

# ESCAPE OUT THE BACK DOOR OR CHARGE IN THE FRONT DOOR: U.S. REACTIONS TO THE INTERNATIONAL CRIMINAL COURT

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**Abstract:** In the last days of his administration, former President Clinton made the United States a signatory to the Rome Treaty for the International Criminal Court, an unexpected move that allowed the United States to continue to participate in the shaping of the court. However, the signature neither indicated approval of the court nor the United States' willingness to be a full participant in it. Instead, many arguments against the participation of the United States exist, and the chances of ratification by the Congress are slim. This Note analyzes the United States' attempts to exempt itself from the Rome Treaty and the arguments against the United States' participation. The Note argues that the United States' participation in the ICC is necessary and appropriate to its position in the international community and supports the United States' full participation through ratification of the Treaty.

## INTRODUCTION

In February 1999, United Nations (U.N.) Secretary-General Kofi Annan told delegates assembled from countries throughout the world, "[t]he best chance humankind had ever had to end the culture of impunity was within grasp . . . We must not let it fall."<sup>1</sup> Annan made his statement during the first meeting of the U.N. Preparatory Commission for the International Criminal Court (PrepCom) in order to urge nations to sign the treaty establishing the International Criminal Court (ICC or the Court).<sup>2</sup> Surely no country could take issue with the establishment of a permanent, impartial, international court to try those accused of genocide, war crimes, crimes of aggression, and

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<sup>1</sup> U.N. *Preparatory Commission for International Criminal Court Begins First Session*, M2 PRESSWIRE, Feb. 17, 1999, available at 1999 WL 12605515 [hereinafter *First Session*].

<sup>2</sup> See *id.*

crimes against humanity.<sup>3</sup> In particular, a country with a history of commitment to trying war criminals, a country whose own legislative body voted in 1994 "to encourage the establishment of an International Criminal Court within the United Nations system," would seem especially disposed towards supporting such a court.<sup>4</sup> Despite the U.S. Senate's vote in support of the ICC,<sup>5</sup> and President Clinton's call in 1997 for the establishment of such a court,<sup>6</sup> the United States refused to sign the Rome Statute for the International Criminal Court (RSICC or the Treaty) in 1998.<sup>7</sup> This refusal put the United States in the company of states such as Iraq and China, other countries that refused to sign the Treaty at the Rome meeting.<sup>8</sup> Former President Clinton did sign the Treaty at the eleventh hour, allowing the United States to continue to influence the development of the court.<sup>9</sup> Clinton vowed not to send the Treaty to Congress for ratification, however, without major revisions, and recommended that his successor follow the same course of action.<sup>10</sup>

One of the United States' main arguments against becoming a full participant in the ICC is that an overzealous prosecutor who disagrees with U.S. policies could bring U.S. military personnel before the court.<sup>11</sup> The United States' desire to protect U.S. service members from ICC prosecution is so strong that the House of Representatives passed, and the Senate is considering, the American Service Member's Protection Act of 2001 (ASPA), which would withhold aid to

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<sup>3</sup> See Benjamin Ferencz, *A Prosecutor's Personal Account: From Nuremberg to Rome*, 52 J. INT'L AFF. 455, 455 (1999), available at 1999 WL 32962031.

<sup>4</sup> Jim Anderson, *U.S. Shies Away From International Criminal Court*, DEUTSCHE PRESSE-AGENTUR, July 18, 1999, available at WL 7/18/99 DCHPA 22:33:00.

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

<sup>6</sup> Ferencz, *supra* note 3.

<sup>7</sup> *U.S. at Odds with Global Criminal Court*, DESERET NEWS, June 12, 2000, at A02, available at 2000 WL 22773324 [hereinafter *U.S. at Odds*].

<sup>8</sup> *Id.*

<sup>9</sup> See *Public Statement on the Rome Treaty on the International Criminal Court*, PUB. PAPERS OF THE PRESIDENTS, available at LEXIS, News Group File [hereinafter *Public Statement*]; *State Department Regular Briefing*, FED. NEWS. SERV., Jan. 2, 2001, available at LEXIS, News Group File [hereinafter *Briefing*].

<sup>10</sup> See *Public Statement*, *supra* note 9.

<sup>11</sup> See Anderson, *supra* note 4; Elizabeth Neuffer, *War Crimes Tribunal Adopted as U.S. Votes 'No'*, BOSTON GLOBE, July 18, 1998, at A1, available at 1998 WL 9143924; Jeremy Rabkin, *This Court Would be Criminal; Congressional Republicans' Just War on the International Criminal Court*, WKLY. STANDARD, June 26, 2000, at 19, available at LEXIS, News Group File.

countries that are parties to the ICC.<sup>12</sup> This bill could cripple, if not effectively destroy, the ICC.<sup>13</sup>

This Note discusses the current status of the ICC and the United States' attempts to be exempted from it, both before and after the United States became a signatory to the Treaty. Part I discusses the background that led to the convening of U.N. delegates in Rome in 1998. Part II explains the U.S. position on the ICC and its desire for exemption, including its efforts at the June, 2000 meeting of Prep-Com. It also examines the ASPA and its effect on the ICC. Part III argues that the United States should ratify the Treaty and that the ASPA should not pass Congress. Finally, this Note argues that the United States must heed the will of the international community, abandon its policy of unilateral action in international affairs, and participate fully in the ICC.

## I. HISTORY OF THE INTERNATIONAL CRIMINAL COURT

### A. *Early Attempts to Create an International Criminal Court*

Attempts to create an international criminal court have been made for centuries.<sup>14</sup> One of the first cited international courts tried Peter Von Hagenbush in 1474 for crimes against "God and man" during his military occupation of a civilian community in Austria.<sup>15</sup>

The attempts were more focused in the years between the First and Second World Wars. The 1919 Treaty of Versailles called for the prosecution of war criminals, permitting ad hoc tribunals to adjudicate alleged war crimes.<sup>16</sup> While no international tribunals were established pursuant to the Treaty of Versailles, there were some national prosecutions in German courts.<sup>17</sup> Article 277 of the Treaty of Versailles specifically called for the prosecution of William II of Hohenzollern, the Emperor of Germany.<sup>18</sup> Other articles allowed for expanded prosecution of other individuals who shared responsibility for

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<sup>12</sup> *Delay Amendment to Protect American Service Members Passes Overwhelmingly*, PR NEWSWIRE, May 10, 2001, available at LEXIS, News Group File [hereinafter *Amendment Passes*]; see Rabkin, *supra* note 11, at 19.

<sup>13</sup> See *Amendment Passes*, *supra* note 12.

<sup>14</sup> See JEFFREY S. MORTON, THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS 55-62 (2000).

<sup>15</sup> *Id.* at 55-56.

<sup>16</sup> M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A DOCUMENTARY HISTORY 6-7 (1998); MORTON, *supra* note 14, at 56.

<sup>17</sup> BASSIOUNI, *supra* note 16, at 6-7.

<sup>18</sup> MORTON, *supra* note 14, at 56.

the war.<sup>19</sup> Out of a list of 896 drawn up by the Allies, however, Germany only tried twelve.<sup>20</sup> The German Kaiser escaped prosecution by fleeing to the Netherlands, where the Dutch refused to extradite him.<sup>21</sup>

The Treaty of Sevres, ending the war with Turkey in 1920, also called for the prosecution of war criminals, but no trials ever took place.<sup>22</sup> National prosecutions were held in other countries, such as Canada, France, and Israel.<sup>23</sup> The League of Nations also tried to establish an international court to enforce the 1937 Terrorism Convention, but the eruption of several world crises prevented it from doing so.<sup>24</sup>

### B. Post-World War II Developments

Efforts to establish an international criminal court became more widespread in scope in the years following World War II.<sup>25</sup> After World War II, the Allies advocated the punishment of individuals responsible for war crimes.<sup>26</sup> The International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East in Tokyo prosecuted German and Japanese individuals for "crimes against peace," "crimes against humanity," and "war crimes."<sup>27</sup> There were questions, however, about the impartiality of the judges, who were drawn from Allied countries, and about the fairness of these tribunals' retroactive jurisdiction.<sup>28</sup> While these trials began the process of applying international law to protect fundamental human rights,<sup>29</sup> they also demonstrated the need for a more permanent, authoritative body of laws to facilitate effective and systematic prosecution of war criminals.<sup>30</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 56–57.

<sup>22</sup> *Id.* at 57.

<sup>23</sup> BASSIOUNI, *supra* note 16, at 8.

<sup>24</sup> *Id.* at 10–11. These included the Spanish Civil War, Italian invasions, and German aggressions. *See id.*

<sup>25</sup> *See* BASSIOUNI, *supra* note 16, at 10–11; MORTON, *supra* note 14, at 57–60; *see also* Ferencz, *supra* note 3, at 455.

<sup>26</sup> MORTON, *supra* note 14, at 30–31.

<sup>27</sup> BASSIOUNI, *supra* note 16, at 7.

<sup>28</sup> MORTON, *supra* note 14, at 31.

<sup>29</sup> *See generally* Ferencz, *supra* note 3.

<sup>30</sup> MORTON, *supra* note 14, at 31.

The creation of the International Criminal Tribunal for the former Yugoslavia at the Hague and the International Criminal Tribunal for Rwanda at Arusha (the Tribunals) reflected the desire of the international community to use international tribunals to prosecute those responsible for violating the laws of war.<sup>31</sup> The Tribunals were undermined, however, by the fact that they had difficulty arresting those indicted.<sup>32</sup> This ineffectiveness resulted in decreased public confidence in the Tribunals, and prevented them from serving as a deterrent to other offenders.<sup>33</sup> The U.N. Security Council reached a point of "tribunal fatigue," as the time and effort required to support the Tribunals in order to ensure their credibility and effectiveness strained the resources of the U.N.<sup>34</sup>

The idea of an international criminal court had been discussed in the U.N. throughout the years between World War II and the 1998 Rome Convention.<sup>35</sup> Between 1947 and 1989, General Assembly-mandated committees sought to formulate the principles of international law developed at Nuremberg and prepare a draft code of offenses against "the peace and security of mankind."<sup>36</sup> Another committee was charged with developing a draft statute for the establishment of an international criminal court.<sup>37</sup> These initiatives failed to coalesce, however, until 1989, when Trinidad and Tobago suggested the formation of an international criminal court to address drug trafficking problems.<sup>38</sup> At that point, work on the project intensified, leading to a conference in Rome from June 15 through July 17, 1998, which resulted in the adoption of the RSICC.<sup>39</sup>

The RSICC, which was adopted by 120 signatories,<sup>40</sup> provides that the ICC, headquartered in the Netherlands, is to prosecute four core crimes: genocide, war crimes, crimes against humanity, and crimes of aggression.<sup>41</sup> Unlike the International Court of Justice (ICJ) in the Hague, which has jurisdiction only over disputes between nations, the

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<sup>31</sup> *Id.* at 57.

<sup>32</sup> *Id.* at 62.

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

<sup>34</sup> BASSIOUNI, *supra* note 16, at 10.

<sup>35</sup> *See generally id.* at 10–19.

<sup>36</sup> *Id.* at 11–12.

<sup>37</sup> *Id.* at 12.

<sup>38</sup> *Id.* at 16.

<sup>39</sup> *See* BASSIOUNI, *supra* note 16, at 18.

<sup>40</sup> *U.S. at Odds*, *supra* note 7.

<sup>41</sup> Ferencz, *supra* note 3.

ICC would have jurisdiction over individuals.<sup>42</sup> The Treaty remained open for signatures until December 31, 2000, and enters into force after sixty nations have ratified it.<sup>43</sup> Before December 31, states were able to sign the Treaty without ratifying it; after December 31, ratification is required in order to sign.<sup>44</sup> In the three years since the RSICC was signed, over forty nations have ratified it.<sup>45</sup> The United States was one of seven nations at the conference in Rome that voted against the RSICC.<sup>46</sup>

## II. U.S. FEARS AND REACTIONS TO THE ICC

The international community created the ICC because the continuing practice of establishing temporary ad hoc tribunals was viewed as an ineffective method of assuring universal justice.<sup>47</sup> Judging from the problems of the Tribunals for Yugoslavia and Rwanda, it became clear that a permanent, effective court with arrest power was needed in order to provide notice of the law and to deter international crimes.<sup>48</sup> The ICC can be effective, however, only if the type of individuals it seeks to prosecute, such as the former president of Serbia, Slobodan Milosevic,<sup>49</sup> believe that they can be caught and brought to trial.<sup>50</sup>

### A. U.S. Efforts in ICC Development

The opinion of the international community is that, without the participation of the United States, the ICC will be "maimed at birth."<sup>51</sup>

<sup>42</sup> Chalmers Johnson, *When Might Makes Wrong/Americans Are Bold. We Are Brash. And to the Rest of the World, We Are Clueless.*, S.F. CHRON., Oct. 8, 2000, at 1Z1, available at 2000 WL 6493506.

<sup>43</sup> *First Session*, *supra* note 1; Holger Jensen, *Bush Facing International Criticism on Trio of Foreign Policy Issues*, ROCKY MTN. NEWS, July 14, 4001, at 7A, available at LEXIS, News Group File.

<sup>44</sup> *ICC Prep Com Shows Progress Despite U.S. Hesitation*, INT'L ENFORCEMENT L. REP., Jan. 2001, available at LEXIS, News Group File.

<sup>45</sup> *At Eighth Session of Preparatory Commission for International Criminal Court, Four Working Groups Announce Completion of Assignments*, M2 PRESSWIRE, Oct. 8, 2001, available at 2001 WL 28645411 [hereinafter *Eighth Session*].

<sup>46</sup> Ferencz, *supra* note 3.

<sup>47</sup> *Id.*

<sup>48</sup> See e.g., Ferencz, *supra* note 3; MORTON, *supra* note 14, at 62.

<sup>49</sup> See *Annals of Justice: In What Court?*, TIME, Oct. 16, 2000, at 58, available at 2000 WL 25227420.

<sup>50</sup> See generally *Rush to Judgment*, TIMES (London), Aug. 26, 2000, available at LEXIS, News Group File.

<sup>51</sup> *Id.*

Most nations desire the inclusion of the United States because it alone has the ability to ensure that criminals sought by the ICC are brought to trial.<sup>52</sup> The United States' participation in the ICC, therefore, would provide the credibility and the strength the ICC needs to be effective.<sup>53</sup>

The United States, however, did not sign the Treaty until December 31, 2000,<sup>54</sup> and now threatens not to ratify and to withdraw its signature.<sup>55</sup> The U.S. delegation at Rome offered to sign if U.S. military personnel could be indicted only with the permission of the United States, a proposition that was rejected by the other nations.<sup>56</sup> What concerns the United States is the possibility of U.S. or NATO peacekeepers being brought before the court if a particular prosecutor does not agree with U.S. policy or motives.<sup>57</sup>

To ensure that this type of prosecution does not occur, the United States sought, unsuccessfully, to require that all ICC cases be referred by the U.N. Security Council, of which the United States is a member and, therefore, has veto power.<sup>58</sup> With this power, it would be less likely that U.S. nationals would be prosecuted.<sup>59</sup> According to the United States, Security Council initiation would ensure that only the most heinous crimes, such as those committed in Nazi Germany and by Saddam Hussein, would be indicted.<sup>60</sup> These crimes are of such a magnitude, however, that it would be highly unlikely that a U.S. service member could be charged.<sup>61</sup>

The RSICC allows an ICC prosecutor to start investigations on his own initiative, subject to a pre-trial conference with the judges of the court.<sup>62</sup> The Security Council then can interrupt the process by seek-

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<sup>52</sup> See *id.*

<sup>53</sup> See generally *U.S. at Odds*, *supra* note 7.

<sup>54</sup> *Public Statement*, *supra* note 9.

<sup>55</sup> See *Bush Administration Ponders Position Towards International Criminal Court*, INT'L ENFORCEMENT L. REP., June 2001, available at LEXIS, News Group File [hereinafter *Bush Administration*].

<sup>56</sup> Anderson, *supra* note 4.

<sup>57</sup> See Rabkin, *supra* note 11.

<sup>58</sup> Brett D. Schaefer, Heritage Foundation Executive Memorandum No. 537, *The International Criminal Court: Threatening U.S. Sovereignty and Security* (July 2, 1998), available at <http://www.nyu.edu/globalbeat/pubs/shaefer070298.html>; see Fred Hiatt, *The Court of No Resort*, WASH. POST, July 2, 2001, at A17, available at LEXIS, News Group File.

<sup>59</sup> Schaefer, *supra* note 58.

<sup>60</sup> Johnson, *supra* note 42; Neuffer, *supra* note 11.

<sup>61</sup> See Johnson, *supra* note 42.

<sup>62</sup> Neuffer, *supra* note 11; Susan Riggs, *The Risks New World Court Poses for the United States*, RECORD (New Jersey), Aug. 31, 2000, at L11, available at LEXIS, News Group File.

ing a one-year, non-renewable period of deferment.<sup>63</sup> The Security Council also has the right to quash any indictment, subject to the veto of any permanent Security Council member.<sup>64</sup>

Concessions were made in the Treaty's development so as to allay U.S. fears of unrestricted prosecution of its nationals.<sup>65</sup> The ICC was given automatic jurisdiction over genocide and crimes against humanity, but not over war crimes.<sup>66</sup> Since war crimes are the most likely category under which U.S. nationals might be charged, this provision would ensure that the United States would have the ability to prosecute its own citizens without fear that these nationals, specifically service members stationed abroad, would be brought first before the ICC.<sup>67</sup>

Despite these concessions, the United States has not changed its position.<sup>68</sup> Instead, the United States began to fight a "rearguard action" to exempt itself and other non-signatories, including Iraq and China, from the jurisdiction of the ICC.<sup>69</sup> It did so by trying to manipulate provisions in the emerging court rules, particularly Article 98 of the Rules of Procedure of the RSICC.<sup>70</sup>

During the three-week meeting of PrepCom held in June 2000, debate focused on a U.S. proposal to rewrite Article 98 in order to lay the groundwork to "[expand] exemption from prosecutions by way of unspecified 'international agreements.'"<sup>71</sup> The language proposed by the United States for Article 98 read, "[t]he [c]ourt shall proceed with a request for surrender or an acceptance of a person into the custody of the [c]ourt only in a manner consistent with international agreement applicable to the surrender of the person."<sup>72</sup>

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<sup>63</sup> Neuffer, *supra* note 11.

<sup>64</sup> Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July/Aug. 2001, available at LEXIS, News Group File.

<sup>65</sup> Neuffer, *supra* note 11.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

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

<sup>69</sup> Barbara Crossette, *U.S. Seeks Exemption From New World Court, U.N. Meets Today on Organizing Issues*, S.D. UNION-TRIB., June 12, 2000, at A2.

<sup>70</sup> *See* Jim Wurst, *Politics: Disagreement Over Meaning of Criminal Court Compromise*, INTER PRESS SERV., July 2, 2000, available at LEXIS, News Group File.

<sup>71</sup> Crossette, *supra* note 69.

<sup>72</sup> Bruce Zagaris, *PrepCom to Finish Work on Procedure and Elements of Crime While Status of U.S. to the Court Undecided*, INT'L ENFORCEMENT L. REP., July 2000, available at LEXIS, News Group File.



Thirty-nine of the forty-five delegates felt that this language was incompatible with the objects and purposes of the Treaty.<sup>73</sup> Compromise was reached, and the Treaty was amended to read as follows:

2. The [c]ourt may not proceed with a request for the surrender of a person without the consent of a sending [s]tate 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 [s]tate is required prior to the surrender of a person of the [s]tate to the [c]ourt.<sup>74</sup>

While the United States claimed victory in this rewording, opponents of U.S. exemption stated that the United States achieved not a road to exemption, but “a winding alley that will lead back to the original meaning of the Statute.”<sup>75</sup>

According to the United States, the proposal was not an amendment or a modification of the RSICC, but instead was a “procedural fix,” consistent with the Treaty, which would allow the United States to be a “good neighbor” to the court.<sup>76</sup> While the United States would not be a member of the ICC, it could assist the court as it assisted the Yugoslav and Rwanda Tribunals.<sup>77</sup> The U.S. proposal would allow it and other non-signatory nations to continue to fulfill their international responsibilities.<sup>78</sup> However, the proposal also would ensure that the nationals of U.S.-dubbed “irresponsible nations,” those rogue nations for which the ICC was created, still would be subject to the court’s jurisdiction, presumably because the court would not enter into any sort of “international agreement” with those nations.<sup>79</sup>

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<sup>73</sup> Wurst, *supra* note 70.

<sup>74</sup> *Report of the U.N. Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Rules of Procedure and Evidence*, at 89, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000) [hereinafter Rule 195].

<sup>75</sup> Betsy Pisik, *No War Criminals Here*, WASH. TIMES, Nov. 27, 2000, at A16, available at LEXIS, News Group File.

<sup>76</sup> Secretary of State Madeleine K. Albright, Remarks at the “Conflicts and War Crimes: Challenges for Coverage” Seminar for Editors Sponsored by The Crimes of War Project and The Freedom Forum (May 5, 2000), available at <http://secretary.state.gov/www.statements/2000/000505.html>.

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

<sup>78</sup> Press Statement, U.S. Department of State, Office of the Spokesman, U.S. Initiative on the International Criminal Court (June 13, 2000), available at <http://secretary.state.gov/www/briefings/statements/2000/ps000613a.html>.

<sup>79</sup> See *id.*

The second prong of the U.S. attempt at exemption dealt with those international agreements, and was introduced at the November meeting of PrepCom,<sup>80</sup> held from November 27 to December 8, 2000.<sup>81</sup> This meeting was the last in which nations that had not signed the Treaty were able to participate; in effect, it was the United States' last opportunity to get its nationals exempted through the language of the Treaty itself.<sup>82</sup>

At this meeting, the committee considered the Relationship Agreement between the court and the U.N. (Relationship Agreement).<sup>83</sup> The Relationship Agreement will deal with the requirements on U.N. aid workers, peacekeepers, and officials to share information and evidence with the ICC.<sup>84</sup> The Relationship Agreement was not finalized at that session, however, a finalized draft was agreed on during the next meeting of PrepCom in September and October of 2001.<sup>85</sup>

The U.S. proposals for this agreement read as follows:

The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the overall direction of a U.N. Member State, and such directing State has so acknowledged, only the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.<sup>86</sup>

However, despite its commitment to exemption at the February/March 2001 PrepCom, the United States did not pursue exemp-

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<sup>80</sup> Wurst, *supra* note 70.

<sup>81</sup> *U.S. Wants Deal Exempting Americans From U.N. Court by Dec. 31*, DOW JONES INT'L NEWS, Oct. 18, 2000, available at WL 10/18/00 DJINS 23:30:00.

<sup>82</sup> See Wurst, *supra* note 70.

<sup>83</sup> *Id.*

<sup>84</sup> Pisik, *supra* note 75.

<sup>85</sup> See Report of the Preparatory Commission for the International Criminal Court, *Proceedings of the Preparatory Commission at its Seventh Session*, at 16, U.N. Doc. PCNICC/2001/L.1/Rev.1/Add.1 (2001); *Eighth Session*, *supra* note 45.

<sup>86</sup> *Proposed Text of Rule to Article 98 of the Rome Treaty*, CICC, available at <http://www.igc.apc.org/icc/html/U.S.2000.html> (last visited Sept. 25, 2000).

tion in the development of the Relationship Agreement, choosing only to take part in the working group on aggression.<sup>87</sup> Regarding its involvement, the U.S. representative stated only that “the U.S. [did] not support the ICC; the U.S. was participat[ing] only in the aggression discussion because of the role of the Security Council; prior efforts to meet the U.S. needs had proved futile; and the U.S. is undertaking a comprehensive review of the ICC issue.”<sup>88</sup>

### B. U.S. Legislation

In anticipation of the U.S. delegation’s failure to exempt U.S. nationals from the jurisdiction of the ICC, Congress prepared a back-door escape. In June, 2000, the ASPA was introduced into both houses of Congress.<sup>89</sup> While Congress took no action at that time, the House of Representatives passed the ASPA in March 2001 as an amendment to the Foreign Relations Authorization Act, Fiscal Years 2002 and 2003.<sup>90</sup>

The ASPA would keep U.S. nationals from ICC jurisdiction essentially by killing the ICC.<sup>91</sup> The ASPA has several provisions to ensure U.S. exemption.<sup>92</sup> U.S. courts are prohibited from aiding efforts to extradite any U.S. national to the ICC, and U.S. intelligence is prohibited from sharing information with the ICC<sup>93</sup> that either would help to exonerate U.S. nationals or to prosecute other war criminals.<sup>94</sup> The ASPA also cuts off all military and financial aid to any country that ratifies the RSICC, except for NATO and other unnamed major allies.<sup>95</sup> The President is authorized in advance to use “all means necessary and appropriate” to secure the release of any U.S. national being held for trial by the ICC.<sup>96</sup> The bill authorizes the rescue service for NATO and other major allies as well.<sup>97</sup> This provision has led to the ASPA being nicknamed the “Netherlands Invasion Act,” as it practi-

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<sup>87</sup> See *Bush Administration*, *supra* note 55.

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

<sup>89</sup> Rabkin, *supra* note 11.

<sup>90</sup> *Amendment Passes*, *supra* note 12; see H.R. 1646, 107th Cong. § 635 et. seq. (2001).

<sup>91</sup> Rabkin, *supra* note 11.

<sup>92</sup> See *id.*

<sup>93</sup> *Id.*; H.R. 1646 § 634(b)–(d).

<sup>94</sup> *Kofi Annan Urges Ratification of Rome Statute as U.S. Deliberates its Position*, INT’L ENFORCEMENT L. REP., Nov. 2000, available at LEXIS, News Group File [hereinafter *U.S. Deliberates Its Position*].

<sup>95</sup> H.R. 1646 § 637(a)–(c); Rabkin, *supra* note 11.

<sup>96</sup> H.R. 1646 § 638(a); Rabkin, *supra* note 11.

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

cally authorizes the United States to send troops to the Hague to rescue U.S. nationals awaiting trial there.<sup>98</sup>

### III. EVALUATION OF U.S. PROPOSALS

The United States has striven for a world based on a balance between military strength and international cooperation through democracy and the rule of law.<sup>99</sup> In accordance with that goal, it appears that U.S. opposition to the ICC draws its justification from an idea that the United States is above international law because of its myriad responsibilities in the world.<sup>100</sup> While the United States does have military responsibilities to the international community, these responsibilities do not justify its opposition to and refusal to participate in the ICC. U.S. opposition to both the RSICC, in the form of its proposals for exemption and refusal to ratify, and the ASPA is misplaced and has resulted in damage to the United States' reputation as protector of the world, as well as to its ability to protect itself.

#### A. U.S. Proposals for Exemption from ICC Jurisdiction

Since the RSICC gives countries the option of trying their citizens in their own courts, legal experts are puzzled over U.S. opposition to the ICC.<sup>101</sup> The United States has court-martialed its own soldiers in the past for criminal activities, and there is no reason to believe it would not continue to do so.<sup>102</sup> The United States can try almost all war crimes committed by U.S. nationals in its own courts, and even could enact a law requiring courts to hear cases of nationals who allegedly have violated the law of nations as stated in the RSICC.<sup>103</sup> If U.S. citizens acting as peacekeepers were ever to commit indictable crimes, as did peacekeepers in Ghana,<sup>104</sup> and the United States did not try them, the United States would suffer a major affront to its

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<sup>98</sup> Dave McIntyre, *Prosecute or Invade The Hague—That's the Question*, DEUTSCHE PRESSE-AGENTUR, Sept. 15, 2000, available at LEXIS, News Group File.

<sup>99</sup> Prepared Testimony of the Lawyers Committee for Human Rights Before the House Committee on International Relations, FED. NEWS SERV. (July 25, 2000), available at LEXIS, News Group File [hereinafter Lawyers].

<sup>100</sup> Johnson, *supra* note 42.

<sup>101</sup> Crossette, *supra* note 69.

<sup>102</sup> See *id.*

<sup>103</sup> Letter from Benjamin Ferencz, *Fears About an International Criminal Court Are Misguided*, N.J. LAW J., June 19, 2000, available at LEXIS, News Group File.

<sup>104</sup> Geoffrey Robertson, *Paradox of U.S. Role in Global Justice*, CANBERRA TIMES, July 20, 2000, at 9, available at 2000 WL 23496222. Ghana peacekeepers in Rwanda handed Tutsi officials whom they were guarding over to opposition death squads. *Id.*

status as a nation committed to justice, thus making it unlikely that such an omission would occur.<sup>105</sup>

The RSICC supports domestic prosecution of war criminals.<sup>106</sup> It contains a provision allowing signatory countries to keep their nationals from prosecution for war crimes for seven years, allowing them sufficient time to conduct those trials domestically.<sup>107</sup> Countries that do not sign the Treaty do not receive the benefit of this privilege.<sup>108</sup>

Finally, the ICC is not retroactive. Rather, it can deal only with events that happen after the RSICC comes into force,<sup>109</sup> estimated to be sometime in 2002.<sup>110</sup> Therefore, any past activity by the U.S. military that concerns the U.S. government would not fall under the jurisdiction of the ICC.<sup>111</sup> Thus forewarned, the U.S. military could develop future assignments with an eye towards the ICC.<sup>112</sup> Again, the probability of a U.S. service member being involved in a crime of the magnitude required for an ICC investigation is not very high.<sup>113</sup> For these reasons, the U.S. proposals for exemption through Article 98 and the Relationship Agreement were unwarranted.

In addition to being unwarranted, the proposals for exemption put forth by the United States at the PrepCom meetings were inconsistent with the purpose of the Treaty.<sup>114</sup> While the new Article 98 comes with an understanding that it "should not be interpreted as requiring new negotiations,"<sup>115</sup> the very language of this Article could suggest otherwise.<sup>116</sup> In referring to the ICC's obligations as being consistent with "international agreement[s]," the language now in the Treaty opens the door for the possibility of exemption agreements between the ICC and states, and provides a basis "for future negotiations between individual States and the ICC for exclusions under Article 98(2)."<sup>117</sup> This type of continuing negotiation is not what the

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<sup>105</sup> See *id.*

<sup>106</sup> Crossette, *supra* note 69.

<sup>107</sup> See Neuffer, *supra* note 11.

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

<sup>109</sup> Wurst, *supra* note 70.

<sup>110</sup> McIntyre, *supra* note 98.

<sup>111</sup> See Wurst, *supra* note 70.

<sup>112</sup> See Lawyers, *supra* note 99.

<sup>113</sup> See *id.*

<sup>114</sup> See Zagaris, *supra* note 72.

<sup>115</sup> Wurst, *supra* note 70 (internal quotations omitted).

<sup>116</sup> See Rule 195, *supra* note 74, at 89; Zagaris, *supra* note 72.

<sup>117</sup> *Id.*

Treaty drafters intended, and in fact amounts to an amendment of the RSICC.<sup>118</sup>

Furthermore, the U.S. proposal for the Relationship Agreement would have limited the ICC's jurisdiction to requests for surrender, making the ICC's ability to try alleged criminals contingent on the consent of the state of nationality of the accused or on that of the Security Council.<sup>119</sup> The drafters of the RSICC did not intend for the court to be restricted in this manner, therefore, U.S. efforts at exemption through the ICC language are likely finished.<sup>120</sup> In trying to gain an exemption through "international agreement[s]," the United States was providing the means for citizens of rogue countries, whom the drafters of the RSICC had in mind when they created the ICC, to escape prosecution.<sup>121</sup>

### B. *U.S. Circumvention of the ICC Through the ASPA*

The ASPA would do more harm than good. First, its very existence will surely hurt the U.S. position at the ICC negotiations.<sup>122</sup> Second, the ASPA effects U.S. national policy objectives by making foreign policy and security hostage to the ICC treaty.<sup>123</sup> Finally, the ASPA is an unnecessary measure that only would endanger any potential future cooperation between the United States and the ICC, cooperation ultimately in U.S. national and security interests.<sup>124</sup>

For the U.S. negotiators to the RSICC who participated in developing the rules and procedures of the ICC, the existence of the ASPA, even before its passage in the House of Representatives, was damaging. Richard Dicker, counsel for Human Rights Watch, called the Act "a very ugly face on U.S. diplomacy."<sup>125</sup> The harshness of this bill weakened the U.S. negotiating position for the November 2000 Prep-Com meeting.<sup>126</sup> It sent a signal to the ICC that the United States

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<sup>118</sup> See Zagaris, *supra* note 72.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*; Bush Administration, *supra* note 55.

<sup>121</sup> See U.S. at Odds, *supra* note 7.

<sup>122</sup> For further information on the U.S. position, see David J. Scheffer, Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the United Nations Preparatory Commission for the International Criminal Court, Statement before the House International Relations Committee (July 26, 2000), available at [http://www.state.gov/www/policy\\_remarks/2000/000726\\_scheffer\\_service.html](http://www.state.gov/www/policy_remarks/2000/000726_scheffer_service.html).

<sup>123</sup> *Id.*

<sup>124</sup> See Lawyers, *supra* note 99.

<sup>125</sup> Riggs, *supra* note 62.

<sup>126</sup> See Scheffer, *supra* note 122.

would not cooperate, thus making the ICC less inclined to work with the United States to protect its nationals.<sup>127</sup>

In addition, the ASPA could harm national and foreign policy objectives.<sup>128</sup> The U.S. Department of Defense recognized this problem, calling the bill "legislative overkill."<sup>129</sup> Since the ASPA requires the Security Council to grant ICC immunity to the U.S. military in order for the U.S. military to participate in U.N. military activity,<sup>130</sup> a refusal of such a grant could prevent the United States from using its military for international issues which affect its national security.<sup>131</sup> Moreover, the ASPA would hamper the President's powers because his ability to send U.S. military forces to participate in peacekeeping efforts, which are often in U.S. security interests, would be restrained by the need for a grant of immunity.<sup>132</sup>

Opponents of the bill further argue that above all, the ASPA is unnecessary because the ICC deals only with crimes for which U.S. service members are unlikely to be indicted.<sup>133</sup> The mandate of the ICC is to be a court of last resort, stepping in to prosecute the most heinous crimes only when a country is unwilling or unable to prosecute its nationals.<sup>134</sup> The ICC will deal only with the most "egregious, planned[,] and large-scale crimes," not "allegations of isolated atrocities."<sup>135</sup> The ICC is intended to deal with actions comparable to those of the Nazis in World War II, of Pol Pot and Saddam Hussein, or of military governments such as those of the 1980's and 1990's in El Salvador, Argentina, Burma, and Indonesia.<sup>136</sup> Thus, it is highly unlikely that a U.S. service member ever could be involved in a crime of the magnitude necessary to trigger ICC attention.<sup>137</sup> Even if a U.S. national were to commit this type of crime, the United States would not hesitate to prosecute him, as shown by the prosecutions for My Lai,<sup>138</sup>

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<sup>127</sup> See *U.S. Deliberates Its Position*, *supra* note 94.

<sup>128</sup> See *Lawyers*, *supra* note 99.

<sup>129</sup> *U.S. Deliberates Its Position*, *supra* note 94.

<sup>130</sup> See H.R. 1646 § 635(a).

<sup>131</sup> Scheffer, *supra* note 122.

<sup>132</sup> *Id.*

<sup>133</sup> See *Lawyers*, *supra* note 99.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Johnson, *supra* note 42.

<sup>137</sup> See *Lawyers*, *supra* note 99.

<sup>138</sup> *Id.*

and the current investigation into possible crimes committed during the Korean War.<sup>139</sup>

In addition, there are extensive safeguards in the ICC system, mostly due to U.S. insistence at the original negotiations in Rome.<sup>140</sup> For example, there are strict guidelines for selecting judges and prosecutors, as well as an internal system of checks and balances to ensure that frivolous cases will not be pursued.<sup>141</sup> The court is intended to deal with countries that lack the ability to mete out justice to their nationals, rather than those with complex legal systems like the United States.<sup>142</sup> The ASPA, therefore, is an unnecessary piece of legislation, which will harm not only U.S. relationships with the international community through the ICC, but also will handicap U.S. national security and foreign policy decisions.<sup>143</sup>

### C. Immediate Ramifications of U.S. Opposition

U.S. opposition to the ICC has already had consequences. On May 3, 2001, the United States lost a seat on the U.N. Commission on Human Rights.<sup>144</sup> Commentators state that this expulsion was the result of increasing international frustration over U.S. opposition to the ICC.<sup>145</sup>

Should the United States decide to withdraw its signature or repudiate the Treaty, as President Bush did with the Kyoto Protocol on global warming,<sup>146</sup> U.S. signatures on all international treaties would be suspect.<sup>147</sup> In terms of the ICC, repudiation would cause the United States to lose any ability to shape the ICC in its early years.<sup>148</sup>

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<sup>139</sup> Robertson, *supra* note 104. The United States has inquired into allegations that U.S. Marines committed war crimes in South Korea in 1950. *Id.* See also William J. Aceves, *Investigating War Crimes, The Struggle for Accountability Hits Home*, S.D. UNION-TRIB., Nov. 4, 1999, available at 1999 WL 29191923.

<sup>140</sup> See Lawyers, *supra* note 99.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *id.*

<sup>144</sup> Bush Administration, *supra* note 55.

<sup>145</sup> See *id.*; Leo Wallach, *UCLA Hosts Famous Nuremberg Prosecutor*, U. WIRE, May 24, 2001, available at LEXIS, New Group File.

<sup>146</sup> E.U. Environment Ministers Lash Out at Bush on Kyoto About-Turn, DEUTSCHE PRESSE-AGENTUR, Apr. 1, 2001, available at LEXIS, News Group File. The United States signed the Kyoto Protocol in 1997. *Id.* President Bush repudiated it in March, 2001. *Id.* The Protocol aims to reduce global warming by cutting greenhouse gas emissions. *Id.* President Bush decided that the United States no longer supports Kyoto because it is not in the country's economic interests. *Id.*

<sup>147</sup> Jensen, *supra* note 43.

<sup>148</sup> Bush Administration, *supra* note 55.



The United States would not be able to influence the approval of the rules of procedure and evidence, or the elements of crimes, nor the final language on the relationship of the court to the U.N.<sup>149</sup> Perhaps even more importantly, the United States would be unable to participate in the selection of judges, and would not be allowed to nominate a U.S. national for a position.<sup>150</sup> Clearly, if the United States should decide it is not to be a party to the ICC, the United States would lose its chance to participate in the development of “a system of justice built not to settle scores, but to affirm the humanity of victims who too often are forgotten.”<sup>151</sup>

### CONCLUSION

In a speech at Harvard University, U.N. Secretary-General Kofi Annan called on jurists to better educate themselves and their fellow citizens about the benefits of the ICC.<sup>152</sup> He stated that he did not believe that U.S. opposition to the ICC stemmed from an opposition to punishing those guilty of atrocious crimes against humanity.<sup>153</sup> The Secretary-General went on to say that all states must live by international law, for if they do not, “they are condemned to live by the law of the jungle.”<sup>154</sup> The United States, as the “greatest power on earth,” could not possibly desire this.<sup>155</sup>

The United States may be the world’s greatest superpower, but this status does not give it an excuse to hold itself above the will of all others in the application of international law. U.S. unilateralism no longer serves U.S. national interests.<sup>156</sup> Instead, by refusing to be bound by rules that the international community supports and by liberally sanctioning nations that have offended it, the United States is isolating itself from the international community.<sup>157</sup> The United States

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Tom Malinowski, *The ICC: An Alliance for Justice*, WASH. POST, July 9, 2001, at A17, available at LEXIS, News Group File.

<sup>152</sup> *Justice, Not Military Force, Must Rule Secretary-General Asks Harvard Jurists To Work for Better Understanding of Benefits of International Criminal Court*, M2 PRESSWIRE, Oct. 2, 2000, available at 2000 WL 26607365.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See Martin Woollacott, *It's Time Americans Woke up to the Rest of the Planet: U.S. Foreign Policy is Mainly an Exercise in Adhering to the Past*, GUARDIAN, Oct. 20, 2000, available at 2000 WL 28346986.

<sup>157</sup> See *id.*

hypocritically believes it has “a right to legislate for the world, but the world has no right to legislate for the U.S.”<sup>158</sup>

The ICC is designed to eliminate international war-related atrocities. The United States shares those goals and, therefore, has little reason to withhold its support for the ICC. To do so would make a mockery of justice and the idea that no one is above the law.<sup>159</sup> The United States cannot use its current status to unilaterally veto that which the majority of the world’s nations support, and expect that it will not be harmed by the result.

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<sup>158</sup> *Id.*

<sup>159</sup> *Asides: America in the Dock*, WALL ST. J., Oct. 23, 2000, at A38, available at 2000 WL-WSJ 26614066.