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CORRECTING COURSE: HOW CONGRESS CAN
STREAMLINE U.S. ENGAGEMENT WITH THE
INTERNATIONAL CRIMINAL COURT

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Since its participation in the 1998 Rome Conference, the United States has vocalized opposition to key components of the International Criminal Court's (ICC) jurisdiction. This opposition has informed longstanding positions taken by the executive branch and motivated anti-ICC legislation passed by Congress. Support for the ICC's investigation in Ukraine challenged these narratives across the legislative and executive branches, but the ICC's arrest warrants of Israeli officials in 2024 renewed Congress's heightened skepticism of the court and sowed political divisions on efforts to sanction the ICC.

Congress's oscillation on the ICC within the past several years prompts a larger question of how the United States can balance its policy interests with existing legal authorities that narrowly permit U.S. cooperation. Statutory exceptions within the American Servicemembers' Protection Act (ASPA) and Dodd Amendment readily provide justification for the President to support the ICC's investigations and prosecutions, but neither exception has been fully employed by the U.S. government. This Note will explore how these exceptions can be deployed by the executive and legislative branches to streamline how the United States can legally support the ICC when doing so aligns with U.S. foreign policy objectives. Based on

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this assessment, this Note will propose that Congress harness these existing legal authorities and create a cogent legislative fix that establishes long-term parameters for U.S. engagement with the ICC. This new statute should feature the best components of ASPA and the Dodd Amendment's exceptions, which allow deference to the executive branch for policy decisions on when the United States should support the ICC's activities, set congressional notification procedures and reporting requirements for the executive branch, and describe what forms of support U.S. agencies can reliably provide to the ICC. Through this reform, the U.S. government can develop straightforward mechanisms for assisting the ICC's investigation and prosecution of individuals accused of crimes against humanity, genocide, and war crimes.

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INTRODUCTION

In February 2022, Russian forces invaded Ukraine under an alleged mandate to protect civilians in eastern Ukraine against the North Atlantic Treaty Organization's (NATO) expanding influence.¹ After the world observed the devastating impact of this invasion, thirty-nine countries prompted the Prosecutor of the International Criminal Court (ICC) to open investigations into atrocities alleged to have occurred in Ukraine since 2013.² After the Prosecutor's preliminary examination, he announced that the ICC had a reasonable basis to believe that crimes within its jurisdiction, including war crimes, genocide, crimes against humanity, and crimes of aggression, have been committed by Russian forces in Ukraine.³

Along with the U.S. Congress's authorization for security assistance to Ukraine following Russia's invasion,⁴ a bipartisan delegation visited the ICC later that year.⁵ Senate Republicans "led a unanimous Senate resolution supporting 'any investigation' into crimes 'levied by [Russia's] President Vladimir Putin,' which would include the ICC investigation."⁶ Congress promptly expanded statutory authority for U.S. support to the ICC's investigation in the 2023 Consolidated Appropriations Act, excluding prohibitions on U.S. material support and information-sharing for the ICC's investigation of alleged international crimes of foreign nationals in Ukraine.⁷ Simultaneously, the Fiscal Year 2023 Omnibus provided the President "with greater flexibility to assist the ICC with information[-]sharing, technical assistance, and financial support" through revisions to the Dodd Amendment, a narrow exception

¹ President Vladimir Putin, The Kremlin, Address by the President of the Russian Federation (Feb. 24, 2022) (transcript available on The Kremlin's website).

² Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 State Parties and the Opening of an Investigation, INT'L CRIM. CT. (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> [<https://perma.cc/EAV8-9VXD>] [hereinafter Statement of ICC Prosecutor on Ukraine].

³ *Id.*; see also Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 92.

⁴ CHRISTINA L. ARABIA, ANDREW S. BOWEN & CORY WELT, CONG. RSCH. SERV., IF12040, U.S. SECURITY ASSISTANCE TO UKRAINE 2 (2024).

⁵ Esti Tambay, *US Delegation Makes Historic Visit to International Criminal Court*, HUM. RTS. WATCH (Nov. 7, 2022, 1:23 PM), <https://www.hrw.org/news/2022/11/07/us-delegation-makes-historic-visit-international-criminal-court> [<https://perma.cc/FBE8-BG4F>].

⁶ *Id.*; see Press Release, Office of U.S. Senator Lindsey Graham (R-SC), Graham Resolution Supports Ukraine Complaint Urging Investigation of Putin as War Criminal (Mar. 2, 2022), <https://www.lgraham.senate.gov/public/index.cfm/2022/3/graham-resolution-supports-ukraine-complaint-urging-investigation-of-putin-as-war-criminal> [<https://perma.cc/X98H-XEEW>].

⁷ Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, § 7073, 136 Stat. 5092 (2022).

that allows U.S. support for the ICC under the American Servicemembers' Protection Act (ASPA).⁸

These legislative developments reflect a remarkable shift in domestic legal authorities that have shaped and strained the United States' relationship with the ICC. Since its participation in the 1998 Rome Conference,⁹ the United States has vocalized opposition to key components of the ICC's jurisdiction to justify not joining the ICC Assembly of State Parties.¹⁰ This opposition has informed longstanding positions taken by federal agencies and military branches and motivated anti-ICC legislation passed by Congress.¹¹ Support for the ICC's investigation in Ukraine challenged these narratives across the legislative and executive branches,¹² but the ICC's arrest warrants of Israeli officials in 2024 renewed Congress's heightened skepticism of the court and sowed political divisions on efforts to sanction the ICC.¹³

Congress's oscillation on the ICC within the past several years prompts a larger question of how the United States can balance its policy interests with existing legal authorities that narrowly permit U.S. cooperation. Statutory exceptions within ASPA and the Dodd Amendment readily provide justification for the President to support the ICC's investigations and prosecutions, but neither exception has been fully employed by the U.S. government.¹⁴ This Note will explore how these exceptions can be deployed by the executive and legislative branches to streamline how the United States can legally support the ICC when doing so aligns with U.S. foreign policy objectives. Based on this assessment, this Note will propose that Congress should harness these existing legal authorities and create a cogent legislative fix that establishes long-term parameters for U.S. engagement with the ICC. This new statute should feature the best components of ASPA and the Dodd Amendment's exceptions, which allow deference to the executive branch for policy decisions on when the United States should support the ICC's

⁸ Press Release, Office of U.S. Senator Dick Durbin (D-IL), Durbin, Graham, Bipartisan Group of Senators Urge President Biden to Support the ICC's Investigation Into Atrocities in Ukraine (Mar. 24, 2023), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-graham-bipartisan-group-of-senators-urge-president-biden-to-support-the-iccs-investigation-into-atrocities-in-ukraine> [<https://perma.cc/WLT7-JEBZ>].

⁹ Press Release, United Nations, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court (July 20, 1998), <https://press.un.org/en/1998/19980720.i2889.html> [<https://perma.cc/B8UZ-JSPR>].

¹⁰ David J. Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State, Remarks Before the Sixth Committee of the 53d General Assembly (Oct. 21, 1998) (explaining why the United States decided not to sign the Rome Statute at the Rome Conference).

¹¹ See *infra* Section I.A.

¹² See *infra* Section I.B.

¹³ See *infra* Section I.B.

¹⁴ See *infra* Part II.

activities, set congressional notification procedures and reporting requirements for the executive branch, and describe what forms of support U.S. agencies can reliably provide to the ICC. Through this reform, the U.S. government can develop straightforward mechanisms for assisting the ICC's investigation and prosecution of foreign nationals accused of crimes against humanity, genocide, and war crimes.

Section I.A. of this Note will explore the historical framework of the United States' relationship with the ICC.¹⁵ It will trace U.S. governmental perspectives beginning from the 1998 Rome Conference to President Trump's sanctions of ICC personnel while discussing the development of ASPA and the Dodd Amendment.¹⁶ Section I.B. will examine the current landscape of United States-ICC relations by delving deeper into recent Ukraine-focused reforms in Congress and calls to sanction the ICC in retaliation for its arrest warrants of Israeli officials.¹⁷ Section I.B. will also explore how executive branch officials have implemented this revised legal authority and discuss divergent viewpoints within the U.S. government.¹⁸ Part II will provide an analysis of how ASPA's waiver system and the Dodd Amendment each allow executive branch support of the ICC beyond Ukraine.¹⁹ By conducting a textual interpretation of each set of provisions, this Note will ascertain how the President may apply these exceptions to ICC matters that are within the United States' national interests.²⁰ Finally, Part III will propose a legislative fix for Congress to bridge gaps between these statutes: centralized provisions that allow the President and Congress to recognize when the United States should support the ICC and determine which types of assistance could be consistently provided.²¹

I. BACKGROUND

A. *Historical Framework*

1. 1998 Rome Conference

The ICC, created by the Rome Statute, is a permanent international judicial body with jurisdiction to prosecute four categories of crimes:

¹⁵ See *infra* Section I.A.

¹⁶ See *infra* Section I.A.

¹⁷ See *infra* Section I.B.

¹⁸ See *infra* Section I.B.

¹⁹ See *infra* Part II.

²⁰ See *infra* Part II.

²¹ See *infra* Part III.

genocide, war crimes, crimes against humanity, and the crime of aggression.²² In the wake of atrocities that deeply shocked the conscience of humanity throughout the twentieth century, the international community was determined to end impunity for perpetrators through effective prosecution on both domestic and international levels.²³ The ICC's membership includes 125 countries who are State Parties to the Rome Statute: thirty-three African States, nineteen Asia-Pacific States, twenty Eastern European States, twenty-eight Latin American and Caribbean States, and twenty-five Western European and other States.²⁴ As of March 2025, the ICC maintains thirty-three cases and twelve ongoing investigations across several regions but predominantly within African States.²⁵

On July 17, 1998, the United Nations (U.N.) Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC adopted the Rome Statute.²⁶ During negotiations, the Clinton Administration supported the ICC's creation but objected to certain provisions.²⁷ As a result, the Clinton Administration "said it would not submit [the Rome Statute] to the [U.S.] Senate for its advice and consent for ratification."²⁸ However, after the United States assisted with the drafting and adopting of important foundational documents, such as the Rome Statute's Rules of Procedure and Evidence, President Clinton signed the Rome Statute in 2000.²⁹ Stating that the U.S. signature was the "right action to take at this point," the Clinton Administration believed that signing the Rome Statute would increase chances for productive discussions with other governments to deter human rights abuses in the months and years ahead.³⁰

Congress initially signaled mistrust of the ICC in November 1999 when it enacted the Admiral James W. Nance and Meg Donovan Foreign

²² Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 92.

²³ *Id.* at Preamble.

²⁴ *The States Parties to the Rome Statute*, INT'L CRIM. CT., <https://asp.icc-cpi.int/states-parties#:~:text=123> [<https://perma.cc/YP3U-2D2H>].

²⁵ *Cases*, INT'L CRIM. CT., <https://www.icc-cpi.int/cases> (last visited Mar. 14, 2025); *Situations Under Investigations*, INT'L CRIM. CT., <https://www.icc-cpi.int/situations-under-investigations> [<https://web.archive.org/web/20241221120447/https://www.icc-cpi.int/situations-under-investigations>].

²⁶ American Servicemembers' Protection Act of 2001, S. 857, 107th Cong. § 2 (2001).

²⁷ ALEXIS ARIEFF, RHODA MARGESSON, MARJORIE ANN BROWNE & MATTHEW C. WEED, CONG. RSCH. SERV., RL34665, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 3 (2011).

²⁸ *Id.*

²⁹ See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 55–56, 66–68 (2002).

³⁰ Presidential Statement on the Rome Treaty on the International Criminal Court Treaty 2000, 3 PUB. PAPERS 2816 (Dec. 31, 2000).

Relations Authorization Act for Fiscal Years 2000 and 2001 (FRAA).³¹ A provision in the FRAA, now codified at 22 U.S.C. § 7401(b), states that “[n]one of the funds authorized to be appropriated by this or any other Act may be obligated for use by, or for support of, the [ICC] unless the United States has become a party to the Court”³² The Office of Legal Counsel (OLC) at the U.S. Department of Justice later found that “§ 7401(b) remains in effect even though it was enacted as part of an appropriations act and provisions in appropriations acts are presumed not to be permanent.”³³

2. President Bush, American Servicemembers’ Protection Act, and the Dodd Amendment

Like his predecessor, President George W. Bush declined to submit the Rome Statute to the Senate for ratification and notified the U.N. Secretary General, as depositary,³⁴ of the United States’ intent not to ratify the treaty.³⁵ The Bush Administration advanced objections based on:

- (1) the [ICC’s] assertion of jurisdiction . . . over citizens, including military personnel, of countries that are not parties to the treaty;³⁶
- (2) the perceived lack of adequate checks and balances on the powers

³¹ Pub. L. No. 106-113, § 1000(a)(7), 113 Stat. 1501, 1535–36 (codified as 22 U.S.C. § 7401(b)); Memorandum from the Office of Legal Counsel at the U.S. Department of Justice on Engagement with the International Criminal Court 2 (Jan. 15, 2010), <https://int.nyt.com/data/documenttools/2009-olc-memo-on-support-for-the-icc/b1a4ef1b0c5dc790/full.pdf> [<https://perma.cc/3494-CWH8>].

³² 22 U.S.C. § 7401(b).

³³ Memorandum from the Office of Legal Counsel at the U.S. Department of Justice on Engagement with the International Criminal Court, *supra* note 31, at 3.

³⁴

In international law, multilateral treaties, once concluded, are usually entrusted to a depositary—normally a State or international organization—charged with assuming a variety of functions, including the receipt of instruments of signature, accession, ratification, reservation etc. Once received, the depositary notifies all relevant parties about the instruments deposited and may, if the treaty so specifies, be charged with additional functions.

Depositary, INT’L COMM. OF THE RED CROSS, http://casebook.icrc.org/a_to_z/glossary/depositary#:~:text=In [<https://perma.cc/8XUV-XBVX>].

³⁵ CONG. RSCH. SERV., RL31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT (ICC) 1–2 (2006). “Because the United States signed the Rome Statute, it had been obligated under international law to refrain from conducting activity in contravention of the object and purpose of the treaty. However, this obligation ends once a signatory state has indicated an intent not to ratify the treaty.” *Id.* at 3 n.17.

³⁶ “The United States has supported a version of the Rome Statute that would have allowed the U.N. Security Council to refer cases involving non-State Parties to the ICC, but would not have allowed other states or the Prosecutor to refer cases.” ARIEFF ET AL., *supra* note 27, at 3 n.10.

of the ICC prosecutors and judges; (3) the perceived dilution of the role of the U.N. Security Council in maintaining peace and security;³⁷ and (4) the ICC's potentially chilling effect on America's willingness to project power in the defense of its interests.³⁸

The Senate cited the potential for politicized prosecution of American soldiers and officials in the post-9/11 context to justify Congress's anti-ICC sentiments.³⁹ Senator Jesse Helms, then-ranking Republican on the Senate Foreign Relations Committee, argued that,

As [America] commenced an aggressive fight against terror . . . [its] military needed to be free from the worry that it might become targeted by the court, forced to stand trial for it[s] actions in war should it push (or cross) the bounds of legally-permissible interrogation and investigation tactics.⁴⁰

As a result, just one month after the ICC began its operations, President Bush signed ASPA into law in August 2002.⁴¹ ASPA contains "sweeping prohibitions against cooperation between U.S. government entities, including U.S. courts, and the ICC."⁴² Prohibited specific conduct includes "responding to requests for cooperation" from the ICC,⁴³ "transmit[ting] . . . letters rogatory from the [ICC],"⁴⁴ "us[ing] . . . appropriated funds to assist the [ICC],"⁴⁵ and "bar[ring] the ICC and its 'agents' from engaging in investigative activities in the United States."⁴⁶ ASPA even includes "a provision that empowers the U.S. military to invade the [ICC's] detention facilities should any American end up there, [which] led to the legislation's unusual nickname: the [Hague Invasion] Act."⁴⁷

³⁷ The United States is a permanent member of the U.N. Security Council, which provides permanent members with veto power over U.N. Security Council Resolutions. Therefore, it may be argued that U.S. international legal power is limited by the ICC's authority. William A. Schabas, *United States' Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L. L. 701, 713–14 (2004).

³⁸ ARIEFF ET AL., *supra* note 27, at 3.

³⁹ Alexa Koenig, Keith Hiatt & Khaled Alrabe, *Access Denied? The International Criminal Court, Transnational Discovery, and the American Servicemembers Protection Act*, 36 BERKELEY J. INT'L L. 1, 13–14 (2018).

⁴⁰ *Id.* at 14 (citing 47 CONG. REC. 18026-28 (2001) (statement of Sen. Helms)).

⁴¹ *Id.* at 15.

⁴² *Id.*

⁴³ 22 U.S.C. § 7423(b).

⁴⁴ § 7423(c).

⁴⁵ § 7423(f).

⁴⁶ Koenig, *supra* note 39, at 15; 22 U.S.C. § 7423(h)(1).

⁴⁷ Koenig, *supra* note 39, at 15; *see* 22 U.S.C. § 7427(a); U.S.: "Hague Invasion Act" Becomes Law, HUM. RTS. WATCH (Aug. 3, 2002), <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> [<https://perma.cc/GZ7L-ZFGJ>].

At its passage, ASPA provided two waivers to permit the executive branch some freedom to cooperate with the ICC.⁴⁸ The “Commander-in-Chief Waiver” grants the President authority “to take certain military actions . . . —even if they otherwise violate ASPA—so long as Congressional notice is provided.”⁴⁹ The “Peacekeeping Waiver” provides the President with authority “to waive the ASPA restrictions when the United States chooses to take part in a peacekeeping operation deemed to be in the national security interest of the United States.”⁵⁰ Congress later adopted the Dodd Amendment, which it intended to serve as “a carve-out for assistance to international efforts to bring to justice foreign nationals accused of genocide, war crimes, or crimes against humanity.”⁵¹ The Dodd Amendment permits the United States to render assistance to international justice efforts related to specific individuals who have been accused of crimes that fall within the ICC’s jurisdiction.⁵²

Executive branch officials articulated several concerns following ASPA’s passage. First, that “[ASP]A would inhibit [the United States’] chances of negotiating procedural safeguards for soldiers and government officials by pulling away from the [ICC] instead of positively engaging [with] it.”⁵³ Additionally, “[ASP]A would potentially infringe on the President’s constitutional authority as Commander-in-Chief by hindering [their] ability to conduct foreign relations.”⁵⁴ However, these concerns were largely set aside by Congress due to their inclusion of the waivers in ASPA.⁵⁵

Despite the legal availability for cooperation, the Bush Administration remained antagonistic toward the ICC. For example, on June 30, 2002, the United States vetoed a U.N. resolution extending the peacekeeping mission in Bosnia and Herzegovina because the Security Council refused to add a guarantee of full immunity for U.S. personnel

⁴⁸ Julian Bava & Kiel Ireland, *The American Servicemembers’ Protection Act: Pathways to, and Constraints, on U.S. Cooperation with the International Criminal Court*, STAN. L. SCH.: L. & POL’Y LAB, June 2016, at 1.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Floriane Lavaud, Ashika Singh & Isabelle Glimcher, *The American Servicemembers’ Protection Act and the Dodd Amendment: Shaping United States Engagement with the ICC (Part II)*, JUST SEC. (Feb. 14, 2023), <https://www.justsecurity.org/85121/the-american-servicemembers-protection-act-and-the-dodd-amendment-shaping-united-states-engagement-with-the-icc-part-ii> [<https://perma.cc/U5FR-RR6H>].

⁵² 22 U.S.C. § 7433; *see infra* Section II.B.

⁵³ Christopher M. Van de Kieft, Note, *Uncertain Risk: The United States Military and the International Criminal Court*, 23 CARDOZO L. REV. 2325, 2346 (2002).

⁵⁴ *Id.*

⁵⁵ *See infra* Section II.A.

from the jurisdiction of the ICC.⁵⁶ Ultimately, the U.N. Security Council and the U.S. delegation reached a compromise and unanimously adopted a resolution requesting the ICC defer, for an initial period of one year, any prosecution of persons participating in U.N. peacekeeping efforts who are nationals of non-State Parties to the ICC.⁵⁷

The Bush Administration reached bilateral immunity agreements, also known as “Article 98 agreements,” with most State Parties to exempt U.S. citizens from possible surrender to the ICC.⁵⁸ Each State Party to an Article 98 agreement promises that it will not surrender citizens of the other State Party to international tribunals or the ICC unless both parties agree in advance.⁵⁹ An Article 98 agreement would prevent the surrender of certain persons to the ICC by parties to the agreement but would not bind the ICC if it were to obtain custody of the accused through other means.⁶⁰ “[T]he Bush Administration terminated military assistance to governments of countries that had not signed Article 98 agreements,”⁶¹ and by 2005, the United States signed one hundred Article 98 agreements with State Parties to the ICC.⁶² However, “[t]he legality of these agreements has been sharply contested when the second party to them is

⁵⁶ Press Release, United Nations, Security Council Rejects Draft Proposing Extension of United Nations Mission in Bosnia and Herzegovina (June 30, 2002), <https://press.un.org/en/2002/sc7437.doc.htm> [<https://perma.cc/74RZ-3VLH>]; see Colum Lynch, *Dispute Threatens U.N. Role in Bosnia: U.S. Wields Veto in Clash over War Crimes Court*, WASH. POST. (June 30, 2002) <https://www.washingtonpost.com/archive/politics/2002/07/01/dispute-threatens-un-role-in-bosnia/126b405f-6f58-4d7a-9dcc-6bd1715155d1> [<https://web.archive.org/web/20210518202722/https://www.washingtonpost.com/archive/politics/2002/07/01/dispute-threatens-un-role-in-bosnia/126b405f-6f58-4d7a-9dcc-6bd1715155d1>].

⁵⁷ Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 EUR. J. INT’L L. 85, 85–86 (2003).

⁵⁸ See VICTORIA K. HOLT & ELISABETH W. DALLAS, STIMSON CENTER, ON TRIAL: THE U.S. MILITARY AND THE INTERNATIONAL CRIMINAL COURT 53–54 (2006). See generally Anne K. Heindel, *The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. SOC. JUST. 345, 365–67 (2004) (criticizing the Bush Administration’s use of bilateral immunity agreements).

⁵⁹ Antoinette Pick-Jones, *Towards Permanently Delegitimizing Article 98 Agreements: Exercising the Jurisdiction of the International Criminal Court Over American Citizens*, 93 N.Y.U. L. REV. 1779, 1795–96 (2018); see Rome Statute of the International Criminal Court art. 98, July 17, 1998, 2187 U.N.T.S. 92.

⁶⁰ Pick-Jones, *supra* note 59, at 1782–83.

⁶¹ CLARE RIBANDO SEELKE, CONG. RSCH. SERV., RL 33337, ARTICLE 98 AGREEMENTS AND SANCTIONS ON U.S. FOREIGN AID TO LATIN AMERICA 4 (2007).

⁶² Press Release, U.S. Dep’t of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), <https://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm#:~:text=On%20May%202%2C%202005%2C%20Angola%20became%20the%20100th,to%20the%20International%20Criminal%20Court%20without%20our%20consent> [<https://perma.cc/28FE-EXQY>].

a [S]tate [P]arty to the Rome Statute.”⁶³ These agreements “undermine the ICC, legitimize immunity, and create a two-tiered system of justice: one for U.S. citizens; and one for the rest of the world’s citizens.”⁶⁴

At the beginning of 2006, the Bush Administration appeared to be divided over whether to continue linking [International Military Education and Training (IMET) and Economic Support Funds (ESF)] assistance to Article 98 agreements. Secretary of State Condoleezza Rice acknowledged that invoking ASPA sanctions on key U.S. military allies may be ‘sort of the same as shooting ourselves in the foot’ and that waivers of military aid restrictions [were] being considered on a case-by-case basis.⁶⁵

Thus, by fall 2006, President Bush waived restrictions on FY2006 IMET and ESF funds for twenty-one countries and by FY2007, Congress modified ASPA to end the ban on IMET assistance to countries without Article 98 agreements.⁶⁶

3. Constructive Engagement During the Obama Administration

Upon President Obama’s entry into office, the U.S. government reassessed its obligations under ASPA. In a memorandum prepared by OLC on January 15, 2010, the Office considered,

[W]hether federal statutes bar the [U.S.] [g]overnment from engaging in certain diplomatic activities that could be supportive of the ICC, from providing funding directly to the ICC for specific cases, from providing certain informational assistance to the ICC, from training ICC personnel, and from detailing [g]overnment employees to the ICC.⁶⁷

OLC found two statutory constraints: the FRAA under 22 U.S.C. § 7401(b) and ASPA.⁶⁸ Under these statutes, “the United States [could]

⁶³ Nadia Banteka, *Mind the Gap: A Systematic Approach to the International Criminal Court’s Arrest Warrants Enforcement Problem*, 49 CORNELL INT’L L. J. 521, 551 (2016). Experts have identified “three primary critiques of Article 98 agreements:” (1) the Bush Administration’s understanding of Article 98(2) was viewed as beyond the scope of the drafting and ratifying states’ intent; (2) “Article 98 agreements violate international treaty norms . . . because, when enforced, they are inconsistent with the object and purpose of the Rome Statute;” and (3) the Bush Administration’s “predatory negotiation tactics” with developing countries undermine the legitimacy of the agreements. Pick-Jones, *supra* note 59, at 1796–1802.

⁶⁴ Lowell B. Bautista, *A Legal Analysis of US Bilateral Immunity Agreements*, 20 WORLD BULL. 28, 32 (2003).

⁶⁵ SEELKE, *supra* note 61, at 6–7.

⁶⁶ *Id.* at 8.

⁶⁷ Memorandum from Office of Legal Counsel at the U.S. Department of Justice on Engagement with the International Criminal Court, *supra* note 31, at 1.

⁶⁸ *Id.*

not provide financial support to the ICC as an institution or obligate for use by the ICC even in specific cases funds that Congress has authorized to be appropriated.”⁶⁹ OLC found, “however, that under both subsection 7401(b) and ASPA, the United States may engage in the diplomatic activities [related to] the ICC.”⁷⁰

[N]either of the statutes in question prohibits the United States from furnishing the informational assistance . . . for particular ICC cases involving foreign nationals accused of genocide, war crimes, or crimes against humanity, or from training ICC personnel or detailing [g]overnment employees to the ICC where those forms of assistance are limited to particular cases involving foreign nationals accused of [those crimes].⁷¹

Therefore, the OLC memo provides support for the argument that the Dodd Amendment permits cooperation with the ICC.⁷²

Generally, the Obama Administration made greater strides to end impunity for international crimes through the work of the State Department and other agencies.⁷³ In 2014, the Obama Administration sent approximately 280 U.S. servicemembers to the central African region to assist national and regional efforts to apprehend key Lord’s Resistance Army (LRA) commanders.⁷⁴ “[A]lthough Congress . . . support[ed] . . . sending military and intelligence assistance to ‘apprehend or remove’ top LRA commanders, Congress neglected to include international justice efforts under the umbrella of transitional justice mechanisms available to the [P]resident.”⁷⁵ However, Congress believed “a principal objective of the foreign policy of the United States” is to support efforts to promote transitional justice and reconciliation on both local and national levels.⁷⁶ “Other appropriations bills and defense authorization acts have echoed Congressional support for the broad aim of eliminating the LRA, but [fell] short of approving military efforts to cooperate [with] an international tribunal (including surrendering

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 1–2.

⁷² *Id.*

⁷³ Bava & Ireland, *supra* note 48, at 27–28.

⁷⁴ Letter to Congressional Leaders on the Deployment of United States Combat-Equipped Armed Forces Personnel to Uganda, South Sudan, the Democratic Republic of the Congo, and the Central African Republic, 1 PUB. PAPERS 298–99 (Mar. 25, 2014), https://www.govinfo.gov/app/collection/ppp/president-44_Obama,%20Barack%20H./2014/01%21A%21January%20to%20June%2030%2C%202014 [https://perma.cc/TS8F-TWFE]. In 2016, this number increased to approximately 300 U.S. servicemembers sent to detain key LRA leaders, who were also indicted by the ICC. Bava & Ireland, *supra* note 48, at 27.

⁷⁵ Bava & Ireland, *supra* note 48, at 27.

⁷⁶ 22 U.S.C. § 2151.

captures suspects and sharing intelligence).”⁷⁷ “When . . . the Central African Republic captured and surrendered Dominic Ongwen—an LRA commander indicted by the ICC who already intended to defect—to American custody, U.S. forces on the ground transferred him to the African Union.”⁷⁸ “Perhaps to avoid running afoul of ASPA, the [United States] exercised what could be described as an unnecessary abundance of caution in constructing a complex chain of custody.”⁷⁹

While the Obama Administration’s official policy toward the ICC was one of engagement as an observer nation,⁸⁰ they did participate constructively during periodic meetings of the ICC’s Assembly of State Parties.⁸¹ At the 2010 ICC Review Conference, a Special Working Group proposed a new crime to be adopted by the State Parties under the Rome Statute—the crime of aggression:⁸²

“Crime of aggression” is defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a [s]tate, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”⁸³

The U.S. delegation expressed several concerns about this definition of a crime of aggression.⁸⁴ “[U.S. Ambassador for War Crimes Stephen Rapp] . . . stated that a definition limiting certain uses of force to stop atrocities could weaken the core human rights mission of the ICC, by essentially preventing military and political forms of human rights protections.”⁸⁵

⁷⁷ Bava & Ireland, *supra* note 48, at 27; *see also* ALEXIS ARIEFF, LAUREN PLOCH BLANCHARD & TOMAS F. HUSTED, CONG. RSCH. SERV., R42094, THE LORD’S RESISTANCE ARMY: THE U.S. RESPONSE 13–16 (2015).

⁷⁸ Bava & Ireland, *supra* note 48, at 27–28.

⁷⁹ *Id.* at 28.

⁸⁰ Observer status is granted to non-member states or entities of a specialized international agency or body. These states have free access to most meetings and may provide public comments but have no abilities to vote on resolutions. *See Observer Status*, UNITED NATIONS ECON. AND SOC. COMM’N FOR W. ASIA, <https://archive.unescwa.org/observer-status> [<https://perma.cc/548C-KNFP>].

⁸¹ MATTHEW C. WEED, CONG. RSCH. SERV., R41682, INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE: 2010 REVIEW CONFERENCE 2 (2011).

⁸² *Id.* at 3–5.

⁸³ *Id.* at 6. Additionally, an “[a]ct of aggression” . . . is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” *Id.*

⁸⁴ *Id.* at 6–7.

⁸⁵ *Id.* at 7. At this time, the United States remained a non-State Party that “[could not] be subjected to ICC jurisdiction over cases initiated by State Party referral or the ICC prosecutor for aggression crimes that are allegedly committed on U.S. soil or by its nationals.” *Id.* at 13.

4. Rollbacks During the First Trump Administration

The Trump Administration's approach to international legal engagement can be broadly characterized as isolationist.⁸⁶ President Trump's National Security Adviser John Bolton stated that "the [ICC] has been ineffective, unaccountable, and indeed, outright dangerous."⁸⁷ Specifically, Bolton was referencing "the ICC Prosecutor[']s request[] [for] authorization to investigate alleged war crimes committed by U.S. [servicemembers] and intelligence professionals during the war in Afghanistan," which neither Afghanistan nor any other State Party requested.⁸⁸ He directly criticized the ICC's crime of aggression provisions and speculated their use in targeting U.S. servicemembers who killed Osama bin Laden, authorized air strikes in Syria, conducted military exercises with allies, or supported Israel's self-defense.⁸⁹ Therefore, Bolton claimed that the ICC maintained "unaccountable powers" that supposedly constituted a constitutional and sovereignty assault against the United States.⁹⁰

Based on this rhetoric, the Trump Administration imposed sanctions on then-ICC Prosecutor Fatou Bensouda and other senior prosecution officials.⁹¹ President Trump issued an executive order in 2020 that authorized asset freezes and entry bans against ICC officials, and their immediate family members, who were identified as being involved with certain investigations, particularly those in Afghanistan and Palestine.⁹²

⁸⁶ Milena Sterio, *The Trump Administration and the International Criminal Court: A Misguided New Policy*, 51 CASE W. RES. J. INT'L L. 201 (2019). During this time, the United States also withdrew from the United Nations Human Rights Council, signaling the Trump Administration's disengagement with the international legal system. *U.S. Withdraws from U.N. Human Rights Council—U.S. Ambassador Haley*, REUTERS (June 19, 2018), <https://www.reuters.com/article/us-un-rights-usa-haley/u-s-withdraws-from-u-n-human-rights-council-u-s-ambassador-haley-idUSKBN1JF335> [<https://perma.cc/A2LT-S5FN>].

⁸⁷ John Bolton, National Security Adviser, Speech at the Federalist Society in Washington D.C. (Sept. 10, 2018), <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court> [<https://perma.cc/L7NX-ABN7>].

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *U.S. Sanctions on the International Criminal Court: Questions and Answers*, HUM. RTS. WATCH (Dec. 14, 2020), <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court> [<https://perma.cc/Y9M4-Q3ZQ>].

⁹² Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court> [<https://perma.cc/8XFD-BDMF>].

B. *Current Landscape*

1. ICC Investigation in Ukraine

Following referrals from ICC State Parties in March 2022, the ICC opened an investigation into alleged war crimes and crimes against humanity committed by Russian or Russian-affiliated forces in Ukraine.⁹³ Such crimes include “torture, summary executions, sexual violence, enforced disappearances, and the pillage of art and cultural artifacts.”⁹⁴

Russian and Russian-affiliated authorities . . . subjected thousands of . . . Ukrainian citizens to a process referred to by Russia as “filtration,” a form of compulsory security screening, in which they typically collected civilians’ biometric data, including fingerprints and front and side facial images; conducted body searches, and searched personal belongings and phones; and questioned them about their political views.⁹⁵

Under the Rome Statute, “[i]ndividuals . . . may be held criminally liable for attempting to commit a war crime,” and “[r]esponsibility also may fall on . . . [c]ommanders and civilian leaders . . . when they knew or should have known about the commission of war crimes.”⁹⁶ Based on these principles, ICC Prosecutor Karim A.A. Khan deployed forty-two investigators, forensic experts, and support personnel to Ukraine to investigate crimes within the court’s jurisdiction.⁹⁷ Ukrainian authorities signed an agreement on March 23, 2023, to support the opening of an ICC office in Ukraine for the purposes of this investigation.⁹⁸

⁹³ *Q&A: Justice Efforts for Ukraine*, HUM. RTS. WATCH (Mar. 29, 2023), <https://www.hrw.org/news/2023/03/29/qa-justice-efforts-ukraine> [https://perma.cc/UB9X-SRP7].

⁹⁴ *Id.* Human Rights Watch also recognized a number of international humanitarian law violations resulting from Russia’s full-scale invasion, such as indiscriminate and disproportionate bombing and shelling in civilian areas. *Id.*

⁹⁵ “*We Had No Choice: “Filtration” and the Crime of Forcibly Transferring Ukrainian Civilians to Russia*,” HUM. RTS. WATCH (Sept. 1, 2022), <https://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians> [https://perma.cc/4Y7Q-VFD9].

⁹⁶ *Q&A: Justice Efforts for Ukraine*, *supra* note 93.

⁹⁷ Statement of ICC Prosecutor Karim A.A. Khan QC, Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of the Netherlands, INT’L CRIM. CT. (May 17, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine> [https://perma.cc/CSE3-CB8M].

⁹⁸ Press Release, Int’l Crim. Ct., Ukraine and International Criminal Court Sign an Agreement on the Establishment of a Country Office (Mar. 23, 2023), <https://www.icc-cpi.int/news/ukraine-and-international-criminal-court-sign-agreement-establishment-country-office> [https://web.archive.org/web/20240905024952/https://www.icc-cpi.int/news/ukraine-and-international-criminal-court-sign-agreement-establishment-country-office].

Additionally, while Russia is not a member of the ICC, Ukraine's acceptance of the ICC's jurisdiction complied with its "mandate to impartially investigate allegations of crimes committed in Ukraine by all parties to the conflict, regardless of the nationality of the person allegedly responsible."⁹⁹ Thus, the ICC issued warrants for Russian President Vladimir Putin and Maria Alekseyevna, Commissioner for Children's Rights in the Office of the President of the Russian Federation, for alleged war crimes such as unlawful deportation and unlawful transfer of children from occupied areas of Ukraine to the Russian Federation.¹⁰⁰

The ICC's arrest warrants for Russian officials, particularly President Putin, pose several questions concerning *ratione materiae* immunity.¹⁰¹ This form of immunity grants a president, as a head of state, absolute immunity from the jurisdiction of other states for any actions committed during their presidency.¹⁰² "[E]xceptions have been made in the case of serious human rights violations," and Article 27 of the Rome Statute states that the ICC's jurisdiction applies equally to all persons without any distinctions for one's official capacity.¹⁰³ However, due to Russia's status as a non-State Party of the ICC, the ICC can only exercise its jurisdiction if President Putin is physically present before the court.¹⁰⁴ Although successful efforts to bring President Putin before the ICC are unlikely, experts view the issuance of the warrants as a "morale boost" for those seeking justice for crimes committed against Ukrainians.¹⁰⁵ The warrants provide added legitimacy to ongoing investigations and signal the international community's commitment to addressing the impact of Russian aggression in Ukraine.¹⁰⁶ As this Note demonstrates, this

⁹⁹ Q&A: Justice Efforts for Ukraine, *supra* note 93.

¹⁰⁰ Press Release, Int'l Crim. Ct., Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova> [https://web.archive.org/web/20250207083028/https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and].

¹⁰¹ Dilara Karmen Yaman, *Heads of States Before the ICC: On the Arrest Warrant Against Putin and Its Consequences*, VOLKERRECHTSBLOG (May 4, 2023), <https://voelkerrechtsblog.org/heads-of-states-before-the-icc> [https://perma.cc/V4M4-WN9Y]. *Ratione materiae* immunity "only extends to acts performed by a state official to fulfil[] the function of the State." *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* Since Russia is a non-State Party, it is not bound to the rules and obligations of the Rome Statute. *Id.*

¹⁰⁵ Heather Ashby, Lauren Baillie & Mary Glantz, *How the ICC's Warrant for Putin Could Impact the Ukraine War*, U.S. INST. OF PEACE (Mar. 23, 2023), <https://www.usip.org/publications/2023/03/how-iccs-warrant-putin-could-impact-ukraine-war> [https://perma.cc/M9S3-SRXZ].

¹⁰⁶ *Id.*

commitment mobilized unprecedented support from the United States regardless of President Putin's actual arrest.¹⁰⁷

2. U.S. Government Response to the ICC Investigation in Ukraine

When President Biden took office, the United States revoked the sanctions against ICC officials but maintained its disagreement with the ICC's actions related to Afghanistan and Palestine.¹⁰⁸ Soon after Russia's invasion of Ukraine, the United States authorized billions of dollars in military assistance for Ukrainian forces,¹⁰⁹ and President Biden intensified the U.S. government's public rhetoric when he labeled President Putin a "war criminal."¹¹⁰ Members of the U.S. Senate similarly "call[ed] for [President] Putin and members of the Russian [government] to be held accountable for the numerous acts of war, aggression, and human rights abuses."¹¹¹ Senator Chris Coons directly cited the Rome Statute's jurisdiction and recalled prior instances of Russian aggression in Chechnya and Georgia to justify the Senate's encouragement of referrals of the situation to the ICC and International Court of Justice (ICJ).¹¹² Specifically, his Senate Resolution supported both courts' ability "to authorize any and all pending investigations into war crimes and crimes against humanity committed by the Russian Armed Forces and their proxies . . . at the direction of President Vladimir Putin."¹¹³

¹⁰⁷ See *infra* Section I.B.2.

¹⁰⁸ Press Release, Ctr. for Const. Rts., Biden Repeal of Trump International Criminal Court Sanctions Welcome but Overdue, Say Lawyers for Victims at ICC (Apr. 2, 2021), <https://ccrjustice.org/home/press-center/press-releases/biden-repeal-trump-international-criminal-court-sanctions-welcome> [<https://perma.cc/5WTV-S33A>]; Press Statement, Antony J. Blinken, Sec'y of State, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court (Apr. 2, 2021), <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court> [<https://perma.cc/PP6E-TQSS>]. Secretary of State Antony Blinken stated that U.S. concerns would be "better addressed through engagement with all stakeholders in the ICC process rather than through the imposition of sanctions." *Id.*

¹⁰⁹ Press Release, White House Press Secretary, Fact Sheet on U.S. Security Assistance for Ukraine (Mar. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-on-u-s-security-assistance-for-ukraine> [<https://perma.cc/QLP6-4NXA>].

¹¹⁰ Ashley Parker, *Biden Calls Putin a 'War Criminal,'* WASH. POST (Mar. 16, 2022), <https://www.washingtonpost.com/politics/2022/03/16/biden-zelensky-speech-response-aid> [<https://perma.cc/34YJ-JMXX>].

¹¹¹ Press Release, Office of U.S. Senator Chris Coons (D-DE), Coons Co-leads Resolution to Support Ukraine Complaint Urging Investigation of Putin as War Criminal (Mar. 4, 2022), <https://www.coons.senate.gov/news/press-releases/coons-co-leads-resolution-to-support-ukraine-complaint-urging-investigation-of-putin-as-war-criminal> [<https://perma.cc/RAB3-MLZ5>].

¹¹² S. Res. 531, 117th Cong. (2022).

¹¹³ *Id.*

These sentiments prompted the bipartisan passage of the 2023 Consolidated Appropriations Act.¹¹⁴ Upon President Biden’s signature, the 2023 Consolidated Appropriations Act officially created an exception to existing prohibitions on ICC assistance.¹¹⁵ The exception, under the appropriations for “War Crimes Accountability,” stated that prohibitions will “not apply with respect to investigative activities that . . . relate solely to investigations and prosecutions of foreign persons for crimes within the jurisdiction of the [ICC] related to the Situation in Ukraine”¹¹⁶ Additionally, the Fiscal Year 2023 Omnibus provides greater flexibility to assist the ICC in its revisions to the Dodd Amendment.¹¹⁷ The Amendment now incorporates the United States’ ability to “render[] assistance to the [ICC] to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine, including to support victims and witnesses.”¹¹⁸

The legislative changes revived rifts between the intelligence and diplomatic communities on ICC cooperation.¹¹⁹ Historically, intelligence and military leaders expressed longstanding legal and policy concerns about cooperation with the ICC.¹²⁰ These concerns include (1) ICC jurisdiction over nationals of non-State Parties and risks of legal exposure for U.S. troops, particularly with regard to ICC investigations in Afghanistan; (2) specific ICC doctrines like complementarity and gravity; and (3) potential issues related to head-of-state immunity.¹²¹ However, Congress unanimously passed legislation that requires the intelligence community to implement greater measures to support the ICC’s investigation in Ukraine.¹²² The House Permanent Select Committee on Intelligence enacted a new provision within the 2023

¹¹⁴ Consolidated Appropriations Act 2023, Pub. L. No. 117-328, 136 Stat. 4459.

¹¹⁵ *Id.* at § 7073(a).

¹¹⁶ *Id.* at § 7073(a)(2)(A).

¹¹⁷ Graham Resolution Supports Ukraine Complaint Urging Investigation of Putin as War Criminal, *supra* note 8.

¹¹⁸ See 22 U.S.C. § 7433(a). Additionally, “[Senators Dick Durbin (D-IL) and Chuck Grassley (R-IA)] introduced the bipartisan Justice for Victims of War Crimes Act—which updates the [domestic legal] war crimes statute to enable prosecution of war criminals in the United States regardless of the nationality of the perpetrator or victim.” Durbin, Graham, Bipartisan Group of Senators Urge President Biden to Support the ICC’s Investigation Into Atrocities in Ukraine, *supra* note 8.

¹¹⁹ Laura A. Dickinson, *U.S.-ICC Symposium—U.S. Cooperation with the ICC to Investigate and Prosecute Atrocities in Ukraine: Possibilities and Challenges*, LIEBER INST. (June 20, 2023), <https://lieber.westpoint.edu/us-cooperation-with-icc-investigate-prosecute-atrocities-ukraine> [<https://perma.cc/BKY3-X7D5>].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Steven Katz, *The Intelligence Community, Atrocities, and Accountability*, LIEBER INST. (Aug. 1, 2023), <https://lieber.westpoint.edu/intelligence-community-atrocities-accountability> [<https://perma.cc/Q7TH-DDQC>].

Intelligence Authorization Act that mandated the creation of a Russian atrocities special coordinator at the Office of the Director of National Intelligence.¹²³

Despite congressional authorization, the Pentagon blocked the Biden Administration from sharing evidence with the ICC gathered by American intelligence agencies about Russian atrocities in Ukraine.¹²⁴ In a National Security Council-led cabinet-level meeting, then-Secretary of Defense Lloyd J. Austin III continued to object to the United States helping the ICC investigate citizens of non-State Parties.¹²⁵ During the Senate Appropriations Defense Subcommittee review of the President's FY 2024 budget request, Austin expressed concerns about "reciprocity going forward" and "remain[ed] concerned about the protection of U.S. military personnel but did not further explain his position."¹²⁶ Ambassador-at-Large for Global Criminal Justice Beth Van Schaack confirmed the Pentagon's continued hindrance of U.S. cooperation with the ICC on Ukraine.¹²⁷

Contrary to the military branches' view, Ambassador Van Schaack believed that there was no acute risk of U.S. personnel receiving charges from the ICC.¹²⁸ One of her predecessors, David Scheffer, argued that the U.S. government, rather than remain "on the defensive about the ICC, should take the offensive and recognize how the ICC . . . advances critical U.S. values, particularly against an aggressor state like Russia."¹²⁹ John Bellinger, a former lawyer for the National Security Council and the State Department in the Bush Administration, similarly stated that if the ICC does attempt to prosecute Americans, the United States would have more allies who agree that the ICC should only be used by countries that

¹²³ *Id.* This special coordinator will lead "the workhorse behind the [U.S.] Department of State's Office of Global Criminal Justice, which formulates U.S. government policy on issues related to war crimes, crimes against humanity, and genocide and is the focal point on information sharing with international tribunals, such as the ICC." *Id.*

¹²⁴ Charlie Savage, *Pentagon Blocks Sharing Evidence of Possible Russian War Crimes with Hague Court*, N.Y. TIMES (Mar. 8, 2023), <https://www.nytimes.com/2023/03/08/us/politics/pentagon-war-crimes-hague.html> [<https://perma.cc/V58D-D59B>].

¹²⁵ *Id.*

¹²⁶ Adam Keith, *Is the Pentagon Relenting?: A Close Study of Opposition to the Int'l Criminal Court's Ukraine Investigation*, JUST SEC. (July 12, 2023), <https://www.justsecurity.org/87231/is-pentagon-opposition-to-the-international-criminal-courts-ukraine-investigation-relenting> [<https://perma.cc/LU3C-C4CG>].

¹²⁷ Dan De Luce & Abigail Williams, *Pentagon is Blocking U.S. Cooperation with International Investigations of War Crimes in Ukraine*, NBC NEWS (May 31, 2023, 8:13 PM), <https://www.nbcnews.com/politics/national-security/defense-holding-us-cooperation-war-crimes-probe-ukraine-rcna87168> [<https://perma.cc/HG3X-7VX9>].

¹²⁸ *Id.*

¹²⁹ David Scheffer, *The United States Should Ratify the Rome Statute*, LIEBER INST. (July 17, 2023), <https://lieber.westpoint.edu/united-states-should-ratify-rome-statute> [<https://perma.cc/M44Q-UPVX>].

are incapable of addressing serious international crimes committed by their citizens.¹³⁰ Therefore, the United States should look at “how [to] use the [ICC], the successor to the Nuremberg tribunals, as a tool to investigate and prosecute Russian war crimes.”¹³¹

3. U.S. Governmental Response to ICC Arrest Warrants for Israeli Officials

In 2024, the ICC’s Office of the Prosecutor issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Israeli Minister of Defense Yoav Gallant.¹³² The ICC found that there were reasonable grounds that each official “committed the war crime of using starvation as a method of warfare and crimes against humanity of murder, persecution, and other inhumane acts.”¹³³ In reaction to the ICC’s actions, the United States submitted written comments to the ICC in which it argued that the arrest warrants were premature and that the ICC lacks jurisdiction to try Israeli nationals for conduct in Gaza due to ongoing questions over Palestine’s statehood.¹³⁴

Along with the United States’ legal advocacy for Israel came political outcry from the executive and legislative branches. President Biden labeled the ICC’s application for arrest warrants as “outrageous,”¹³⁵ while Senate Republicans openly threatened Karim Khan: “Target Israel and we will target you. If you move forward with the measures indicated in the report, we will move to end all American support for the ICC, sanction your employees and associates, and bar you and your families from the United States. You have been warned.”¹³⁶ Accordingly, in a joint bill, Republican members of the House and Senate sponsored the Illegitimate Court Counteraction Act, which ordered the

¹³⁰ Savage, *supra* note 124.

¹³¹ *Id.*

¹³² Statement of ICC Prosecutor, Karim A.A. Khan KC, on the Issuance of Arrest Warrants in the Situation in the State of Palestine, INT’L CRIM. CT. (Nov. 21, 2024), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-state-palestine> [<https://web.archive.org/web/20241121171923/https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-state-palestine>].

¹³³ *Id.*

¹³⁴ Marty Lederman, *Toward a Fuller Understanding of the U.S. (and Israeli) Legal Objections to the ICC Arrest Warrants for Netanyahu and Gallant, Part II*, JUST SEC. (Oct. 15, 2024), <https://www.justsecurity.org/103940/us-israeli-objections-icc-warrants-netanyahu-gallant-part-ii> [<https://perma.cc/FWK2-XZRU>].

¹³⁵ *Biden Says ICC Move on Arrest Warrants for Israeli Leaders “Outrageous.”* REUTERS (May 20, 2024, 1:11 PM), <https://www.reuters.com/world/biden-says-icc-move-arrest-warrants-israeli-leaders-outrageous-2024-05-20> (last visited Jan. 5, 2025).

¹³⁶ Letter from Elected Officials of the United States to Karim A. A. Khan KC, Office of the Prosecutor, Int’l Crim. Ct. (Apr. 24, 2024).

President to issue sanctions on any foreign person who assists ICC investigations and arrests and rescinds appropriations for the ICC.¹³⁷ Although the Illegitimate Court Counteraction Act passed in the House, the Biden Administration disagreed with the sanctions approach, therefore dividing support for the bill along partisan lines.¹³⁸

On February 6, 2025, President Trump issued an executive order that largely adopts the sanctions proposed in the Illegitimate Court Counteraction Act.¹³⁹ The executive order also declares a national emergency to address what it describes as an “unusual and extraordinary threat to the national security and foreign policy of the United States.”¹⁴⁰

The United States’ rhetorical reversal in support for the ICC in the Israel-Palestine context may just be one additional chapter in its complex story of flip-flopping cooperation based on the ICC’s alignment with U.S. policy objectives. But Congress’s increasingly active role in shaping the United States’ stance on the ICC in recent years presents an opportunity for it to detach domestic legal authorities for ICC support from the political pendulum. Instead, Congress can formalize such authorities through a statutory course correction.

II. ANALYSIS

A. *Presidential Waivers Under ASPA*

While Congress intended to block most opportunities for the United States to engage with the ICC, ASPA allows for two additional ASPA waivers that permit deference to the President’s decision-making on cooperation.¹⁴¹ “The ‘Peacekeeping Waiver’ allows the President to waive ASPA restrictions when the United States chooses to take part in a peacekeeping operation deemed to be [within its] national security

¹³⁷ Illegitimate Court Counteraction Act, H.R. 8282, 118th Cong. §§ 2–3 (2024). Ironically, § 3(e) of the bill contains a waiver provision that allows the President to waive or terminate sanctions if doing so is “vital to the national security interests of the United States.” *Id.* Such language is mirrored in the waiver provisions of ASPA. *See infra* Section II.A.

¹³⁸ Mychael Schnell & Mike Lillis, *Republicans Advance Sanctions on International Criminal Court*, THE HILL (June 3, 2024, 8:48 PM), <https://thehill.com/homenews/house/4701257-sanctions-international-criminal-court> [https://web.archive.org/web/20240801000000*/https://thehill.com/homenews/house/4701257-sanctions-international-criminal-court]. As of January 9, 2025, the House has officially voted to impose sanctions on ICC officials. Karoun Demirjian, *House Passes Bill to Impose Sanctions on I.C.C. Officials for Israeli Prosecutions*, N.Y. TIMES (Jan. 9, 2025) <https://www.nytimes.com/2025/01/09/us/politics/icc-sanctions-house-israel.html> [https://web.archive.org/web/20250000000000*/https://www.nytimes.com/2025/01/09/us/politics/icc-sanctions-house-israel.html].

¹³⁹ *See* Exec. Order No. 14203, 90 Fed. Reg. 9369 (Feb. 6, 2025).

¹⁴⁰ *Id.* at 9370.

¹⁴¹ *See supra* Section I.B.

interest . . . ,”¹⁴² while the Commander-in-Chief Waiver states that the President can take certain military actions “even if they otherwise violate ASPA—so long as [c]ongressional notice is provided.”¹⁴³ Both waivers, however, contain limitations for U.S. cooperation with the ICC.¹⁴⁴

1. Interpretation

a. Peacekeeping Waiver

Section 7424 of ASPA states that “the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution . . . authorizing any peacekeeping operation” under the U.N. Charter permanently exempts American armed forces from participating in any criminal prosecution or other assertion of jurisdiction by the ICC.¹⁴⁵ However, the President is authorized to waive the prohibitions and requirements of § 7424 for one year in advance of notifying appropriate congressional committees and prohibiting the ICC from exercising jurisdiction over covered U.S. or allied persons from arrest, detention, prosecution, or imprisonment by the ICC.¹⁴⁶ Additional conditions for the waiver’s application include the President’s reasonable belief that the ICC’s named individual committed the crime of which they are accused¹⁴⁷ and that the ICC’s investigation or prosecution is within the national interest of the United States.¹⁴⁸ After reporting these conditions to Congress, the President may extend this waiver for successive periods of one year.¹⁴⁹

The Peacekeeping Waiver’s language emulates the “case-by-case” manner in which the Commander-in-Chief Waiver and the Dodd Amendment are both situated.¹⁵⁰ This suggests that Congress did not intend to limit the United States’ ability to support the ICC when the

¹⁴² Bava & Ireland, *supra* note 48, at 2.

¹⁴³ *Id.*

¹⁴⁴ “[ASPA] would hold national security and foreign policy interests hostage to the fate of our relationship with the governments that support the ICC and to the willingness of other members of the Security Council to immunize our armed forces personnel from ICC jurisdiction.” *Hearing on H.R. 4654 Before the H. Int’l Rels. Comm.*, 106th Cong. (2000) (statement of 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) [hereinafter *Hearing on H.R. 4654*].

¹⁴⁵ 22 U.S.C. § 7424.

¹⁴⁶ 22 U.S.C. § 7422(a).

¹⁴⁷ § 7422(c)(2)(B).

¹⁴⁸ § 7422(c)(2)(C).

¹⁴⁹ § 7422(b).

¹⁵⁰ See *infra* Section II.A.1.b; *infra* Section II.B.1; see also Bava & Ireland, *supra* note 48, at 16.

executive branch determines key conditions.¹⁵¹ It is unambiguous that the United States maintains a national interest in the prosecution of suspected war criminals in peacekeeping operations, particularly in the context of counterterrorism efforts, but it is unclear whether the “Peacekeeping Waiver must be tied to an actual peacekeeping operation authorized by []§ 7424.”¹⁵² While § 7424(c)(1) states that the President must certify that the Security Council permanently exempted U.S. armed forces from ICC prosecution, § 7424(c)(3) generally allows the President to certify based on national interests of the United States that justify U.S. armed forces’ participation in “the peacekeeping or peace enforcement operation.”¹⁵³ This interpretation may contravene the overall intent of ASPA, but it is possible that Congress left the waiver’s link between peacekeeping and ICC operations “deliberately vague in order to allow the President the greatest amount of latitude in choosing which ICC cases to support.”¹⁵⁴ Therefore, the Peacekeeping Waiver “would be consistent with the broad presidential authorities ASPA grants in subsequent sections.”¹⁵⁵

b. Commander-in-Chief Waiver

Section 7430 of ASPA preserves the President’s ability to cooperate with the ICC on a “case-by-case basis”¹⁵⁶ in their constitutional capacity as Commander-in-Chief.¹⁵⁷ Unlike the Peacekeeping Waiver’s conditions for congressional approval,¹⁵⁸ the Commander-in-Chief Waiver simply directs the President to submit a notification to Congress no later than fifteen days after they take action to a specific matter involving the ICC.¹⁵⁹ If a full notification could jeopardize national security or compromise a law enforcement activity, the President may notify appropriate congressional committees that “an action has been taken and a determination has been made” based on this statutory authority.¹⁶⁰

The Commander-in-Chief Waiver may be read as a simple affirmation of the President’s constitutional authority.¹⁶¹ “If an act is expressly within the powers of the President, the executive [branch] is allowed to carry it out regardless of whether it is on a case-by-case

¹⁵¹ See § 7422(a), (c)(2)(B).

¹⁵² Bava & Ireland, *supra* note 48, at 17.

¹⁵³ 22 U.S.C. § 7424(c)(1), (3).

¹⁵⁴ Bava & Ireland, *supra* note 48, at 17.

¹⁵⁵ *Id.*

¹⁵⁶ 22 U.S.C. § 7430.

¹⁵⁷ See U.S. CONST. art. II, § 2, cl. 1.

¹⁵⁸ See 22 U.S.C. § 7422.

¹⁵⁹ 22 U.S.C. § 7430(b)(1).

¹⁶⁰ § 7430(b)(2).

¹⁶¹ Bava & Ireland, *supra* note 48, at 18.

basis.”¹⁶² Therefore, the Commander-in-Chief Waiver minimizes ASPA’s attempt to create a “blanket ban on [ICC] cooperation” and suggests a pathway for the United States to “pursue cooperation . . . when U.S. nationals are not subject to [investigation or] prosecution.”¹⁶³

Justice Robert Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* provides three classes of executive action that merit differing levels of constitutional scrutiny.¹⁶⁴ One aspect of the *Youngstown* framework recognizes that a “zone of twilight” exists when the President exercises “concurrent authority with Congress in the absence of legislative action to the contrary.”¹⁶⁵ Another aspect of the framework holds that the President’s power is “at its lowest ebb” when it is used against Congress’s express or implied will.¹⁶⁶ Here, the Constitution’s express delegation of Commander-in-Chief authority to the President is distinguished from the powers afforded to Congress.¹⁶⁷ It may be argued that the Commander-in-Chief Waiver “amount[s] to tacit [c]ongressional approval for presidential cooperation with the ICC,” thus placing it within Justice Jackson’s “zone of twilight.”¹⁶⁸

Some believe that ASPA still encroaches on the President’s powers by substantially impairing their ability to perform their duties.¹⁶⁹ Compared to the congressional notification processes under the 1973 War Powers Resolution (WPR), ASPA differentially places hurdles in the President’s initial decision-making on ICC support while the WPR recognizes a sixty-day window in which the President can act on their constitutional authority.¹⁷⁰ Additionally, under the WPR, Congress’s reporting requirements serve as mechanisms for information-sharing, but under ASPA, they serve as “another pre-deployment restriction on the President[’s] . . . ability to flexibly command the armed forces.”¹⁷¹

This argument has also been applied to the United States’ diplomatic relationships. In spite of both waivers, ASPA’s mandate would infringe on the President’s exclusive responsibility under the Constitution to maintain foreign relations.¹⁷² The Department of Justice advised that

¹⁶² *Id.*

¹⁶³ *Id.* at 19.

¹⁶⁴ 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); see Bava & Ireland, *supra* note 48, at 19.

¹⁶⁵ Bava & Ireland, *supra* note 48, at 19; *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁶⁶ *Youngstown Sheet & Tube Co.*, 343 U.S. at 637–38.

¹⁶⁷ See 22 U.S.C. § 7430.

¹⁶⁸ Bava & Ireland, *supra* note 48, at 19.

¹⁶⁹ Van de Kieft, *supra* note 53, at 2347–48.

¹⁷⁰ See *id.* at 2349.

¹⁷¹ *Id.* at 2350.

¹⁷²

ASPA's restrictions would tremendously limit "the United States' ability to participate in cooperative international activities, such as providing [American] military or law enforcement personnel, advice, or equipment" to assist the ICC.¹⁷³ Therefore, ASPA would seem to bar the President from communication with an international forum if such conduct were considered "cooperation" with the ICC.¹⁷⁴

2. Application

a. Peacekeeping Waiver

The Peacekeeping Waiver provides a multi-step process for attaining congressional approval.¹⁷⁵ Once the President asserts their reasonable belief that an individual committed a crime and that the individual's prosecution is relevant to the national interests of the United States, the President may notify congressional committees of their waiver to § 7424.¹⁷⁶ From there, the President may authorize U.S. armed forces to share certain types of intelligence or provide U.S. legal support to an ICC prosecution team.¹⁷⁷

ASPA still provides some "indirect bars" for providing manpower to the ICC or training for ICC personnel.¹⁷⁸ Section 7423 prohibits "provision of support" to the ICC, with "support" defined as "'assistance of any kind,' including 'services' and 'the training or detail of personnel.'" ¹⁷⁹ Furthermore, all provisions must comply with § 7401, the FRAA, which bars providing any appropriated funds to the ICC for any purpose, including institutional support or prosecution of specific cases.¹⁸⁰ However, § 7425's prevention of transfers of classified national security information and law enforcement information to the ICC may not prohibit the executive branch from entirely barring informational

Because the Constitution vests authority over the nation's diplomatic negotiations in the President, the President and his subordinates must have discretion to decide whether to enter into negotiations with foreign governments and to control the content of those negotiations. The requirement in these provisions that the President submit to Congress plans for amending certain agreements with foreign nations implies a Congressional mandate that the President negotiate such changes.

Hearing on H.R. 4654, supra note 144.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See supra* Section II.A.1.a.

¹⁷⁶ *See* 22 U.S.C. § 7424.

¹⁷⁷ *See Bava & Ireland, supra* note 48, at 10–11.

¹⁷⁸ *Id.* at 10.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 9–10.

transfers to the ICC.¹⁸¹ If information about an ICC suspect or evidence linking the person to the crime is available, it may be relayed to the ICC as long as it is not formally classified.¹⁸² Without additional congressional scrutiny, this application may be utilized by a President who seeks to engage constructively with ICC investigations.

Criteria for what constitutes a peacekeeping operation remain ambiguous due to conflicting terms in § 7424(c)(1) and (c)(3).¹⁸³ Requiring a series of presidential actions that adhere to the establishment of a U.N. Peacekeeping Force pursuant to the U.N. Charter may not always provide a straightforward path for congressional authorization. Following the referral of the Darfur situation to the U.N. Security Council in 2005,¹⁸⁴ the United States abstained on the resolution vote for the conflict's referral to the ICC.¹⁸⁵ The United States had the political authority to deprive the ICC from exercising jurisdiction due to its veto power in the Security Council.¹⁸⁶ While the Security Council's referral of Darfur remained unfettered by a veto from the United States,¹⁸⁷ it is not beyond the realm of possibility for other states possessing veto power, particularly Russia or China, to limit referrals in future situations where their national interests may be at stake. Therefore, § 7424(c)(3)'s broader allowance for the President's certification of national interests in a general "peacekeeping operation or effort" provides more consistency for justifying the use of the Peacekeeping Waiver.

b. Commander-in-Chief Waiver

The constitutional basis for the Commander-in-Chief Waiver provides the broadest possible authority for the President to engage in ICC support. For instance, some U.S.-gathered intelligence may be shared with the ICC upon the President's exercise of their power as Commander-in-Chief.¹⁸⁸ "Facts on the ground" that could only be discerned by military or intelligence agencies may be crucial to an ICC investigation that requires "details of a suspect's criminal activities and

¹⁸¹ *Id.* at 13.

¹⁸² *Id.* at 14.

¹⁸³ *See supra* Section II.A.1.a; 22 U.S.C. § 7424(c)(1), (3).

¹⁸⁴ Article 13(b) of the Rome Statute provides that the ICC may exercise jurisdiction in "[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 of the International Criminal Court art. 13, July 17, 1998, 2187 U.N.T.S. 90.

¹⁸⁵ *See* Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status*, 24 BERKELEY J. INT'L L. 650, 650 (2006).

¹⁸⁶ *Id.* at 653.

¹⁸⁷ *Id.* at 652.

¹⁸⁸ Bava & Ireland, *supra* note 48, at 21.

whereabouts.”¹⁸⁹ “Because the President retains ultimate authority over agencies that are governed by Title 10,”¹⁹⁰ this type of intelligence transfer to the ICC would fulfill a military objective that could fall within a U.S. national interest.¹⁹¹

Legal experts point to the Commander-in-Chief Waiver as the means by which President Obama authorized U.S. support to the ICC with Dominic Ongwen’s arrest in the Central African Republic.¹⁹² While the Obama Administration may have authorized an indirect transfer of Ongwen to assure compliance with ASPA, successful use of the Commander-in-Chief Waiver “would have permitted a direct transfer to the ICC.”¹⁹³ In fact, direct transfer is more likely to avoid risks of “local hostility toward the ICC and the prevalence of corruption” in countries with which the United States may conduct an indirect transfer.¹⁹⁴ Therefore, if the United States ties its assistance to the ICC under the President’s Article II authorities, it can engage in the most effective modes of support that simultaneously serve its national interests.

B. *Dodd Amendment*

1. Interpretation

The Dodd Amendment, passed as a carve-out provision in 2002, remains one of the clearest exceptions to ASPA’s legislative purpose.¹⁹⁵ Section 7433(a) of ASPA states that “[n]othing . . . 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”¹⁹⁶ As of late 2022, the Dodd Amendment now includes “rendering assistance to the International Criminal Court to assist with investigations and prosecutions of foreign nationals related to the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* Title 10 of the United States Code governs military and Department of Defense operations. 10 U.S.C. § 111.

¹⁹¹ See Bava & Ireland, *supra* note 48, at 21.

¹⁹² See *id.* at 20; Christopher “Kip” Hale & Maanasa K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 WASH. U. GLOB. STUD. L. REV. 581, 592 (2013); *supra* Section I.A.3.

¹⁹³ Bava & Ireland, *supra* note 48, at 20.

¹⁹⁴ *Id.*

¹⁹⁵ See Lavaud et al., *supra* note 51.

¹⁹⁶ 22 U.S.C. § 7433(a).

Situation in Ukraine, including to support victims and witnesses.”¹⁹⁷ Section 7433(b) clearly demarcates this support from “investigations or prosecutions of U.S. servicemembers or other covered United States persons or covered allied persons.”¹⁹⁸ Following the same procedures within the ASPA waivers, the next section requires the Secretary of State to notify the Committees on Appropriation, the Senate Foreign Relations Committee, and the House Foreign Affairs Committee of any amount of U.S. support to the ICC no later than fifteen days prior to carrying out such obligation.¹⁹⁹

The Dodd Amendment does not state that the United States may assess ICC support on a case-by-case basis; rather, it tells the President which cases are already acceptable.²⁰⁰ As a result, each class of cases must be evaluated based on Dodd Amendment criteria, thus narrowing the President’s ability to seek support for situations unconsidered by Congress.²⁰¹ For example, members of Congress declined to include crimes of aggression within the Dodd Amendment.²⁰² This omission may prevent the United States from supporting the ICC’s pursuit of investigations involving such crimes. While this issue may not be at stake in the present circumstances surrounding the ICC’s investigation in Ukraine,²⁰³ there may be future instances in which U.S. national interests align with an ICC attempt to address crimes of aggression. In such an instance, the Dodd Amendment would only provide part of the needed justification for U.S. support to the ICC.

2. Application

The Dodd Amendment “does not render the rest of ASPA inoperative” or allow all forms of assistance to the ICC in the circumstances named above.²⁰⁴ “[T]he restriction[s] on ‘obligating’ funds for, use by, or support of the ICC found in the FRAA,” while referenced throughout ASPA, are not codified within ASPA itself and therefore remain uncovered by the Dodd Amendment.²⁰⁵ Additionally, the Dodd Amendment’s conditions that limit support to foreign nationals accused

¹⁹⁷ *Id.*

¹⁹⁸ § 7433(b).

¹⁹⁹ § 7433(c).

²⁰⁰ *See* § 7433(a)–(b).

²⁰¹ *See* Bava & Ireland, *supra* note 48, at 6.

²⁰² *Id.*

²⁰³ Because Russia is not a party to the ICC, the ICC cannot investigate any of its alleged crimes of aggression. *See supra* Section I.B.1.

²⁰⁴ Bava & Ireland, *supra* note 48, at 5.

²⁰⁵ *Id.*

of crimes against humanity, genocide, or war crimes subsequently limit which entities within the ICC can receive support.²⁰⁶ Similarly, unless the ICC issues a formal indictment that establishes that an individual is a foreign national responsible for one of the three Rome Statute crimes, a higher burden is placed on the executive branch to prove that a case without such characteristics can be excluded from ASPA prohibitions.²⁰⁷

The Dodd Amendment enables certain U.S. intelligence-sharing and witness protection support if framed outside of § 7401's realm. Intelligence can specifically assist prosecutions, or can be collected for a national interest independent of any ICC activities and shared later with the ICC.²⁰⁸ Similarly, witness protection measures paid by the ICC and not by the United States may be permissible.²⁰⁹ Furthermore, legal experts have identified ways that the ICC can obtain content and non-content data held in electronic storage by private companies incorporated in the United States.²¹⁰ Several options are available in order to secure privately-held electronic information: "(1) submitting requests directly to tech companies; (2) filing requests for assistance in U.S. district courts; . . . [(3)] asking foreign governments to submit Mutual Legal Assistance (MLA) requests on the ICC's behalf; and [(4)] partnering with joint law enforcement bodies, like INTERPOL, to make foreign-to-domestic law enforcement requests."²¹¹

The Dodd Amendment has been under-utilized by the U.S. government. As the military and intelligence branches fear, even by assisting ICC investigations related to "Osama bin Laden, other members of [Al-Qaeda], [or] leaders of Islamic Jihad,"²¹² U.S. support may inadvertently reveal potential violations of the Rome Statute by American personnel during the wars in Afghanistan and Iraq. However, the Dodd Amendment's narrow exceptions make crystal clear that all Americans are "covered . . . persons" under ASPA's strong protections.²¹³ Therefore, the Dodd Amendment, which solely allows U.S. cooperation with ICC investigations involving foreign nationals, should not be misconstrued by the Pentagon as a slippery slope for U.S. armed forces' potential exposure to prosecutions.

²⁰⁶ See *id.* at 6. These entities include the Office of the Prosecutor and Office of Public Counsel for Victims to the extent that cases within their dockets comply with the Dodd criteria. See *id.* at 6–7.

²⁰⁷ See *id.* at 7.

²⁰⁸ See *id.* at 12.

²⁰⁹ See *id.* at 12–13.

²¹⁰ See Koenig et al., *supra* note 39, at 1.

²¹¹ *Id.* at 1–2.

²¹² 22 U.S.C. § 7433(a).

²¹³ § 7433(b).

In relation to Ukraine, the recent revisions to the Dodd Amendment and FRAA codify a range of methods the United States can use to support the ICC's investigation.²¹⁴ To replicate these efforts for individuals or situations not expressly provided for in § 7433, however, Congress must be readily willing and able to garner bipartisan support for a future national interest. Barring any additional revisions, the executive branch is limited to the Dodd Amendment's criteria. Dissonance between domestic law and international legal norms could further impact the United States' reputation as a reliable partner in addressing mass atrocities and seeking accountability for those responsible. Congress's ability to regularly update the Dodd Amendment and FRAA thus plays a larger role in the United States' engagement with the ICC.

III. PROPOSAL

Based on the above considerations of the ASPA waiver system and Dodd Amendment, this Note advocates for a new statute that incorporates the most effective components of both sets of provisions. These components include (1) deference to the executive branch's ability to assess U.S. national interests, (2) standard procedures for seeking congressional input on proposed ICC support, and (3) clear expectations on what types of support are approved.

A. *Deference to the Executive Branch*

A reformed statute should maintain the President's Article II authority as a primary avenue through which the executive branch can act in support of the ICC. This language should be derived from the Commander-in-Chief Waiver, which authorizes the President to act in a matter involving the ICC on a case-by-case basis.²¹⁵ The reform should also echo the Peacekeeping Waiver's requirement for the President to maintain a reasonable belief and national interest in an ICC investigation or prosecution of a named individual.²¹⁶ Constitutional authority and standards for reasonable belief and national interests should work in tandem to develop greater adherence to the executive branch's assessment of which ICC matters are viable for U.S. support.

This reform should avoid references to named individuals and situations, such as those included in the Dodd Amendment.²¹⁷ Instead, the

²¹⁴ See 22 U.S.C. §§ 7422, 7424.

²¹⁵ 22 U.S.C. § 7430(a).

²¹⁶ See 22 U.S.C. § 7422(c)(2)(B)–(C).

²¹⁷ See 22 U.S.C. § 7433(a).

reformed statute should continue using “foreign nationals accused of genocide, war crimes or crimes against humanity.”²¹⁸ Making clear that these exceptions to ASPA concern only foreign nationals will assuage existing concerns about prosecutorial threats to American servicemembers while demonstrating the limits of U.S. involvement with ICC activities. Furthermore, omitting crimes of aggression sets aside ongoing debates about how the Rome Statute defines such crimes.²¹⁹ However, this Note suggests that the United States should continue building consensus with State Parties to reach acceptable definitions that could be incorporated into this reform in the future.

By removing specific names and countries from this statutory reform, Congress can alleviate pressures on itself to conduct legislative upkeep on the exception’s limitations. Leaving decision-making on national interests up to the executive branch allows members of Congress to focus on the practical elements of regular relations with the ICC, such as evaluation of agency reporting and passage of targeted appropriations. This recalibration of roles between the legislative and executive branches can enhance institutional trust between Congress and the ICC.

B. *Congressional Notification*

A legislative fix should maintain the waiver system’s and Dodd Amendment’s requirements for congressional notification. It should include the Peacekeeping Waiver’s authorization for the President to waive ASPA prohibitions for successive periods of one year and allow extensions of waivers based on the President’s communications with appropriate committees at least fifteen days in advance.²²⁰ For greater clarity, the reform could specifically reference which committees are charged with responding to notifications as demonstrated in the Dodd Amendment’s provisions.²²¹

Preserving procedures for congressional notification will balance the deference to executive decision-making with conventional mechanisms for oversight. By strengthening this interbranch process, Congress can standardize its stance on U.S. support of the ICC, which can foster greater trust in international institutions more broadly. Additionally, the executive branch’s notifications to Congress for ICC activities will mirror existing review processes included in the WPR²²²

²¹⁸ *Id.*

²¹⁹ *See supra* text accompanying notes 80–85.

²²⁰ 22 U.S.C. § 7422(b).

²²¹ *See* 22 U.S.C. § 7433(c).

²²² *See* Van de Kieft, *supra* note 53, at 2349.

and security assistance authorizations.²²³ As a result, U.S. support for the ICC can be more thoroughly integrated within Congress's existing foreign policy framework.

C. *Types of Support*

Finally, this proposed legislative reform should continue emphasizing intelligence-sharing as the predominant mode of ICC support. The United States already possesses a combination of economic, intelligence, logistical, and diplomatic resources shared by few, if any, other countries²²⁴ thus making transfers of knowledge one of the least obstructive ways to support the ICC. While the ICC's investigation in Ukraine enjoys political support from around the world,²²⁵ the Office of the Prosecutor needs to collect significant evidence from diverse sources to successfully convict suspects of mass atrocity crimes.²²⁶ If the United States can take more consistent steps to share information that may become evidence in an ICC prosecution, the ICC can achieve greater legitimacy that prompts other State Parties to contribute their share.²²⁷

The legislative fix should also seek ways to incorporate technological developments within information-sharing. Since much documentary evidence resides on the servers of U.S. corporations, the ICC cannot fulfill its mandate to prosecute international crimes without access to this information.²²⁸ U.S. governmental support of the ICC's ability to engage with tech companies, seek mutual legal assistance support from State Parties, request that U.S. courts assist with discovery, or use diplomatic channels with the U.S. Department of State is generally allowable under the Dodd Amendment criteria.²²⁹ Therefore, Congress should recognize these measures as valid forms of ICC support.

Statutory reforms should include provisions that harmonize interagency standard-setting on the ICC. Given executive branch agencies' varied positions on the ICC,²³⁰ effective improvements to U.S.-ICC relations require that the U.S. government create a forum for opposing views within the government to be shared and

²²³ See generally ARABIA ET AL., *supra* note 4.

²²⁴ Hale & Reddy, *supra* note 192, at 584.

²²⁵ See Statement of ICC Prosecutor on Ukraine, *supra* note 2.

²²⁶ Yvonne Dutton & Milena Sterio, *The War in Ukraine and the Legitimacy of the International Criminal Court*, 72 AM. U. L. REV. 779, 806 (2023).

²²⁷ See *id.* at 781.

²²⁸ Koenig et al., *supra* note 39, at 34 (stating that documentary evidence includes digital photographs, videos, emails, and internet postings).

²²⁹ See *id.* at 35.

²³⁰ See *supra* text accompanying notes 119–131.

misunderstandings to be corrected when needed.²³¹ Such a forum will allow the United States to speak with one voice and help achieve consistency between each agency's relationship with the ICC.²³² Greater executive branch attorney involvement with the ICC could convince Congress to repeal legislation like the FRAA, which limits opportunities for U.S. economic and legal personnel support.²³³ Although the Dodd Amendment currently permits staffing and training to ICC personnel on circumstances involving foreign nationals convicted of one of the three core crimes, these forms of assistance could not be provided for broader ICC purposes.²³⁴

CONCLUSION

When the United States attended the 1998 Rome Conference, its officials intended to build an international criminal court which the United States would one day join.²³⁵ The instructions were not to stand in permanent opposition to it. This Note argues that deliberate complications that stand in the way of U.S. cooperation on a domestic level were not part of the instructions either.

Russia's invasion of Ukraine reinvigorated the international community's interest in seeking strengthened ICC investigations and prosecutions.²³⁶ Current executive and legislative branch discourse on the ICC ushers in a new era for the United States to codify its international legal obligations. To build upon this momentum, this Note proposes that both branches reassess statutory allowances for U.S. engagement with the ICC. Authorities already exist: ASPA's Commander-in-Chief Waiver lends ample authority to the President on the nature of engagement while the Dodd Amendment's language on "other foreign nationals" makes clear that the United States does not seek to contravene its longstanding protection of U.S. citizens from the ICC's jurisdiction.²³⁷ Therefore, executive branch deference paired with congressional accountability can empower the United States to become a reliable partner in the furtherance of international justice efforts.

²³¹ Hale & Reddy, *supra* note 192, at 612.

²³² *Id.* at 612–13.

²³³ See 22 U.S.C. § 7401. "For support of" the ICC is "not [clearly] defined in the FRAA, but both the dictionary definition and the definition in ASPA would cover forms of assistance like secondments and training." Bava & Ireland, *supra* note 48, at 11.

²³⁴ See Bava & Ireland, *supra* note 48, at 11.

²³⁵ Scheffer, *supra* note 129.

²³⁶ See Statement of ICC Prosecutor on Ukraine, *supra* note 2.

²³⁷ See 22 U.S.C. §§ 7430, 7433.