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State Cooperation & The International Criminal Court: A Role for the United States?

Beth Van Schaack¹

The International Criminal Court (ICC) is almost entirely dependent on State cooperation to effectuate its mandate to bring to justice individuals responsible for committing “the most serious crimes of concern to the international community as a whole.”² State cooperation is also central to the evolving relationship between the ICC and the United States.³ President Barack Obama entered office with a pledge to temper the prior administration’s hostility toward the ICC. Since then, he has been conducting a high-level review of U.S. policy toward the ICC.⁴ Although no official position has been announced, subsequent public statements by Secretary of State Hillary Rodham Clinton, U.S. Ambassador to the United Nations Susan Rice, Ambassador-at-Large for War Crimes Issues Stephen J. Rapp, and Legal Advisor Harold Hongju Koh have confirmed that the United States stands ready to re-engage with the Court. Notwithstanding this rapprochement, domestic legislation dating from the Bush Administration prohibits most forms of cooperation with the Court absent specific waivers or other contingencies. If the United States is to best position itself to use all international tools available to it to advance United States interests in responding effectively to the commission of international crimes, this legislation should be repealed or significantly scaled back. Short of ratifying the ICC Statute, there are a number of ways that the United States can work with the Court to both promote the United States’ foreign policy agenda and support the mission of the Court. Re-engaging with the Court through appropriate cooperative efforts will go far toward restoring the United States to its prior leadership position in the arena of international justice.

State Cooperation and International Justice

Fully effectuating a system of international justice depends on the involvement and cooperation of States, regional organizations, and the United Nations. International tribunals can assert jurisdiction over only a limited number of cases, so domestic courts must bear the primary responsibility for investigating and prosecuting international crimes. Where international tribunals do assert jurisdiction, they are dependent on the assistance and support of States. This assistance can come in many forms, including the arrest and surrender of the accused; public outreach; diplomacy; procuring evidence; the identification, tracing, and freezing of assets; the

¹ Associate Professor of Law, Santa Clara University School of Law. Prof. Van Schaack served as the Academic Advisor to the United States delegation to the 2010 Kampala Review Conference. The views expressed herein are hers alone and do not reflect the policy of the United States toward the International Criminal Court. The author is indebted to the research assistance of Bruce Yen for this project.

² Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 90 (*entered into force* July 1, 2002), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

³ See generally American Coalition for the International Criminal Court, *Chronology of U.S. Actions Related to the International Criminal Court*, <http://www.amicc.org/docs/US%20Chronology.pdf> (Aug. 30, 2010).

⁴ In connection with this policy review, the American Society of International Law convened an independent task force to recommend ways in which the Obama Administration could further enable positive engagement with the Court. See ASIL, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (March 2009), available at <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf> (hereinafter “ASIL Policy Paper”).

relocation of victims and witnesses; the provision of security, logistical, and operational support in country; the accommodation and transport of court personnel and defense counsel; sanctioning uncooperative States; and enforcement of orders for interim release and sentencing judgments. The experience of the *ad hoc* tribunals for the former Yugoslavia, Rwanda, and elsewhere reveals that the execution of arrest warrants is the most critical form of cooperation; this is already proving to be true in the ICC context as well.⁵

Notwithstanding U.N. Charter or treaty-based obligations to cooperate on the part of target and other States, the original *ad hoc* tribunals have struggled to gain full and effective cooperation. As subsidiary organs of the Security Council enjoying a Chapter VII provenance, the International Criminal Tribunals for the former Yugoslavia and Rwanda (the ICTY and ICTR) have been able to call on the Security Council in the event that State cooperation from target States was not forthcoming. Nonetheless, the Council's response to such non-compliance was often less than robust; as such, the tribunals have struggled to fulfill their mandates in the face of State recalcitrance. This was especially true for Serbia, and to a lesser extent, Rwanda and Croatia. Other *ad hoc* tribunals have either been part of United Nations transitional administrations (as with the Special Panels for East Timor or the Kosovo Special Panels) or the subject of an agreement with the host State (as with the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia). These features have also facilitated cooperation to a certain extent. Nonetheless, target and other States have harbored fugitives, refused to turn over evidence relevant to ongoing prosecutions, or simply failed to put their muscle behind judicial directives.

The United States, along with other States, has over the years rendered a range of formal and informal assistance to the *ad hoc* tribunals. In addition to supplying technical assistance and seconding personnel, the United States has utilized diplomatic and economic sanctions, frozen assets, shared evidence, offered rewards for information leading to the arrest or conviction of indictees, and authorized and participated in multilateral military efforts to track and apprehend suspects.⁶ As such, the United States has extensive experience using its intelligence capabilities, criminal justice expertise, and military muscle to further international justice. Even as a non-State party, the United States is poised to continue to play this role vis-à-vis the ICC in light of the détente between the United States and the Court.⁷ Aspects of domestic law, however, render a whole range of forms of assistance potentially unlawful.

⁵ See [Draft] Declaration on Cooperation, Doc No. RC/ST/CP/2, at 1 (June 7, 2010), available at http://www2.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-CP-2-ENG.pdf, (emphasizing “the crucial role that the execution of arrest warrants plays in ensuring the effectiveness of the Court’s jurisdiction and . . . the primary obligation of States Parties, and other States under an obligation to cooperate with the Court, to assist the Court in the swift enforcement of its pending arrest warrants”).

⁶ See generally Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925 (2000) (describing forms of formal and informal assistance).

⁷ See State Dep’t Press Briefing, *U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference*, available at http://www.state.gov/s/wci/us_releases/remarks/143178.htm (comments of Ambassador-at-Large for War Crimes Issues, Stephen J. Rapp: “even while we don’t become a member of the ICC, the opportunity to do some of those same kinds of things presents itself with the ICC, where that court is pursuing the same kind of cases that we prosecuted through these international institutions in Rwanda and Sierra Leone”).

State Cooperation and the International Criminal Court

Lacking its own enforcement mechanism, the ICC is entirely dependent on States and other entities to carry out many of its core functions. As former ICC President Philippe Kirsch has noted, “Like any judicial system, the ICC system is based on two pillars. The Court is one pillar, the judicial pillar. The operational pillar belongs to States, international organizations, and civil society.”⁸ Part nine of the ICC Statute is devoted to the issue of State cooperation. Article 88 specifically obliges States Parties to alter their domestic legal arrangements in connection with ratification of the treaty.⁹ In particular, States Parties are to ensure that their domestic legal arrangements enable them to render a number of forms of cooperation, including the arrest and transfer of suspects, the freezing of assets, the protection of victims and witnesses, and the procuring of documentary and testimonial evidence (see Articles 86-93). In the event of non-compliance, the Court can refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council (Article 87(7)). These obligations are subject to exceptions yet to be tested in situations in which the disclosure of information would threaten national security, as determined by the State itself in consultation with the Court (Article 72). In addition, the Court can provide assistance to States Parties investigating and prosecuting ICC crimes pursuant to Article 93(10). States parties are to execute requests for assistance in accordance with their relevant domestic procedures pursuant to Article 99(1), although domestic law may not be invoked to deny cooperation per Article 93(3). In the event of noncompliance, the Assembly of States Parties likely cannot do much more than make a finding to this effect. In the event that the Council refers a situation, it can utilize its Charter-based enforcement powers to gain State cooperation, but it may be unable or reluctant to invoke this power to the fullest extent, as has been seen in the Darfur context.

Article 87(5) of the ICC Statute also envisions that the Court might invite assistance from non-States Parties, such as the United States and two other permanent members of the Security Council that have yet to join the Court: China and the Russian Federation. Non-States Parties are welcome to enter into cooperative arrangements with the Court on an *ad hoc* basis. If these non-State Parties fail to cooperate, they too can be forwarded to the Assembly of States Parties, or the Security Council in the event of a Council referral. The public record reveals that at least one formal request for assistance from the ICC to the United States is outstanding with respect to the situation in Darfur.¹⁰ Since President Obama took office, United States personnel have been in regular contact with high-level Court personnel, so no doubt other forms of potential assistance have been discussed.

⁸ Citizens for Global Solutions, *Citizens for Global Solutions with President Kirsch*, <http://www.globalsolutions.org/node/1175>.

⁹ That provision reads: “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.”

¹⁰ Daily Press Briefing, Transcript, U.S. Department of State, Sean McCormack, Spokesperson (July 14, 2008), available at <http://2001-2009.state.gov/r/pa/prs/dpb/2008/july/106986.htm>. See also Clint Williamson, Ambassador-at-Large for War Crimes Issues, U.S. Department of State, Remarks at the Century Foundation on Reassessing the International Criminal Court: Ten Years Past Rome (Jan. 13, 2009). Transcript available at <http://www.tcf.org/publications/internationalaffairs/ICC%20Transcript.pdf>.

The issue of State cooperation was central to the stocktaking component of the 2010 Kampala Review Conference.¹¹ States Parties adopted a number of declarations reinforcing the importance of, while also identifying the challenges to, effective and comprehensive State cooperation.¹² In addition, States issued dozens of pledges, committing themselves to cooperating with the Court. The United States pledged as follows:

1. The United States renews its commitment to support rule-of-law and capacity building projects which will enhance States' ability to hold accountable those responsible for war crimes, crimes against humanity and genocide.
2. The United States reaffirms President Obama's recognition on May 25, 2010 that we must renew our commitments and strengthen our capabilities to protect and assist civilians caught in the [Lord's Resistance Army's] wake, to receive those that surrender, and to support efforts to bring the LRA leadership to justice.¹³

As the only non-State Party to make such a pledge, the United States received tremendous positive feedback from the ICC's Assembly of States Parties. It also signaled its support for the Ugandan prosecutions, which focus on crimes committed by the Lord's Resistance Army.

U.S. Cooperation with the Court

Even if the United States was so inclined, the it is barred from providing many forms of cooperation to the Court by the American Servicemembers Protection Act of 2002 (ASPA).¹⁴ The ASPA—enacted a month after the Rome Treaty entered into force—is a product of the initial hostility of the Bush Administration toward the Court¹⁵ as symbolized by the May 6, 2002 retraction of the United States' signature on the Rome Treaty. At that time of the signing of the Rome Treaty in 2000, President Clinton did not recommend that his successor submit the Treaty to the Senate for advice and consent until the United States' fundamental concerns were addressed, most notably the ability of the Court via an unaccountable prosecutor to exercise

¹¹ See, e.g., Stocktaking of International Criminal Justice, Cooperation, Summary of the Roundtable Discussion, Doc. No. RC/ST/CP/1/Rev. 1 at 7 (June 28, 2010), available at <http://www2.icc-cpi.int/NR/rdonlyres/FB6E4F55-DCF6-4D5F-9500-6BD25E578667/0/RCSTCP1Rev1ENG.PDF> (highlighting the fact that many states parties had not yet implemented their obligations under Article 88); Report of the Bureau on Stocktaking: Cooperation, Background Paper and Proposals for Outcome, Doc No. ICC-ASP/8/50 (Mar. 18, 2010), available at http://www2.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-50-ENG.pdf (setting forth focal points on the issue of cooperation in preparation for the Review Conference).

¹² [Draft] Declaration on Cooperation, *supra* note ____.

¹³ Pledges, Doc. No. RC/9 at 18 (July 15, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/18B88265-BC63-4DFE-BE56-903F2062B797/0/RC9ENGFRASPA.pdf>.

¹⁴ 2002 Supplemental Appropriations Act for Further Recover from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909, codified at 22 U.S.C. §§ 7421-7432. See generally Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537 (2003) (discussing legislative history and statutory framework). Representative Tom DeLay (R-TX) introduced the legislation as an amendment to the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States. As an amendment to an appropriations bill, the legislation went through the Appropriations Committee rather than the International Relations Committee. Efforts to enact an earlier version of the ASPA date to 2000.

¹⁵ The Congressional findings associated with the ASPA evince this hostility. See 22 U.S.C. § 7421 (cataloging perceived flaws in the ICC Statute).

jurisdiction over the nationals of non-states parties. The retraction of this signature was accomplished by a letter from John Bolton when he was President George W. Bush's Undersecretary for Arms Control and International Security, to Kofi Annan, then Secretary-General of the United Nations.¹⁶ This indication of an intent not to ratify the treaty removed any obligation of the United States to refrain from acting contrary to the object and purpose of the treaty, as required by Article 18 of the Vienna Convention on the Law of Treaties, which states: "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."

The American Servicemembers Protection Act contains a number of provisions geared toward limiting both U.S. involvement with the Court and the exposure of U.S. or allied citizens to prosecution before the Court. For example, members of the U.S. Armed Forces are prohibited from participating in any UN peacekeeping force or UN peace enforcement operation unless permanently exempted from prosecution.¹⁷ This prohibition is subject to a presidential waiver so long as notice is given to the appropriate congressional committee, U.S. nationals are exempt from prosecution, and target countries are either not parties to the ICC Statute or have entered into agreements not to extradite (or otherwise transfer or surrender) U.S. citizens to the Court. The United States succeeded in getting the Security Council to issue a number of resolutions to temporarily protect U.S. citizens from prosecution in regions where the United States has deployed troops.¹⁸

In its original incarnation, other aspects of the ASPA were geared toward intimidating potential ICC States Parties by threatening to withhold various forms of international aid—including military assistance in the form of International Military Education and Training (IMET) and Foreign Military Funds (FMF)—unless they agreed not to transfer U.S. citizens to the Court.¹⁹ In 2004, the Nethercutt Amendment to an appropriations act added economic aid to the types of foreign assistance subject to suspension.²⁰ These so-called Economic Support Funds (ESF) include funds for promoting antiterrorism and security operations, anti-corruption efforts, economic and democratic development, human rights, and peace processes. Together, these pieces of legislation provided that aid could continue so long as one of three contingencies was in place: (1) the country entered into an agreement insulating United States nationals from the

¹⁶ See Letter from John R. Bolton, U.S. Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary-General (May 6, 2002) (on file with the U.S. Department of State), *available at* <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

¹⁷ 22 U.S.C. § 7424 (2010).

¹⁸ See, e.g., S.C. Res. 1593 (Mar. 31, 2005) (providing that nationals from non-ICC states deployed to Sudan are subject to the exclusive jurisdiction of the contributing state); S.C. Res. 1422 (July 12, 2002) (providing that the ICC shall not commence or proceed with an investigation or prosecution of any current or former officials or personnel from a non-state party to the ICC Statute for one year).

¹⁹ 22 U.S.C. § 7426 (repealed in 2008).

²⁰ The Nethercutt Amendment was part of the appropriations bill adopted on December 7, 2004, for fiscal year 2005. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 108-447, § 574, 118 Stat. 2968, 3027-8 (2004). The Amendment was not included in the Omnibus Appropriations Act adopted for Fiscal Year 2009. Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524 (2009).

Court; (2) the President waived this sanction in the national interest; or (3) the country was a NATO member, a non-NATO ally (such as Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan. All of these sanctions were subject to exceptions and additional waivers.

The Bush Administration used the coercive provisions in the ASPA to extract a number of bilateral treaties with States in which parties pledged not to refer each other's nationals to the Court without the consent of the State of nationality. Human rights NGOs deemed these agreements "bilateral immunity agreements" (BIAs). The United States claimed authority for such agreements in Article 98 of the ICC Statute, which bars the Court from proceeding with "a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law" regarding diplomatic immunity or 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."²¹ At the moment, over 100 such agreements—terminable at will by either party—remain in force, although it appears that the United States has not entered into an Article 98 agreement since its 2007 agreement with Montenegro.²² President Bush granted a number of waivers to strategic States (some in connection with Operation Enduring Freedom/Iraqi Freedom), but suspended various forms of assistance to over thirty States Parties to the ICC.²³ Not surprisingly, this strong-arm approach had negative repercussions²⁴ insofar as it antagonized our allies, alienated States subject to sanctions, angered the human rights community,²⁵ and enabled other States to step into the void in foreign assistance, especially in Latin America.²⁶ The European Parliament, for example, issued a resolution condemning the ASPA and calling upon the United States to participate in the common endeavor of the international community to bring tyrants to trial.²⁷ The European Union

²¹ Article 98 was likely drafted with Status of Forces and Status of Mission Agreements in mind. Kimberly Prost & Angelika Schlunck, *Article 98: Cooperation With Respect to Waiver of Immunity and Consent to Surrender*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1131, 1131 (Otto Triffterer, ed., 1999).

²² See Georgetown Law Library, *International Criminal Court—Article 98 Agreements Research Guide*, http://www.ll.georgetown.edu/guides/article_98.cfm.

²³ See Congressional Research Service, *International Criminal Court Cases in Africa: Status and Policy Issues 6* (May 18, 2009) (discussing sanctions and waivers), available at <http://fpc.state.gov/documents/organization/128346.pdf>.

²⁴ See generally Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 418 (2004) (arguing that "the United States' over-reliance on 'hard power' to alter the ICC's constitutional framework has diminished its ability to achieve its goals, on a more sustainable basis, through persuasion. Resentment of aggressive U.S. tactics aimed at securing an ironclad exemption from ICC jurisdiction has radiated across other arenas of national concern, impairing the United States' ability to secure support for other policy objectives").

²⁵ See, e.g., Amnesty International, *International Criminal Court: U.S. Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes*, IOR 40/025/2002 (Sept. 1, 2002) (arguing that Article 98 agreements violate the Rome Statute and urging countries not to enter into these agreements with the United States), available at <http://www.amnesty.org/en/library/info/IO40/025/2002>.

²⁶ See generally Coalition for the International Criminal Court, *Comments by US Officials on the Negative Impact of Bilateral Immunity Agreements (BIAs) and the American Servicemembers' Protection Act (ASPA)* (Dec. 1, 2006), http://www.iccnw.org/documents/CICCFCS-CommentsUSOfficials_BIA-ASPA_current.pdf (compiling statements by U.S. officials).

²⁷ European Parliament Resolution on the Draft American Servicemembers' Protection Act, Eur. Parl. Doc. P5 TA-PROV 1367 (2002), available at

originally issued “guiding principles” limiting the degree to which its members could enter into Article 98 agreements with the United States, but ultimately granted its members permission to enter into such agreements so long as only American military personnel and diplomats were exempt from prosecution.²⁸ Although the United States has not entered into any new Article 98 in recent years, the Obama Administration has yet to indicate that it does not intend to enforce these agreements or use these or other means to discourage additional States from joining the Court.

The Bush Administration’s second term witnessed a moderation of the relationship with the Court. In keeping with this evolution, the ASPA’s punitive provisions began to see significant dismantling, by either congressional repeal or non-renewal, starting in 2006.²⁹ This change of policy reflected the fact that the withholding or complete denial of foreign aid proved to be counter-productive and contrary to United States’ interests, particularly in a post-September 11th era when military and other forms of foreign assistance had become central to the United States’ anti-terrorism agenda. Members of the Department of Defense testified publicly that such agreements reduced troop training opportunities and hindered the United States’ ability to fight terrorism abroad.³⁰ Indeed, then-Secretary of State Condoleezza Rice noted in 2006 that adhering to some provisions of the ASPA was akin to “shooting ourselves in the foot.”³¹

Although the ASPA has largely been declared, other aspects of the legislation remain in full force.³² Most importantly for the question of State cooperation, the ASPA continues to prohibit many forms of cooperation with the Court by U.S. courts, state or local government entities, and in some cases federal agencies and personnel.³³ Forms of prohibited cooperation include transmitting letters rogatory, aiding in the investigation or transfer of any U.S. citizen or permanent resident to the Court, using appropriated funds to assist the Court, and assisting in the extradition of any person to the Court.³⁴ An earlier piece of legislation prohibits any appropriated funds from being used to support the ICC.³⁵ Treaties of mutual assistance are to be interpreted to comply with the ASPA.³⁶ No agent of the ICC may conduct any investigative activity in the United States (§ 7423(h)), and no U.S. court or state or local governmental entity may respond to

http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=020704&LANGUE=EN&TPV=DEF&LASTCHAP=57&SDOCTA=8&TXTLST=1&Type_Doc=FIRST&POS=1.

²⁸ See European Union, *Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court* (Sept. 30, 2002), 42 ILM 240, 241 (2003).

²⁹ Most importantly, the National Defense Authorization Act of 2008 eliminated restrictions on military assistance for states that refuse to sign Article 98 agreements with the United States. Pub. L. No. 110-181, § 1212, 122 Stat. 3, 371 (2008).

³⁰ *Id.*

³¹ Condoleezza Rice, U.S. Secretary of State, *Trip Briefing: En Route to San Juan, Puerto Rico* (Mar. 10, 2006) (on file with the U.S. Department of State), available at <http://2001-2009.state.gov/secretary/rm/2006/63001.htm>.

³² This includes the radical provision that the United States can use “all means necessary and appropriate” to bring about the release of any U.S. citizen detained or imprisoned by the Court—the so-called “Invade the Hague” provision (22 U.S.C. § 7427 (2010)).

³³ 22 U.S.C. §§ 7423-7425.

³⁴ *Id.* at §§ 7423(b)-(f).

³⁵ Foreign Relations Authorization Act, Pub. L. No. 106-133, § 705 (2000-2001).

³⁶ 22 U.S.C. § 7423(g).

requests for cooperation from the Court.³⁷ Even information sharing is prohibited; the President must ensure that appropriate procedures are in place to prevent the direct or indirect transfer of not only classified national security information, but also *any* law enforcement information to the Court or to a party to the ICC Statute.³⁸ In addition, the legislation bars U.S. government entities from providing any support to the Court.³⁹ “Support” is broadly defined in the legislation as “assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals”.⁴⁰ These limitations do not apply to actions taken by the President pursuant to his authority as Commander-in-Chief of the Armed Forces or in the exercise of executive power.⁴¹ The result of these provisions is that the Court is deprived not only of U.S. support and assistance, but also of U.S. training and expertise.

The President is entitled to waive the provisions barring cooperation and the transfer of information to the Court.⁴² This waiver is allowed where the investigation or prosecution is within the United States’ national interest and the suspect is not a “covered” U.S. person or allied person, such as a member of the U.S. Armed Forces, an elected or appointed member of the U.S. government, any other person working on behalf of the U.S. government, or military or other personnel of NATO member countries and major non-NATO allies so long as that government is not a party to the ICC.

Notwithstanding all these particular limitations, the statute also provides that the United States is not prohibited from participating in international efforts to bring to justice certain foreign nationals (including Osama bin Laden, Saddam Hussein, Slobodan Milošević, and members of al Qaeda) and “other foreign nationals accused of genocide, war crimes or crimes against humanity,” thanks to an amendment proposed by Senator Christopher Dodd (D-CT).⁴³ It is unclear to what extent the Dodd Amendment trumps other more restrictive elements of this legislation.⁴⁴ Unofficially, it has been suggested that the Office of Legal Counsel produced a memorandum suggesting that the Dodd Amendment might allow for the provision of certain forms of case-by-case, in-kind, and facilitative assistance to the Court without breaching ASPA. Moreover, there are some contributions the United States can make to situations under

³⁷ *Id.* at § 7423(b).

³⁸ *Id.* at § 7425.

³⁹ *Id.* at § 7423(e).

⁴⁰ *Id.* at § 7432(12).

⁴¹ *Id.* at § 7430.

⁴² *Id.* at § 7422(c).

⁴³ *Id.* at § 7433.

⁴⁴ Clint Williamson, former Ambassador-at-Large for War Crimes, stated publicly,

We have really relied on the final provision of ASPA, which is sort of this get-out-of-jail-free card, which says that nothing in this act shall constrain the U.S. from doing what’s necessary to bring people to justice for genocide and other serious crimes. We have used this final provision to license our interaction with the ICC. But it’s really can [sic] be applied on a case by case basis, and this has allowed us, I think, great latitude on Darfur.

Clint Williamson, U.S. Department of State, Remarks at the Century Foundation on Reassessing the International Criminal Court: Ten Years Past Rome 10 (Jan. 13, 2009), *available at* <http://www.tcf.org/publications/internationalaffairs/ICC%20Transcript.pdf>.

consideration in the Court that likely do not run afoul of ASPA. For example, the United States can assist in international justice efforts by encouraging and enabling positive complementarity in national systems. Indeed, in Kampala, the United States hosted an important side event on positive complementarity in the Democratic Republic of Congo—one of the countries with cases before the ICC.⁴⁵ The United States can also likely assist in witness protection and relocation efforts so long as no funds are provided directly to the Court. Likewise, it can condition aid to countries that are in a position to assist with arrests, such as Kenya, which has already played host to President Omar Al-Bashir, who has been indicted by the ICC.

Cooperation and the Obama Administration

As a non-State party, the United States is under no legal obligation to cooperate with the ICC,⁴⁶ although there may be some customary law obligations not to actively hinder accountability for international crimes.⁴⁷ Nonetheless, there have already been situations in which cooperation with the Court as a matter of policy will advance U.S. foreign relations and other interests. The 2005 Darfur referral by the Security Council, which the United States allowed, has already demonstrated that ICC action can be consistent with United States foreign policy. No doubt, capturing Joseph Kony and his indicted LRA henchmen is also within the strategic interests of the United States.⁴⁸ Notwithstanding that the United States and the Court are enjoying a *détente*, it is exceedingly difficult for the United States to render much meaningful broad-based assistance to the ICC without running afoul of the ASPA, notwithstanding that the Dodd amendment may provide some cover in this regard on a case-by-case basis.⁴⁹ Given that the coercive aspects of the American Servicemembers Protection Act are no longer in force, repealing, scaling back, or mitigating the anti-cooperation aspects of the ASPA should be a high priority for the Obama Administration.

To enable increased cooperation with the Court, President Obama could effectuate case-specific waivers within the ASPA to the maximum extent possible. In addition, the United States can take steps to dismantle the Article 98 agreements, if only by indicating that it does not intend

⁴⁵ See Press Briefing, *supra* note ____ (noting the role that the United States can play in promoting and assisting national-level prosecutions).

⁴⁶ Article 34 of the Vienna Convention on the Law of Treaties states the *pacta tertiis nec nocent nec prosunt* principle: “a treaty does not create either obligations or rights for a third state without its consent.”

⁴⁷ See G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 79, U.N. Doc. A/9326 (1973), available at <http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/46/IMG/NR028146.pdf> (“8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.”).

⁴⁸ On May 24, 2010, President Obama signed into law the Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, which aims to “support stabilization and lasting peace in northern Uganda and areas affected by the Lord’s Resistance Army through development of a regional strategy to support multilateral efforts to successfully protect civilians and eliminate the threat posed by the Lord’s Resistance Army and to authorize funds for humanitarian relief and reconstruction, reconciliation, and transitional justice, and for other purposes.” Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209 (2010).

⁴⁹ The United States did facilitate the surrender of Thomas Lubanga Dyilo to the ICC by enabling the lifting of Security Council travel restrictions and sanctions. See Judge Philippe Kirsch, *Address to the United Nations General Assembly* (Oct. 9, 2006), http://www.icc-cpi.int/NR/rdonlyres/53692E4E-2B35-41BD-8B90-91828D55880A/278543/PK_20061009_en.pdf.

to enforce them or seek additional such protections in the future from other members, or potential members, of the Court. That said, a more thorough legislative reform agenda targeted at the ASPA's anti-cooperation provisions is necessary to enable a "more systemic and institutionalized program of cooperation with or support of the Court"⁵⁰ Beyond what the Dodd amendment may allow with respect to particular cases. These more broad-based changes would enable the United States greater flexibility in providing cooperation where the ICC's investigations and prosecutions are consistent with its interests and in engaging in long-term cooperative activities and building institutional ties with the Court.

Short of total repeal of the ASPA, Congress could be encouraged to make surgical amendments to the legislative scheme to curtail its over-broad elements. The most effectual fix would be the repeal of § 7423 of the ASPA, which prohibits a number of forms of cooperation and support. This would enable the United States to choose from a range of ways to cooperate with the Court—entirely at its discretion and when it is in its interests to do so. Congress could also tinker with specific parts of § 7423. In particular, the limitations on cooperating with ICC investigations or transferring suspects to the Court could be removed in the case of non-U.S. nationals (so-called covered allied persons in § 7432(3)) and—more controversially—in the cases of individuals who are not members of the U.S. armed forces or elected/appointed government officials (i.e., "other persons employed by or working on behalf of the United States Government" (§7432 (4)). "Support" could be more narrowly defined to exclude only financial support and thus allow for the provision of in-kind assistance, such as training, intelligence or collaboration in law enforcement (§7432(12)). The 2001 Foreign Relations Authorization Act could be repealed or amended to be consistent with the terms of ASPA, since it may be interpreted as even broader than the provisions of ASPA preventing the provision of support for the Court. Congress could also permit the ICC to conduct investigations within the United States (§ 7423(h)). Similarly, Congress at a minimum could redraft § 7425 to allow for the sharing of law enforcement information for the purpose of facilitating the investigation of ICC crimes, the apprehension of fugitives, and the prosecution of defendants. The ban on the sharing of classified information could remain in place subject to the waiver provisions. Finally, the various waiver provisions in § 7422(c) could be liberalized. A risk inherent to seeking legislative reform is that it may result in the return of ASPA's more restrictive provisions, or a weakening of the *modus vivendi* provided by the Dodd Amendment, so the timing of any such effort should be carefully considered to ensure Congress's receptivity to cooperating with the Court.

Conclusion

The total ban on U.S. cooperation with the ICC contained within the ASPA hampers the ability of the United States to advance U.S. interests in accountability where they dovetail with situations under investigation by the Court. It also leaves the ICC without U.S. expertise in intelligence and law enforcement. By effectuating modest amendments to the ASPA, the United States can remain a non-State party and still provide cooperation and other forms of support where consistent with United States interests. This mutually beneficial relationship will

⁵⁰ ASIL Policy Paper, *supra* note ____, at 33. Models include the cooperation agreements between the United States and the ICTY and ICTR.

ultimately enhance international justice efforts and restore the United States to a leadership position in this arena.