http://www.amicc.org/docs/Afghanistan.pdf>. The Reuters article summarizes three sets of allegations that could be (continued...)

further details about the specific incidents or allegations that the ICC is considering.<sup>110</sup> The Prosecutor also has not made public any decision regarding whether he is inclined to seek the Pre-Trial Chamber's permission to initiate a formal investigation.<sup>111</sup>

The United States has not officially supported or opposed the Chief Prosecutor's statements or information-gathering efforts regarding Afghanistan. Under questioning from Members of Congress in December 2009, Karl Eikenberry, U.S. Ambassador to Afghanistan, and General Stanley McChrystal, Commander of U.S. Forces Afghanistan and the International Security Assistance Force (ISAF), did not specifically refute the ICC's authority to investigate alleged crimes committed by U.S. and other NATO troops in Afghanistan. Instead, they stated that the U.S.-Afghanistan BIA and SOFA precluded the ICC from obtaining custody of members of the U.S. armed forces. In addition, alluding to the ICC's Article 17 on complementarity, they explained that any alleged wrongdoing would be properly investigated and prosecuted, if necessary, under the U.S. military justice system. General McChrystal and Ambassador Eikenberry stated that they were opposed to any ICC arrest and prosecution of members of the U.S. armed forces for actions taken in Afghanistan.<sup>112</sup>

### *ICC Jurisdiction over Alleged Crimes in Afghanistan*

Unlike the Iraq situation discussed previously, the ICC has jurisdiction over alleged crimes that occurred in Afghanistan, even in cases where those offenses were committed by nationals of States that are not themselves States Parties to the ICC, because Afghanistan acceded to the Rome Statute on February 10, 2003. Afghanistan could choose to lodge a declaration with the Court accepting the Court's ad hoc jurisdiction over a period of time prior to that date under Article 12(3), thus empowering the Prosecutor to investigate crimes committed on Afghan soil after the Rome Statute entered force (July 1, 2002), but prior to Afghanistan's May 2003 ratification of it.

However, as with other cases, the ICC must consider not only whether it has jurisdiction over a situation, but also whether the situation meets the requirements described in Article 53 for a formal investigation and whether it is admissible under the complementarity requirements under Article 17. As a result, if the United States, for example, shows that it is willing and able to conduct "genuine" investigations and, where appropriate, prosecutions of nationals allegedly involved in criminal activities, those cases would become permanently inadmissible in the ICC. In addition, both countries can always seek to have the U.N. Security Council adopt a resolution

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(...continued)

under consideration, depending on the information the Prosecutor received: (1) Afghan officials' allegations that "unwarranted NATO air strikes" have caused "heavy civilian death tolls;" (2) NATO officials' allegations that the Taliban and al Qaeda are guilty of "attacking schools and kidnapping and murdering aid workers and other innocent civilians;" and (3) rights groups' accusations that the Bush Administration "authorized the use of torture in Afghan jails ..."<sup>110</sup> *Id.*

<sup>110</sup> Charbonneau, *supra* note 109.

<sup>111</sup> Although it is not necessarily an indication of future behavior, the last time that the ICC considered allegations against U.S. troops, the Prosecutor did make public his decision not to initiate a formal investigation. That investigation would have looked into U.S. soldiers' activities in Iraq. The Prosecutor's decision and reasoning not to seek the Pre-Trial Chamber's authority to investigate is available on the ICC Office of the Prosecutor website.

<sup>112</sup> U.S. Congress, House Committee on Foreign Affairs, *U.S. Strategy in Afghanistan – Part II*, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., Dec. 10, 2009.

pursuant to Article 16 of the Rome Statute to defer an investigation or prosecution for one year, with the option of renewal.<sup>113</sup>

### *Extradition of U.S. Nationals*

Should the Prosecutor decide to proceed with a formal investigation and prosecution of crimes allegedly committed by U.S. citizens, a predictable concern is whether a foreign government could extradite U.S. suspects to the ICC. As always, a country's ratification of the Rome Statute is not a prerequisite for the ICC's transmission of a request for the arrest and surrender of a suspect, but only those countries that are States Parties to the Rome Statute are mandated to comply with such a request.<sup>114</sup>

Unlike the United States, Afghanistan is a party to the Rome Statute, having ratified it on February 10, 2003. In theory this means that Afghanistan is mandated to comply with a request from the ICC to surrender an American national. However, the United States and Afghanistan have also entered two agreements, the U.S.-Afghanistan Bilateral Immunity Agreement (BIA)<sup>115</sup> and the U.S.-Afghanistan SOFA,<sup>116</sup> which present the kind of international obligations that, under Article 98, may preclude the ICC from requesting that Afghanistan surrender an American.<sup>117</sup> These Article 98 Agreements do not bar the ICC from asking States Parties *other than* Afghanistan to extradite the accused if the accused voluntarily enters their territory.<sup>118</sup> However, the effect that these two agreements would have on a similar request to *Afghanistan* is unclear given the debate over the meaning and applicability of Article 98. Without guidance from the ICC itself, it is impossible to know whether the Court would find that the BIA or the SOFA precludes an ICC request that Afghanistan surrender a U.S. national. It is also not clear whether Afghanistan would honor an extradition request from the ICC in light of any conflicting obligation imposed by the BIA or SOFA.

As discussed, there are at least two potential approaches that the ICC might take on this question in addition to the textualist reading of Article 98 on which the United States has relied in entering bilateral immunity agreements.<sup>119</sup> If the ICC agrees with the view that Article 98 preserves only

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<sup>113</sup> See Rome Statute, Art. 16. *E.g.* SC Res. 1422, U.N. Doc. S/RES/1422 (2002).

<sup>114</sup> Rome Statute, Art. 89(1).

<sup>115</sup> See Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Afg., Sept. 20, 2002, Temp. State Dep't No. 03-119, KAV 6308; Rome Statute, Art. 89.1 (indicating that only State Parties are required to comply with a request to surrender).

<sup>116</sup> Status of Military and Civilian Personnel, U.S.-Afg., Sept. 26, 2002–May 28, 2003 (entered into force May 28, 2003), Temp. State Dep't No. 03-67, KAV 6192. For more on the United States-Afghanistan SOFA, read the relevant portion of CRS Report RL34531, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, by R. Chuck Mason.

<sup>117</sup> See Article 98(2).

<sup>118</sup> See Prost & Kreß, *supra* note 54, at 1614. However, these agreements would not block the ICC from requesting a country without a BIA with the United States to extradite the American suspect if the suspect came on to its territory. See Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Afg., Aug. 23, 2003, Temp. State Dep't No. 03-119, KAV 6308; Rome Statute, Art. 89.1 (indicating that only State Parties are required to comply with a request to surrender).

<sup>119</sup> See *supra* notes 55-65 and accompanying text. This discussion pointed to three common perspectives on what agreements contained obligations that Article 98 was drafted to protect: (1) obligations contained in agreements that protect persons present on the foreign territory because they were sent there on official business (the prototype of these agreements are Status of Forces Agreements (SOFAs) like the one between the United States and Afghanistan), (2) obligations contained in agreements that were entered into by the State Party before it signed the Rome Statute (which continued...)

SOFA-like obligations contained in international agreements, the Court would most likely interpret the U.S.-Afghanistan SOFA as preempting an ICC request that Afghanistan surrender U.S. *personnel*, but conclude that the U.S.-Afghanistan BIA does not preempt an ICC request that Afghanistan surrender any U.S. *citizens* present in Afghanistan who were not serving as U.S. personnel.<sup>120</sup> If, on the other hand, the ICC interprets Article 98 pursuant to either of the other two approaches discussed, namely (1) that Article 98 was intended to preempt requests to surrender that conflict with international obligations *predating* the sending State's entry into the ICC,<sup>121</sup> or (2) that Article 98 should be interpreted literally,<sup>122</sup> then a request to Afghanistan for the surrender of a U.S. citizen would most likely be deemed preempted by the BIA. While the ICC is the sole arbiter of the meaning and applicability of Article 98, political realities could weigh in favor of the U.S. position on the application of Article 98 to its BIA with Afghanistan.<sup>123</sup>

## Gaza Strip

On January 22, 2009, the Palestinian National Authority (PNA) lodged a declaration pursuant to Article 12(3) of the Rome Statute with the Registrar of the ICC, accepting ICC ad hoc jurisdiction over alleged crimes committed during the December 2008/January 2009 conflict between Israeli and Hamas forces in the Gaza strip.<sup>124</sup> The ICC's jurisdiction over any alleged crimes would come solely from the PNA's declaration as neither Israel nor the PNA are States Parties to the Rome Statute.<sup>125</sup> However, the PNA's declaration is complicated by the fact that it has not been

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(...continued)

may include the U.S.-Afghanistan BIA since it was signed before Afghanistan signed the Rome Statute), and (3) obligations contained in any international agreement no matter its label or the date it entered force (a perspective that would include both the United States-Afghanistan BIA and SOFA).

<sup>120</sup> Under this approach, the key to having the ICC respect the U.S.-Afghanistan BIA would, arguably, be the scope of its protection against extradition: only if its protection is limited to U.S. citizens sent to Afghanistan on official business would Article 98 permit the agreement to preempt a request to surrender. The BIA prohibits the United States and Afghanistan from surrendering to the ICC the "persons" of either party, meaning any "current or former Government officials, employees (including contractors), or military personnel or *nationals of one Party*." Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Afg., Sept. 20, 2002, Temp. State Dep't No. 03-119, KAV 6308 (emphasis added). Therefore, if the ICC adopted this approach, it might read the BIA as extending protection against extradition to too broad a range of people to warrant preservation under Article 98. However, under this same approach, the ICC might conclude that the *SOFA* preempts an ICC request to Afghanistan for the surrender of U.S. personnel because it contains the type of obligations that proponents of this view believe Article 98 was intended to preserve. See Status of Military and Civilian Personnel, U.S.-Afg., Sept. 26, 2002–May 28, 2003 (entered into force May 28, 2003), Temp. State Dep't No. 03-67, KAV 6192 (prohibiting Afghanistan from surrendering or otherwise transferring "United States personnel" to the custody of an international tribunal, other entity, or other state without the express consent of the U.S. government).

<sup>121</sup> Under the approach that Article 98 preserves only those international obligations contained in agreements that Afghanistan signed before it signed the Rome Statute on February 10, 2003, the BIA would most likely preempt an ICC request for the surrender of a U.S. national because it was signed on September 20, 2002, several months before Afghanistan signed the Rome Statute. See *supra* notes 61-65 and accompanying text.

<sup>122</sup> Under the textualist approach on which United States has relied in creating BIAs, Article 98 preserves all BIAs, regardless of the scope of their protection against extradition or date on which they were signed, because a State Party's compliance with an ICC request to surrender necessitates its non-compliance with a BIA.

<sup>123</sup> See Prost & Kreß, *supra* note 54, at 1616. As Prost and Kreß describe the issue, "[A]ny determination by the Court that no conflicting international obligation exists will leave the requested State Party with the risk that the Court's determination of the international legal obligation is wrong. It was felt, however, that this risk is a tolerable one to bear in light of both the judicial expertise united on the bench and the persuasive authority that any relevant determination by the Court is bound to carry with it." *Id.*

<sup>124</sup> OFFICE OF THE PROSECUTOR, *supra* note 78.

<sup>125</sup> Palestine was not represented by a delegation at the Rome Conference but was able to send an observer delegation (continued...)

recognized as a State, and, absent this recognition, the PNA cannot confer on the Court ad hoc jurisdiction over offenses on its territory under Article 12.<sup>126</sup> This has raised concerns that the contentious issue of Palestinian statehood could come before the ICC.<sup>127</sup>

When the PNA lodged its declaration seeking to confer on the ICC ad hoc jurisdiction, the Office of the Prosecutor had received 213 communications from individuals and NGOs relating to the situation between Israel and the Palestinian Territories.<sup>128</sup> By February 13, 2009, less than a month later, that number had jumped to 326.<sup>129</sup> The Prosecutor has not released any further information about the status of its preliminary analysis into the Gaza Conflict.<sup>130</sup>

In September 2009, the U.N. Human Rights Council-established U.N. Commission of Inquiry on Gaza presented the Report of the U.N. Fact Finding Mission on the Gaza Conflict (“Goldstone Report”),<sup>131</sup> which found both war crimes and crimes against humanity had been committed in the Gaza conflict.<sup>132</sup> The report recommended that the U.N. Security Council (1) require Israel and the PNA to carry out national level investigations and prosecutions against those responsible for the crimes, and (2) if Israel and the PNA failed to conduct these proceedings within a six-month period, refer the situation to the ICC Prosecutor.<sup>133</sup> If the U.N. Security Council ultimately refers the situation to the ICC, then, under Article 13(b), the ICC Prosecutor will have jurisdiction even though neither Israel nor Palestine is a member of the ICC and the ICC may not deem Palestine a “state” under the Rome Statute.<sup>134</sup> The Security Council has referred only one situation to the ICC

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to the talks. COALITION FOR THE INTERNATIONAL CRIMINAL COURT, THE ICC AND THE ARAB WORLD 1 (2009), available at [http://www.iccnw.org/documents/Arab\\_States\\_the\\_ICC\\_Factsheet\\_\\_EN\\_.pdf](http://www.iccnw.org/documents/Arab_States_the_ICC_Factsheet__EN_.pdf).

<sup>126</sup> See Rome Statute, Art. 4(2) (“The Court may exercise its functions and powers ... on the territory of any State Party and, by special agreement, on the territory of any other *State*.” (emphasis added)). In light of this complication, the Minister of Justice of the Palestinian National Authority (PNA), Dr. Ali Khashan, has also submitted legal arguments in support of its declaration. Press Release, ICC, ICC Prosecutor Receives Palestinian Minister of Justice, Arab League, and Independent Fact-Finding Committee (Oct. 16, 2009) available at <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/Press+Releases+%282009%29/> (last visited Mar. 5, 2010).

<sup>127</sup> E.g. Joshua Rozenberg, *ICC’s Credibility Hangs on Palestinian Statehood Decision*, Law Soc’y Gazette, May 21, 2009. However, the question would evade being answered by either the Prosecutor or the ICC if the U.N. Security Council referred the situation to the ICC. See Rome Statute, Art. 13(b); see also John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 9 (2009) (stating that, other than conferral of jurisdiction by the PNA’s declaration, the only other potential bases for ICC jurisdiction over these allegations would be the nationality of a particular offender or a referral by the Security Council).

<sup>128</sup> OFFICE OF THE PROSECUTOR, *supra* note 78.

<sup>129</sup> OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, VISIT OF THE PALESTINIAN NATIONAL AUTHORITY MINISTER OF FOREIGN AFFAIRS, MR. RIAD AL-MALKI, AND MINISTER OF JUSTICE, MR. ALI KHASHAN, TO THE PROSECUTOR OF THE ICC (Feb. 13, 2009), <http://www.icc-pi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine> (follow “Visit of the Minister of Justice of the Palestinian National Authority”) (last visited Dec. 14, 2009).

<sup>130</sup> For an in-depth discussion of the conflict, see CRS Report R40101, *Israel and Hamas: Conflict in Gaza (2008-2009)*, coordinated by Jim Zanotti.

<sup>131</sup> The text is available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

<sup>132</sup> COALITION FOR THE INTERNATIONAL CRIMINAL COURT, THE ICC AND THE ARAB WORLD 3 (2009), available at [http://www.iccnw.org/documents/Arab\\_States\\_the\\_ICC\\_Factsheet\\_\\_EN\\_.pdf](http://www.iccnw.org/documents/Arab_States_the_ICC_Factsheet__EN_.pdf).

<sup>133</sup> *Id.*

<sup>134</sup> See Rome Statute, Art. 13(b). However, if the U.N. Security Council grants the ICC jurisdiction over the case, the ICC Prosecutor will still be required to conduct a preliminary analysis and address any issues of admissibility.

Prosecutor previously, and that referral resulted in the ICC Prosecutor opening a formal investigation into alleged war crimes in Darfur.<sup>135</sup>

The United States has generally opposed ICC involvement in investigating alleged crimes committed during the December 2008-January 2009 conflict between Israel and Hamas in the Gaza Strip. U.S. representatives in the United Nations have disagreed with the conclusions of the Goldstone Report, including the recommendation of a U.N. Security Council resolution to authorize an ICC investigation of alleged crimes. The United States was one of six members to vote against a resolution adopted by the U.N. Human Rights Council endorsing the findings of the Goldstone Report.<sup>136</sup> State Department spokesman Ian Kelly, in addition to disagreeing with the report's assessment of the actions taken by both sides to the conflict, also expressed the department's concern over calls in the report for the issue "to be taken up in international fora outside the Human Rights Council and in national courts of countries not party to the conflict."<sup>137</sup> Other statements by U.S. representatives have indicated the Obama Administration's preference that the Gaza issue be dealt with in the Human Rights Council and not in the ICC or the Security Council, where a vote on a resolution referring the alleged crimes to the ICC for investigation might occur.<sup>138</sup>

## Developments in U.S. ICC Policy

A shift in the overall U.S. government policy and treatment of the ICC is apparent from legislative and executive branch actions in recent years. As discussed earlier, the United States has based its opposition to the ICC on sovereignty concerns, the possibility for overreach by the ICC prosecutor, and the desire to protect members of the U.S. armed forces from politically motivated prosecutions before the Court. While these concerns do not seem to have abated, the views of the U.S. government, beginning under the George W. Bush Administration and continuing under the Obama Administration, appear to have shifted toward the conclusion that the ICC may sometimes serve as a useful tool in bringing perpetrators of the worst atrocities to justice. In addition, representatives of the Obama Administration have stated that despite continuing concerns about the Court, the United States can best protect and promote its interests through engaging with the ICC. Congress, after passing a number of pieces of legislation evincing opposition to the ICC and any effect of the Court on U.S. individuals or interests, has recently moved to roll back restrictions on U.S. foreign assistance to ICC States Parties.

## Executive Branch Policy

Although remaining opposed to United States becoming a State Party to the Rome Statute, the Bush Administration in its second term took actions that evidenced an acceptance of the work and importance of the ICC in bringing perpetrators of atrocities to justice. In its first year, the Obama

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<sup>135</sup> SC Res. 1593, U.N. Doc S/RES/1593 (2005).

<sup>136</sup> The text of the U.N.HRC resolution (Resolution S-12/1), dated October 16, 2009, is available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

<sup>137</sup> Remarks by State Department Spokesman Ian Kelly, September 19, 2008, <http://www.state.gov/r/pa/prs/ps/2009/sept/129371.htm>.

<sup>138</sup> See e.g. Remarks by Ambassador Alejandro Wolff, U.S. Deputy Permanent Representative to the United Nations, on the Middle East, at the Security Council Stakeout, October 7, 2009, <http://usun.state.gov/briefing/statements/2009/130384.htm>; Remarks by State Department Spokesman Ian Kelly, October 8, 2009.

Administration was at times supportive of the ICC in its statements, and began to engage with the ICC, but did not adopt a policy to join the Court. The Obama Administration has undertaken an interagency review of its ICC policy and is expected to complete the review and make public its conclusions sometime in 2010.

## **United States Engagement with the ICC**

In November 2009, the United States participated as an observer in the ICC's annual Assembly of States Parties in The Hague. In announcing the decision, Stephen Rapp, the U.S. Ambassador-at-Large for War Crimes Issues, stated, "Our government has now made the decision that Americans will return to engagement with the ICC."<sup>139</sup> He insisted, however, that the United States still does not intend to become party to the Rome Statute at this time.<sup>140</sup> Ambassador Rapp specifically mentioned continuing concerns over the possibility that U.S. service members "might be subject to politically inspired prosecutions."<sup>141</sup>

Both Ambassador Rapp and the State Department Legal Advisor, Harold Koh, attended the ICC Assembly of States Parties. In his remarks to the Assembly, Ambassador Rapp asserted that while not a State Party to the Rome Statute, the United States did not at any point abandon its commitment to bringing perpetrators of atrocities to justice, including through international criminal tribunals such as those created by the United Nations for crimes committed in the former Yugoslavia and Rwanda.<sup>142</sup> He stated that there are instances when only the international community, working together, can ensure justice is done, and cited the U.S. support of and cooperation in the ICC's investigation into alleged crimes in Darfur.<sup>143</sup> He also explained the U.S. intention to gain a "better understanding of the issues being considered [by the ICC States Parties] and the workings of the Court."<sup>144</sup> Ambassador Rosemary DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, stated in the Security Council on December 4, 2009, "Although the United States is not a party to the Rome Statute, the United States was pleased to participate last week for the first time as an observer to the Assembly of States Parties to the Rome Statute. This decision reflected the U.S. commitment to engage with the international community on issues that affect our foreign policy interests."<sup>145</sup>

Ambassador Rapp has also stated that the United States will participate in the Review Conference of the Rome Statute, to take place in Kampala, Uganda, in May-June 2010.<sup>146</sup> At the Assembly, he spoke about the possibility of amending the Rome Statute to include the crime of aggression

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<sup>139</sup> Quotation as reported by several news organizations. See e.g. Tom Maliti, *Envoy says US to Attend War Crimes Court Meeting*, ASSOCIATED PRESS ONLINE, Nov. 16, 2009; *US to Resume Engagement With ICC*, BBC NEWS, Nov. 16, 2009, <http://news.bbc.co.uk/2/hi/8363282.stm>; *Kenya Said to Give Shelter to Financier of Rwanda Genocide*, VOICE OF AMERICA, Nov. 16, 2009, <http://www1.voanews.com/english/news/a-13-2009-11-16-voa52-70423427.html>.

<sup>140</sup> Colum Lynch, *US to Attend, but Not Join, ICC Conference*, WASH. POST, Nov. 17, 2009, p. A20.

<sup>141</sup> Quotation as reported by several news organizations. See e.g. Maliti, *supra* note 120; David Clarke, *U.S. to Attend Hague Court Meeting as Observer*, REUTERS, Nov. 16, 2009.

<sup>142</sup> Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, *Remarks to the 2009 ICC Assembly of States Parties*, Nov. 19, 2009.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Ambassador Rosemary A. DiCarlo, U.S. Alternate Representative to the United Nations for Special Political Affairs, *Remarks in the Security Council Chamber on Sudan and the ICC*, Dec. 4, 2009.

<sup>146</sup> Lynch, *supra* note 140.

within the ICC's jurisdiction, an issue that will be a topic of discussion at the 2010 Review Conference. His remarks reflected the continuing U.S. opposition to inclusion of such a crime within the Court's purview, stating that determining and dealing with aggression is the responsibility of the U.N. Security Council, and that decisions on ICC prosecution of aggression could draw the ICC "into a political thicket that could threaten its perceived impartiality."<sup>147</sup>

## **U.S. Actions in the United Nations Concerning the ICC**

On March 31, 2005, the U.N. Security Council by a vote of 11 in favor with four Members abstaining, including the United States, adopted Resolution 1593, which referred allegations of crimes committed by President Omar Hassan Ahmad al-Bashir of Sudan to the ICC prosecutor. On July 31, 2008, the United States abstained in a Council vote on Resolution 1828, which contained language implying that the Security Council would consider an Article 16 deferral of the Bashir prosecution under the Rome Statute.<sup>148</sup> The Obama Administration has opposed an Article 16 deferral of the prosecution of President Bashir.<sup>149</sup> Upon the issuance of the arrest warrant for President Bashir, Ambassador Susan Rice, U.S. Permanent Representative to the United Nations, released a statement calling for restraint from all parties in Darfur, and cooperation from the government of Sudan.<sup>150</sup> With regard to the enforcement of the warrant for the arrest of the President of Sudan, Ambassador Rapp stated in his confirmation hearing that it is the Obama Administration's intent to support ICC efforts to enforce the arrest warrant.<sup>151</sup>

The Obama Administration has also reversed a Bush Administration policy to oppose language in Security Council resolutions referring to the ICC.<sup>152</sup> On September 30, 2009, the U.N. Security Council, chaired by U.S. Secretary of State Hillary Clinton, unanimously adopted Resolution 1888, which contains a specific reference to sexual violence crimes listed in the Rome Statute.<sup>153</sup>

## **Obama Administration Statements Concerning the ICC**

Although the Obama Administration has expressed general support for the ICC and has stated that the ICC may sometimes service as a useful tool for prosecuting war crimes and other atrocities, the Administration has not announced a policy to automatically back every proposed ICC

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<sup>147</sup> Rapp, *supra* note 142.

<sup>148</sup> See David Scheffer, *The Security Council's Struggle Over Darfur and International Justice*, *JURIST*, Aug. 20, 2008, <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>.

<sup>149</sup> James B. Warlick, Assistant Secretary of State for International Organization Affairs, *U.S. Reengagement With the U.N.*, U.S. Department of State Foreign Press Center Briefing, Mar. 30, 2009; National Public Radio, Interview With Susan E. Rice, U.S. Ambassador to the United Nations, Mar. 6, 2009; Colum Lynch, *Sudan Retains Clout While Charges Loom*, *WASH. POST*, Feb. 9, 2009.

<sup>150</sup> Susan E. Rice, U.S. Ambassador to the United Nations, press release concerning issuance of ICC warrant for arrest of President Omar Hassan Ahmad al-Bashir of Sudan, Mar. 4, 2009, [http://www.usunnewyork.usmission.gov/press\\_releases/20090304\\_039.html](http://www.usunnewyork.usmission.gov/press_releases/20090304_039.html).

<sup>151</sup> Ambassador Rapp, responding to a question concerning the arrest warrant for Sudanese President al-Bashir, stated that "we will support efforts of the ICC to enforce its arrest warrant." U.S. Congress, Senate Committee on Foreign Relations, hearing to consider nominations, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., July 22, 2009 (text from *Federal News Service*; available from LexisNexis Congressional; accessed 3/10/2010).

<sup>152</sup> U.S. Department of State, "U.S. "Ready to Lead Once More" at United Nations," *America.gov*, Aug. 14, 2009; Susan E. Rice, U.S. Ambassador to the United Nations, *A New Course in the World, a New Approach at the U.N.*, remarks at New York University's Center for Global Affairs and Center on International Cooperation, Aug. 12, 2009.

<sup>153</sup> SC Res. 1888, U.N. Doc. S/RES/1888 (2009).

investigation and prosecution. Instead, as Ambassador Rapp stated before the ICC Assembly of States Parties, the United States will support international tribunals when they are necessary to achieve justice, but will continue to place “greatest importance” on helping individual States set up their own systems of justice to deal with the worst atrocities.<sup>154</sup> The Obama Administration has treated possible U.S. adherence to the ICC Statute as a separate issue from its willingness to support the Court’s work, continuing to cite the security of U.S. armed forces as a stumbling block to the U.S. joining as a State Party to the Rome Statute.

### *ICC’s Effectiveness and the United States as a Possible State Party*

Indications that the Obama Administration would shift U.S. policy toward the ICC were apparent early on, with Administration representatives characterizing the ICC as a body with potential to provide justice for victims of atrocities. In response to written questions from Senator John Kerry prior to her nomination hearing to become Secretary of State, Hillary Clinton stated that the Obama Administration would end U.S. “hostility” to the ICC, and would support the work of the ICC.<sup>155</sup> She stated that the ICC had so far operated with “professionalism and fairness,” citing the ICC’s work on cases in Darfur, Congo, and Uganda.<sup>156</sup> She explained that the Obama Administration would conduct a full review of the U.S. position on becoming a State Party to the Rome Statute, citing the continuing concern about the security of members of the U.S. armed forces deployed overseas. In January 2009, U.N. Ambassador Susan Rice stated that the ICC is “look[ing] to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda and Darfur.”<sup>157</sup>

In August 2009, Secretary of State Hillary Clinton spoke about the fact that the United States had not become party to the Rome Statute. Responding to arguments regarding an apparent contradiction between U.S. support for a possible ICC investigation into the massacres that marked the 2007 elections in Kenya and the U.S. refusal to become party to the Rome Statute, she stated it is “a great regret” that the United States is not a party to the Rome Statute, adding, “I think we could have worked out some of the challenges that are raised concerning our membership by our own government, but that has not yet come to pass.”<sup>158</sup> She asserted, however, that the United States will support the ICC in its investigations and prosecutions.

### *Continuing U.S. Preference for National Justice Systems and Special Tribunals*

The Obama Administration has continued to adhere to a policy of encouraging local and national justice systems to take up prosecutions of alleged atrocities, or to create special tribunals within communities where the violence has occurred. Ambassador Rapp, during his nomination hearing,

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<sup>154</sup> Rapp, *supra* note 142.

<sup>155</sup> See Hillary Clinton, written responses to questions for the record from Sen. John Kerry in advance of nomination hearing to become Secretary of State, January 2009, p. 66, <http://www.amicc.org/docs/KerryClintonQFRs.pdf>.

<sup>156</sup> *Id.* The ICC has thus far instituted proceedings for cases originating solely in sub-Saharan Africa (although it has conducted an investigation of paramilitaries in Colombia). For a detailed discussion of the ICC cases in Africa, see CRS Report RL34665, *International Criminal Court Cases in Africa: Status and Policy Issues*, by Alexis Arieff, Rhoda Margesson, and Marjorie Ann Browne.

<sup>157</sup> Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, statement before the U.N. Security Council, Jan. 29, 2009.

<sup>158</sup> Secretary of State Hillary Clinton, *Remarks at “Townterview” Hosted by CNN and KTN*, University of Nairobi, Nairobi, Kenya, Aug. 6, 2009, <http://www.state.gov/secretary/rm/2009a/08/126954.htm>.

stated that the Office for War Crimes Issues is committed to bringing individuals to account for war crimes and other atrocities. He expressed the U.S. government's continuing preference for local and specialized forms of justice for such crimes, but acknowledged the need for international efforts in some cases:

Our first preference should be for a process of accountability at the level that is closest to the affected communities. However, peace and reconciliation can best be assured by a justice system that is independent and has sufficient capacity to hold to account those bearing the greatest responsibility for atrocities. Achieving accountability in different situations will require varying levels of assistance and international participation.<sup>159</sup>

This statement seems to reflect the continuation of the view that the United States will cooperate with the ICC when it believes it is a useful forum for bringing criminals to justice, but that it will encourage other special courts or the use of national justice systems when feasible.<sup>160</sup> This position is, arguably, consistent with the principle of complementarity that underlies the ICC because it sees ICC involvement as limited to those situations when local justice systems lack the capacity to effectively deal with alleged atrocities.

This approach has been reinforced in Obama Administration comments concerning specific ICC investigations and other proceedings. With regard to the 2007 election violence in Kenya, Secretary Clinton in August 2009 stated that it is the hope of the United States that Kenya can use its own national justice system to bring alleged criminals to justice, therefore negating the need for the ICC to conduct prosecutions.<sup>161</sup> The United States has urged Kenya to create a special tribunal to prosecute alleged perpetrators of the violence, but has also urged Kenyan officials to cooperate fully with the ICC in its investigations into these criminal allegations.<sup>162</sup> If Kenya cannot set up a special tribunal, U.S. diplomatic officials have stated support for action by the ICC.<sup>163</sup>

In the Democratic Republic of the Congo (DRC), the ICC has brought charges against certain military commanders for war crimes, crimes against humanity, and sexual crimes. The United States has not opposed these cases, but has stated that other mechanisms of justice and accountability are needed in the DRC.<sup>164</sup>

### *ICC's Effect on Peace Settlements*

Some observers have criticized the ICC for effectively discouraging the settlement of armed conflicts, arguing that alleged perpetrators of war crimes and other atrocities will lose any incentive to bring hostilities to an end if an ICC warrant for their arrest is issued. In addition,

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<sup>159</sup> Nomination Hearing, *supra* note 151.

<sup>160</sup> Ambassador Rapp served as a prosecutor for two special courts, namely the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

<sup>161</sup> Secretary of State Clinton Delivers Remarks with Kenyan Foreign Minister Moses Wetangula, CQ Transcripts, August 5, 2009.

<sup>162</sup> See Remarks of U.S. Ambassador Michael Ranneberger to the Law Society of Kenya, "The Reform Agenda and Kenya's Historic Opportunity," October 30, 2009, <http://nairobi.usembassy.gov/root/pdfs/reformag.pdf>.

<sup>163</sup> U.S. Embassy Nairobi, "Ambassador Ranneberger Discusses U.S.-Kenyan Relations," CO.NX webchat transcript, August 12, 2009, <http://nairobi.usembassy.gov/root/pdfs/transcript090812.pdf>.

<sup>164</sup> Remarks by Ambassador Susan Rice on Women, Peace and Security, USU.N. Press Release, August 7, 2009, <http://www.america.gov/st/democracyhr-english/2009/August/20090807170949eaifas0.2164074.html>.

some have criticized the United States and others for negotiating with governments whose representatives are currently wanted by the ICC for alleged crimes. Ambassador Rapp has addressed these concerns, claiming that while the United States is currently working to achieve a peace settlement with the Sudanese government and rebel groups in Darfur, for example, such efforts are not “inconsistent with pressing for accountability for those responsible for serious violations of international humanitarian law.”<sup>165</sup> In addition, he stated that the indictments of Charles Taylor by the Special Court for Sierra Leone and of Joseph Kony by the ICC enhanced, rather than hindered, prospects for peace in Sierra Leone and Uganda, respectively.<sup>166</sup>

## **Bilateral Immunity Agreements**

As explained previously, the United States has executed BIAs with scores of countries, in the hope of limiting the ICC’s ability to request that States Parties surrender U.S. nationals to the ICC. The United States concluded the most recent BIA in 2007, with Montenegro. CRS has located the texts of 96 BIAs, but there are six additional BIAs that were reported but not located. A number of countries have concluded BIAs with the United States despite not being States Parties to the Rome Statute. These agreements remain in effect, although, as discussed above, their effectiveness under international law has been questioned.

## **Recent Congressional Action**

Although several provisions in legislation opposing U.S. adherence to and support for the ICC Statute remain in effect, recent Congresses have eliminated or refrained from renewing sanctions provisions that affect U.S. assistance for countries that are ICC States Parties. Although these actions could be interpreted as indicating a change in Congress’s position towards the ICC, the changes might also be interpreted as being primarily rooted in a concern that sanctions may have begun to hurt U.S. interests.

## **Section 2007 of the American Servicemembers’ Protection Act**

Enacted in 2002, Section 2007<sup>167</sup> of the American Servicemembers’ Protection Act (ASPA) prohibited U.S. military assistance to ICC States Parties. Such assistance was defined in Section 2013(13) of the act as assistance provided under chapter 2 (Military Assistance) or 5 (International Military Education and Training, or IMET) of part II of the Foreign Assistance Act of 1961, as amended (FAA, P.L. 87-195), as well as credit sales of defense articles or services under Section 23 of the Arms Export Control Act, as amended (AECA, P.L. 90-629; 22 U.S.C. § 2463).

Section 2007 contained a general prohibition on assistance, two bases for presidential waivers of that prohibition, and an exemption from the prohibition. Subsection (a) stated that effective one year after the date on which the Rome Statute enters into force, no U.S. military assistance may be provided to States Parties to the ICC. Subsection (b) provided that the President could waive, without prior notice to Congress, the prohibition with regard to a country if he determines and

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<sup>165</sup> Nomination Hearing, *supra* note 151.

<sup>166</sup> *Id.*

<sup>167</sup> Formerly codified at 22 U.S.C. § 7426.

reports to Congress that it is in the U.S. national interest to do so. Subsection (c) authorized the President to waive, again without prior notice to Congress, the prohibition with regard to a country if (1) the country entered into a BIA with the United States and (2) the President reported the agreement to Congress. Subsection (d) exempted NATO members, designated major non-NATO allies (MNNAs),<sup>168</sup> and Taiwan from the prohibition.

### **Nethercutt Amendment Provisions**

Provisions enacted in the 2005, 2006, and 2008 Foreign Operations Appropriations bills (so-called “Nethercutt Amendment” provisions<sup>169</sup>) contained similar funding prohibitions for Economic Support Fund (ESF) assistance to ICC States Parties:

- Section 574 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005 (FY2005 Appropriations Act; Division D of P.L. 108-447; 118 Stat. 3027) prohibited Economic Support Fund (ESF) assistance to ICC States Parties for funds available through September 30, 2006.
- Section 574 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006 (FY2006 Appropriations Act; P.L. 109-102; 119 Stat. 2229) contained the same general ESF prohibition for funds available through September 30, 2007.<sup>170</sup>
- Section 671 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (FY2008 Appropriations Act; Division J of P.L. 110-161; 121 Stat. 2354) prohibited ESF assistance for ICC States Parties with regard to funds available through September 30, 2009.

Each Nethercutt Amendment provision differed somewhat from the other two. Section 574 of the FY2005 Appropriations Act contained a general prohibition on ESF assistance, two bases for a Presidential waiver of the prohibition, and an exemption from the prohibition. Subsection (a) prohibited the use of ESF funds to assist a country that is a party to the ICC and that has not entered into an Article 98 agreement with the United States. Subsection (b) authorized the President to waive, without prior notice to Congress, this prohibition for NATO members, MNNAs, or Taiwan, if he determines and reports to Congress that it is important to U.S. *national security interests* to do so (emphasis not in legislation).<sup>171</sup> Subsection (c) allows the President to waive, without prior notice to Congress, the prohibition with regard to a country if the country entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the ICC from proceeding against U.S. personnel in such country, and if the President reports to Congress on the agreement. Subsection (d) provided that the prohibition does not apply to countries otherwise eligible for assistance under the Millennium Challenge Act of 2003 (MCA, Title VI of Division D of the Consolidated Appropriations Act, 2004; P.L. 108-199).

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<sup>168</sup> The current major non-NATO allies (MNNAs) are Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, Thailand, and the Republic of Korea. 22 C.F.R. § 120.32.

<sup>169</sup> Former Representative George Nethercutt first proposed an amendment to the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005 containing the original provision prohibiting ESF assistance to ICC States Parties.

<sup>170</sup> This provision applied to continuing appropriations made in FY2008.

<sup>171</sup> Compare Section 2007(b) of ASPA, which provided for a waiver under a determination of national interest, not national *security* interest (emphasis not in legislation). In addition, under Section 574, NATO members, MNNAs, and Taiwan may be eligible for waiver, but are not outright exempt from the prohibition.

Section 574 of the FY2006 Appropriations Act contained the general prohibition on ESF assistance, two bases for a Presidential waiver of the prohibition, an exemption from the prohibition in that section, and an additional exemption from the prohibition contained in the Nethercutt Amendment provision from the 2005 Act. Subsection (a) provided the identical prohibition on ESF funds to ICC States Parties without an Article 98 agreement with the United States. Subsection (b) also provided for a Presidential determination justifying a waiver of the prohibition, but it required prior notice to Congress, included “such other country as he may determine” along with NATO members, MNNAs, and Taiwan as eligible to receive the waiver, and changed the standard from a determination of national *security* interest to one of national interest. Subsection (c) of the FY2006 Act provision is similar to that of FY2005, allowing the President to waive if a country entered an Article 98 agreement, except this waiver also became dependent on prior notice to Congress. Subsection (d) contained the identical exemption from the prohibition for MCA-eligible countries. Subsection (e) exempted democracy and rule of law programs and activities from the FY2005 Nethercutt Amendment’s prohibition on ESF funds to ICC States Parties.

Subsections (a) through (d) of Section 671 of the FY2008 Appropriations Act were identical to those of Section 574 of the FY2006 Appropriations Act, with the same general prohibition; national interest waiver eligibility for NATO, MNNAs, Taiwan, and “such other” countries as the President may determine; Article 98 agreement waiver; and MCA-eligible country exemption. There was no further subsection concerning previous Nethercutt Amendment provisions.

### **Modifications to the ASPA/Nethercutt Sanctions Policy**

Although Section 2007 of ASPA and the Nethercutt Amendment provisions articulated a strong policy of opposition to the ICC, in line with the U.S. policy toward the Court during much of the Bush Administration, questions from within the executive branch on the costs and benefits of such sanctions surfaced as early as 2006. Secretary of State Condoleezza Rice was quoted as describing the sanctions as akin to “shooting ourselves in the foot” when they prohibited military aid to key U.S. allies. The 2005 Quadrennial Defense Review characterized APSA’s restrictions as a burden on the U.S. military in its efforts to combat terrorism. In addition, President Bush granted nearly 90 waivers of ASPA or Nethercutt prohibitions during his Administration on national interest grounds where no BIA was in place, revealing a substantial need to continue military and ESF assistance to U.S. partners that were also ICC States Parties. A number of Members of Congress shared the concerns of certain Bush Administration officials.

In 2006, Congress amended Section 2013(13)(A) of the ASPA to remove IMET funding from the definition of U.S. military assistance (Section 1222 of Division A of the John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109-364). In 2007, Section 1212(a) of the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181; 122 Stat. 371) repealed Section 2007 of ASPA altogether, thus ending the prohibition on FAA military assistance and AECA military credit sales for States Parties to the ICC. After being included in the previous three bills, Nethercutt Amendment language was not included in the most recent foreign operations appropriations legislation (Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009; Division H of P.L. 111-8). At present, therefore, ICC-related prohibitions on military and ESF assistance are no longer operative.

## **Legislation Proposed in the 111<sup>th</sup> Congress**

To date, no bills have been introduced in the current Congress relating to the ICC or U.S. becoming party to the Rome Statute, or participating in or cooperating with the Court. Members in the House have proposed non-binding resolutions concerning the ICC as it relates to alleged atrocities.

**H.Res. 867:** This resolution characterizes the Goldstone Report concerning the 2008-2009 conflict in Gaza as biased and unbalanced in its criticism of Israel's actions during that conflict. It calls on President Obama to veto "any United Nations Security Council resolution that endorses the contents of this report, seeks to act upon the recommendations contained in this report, or calls on any other international body to take further action regarding this report." The Goldstone Report recommended that the Security Council refer the Gaza case to the ICC prosecutor to investigate allegations of war crimes if no prosecutions by national justice systems are undertaken within 6 months. It passed the House on November 3, 2009.

**H.Res. 241:** This resolution commends the ICC for issuing a warrant for the arrest of Omar Hassan Ahmad al-Bashir, President of the Republic of the Sudan. It was referred to the House Foreign Affairs Committee on March 12, 2009.

**H.Con.Res. 97:** This concurrent resolution calls on the President to (1) support U.N. Security Council referrals of atrocities to the ICC; (2) state as U.S. policy a commitment to support the Rome Statute and to reactivate the United States as signatory to the Statute; (3) cooperate with ICC investigations unless it is not in the U.S. national interest; (4) participate as observer at the annual ICC Assembly of States Parties; (5) and grant waivers, based on national interest, of prohibitions against assistance and cooperation with the ICC. It was referred to the House Foreign Affairs Committee on April 2, 2009.

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