

International Criminal Law: A Bittersweet Year for Supporters and Critics of the International Criminal Court

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I. Introduction

The year 2002 was a bittersweet one for both supporters and critics of the 1998 Rome Statute of the International Criminal Court (ICC). By the spring, after years of advocacy and lobbying in governments around the world by ICC supporters, the requisite number of states needed for the Rome Statute to enter into force had ratified the treaty. The ratifications and the consequent entry into force of the Rome Statute in turn catalyzed a diplomatic and legislative response by the Bush administration and the U.S. Congress to address the concerns of ICC critics within those bodies. By year's end, ICC supporters could count many important advances toward establishing the fully functioning tribunal constituted by the Rome Statute, while the administration and ICC critics in Congress could likewise count achievements toward addressing their concerns about that same tribunal. This article recapitulates the salient achievements of each camp and the core arguments animating their efforts.

II. From Rome to Sixty Ratifications

At the outset of the year, the stage had already been set for the political, diplomatic, and legal wrangling that would ensue throughout 2002. A year and a day prior, on December 31, 2000, former President Clinton signed the Rome Statute on behalf of the United States stating, however, that in signing the Statute

we [the United States] are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of states that have not.¹

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1. Statement by the President, The White House, Office of the Press Secretary, *Signature of the International Criminal Court Treaty* (Dec. 31, 2000), at <http://usembassy.state.gov/posts/pk1> (last visited Feb. 25, 2003).

President Clinton further stated that, given U.S. concerns, "I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied."² President Clinton emphasized, however, that he was signing the Rome Statute because, in his judgment, the United States could influence the ultimate shape of the ICC more effectively as a signatory.³

While the change in administration in January 2001 did not bring the United States any closer to ratifying the Rome Statute, throughout 2001 the number of ratifying parties grew steadily. By January 1, 2002, forty-eight states had deposited their ratification instruments with the UN, thus becoming States Parties to the Statute; Slovenia became the forty-eighth State Party on New Year's Eve 2001.⁴ Article 126 of the Rome Statute provides that the Statute shall enter into force on the first day of the month following the sixtieth day after sixty states have deposited instruments of ratification with the Secretary-General of the United Nations.⁵ In the months following Slovenia's ratification, eight more states deposited their ratifications in rapid succession, bringing the total number of ratifications to fifty-six by April 9, 2002.⁶ On that day, the UN announced that on April 11, 2002, at least seven more countries intended to deposit their ratifications with the UN, so that, under article 126, the Rome Statute would enter into force by July 1, 2002.⁷ On April 11, 2002, ten additional countries ratified the Statute making the date a momentous occasion for ICC supporters worldwide.⁸

III. The Critics' Response and the Supporters' Riposte

A. THE UNITED STATES ANNOUNCES ITS INTENTION NOT TO RATIFY THE ROME STATUTE

The administration responded to the UN's April 11 announcement with multilateral and bilateral diplomacy, as well as with political support for legislative initiatives by ICC critics in Congress. On May 6, 2002, the administration formally expressed its intention not to become a party to the Rome Statute.⁹ In a letter addressed to the UN Secretary-General, the administration stated, "[t]his is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000."¹⁰ Also on May 6, the administration promulgated a policy statement on the ICC and conveyed its position through,

2. *Id.*

3. *See id.*

4. *See* Press Release, Coalition for the International Criminal Court (CICC), Slovenia Ratifies the International Criminal Court Treaty (Jan. 2, 2002), at <http://www.iccnw.org> (last visited Feb. 25, 2003). The CICC is a coalition of non-governmental organizations that support the ICC.

5. Rome Statute of the International Criminal Court, July 17, 1998, art. 126 [hereinafter Rome Statute], at <http://www.un.org/law/icc/statute/rome.htm> (last visited Feb. 25, 2003).

6. *See* Press Release, CICC, Historic Ratification of the International Criminal Court Treaty to be Achieved at UN Treaty Event (Apr. 9, 2002), at <http://www.iccnw.org> (last visited Feb. 25, 2003).

7. *See id.*

8. *See* Press Release, CICC, International Criminal Court Established at Landmark UN Treaty Event (Apr. 11, 2002), at <http://www.iccnw.org> (last visited Feb. 25, 2003).

9. Press Statement, U.S. Department of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), at <http://www.state.gov> (last visited Feb. 25, 2003).

10. *Id.*

among other things, remarks by Marc Grossman, Under-Secretary of State for Political Affairs, to the Center for Strategic and International Studies.¹¹

B. THE ADMINISTRATION'S ARGUMENTS AND CONCERNS

In its policy statement and Under-Secretary Grossman's remarks, the administration highlighted several of its concerns arising from the ICC entering into force and outlined its arguments underlying those concerns. Citing article 12 of the Rome Statute, the administration noted that the ICC is authorized to exercise jurisdiction not only over nationals of States Parties, but also over nationals of non-party states, such as the United States, who are accused of committing one of the Statute's proscribed offenses (such as, genocide, crimes against humanity, and war crimes) within the territory of a State Party.¹² Such jurisdiction, the administration argued, undermines the sovereignty of non-party states by subjecting their nationals to the provisions of a treaty to which the non-party states themselves have not acceded.¹³ The administration further argued, citing article 17, that the Rome Statute's principle of complementarity undermines the sovereignty of States Parties and non-party states.¹⁴ Article 17 provides that the ICC shall not exercise jurisdiction over a case when a state with jurisdiction has investigated the case and decided not to prosecute, unless the ICC determines that the state's decision not to prosecute resulted from the state's "unwillingness or inability" to do so.¹⁵ The administration argued that article 17 undermines state sovereignty by authorizing the ICC to examine, and ultimately reject, any state's decision not to prosecute a possible ICC-proscribed offense over which the state could exercise jurisdiction. Citing articles 5 and 121, the administration also argued that the Rome Statute treats States Parties and non-party states disparately in that it affords States Parties the option of not ratifying future offenses created or defined under the Statute, such as the as yet undefined crime of aggression, but does not afford non-party states the same option.¹⁶

11. See Fact Sheet, U.S. Department of State, *International Criminal Court* (May 6, 2002), available at <http://www.state.gov> (last visited Feb. 25, 2003); Marc Grossman, U.S. Department of State, Remarks to the Center for Strategic and International Studies, American Foreign Policy and the International Criminal Court (May 6, 2002), available at <http://www.state.gov> (last visited Feb. 25, 2003); see also News Release, U.S. Department of Defense, Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002), available at <http://www.defenselink.mil/news/May2002> (last visited Feb. 25, 2003) [hereinafter Rumsfeld].

12. Article 12 of the Rome Statute provides in part that "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute . . . the State on the territory of which the conduct in question occurred . . . [or] [t]he State of which the person accused of the crime is a national." See Rumsfeld, *supra* note 11.

13. *Id.*

14. See *id.* Rome Statute article 17 provides in part that "the Court shall determine that a case is inadmissible where . . . [t]he 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." Article 17 further provides various factors the ICC is to consider in assessing a state's unwillingness or inability to prosecute, including evidence of undue delay, bad faith or institutional collapse. Rome Statute, *supra* note 5, art. 17.

15. See Rome Statute, *supra* note 5, art. 17.

16. See Rumsfeld, *supra* note 11. Rome Statute article 5 lists the crime of aggression, along with the crimes of genocide, crimes against humanity, and war crimes as one within the ICC's purview; article 5 further provides that the ICC will not exercise jurisdiction over cases involving aggression until that crime is defined pursuant to the Statute's amendment provisions, including article 121. Article 121 in turn provides in part that

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not

The administration also leveled much criticism at the powers granted to the ICC Prosecutor by the Rome Statute. Citing article 15, the administration noted that the Prosecutor can begin investigations on his or her own initiative and proceed with a full investigation after a review by three judges of the Pre-Trial Chamber.¹⁷ The administration argued that such an institutional structure opens the door to politically motivated prosecutions.¹⁸ The administration further argued that, ultimately, the prosecutor is not accountable to any institution outside the ICC itself, such as the UN Security Council, and that the Rome Statute therefore lacks sufficient checks and balances.¹⁹ Predicated on the foregoing, the administration argued that the ICC could have a chilling effect upon American foreign policy because “by putting U.S. officials, and our men and women in uniform, at risk of politicized prosecutions, the ICC will complicate U.S. military cooperation with many friends and allies who now have a treaty obligation to hand over U.S. nationals to the Court—even over U.S. objections.”²⁰

The administration argued that the UN Security Council ought to be responsible for checking the powers of the ICC Prosecutor, which, the administration argued, was the position taken by the United States at the 1998 Rome conference.²¹ Because its concerns with the Rome Statute remained, the administration stated that, rather than supporting the ICC as constituted, it would promote domestic accountability for war criminals in their respective states. Further, where necessary, it would advocate the use of ad hoc tribunals under UN Security Council auspices, like the tribunals for the former Yugoslavia, Rwanda, and most recently Sierra Leone.²² The administration also foreshadowed the diplomatic and legislative measures it would pursue later in the year, stating that “[w]e intend to make clear, in several ways, that the United States rejects the jurisdictional claims of the ICC.”²³

exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

Rome Statute, *supra* note 5, art. 5.

17. See Rumsfeld, *supra* note 11. Rome Statute article 15 provides in part that,

[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court . . . The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court . . . If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected . . . If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

Rome Statute, *supra* note 5, art. 15.

Article 39 provides in part that “[t]he functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence.” *Id.* art. 39. It should be noted however that, notwithstanding article 39, article 57(2) (a) provides that orders under article 15 “must be concurred in by a majority of its [the Pre-Trial Chamber’s] judges.” *Id.* art. 57(2)(a).

18. See Rumsfeld, *supra* note 11.

19. See *id.*

20. *Id.*

21. See *id.*

22. See *id.*

23. *Id.*

C. THE COUNTERARGUMENTS AND CRITICISMS OF ICC SUPPORTERS

The administration's May 6 announcements and accompanying remarks were met with consternation and strong criticism from supporters of the ICC, including some members of Congress, U.S. allies in NATO, and domestic and international human rights groups.²⁴ Supporters of the ICC argued that the administration's concerns are unfounded. Regarding the relationship between the ICC and the sovereignty of non-party states, such as the United States, ICC supporters argued that the Rome Statute infringes upon state sovereignty no more so than traditional, universally accepted norms of international and domestic criminal law and extradition law.²⁵ Noting that the ICC exercises jurisdiction over individual nationals, not states, ICC supporters noted further that all states, including the United States, recognize and accept that states have the right to legislate and execute criminal laws within their territory against foreign nationals, as well as to extradite another state's nationals to third states when such foreign nationals are accused of criminal wrongdoing in the third state.²⁶ ICC supporters therefore argued that, to the extent the Rome Statute provides for ICC jurisdiction over nationals of a non-party state who commit proscribed offenses within the territory of a State Party, the Statute merely provides States Parties with a new, alternative forum to which they may extradite another state's nationals, so long as the other predicates for ICC jurisdiction pertain.²⁷

Citing those other predicates to ICC jurisdiction, ICC supporters argued that the administration's concerns regarding politicized prosecutions in the absence of greater UN Security Council oversight of the ICC Prosecutor are also without foundation. Supporters noted that ICC jurisdiction is limited in several regards. First, with two exceptions, ICC jurisdiction reaches only crimes perpetrated by nationals of States Parties or crimes committed within the territory of States Parties. The two exceptions in which neither of these two jurisdictional nexuses are required are: (1) if a non-state party expressly accepts ICC jurisdiction, thus establishing a jurisdictional nexus for the purpose of prosecuting proscribed offenses arising from a particular situation;²⁸ and (2) if the Security Council itself refers a case, in the absence of either jurisdictional nexus, to the ICC pursuant to its powers to maintain and restore international peace under Chapter VII of the UN Charter.²⁹ Supporters further argued that the subject matter jurisdiction of the ICC is narrowly circum-

24. See, e.g., Peter Slevin, *U.S. Renounces Its Support of New Tribunal for War Crimes*, WASH. POST, May 7, 2002, at A1, available at <http://www.washingtonpost.com>.

25. See American Non-Governmental Organizations Coalition for the International Criminal Court, *AMICC Response to the US Administration International Criminal Court Policy*, available at <http://www.amicc.org/usinfo/administration.html> (last visited Feb. 25, 2003) [hereinafter *AMICC*]. The AMICC is a coalition of non-governmental organizations that supports U.S. ratification of the Rome Statute.

26. See *id.*

27. See *id.*

28. See *id.* Rome Statute article 12 provides in part that "[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question." Rome Statute, *supra* note 5, art. 12. In addition, Rule 44 of the Rules of Evidence and Procedure adopted by the Assembly of States Parties provides that a state's acceptance of ICC jurisdiction under article 12 "has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply." See *Assembly of States Parties to the Rome Statute of the International Criminal Court*, 1st sess., U.N. Doc. ICC-ASP/1/3 (2002), available at <http://www.un.org/law/icc/asp/1stsession/report> (last visited Feb. 25, 2003) [hereinafter *Assembly*].

29. See *Assembly*, *supra* note 28. Rome Statute article 13 provides in part that

[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance

scribed, reaching only specifically defined acts of genocide, large scale war crimes, and widespread crimes against humanity, and even then only those offenses committed with a state of mind element of "intent and knowledge."³⁰ ICC supporters also argued that the complementarity principle is a significant jurisdictional limitation on the ICC, in that it institutionalizes the Court's deference to states as the primary forums for prosecuting the offenses proscribed by the Rome Statute. In addition, supporters argued that the Rome Statute affords both an accused and the national state of an accused, the right to object to ICC jurisdiction, and authorizes the UN Security Council to request that the ICC defer investigating or prosecuting an offense pursuant to Chapter VII of the UN Charter.³¹ Supporters also argued that the authority of the Assembly of States Parties the governing, administrative, and oversight organ of the ICC to remove ICC judges, prosecutors, and deputy prosecutors for misconduct, further safeguards against politicized prosecutions.³²

D. THE FOUNDERS OF THE COURT PRESS FORWARD

With these arguments, among others, as a backdrop throughout 2002, the ICC progressed toward becoming fully operational, while the administration endeavored to address its concerns through multilateral and bilateral diplomacy, as well as through support for legislative initiatives of ICC critics in Congress. Pursuant to article 126, the Rome Statute entered into force on July 1, 2002. Once fully functional, the ICC can pursue proscribed offenses committed from that date forward. From July 1–12, the Preparatory Commission,

with the provisions of this Statute if . . . [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

Rome Statute, *supra* note 5, art. 28.

30. See *AMICC*, *supra* note 25; Rome Statute, *supra* note 5, arts. 5–8, 30(1). Regarding "crimes against humanity," article 7 provides that ICC jurisdiction reaches the defined conduct "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." *Id.* art. 7. Regarding "war crimes," article 8 provides that ICC jurisdiction reaches the defined conduct "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." *Id.* art. 8.

31. See *AMICC*, *supra* note 25. Rome Statute article 19 provides in part that

[c]hallenges to the admissibility of a case on the grounds referred to in article 17 [re Issues of Admissibility] or challenges to the jurisdiction of the Court may be made by . . . [a]n accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58 . . . [a] State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted . . . or [a] State from which acceptance of jurisdiction is required under article 12.

Rome Statute, *supra* note 5, art. 19.

Article 16 provides that,

[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Rome Statute, *supra* note 5, art. 16.

32. See *AMICC*, *supra* note 25. Rome Statute article 46 provides in part that

A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office . . . in cases where that person . . . [i]s found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence . . . or [i]s unable to exercise the functions required by this Statute.

Rome Statute, *supra* note 5, art. 46.

a body established by resolution at the 1998 Rome Conference, and charged with drafting, *inter alia*, Rules of Procedure and Evidence, Elements of Crimes, and procedures for the election of ICC officials for the Court, held its tenth session, laying the groundwork for the first session of the Assembly of States Parties in September of 2002. At the Assembly's first session, it filled its official posts, and adopted by consensus the rules generated by the Preparatory Commission, including the Rules of Procedure and Evidence, Elements of Crimes, and Procedure for the nomination and election of judges, the Prosecutor, and Deputy Prosecutors.³³ After receiving nominations from States Parties for judgeships throughout the fall, in February of 2003, the Assembly elected the first panel of eighteen judges to staff the judicial organs of the ICC.³⁴ ICC supporters generally praised the integrity of the nomination and election process, as well as the quality and diversity, both gender and geographic, of the panel.³⁵

E. THE ADMINISTRATION AND CONGRESS FORGE AHEAD AS WELL

1. *Multilateral Efforts*

Meanwhile, the administration and ICC critics in Congress moved to address their concerns. On June 30, the day before the tenth session of the Preparatory Commission opened, the administration initiated the multilateral part of its strategy. In a statement to the UN Security Council, U.S. Permanent Representative to the United Nations, Ambassador John D. Negroponte, announced that without a Security Council resolution establishing immunity for personnel contributed to Security Council-authorized peacekeeping missions, the United States would veto the resolution to renew the UN peacekeeping mission in Bosnia-Herzegovina.³⁶ Ambassador Negroponte argued that, having accepted the risks of "exposing people to dangerous and difficult situations in the service of promoting peace and stability, we will not ask them to accept the additional risk of politicized prosecutions before a court whose jurisdiction over our people the Government of the United States does not accept."³⁷ Ambassador Negroponte's statement ignited a strong response from other members of the UN Security Council, the Secretary-General, attendees of the Preparatory Commission, and other ICC supporters. After two weeks of intense negotiations, on July 12, 2002, the Security Council, by a unanimous vote, adopted Resolution 1422, which provides that for one year from July 1, 2002, the ICC will not begin, or proceed with, an investigation or prosecution against officials or personnel of UN peacekeeping operations contributed to such operations by states not party to the Rome Statute.³⁸ The Security Council also expressed its intention to renew Resolution 1422 for further one-year periods as long as necessary.³⁹

33. See *Assembly*, *supra* note 28.

34. See Assembly of States Parties, Nomination of Judges to the International Criminal Court, available at <http://www.un.org/law/icc/asp/aspfra.htm> (last visited Feb. 25, 2003); see also Christopher Marquis, *U.N. Begins Choosing the Judges for New Court*, N.Y. TIMES, Feb. 6, 2003, at A9.

35. See Press Release, CICC, First 18 Judges Elected to the International Criminal Court (Feb. 7, 2003), <http://www.iccnw.org/pressroom/ciccmmediastatements> (last visited Feb. 25, 2003).

36. See Press Release, Ambassador John D. Negroponte, Explanation of Vote on the Renewal of the Mandate for the United Nations Mission in Bosnia and Herzegovina, in the Security Council (June 30, 2002), available at <http://www.un.int/usa> (last visited Feb. 25, 2003).

37. See *id.*

38. Res. 1422, U.N. SCOR, 4572d Sess., U.N. Doc. S/RES/1422 (2002).

39. See *id.*

ICC supporters derided Resolution 1422 as an assault on the integrity of the ICC. Paul Heinbecker, Canada's Ambassador to the UN, called July 12, "a sad day for the United Nations" and stated that "[w]e don't think it is in the mandate of the Security Council to interpret treaties that are negotiated somewhere else. It's not appropriate to create two classes of people under international law, one which is for peacekeepers and one . . . for everybody else."⁴⁰ ICC supporters argued that the Security Council acted *ultra vires* in passing Resolution 1422 because the Security Council's invocation of UN Charter Chapter VII in the resolution's preamble notwithstanding, the resolution did not in fact address a threat to international peace.⁴¹

2. *Bilateral Efforts*

The administration also advanced the bilateral part of its strategy to address its concerns regarding the ICC. Beginning in August, and citing article 98 of the Rome Statute as a foundation, the United States announced that it would seek separate bilateral agreements with states worldwide, committing them not to extradite U.S. nationals to the ICC.⁴² Article 98(2) of the Rome Statute provides that

[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.⁴³

The administration articulated its position that article 98 provides a basis for these bilateral treaties in a series of statements by John R. Bolton, State Department Under-Secretary for Arms Control and International Security.⁴⁴ Under-Secretary Bolton announced that

[u]sing Article 98 of the Rome Statute as a basis, we are negotiating agreements with individual States Parties to protect our citizens from being handed over to the Court. Without undermining the Court's basic mission, these agreements will allow us the necessary protections in a manner that is legally permissible and consistent with the letter and spirit of the Rome Statute.⁴⁵

Later in the year, Under-Secretary Bolton stated that "[o]ur ultimate goal is to conclude article 98 agreements with every country in the world, regardless of whether they have signed or ratified the ICC."⁴⁶ Toward this end, the administration achieved a diplomatic advance in the fall when the European Union agreed to allow its member states to negotiate individual article 98 agreements with the United States, within certain EU guidelines.⁴⁷

40. Colum Lynch, *U.S. Wins 1-Year Shield from War Crimes Court*, WASH. POST, July 13, 2002, at A16.

41. See CICC, *UN Security Council Passes ICC Resolution in Contravention of UN Charter* (July 12, 2002), available at <http://www.iccnw.org/pressroom/ciccmediastatements> (last visited Feb. 25, 2003).

42. See, e.g., Christopher Marquis, *U.S. Is Seeking Pledges to Shield Its Peacekeepers from Tribunal*, N.Y. TIMES, Aug. 7, 2002, at A1; Peter Slevin, *U.S. Presses Allies on War Crimes Court: Aid Wielded in Push for Immunity Pacts*, WASH. POST, Aug. 27, 2002, at A12.

43. Rome Statute, *supra* note 5, art. 98(2).

44. See John R. Bolton, U.S. Department of State, Remarks at the Aspen Institute, The United States and the International Criminal Court (Sept. 16, 2002), available at <http://www.state.gov> (last visited Feb. 25, 2003); John R. Bolton, United States Department of State, Remarks to the Federalist Society, The United States and the International Criminal Court (Nov. 14, 2002), available at <http://www.state.gov> (last visited Feb. 25, 2003).

45. See Bolton, Remarks at the Aspen Institute, *supra* note 44.

46. See Bolton, Remarks to the Federalist Society, *supra* note 44.

47. See *Uncle Sam Lays Down the Law*, THE ECONOMIST, Oct. 3, 2002, available at <http://www.economist.com> (last visited Feb. 25, 2003).

The guidelines provided, among other things, that any such agreements cover only persons who are nationals of states not party to the Rome Statute and who are present in the territory of the EU member state in an official capacity, on behalf of the state with which the corresponding article 98 agreement is concluded.⁴⁸

ICC supporters strenuously criticized the administration's proposed article 98 agreements as invalid under the Rome Statute, and a further effort to undermine the ICC. Some ICC supporters argued, among other things, that contrary to the administration's interpretation, the negotiating history of article 98 establishes that its provisions were intended to respect preexisting international law and treaty obligations of States Parties, not new agreements entered into by States Parties, post ratification of the Rome Statute.⁴⁹ ICC supporters further argued that paragraph 2 of article 98 was specifically drafted in recognition of the Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs), which generally govern the legal status of military and related civilian personnel sent by one state to, and actively serving in the territory of, another state.⁵⁰

3. *Unilateral Efforts*

The administration's diplomatic efforts to conclude the proposed article 98 agreements were bolstered by passage of the American Servicemembers' Protection Act of 2002 (ASPA).⁵¹ The final conference report on the ASPA was adopted in the Senate on July 24, 2002, by a vote of ninety-two to seven, with one abstention, and President Bush signed it into law on August 2. Through the ASPA, ICC critics in Congress made plain their concerns about the Court's potential effect on U.S. foreign policy. While section 2003 of the ASPA authorized the President, under particular circumstances and with certain preconditions, to waive most of the substantive provisions of the ASPA itself, the ASPA essentially proscribed American cooperation with the ICC and obliged the President not to subject U.S. servicemembers to a risk of ICC prosecution.⁵² Section 2004 of the ASPA prohibits any federal, state, or local court or government agency from cooperating with a request from the ICC.⁵³ Section 2005 of the ASPA prohibits the President from committing troops to UN peacekeeping operations unless the President formally certifies to Congress, among other things, that members of the American armed services can participate without risk of being subject to ICC jurisdiction, either because a UN Security Council resolution permanently exempts them from ICC prosecution, or the United States concluded article 98 agreements with the countries relevant to the operation.⁵⁴ Further, section 2007 provides in part that, with exceptions for NATO countries, certain major non-NATO allies, and Taiwan, "no United States military assistance may be provided to the government of a

48. See AMICC, *Chronology of the U.S. Opposition to the International Criminal Court* (Nov. 18, 2002), available at <http://www.amicc.org/docs/USTimeline> (last visited Feb. 25, 2003).

49. See CICC Memo, *Bilateral Agreements Proposed by US Government* (Aug. 23, 2002), available at <http://www.iccnw.org/documents/otherissues/impunityart98> (last visited Feb. 25, 2003).

50. See *id.*

51. See American Servicemembers' Protection Act, Pub. L. No. 107-206, 116 Stat. 820 (2002) (codified as amended at 22 U.S.C. §§ 7421-31 (2003)) [hereinafter ASPA].

52. *Id.*

53. See *id.* § 2004. Section 2015 of the ASPA provides, however, that "nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity." *Id.* § 2015.

54. See *id.* § 2005.

country that is a party to the International Criminal Court.”⁵⁵ Section 2007 does, however, permit the President to waive this prohibition in the interest of national security or “if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.”⁵⁶ In addition, section 2008 authorized the President to “use all means necessary and appropriate” to free U.S. servicemembers and allies detained or imprisoned by, or on behalf of, the ICC.⁵⁷

Like the administration’s multilateral and bilateral diplomatic efforts to address its concerns about the ICC, ICC supporters strongly criticized the ASPA as an American effort to undermine the Court. Some ICC supporters have referred to the ASPA as the “Hague Invasion Act” due to its authorization of the use of force to free U.S. servicemembers and allies in ICC custody.⁵⁸ Such criticism notwithstanding, the administration has cited the ASPA’s prohibition of military aid to States Parties with which the United States has not concluded an article 98 agreement as diplomatic leverage in its efforts to secure those agreements.⁵⁹

IV. Conclusion: Supporters’ and Critics’ Efforts Continue

While the administration and ICC critics in Congress continue to attempt to address their concerns about the Court and to insulate American personnel from the Court’s jurisdiction, the newly elected ICC officials and ICC supporters have continued their endeavor to establish a fully functional tribunal. The judges elected by the Assembly of States Parties in February 2003 will be sworn in during a ceremony at The Hague on March 11, 2003 and the Assembly is scheduled to elect the Prosecutor when it meets in April of 2003.⁶⁰ The Court will then be fully ready for business. In addition, ICC supporters have continued to advocate for the Rome Statute and lobby governments to ratify it. The number of state ratifications stood at eighty-nine during the drafting of this article, with Afghanistan becoming the eighty-ninth State Party on February 10, 2003.⁶¹ On the other hand, while questions remain open regarding the nature of the legal relationship between the administration’s proposed article 98 agreements and the Rome Statute, the United States had signed twenty-one such agreements at the time of the drafting of this article.⁶²

55. See *id.* § 2007.

56. See *id.*

57. See *id.* § 2008.

58. See Press Release, CICC, US Congress Passes Anti-ICC “Hague Invasion Act” (July 26, 2002), available at <http://www.iccnw.org/documents/otherissues/aspa> (last visited Feb. 25, 2003).

59. See Slevin, *supra* note 42.

60. See Press Release, CICC, First 18 Judges Elected to the International Criminal Court (Feb. 7, 2003), available at <http://www.iccnw.org/pressroom/ciccmediastatements> (last visited Feb. 25, 2003).

61. See CICC, State Signatures and Ratifications Chart, available at <http://www.iccnw.org/countryinfo> (last visited Feb. 25, 2003).

62. See AMICC, *Administration ICC Policy*, available at <http://www.amicc.org/usinfo> (last visited Feb. 25, 2003). The United States has signed such agreements with the following countries: Afghanistan, Bahrain, Djibouti, Dominican Republic, East Timor, El Salvador, Gambia, Georgia, Honduras, India, Israel, the Marshall Islands, Mauritania, Micronesia, Nepal, Palau, Romania, Sri Lanka, Tajikistan, Tuvalu, and Uzbekistan.