

# **WORKING PAPER**

## **DIGITAL EVIDENCE AND THE AMERICAN SERVICEMEMBERS' PROTECTION ACT**

### **SALZBURG WORKSHOP ON CYBERINVESTIGATIONS**

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## Abstract

This paper provides background on the American Servicemembers' Protection Act (ASPA or Act) and examines the circumstances surrounding the passage of the Act, its key provisions and their exceptions, and how the Act affects investigations by the International Criminal Court (ICC or Court).

International criminal prosecutions increasingly rely on cyberinvestigations to uncover digital evidence that can be subsequently admitted in court proceedings. ASPA restricts U.S. cooperation with the ICC and its investigations within the United States. As the majority of e-mails and social media platforms are linked to U.S. entities, ICC cyberinvestigations will inevitably invoke ASPA in one way or another. This paper examines the current administration's increased engagement with the ICC within the scope of ASPA, as well as whether or not this engagement signals that revisions to the Act should be made. These questions serve as the starting point for examining the nexus of cyberinvestigations, ASPA, and the International Criminal Court.

## I. Introduction

This background paper examines the American Servicemembers' Protection Act (ASPA or the Act), which was signed into law by then-President George W. Bush on August 2, 2002. The Act contains a broad prohibition on cooperation between the United States and the International Criminal Court (ICC or the Court), strictly prohibiting U.S. "support" to the ICC and limiting ICC "investigative activity" within the United States.<sup>1</sup> Notwithstanding these broad restrictions, the Act contains exceptions that allow for conditional assistance to the ICC. The most important of these is "the Dodd Amendment," which allows for U.S. cooperation with ICC prosecutions of foreign nationals on a case-by-case basis.<sup>2</sup>

As the ICC Office of the Prosecutor (OTP) increases its efforts to collect and introduce digital evidence in proceedings, it is necessary to understand how ASPA applies to digital information under the control, or within the territory, of the United States. Furthermore, knowledge of the Act's exceptions can assist in identifying possible avenues for U.S. cooperation with OTP investigations. This knowledge takes on an added importance in the context of digital information, given that the majority of this information is controlled by U.S. Internet Service Providers (ISPs).

Accordingly, this paper examines (1) the political environment at the time the Act was passed; (2) the Act's impact on the investigative abilities of the ICC; (3) the ways in which the U.S. is using the Dodd Amendment and other exceptions to support the OTP and the Court in general; (4) what penalties, if any, individuals and institutions might incur in connection with breaches of the Act; and (5) the unresolved questions regarding the functions of the Act and its reach.

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<sup>1</sup> American Servicemembers' Protection Act, 22 U.S.C. §§ 2004(h), 2013(12) (2008), *available at* <http://www.house.gov/legcoun/Comps/aspa02.pdf>.

<sup>2</sup> ASPA § 2015.

This paper is based on limited research, and does not include classified or internal documents on the Act's operations. It sets out to provide a background and understanding of the framework of ASPA, as it is publicly known. Our findings are based on primary and secondary research on ASPA, as well as interviews conducted with government officials knowledgeable of ASPA's operations.

## II. Legislative History

The United States was an initial supporter of the ICC, and it actively participated in the negotiations leading up to the final conference in Rome.<sup>3</sup> However, as the conference approached a final vote on the Court's statute (Rome Statute), U.S. officials realized certain critical negotiating objectives would not be achieved, and support for the Rome Statute quickly diminished.<sup>4</sup> David Scheffer, former Ambassador-at-Large on War Crimes Issues at the U.S. Department of State and U.S. lead negotiator in Rome, unsuccessfully attempted to buy time for U.S. reconsideration of the Statute before deliberations were pushed through to a vote.<sup>5</sup> On July 1, 2002, after receiving the necessary sixty ratifications for implementation, the Rome Statute of the International Criminal Court entered into force.<sup>6</sup>

American concerns about the new international court were multifold. After the Rome Statute vote, Ambassador Scheffer reported to Congress that the Rome Statute could potentially "inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives."<sup>7</sup> The U.S. had two principal concerns. First, the ICC's possible exercise of jurisdiction over non-party nationals prompted sovereignty concerns related to the prosecution of U.S. troops and civilians serving abroad.<sup>8</sup> Second, the possibility for politicized prosecutions and an unaccountable prosecutor raised concerns about the targeting of Americans.<sup>9</sup> Although the U.S.—during the waning days of the Clinton Administration—ultimately signed the Rome Statute in 2000, it subsequently notified the United Nations Secretary General in May 2002 that it did not intend to become a party.<sup>10</sup> The U.S. thereby relieved itself of an obligation not to

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<sup>3</sup> DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 192 (Princeton University Press 2012).

<sup>4</sup> *Id.* at 207.

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

<sup>6</sup> See Rome Statute of the International Criminal Court, *entered into force* July 1, 2002, 2187 U.N.T.S. 90.

<sup>7</sup> *American Service-Members' Protection Act*, U.S. DEPARTMENT OF STATE, BUREAU OF POLITICAL AND MILITARY AFFAIRS, <http://www.state.gov/t/pm/rls/othr/misc/23425.htm> (last visited Sept. 11, 2013).

<sup>8</sup> JENNIFER K. ELSEA, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 5-6 (2006), *available at* <http://congressionalresearch.com/RL31495/document.php?study=U.S.+Policy+Regarding+the+International+Criminal+Court>.

<sup>9</sup> *Id.* at 7-8. Other U.S. concerns included the fact that fewer due process guarantees existed under the Rome Statute than the U.S. Constitution, as well as an American belief that the ICC would interfere with U.N. Security Council operations. *Id.* at 8-11.

<sup>10</sup> WILLIAM H. TAFT, IV ET AL., AMERICAN SOCIETY OF INTERNATIONAL LAW, U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT 30-31 (2009). John Bolton, former U.S. Ambassador to the United Nations, described his rescinding of the American

defeat the Statute’s “object and purpose.”<sup>11</sup> U.S. concerns then set the stage for subsequent legislation targeting the ICC in the American Servicemembers’ Protection Act.

The American Servicemembers’ Protection Act became law in August 2002. Senator Jesse Helms introduced the legislation,<sup>12</sup> which the Senate adopted as an amendment to the Supplemental Defense Appropriations Act of 2002.<sup>13</sup> Senator Helms and other legislators argued that the legislation was necessary because the ICC threatened U.S. sovereignty.<sup>14</sup> Therefore, they included a provision allowing the President to use “all means necessary and appropriate” to release U.S. personnel detained on behalf of the Court, as well as other provisions restricting cooperation with the ICC.<sup>15</sup> Senator Christopher Dodd, however, managed to add language to the Act that expressly permitted a certain degree of U.S. cooperation with the ICC.<sup>16</sup> This mixed result reflected divided Congressional opinions as to whether there should be cooperation with the Court with respect to cases involving individuals accused of committing serious international crimes.

### III. Functions and Operation

ASPA currently prohibits U.S. cooperation with ICC investigations in three ways. First, the term “support” limits the extent of U.S. assistance to the ICC. Second, a prohibition on ICC “investigative activity” is included in the Act to prevent ICC investigations “within the United States.” Third, the Act bars the sharing of intelligence and law enforcement information with the ICC or with any States Parties to the Rome Statute.<sup>17</sup>

#### A. Defining “Support”

The prohibition on “support” can be broadly interpreted to limit virtually any U.S. governmental “agency or entity of the United States Government or of any State or local government, including any court” from cooperating in any manner with the ICC.<sup>18</sup> Therefore, essentially all public entities are prohibited from providing support to the ICC.

The Act defines support 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.”<sup>19</sup>

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intention to ratify the Rome Statute as “the happiest moment in my government service.” Carla Anne Robbins, *Disarming America’s Treaties*, WALL STREET JOURNAL, July 19, 2002.

<sup>11</sup> See Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

<sup>12</sup> 147 CONG. REC. 24,377 (2001).

<sup>13</sup> 148 CONG. REC. 14,051 (2002).

<sup>14</sup> 148 CONG. REC. 9589 (2002).

<sup>15</sup> ASPA § 2008.

<sup>16</sup> 148 CONG. REC. 9590 (2002).

<sup>17</sup> Id.

<sup>18</sup> ASPA §§ 2004(e), (h), 2013(12).

<sup>19</sup> ASPA § 2013(12). As Senator Warner explained, “no Federal or State entity, including courts, may cooperate with the ICC in law enforcement matters,” including: arrest, extradition, search and seizure,

Furthermore, “[n]o classified national security information can be transferred directly or indirectly to the ICC.”<sup>20</sup> Senator John Warner, discussing ASPA on the Senate floor in 2002, elaborated that the prohibition included “searches and seizures, discovery, asset seizure ... [and] otherwise render[ing] services to the ICC.”<sup>21</sup>

#### B. Defining “Investigative Activity within the United States”

The Act’s “Prohibition on Investigative Activities of Agents” limits the ICC’s activities in the United States. It provides that “[n]o agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.”<sup>22</sup>

Although an authoritative interpretation of the statute from the Office of Legal Counsel, Department of Justice,<sup>23</sup> has not been made public, a restrictive reading of “investigative activity” could prohibit virtually any ICC activity within the United States. Both the clauses “investigative activity” and “within the United States” could prohibit ICC personnel from conducting any activities in support of either their examination of witnesses or their investigations on U.S. soil. The restrictions could extend to a smaller scale of activity than one might initially assume from reading the plain text of the Act. For example, this reading may even prohibit investigative activity involving an ICC investigator contacting a witness located in the United States. Because the call is pursuant to an ICC investigation, ASPA could be interpreted to require the witness to relocate outside the U.S. before speaking with an ICC agent about anything of substance regarding the individual’s potential testimony. These examples demonstrate the extent of ASPA’s interference on ICC investigative activity with a restrictive reading of the Act.

A more liberal reading could instead center on the location of the ICC investigator. The investigative activity provision of ASPA then would not be implicated until the ICC investigator actually enters U.S. territory, and so a phone call to a potential witness may not be prohibited as “investigative activity within the United States.” Or, if the phone call is not investigatory in nature, the call itself may be exempt. The reading of what is “investigative” and what is considered “within the United States” goes to the heart of issues with cyberinvestigations and ASPA.

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discovery, asset seizure, financial support, transfer of property, personnel details, intelligence sharing, or otherwise rendering services to the ICC. 148 CONG. REC. 9589 (2002).

<sup>20</sup> ASPA § 2006; 148 CONG. REC. 9589 (2002).

<sup>21</sup> 148 CONG. REC. 9589 (2002).

<sup>22</sup> ASPA § 2004(h).

<sup>23</sup> The Office of Legal Counsel at the Department of Justice is charged with “provid[ing] authoritative legal advice to the President and all the Executive Branch agencies.” OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE (last visited October 12, 2013), <http://www.justice.gov/olc/>.

### C. Obtaining Digital Evidence from Service Providers

The extent to which considerations related to ASPA limit the ICC's ability to gather digital evidence from U.S. service providers remains unclear. This is important for investigations, as the amount of information flowing through U.S. service providers is very high. As described below, there is nothing in ASPA's statutory language to suggest that U.S. service providers that hold digital evidence<sup>24</sup> are bound by its restrictions. However, service providers may be reluctant to cooperate for practical, political, or other reasons. Further, establishing the location of data can be relatively difficult. Overall, as described in the working paper "Digital Evidence: Investigatory Principles," ICC investigators will need to develop protocols for accessing digital evidence from service providers. Moving forward, it would be helpful to identify whether United States service providers consider themselves restricted by ASPA or related considerations, and what might prevent these actors from cooperating with the ICC.

#### i. ASPA's Jurisdiction and Private Companies

On its face, ASPA restricts only the actions of public entities, not private companies such as Internet Service Providers (ISPs or service providers). Specifically, the Act states that "no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute."<sup>25</sup> However, a question remains as to whether or not private U.S. entities would want to cooperate with the ICC, or feel obligated to do so, given that the United States is not bound by the Rome Statute.

There do exist important threshold questions as to how companies might respond to such requests. There is the possibility of a chilling effect, where private entities may be unwilling to cooperate because of political considerations surrounding ASPA, and related fears of governmental retribution for cooperating. This effect appears with other complex statutes, such as when a statute imposes sanctions for prohibited conduct with a foreign entity, and companies may restrict conduct beyond that specified in the statute for fear of being in violation.

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<sup>24</sup>As set forth in the "Digital Evidence: Investigatory Principles" working paper for this meeting, digital evidence is "data that is created, manipulated, stored or communicated by any device, computer or computer system or transmitted over a communication system, that is relevant to the proceeding." For the purposes of the discussion, the "Digital Evidence: Investigatory Principles" working paper divides "digital evidence" into three categories. The first category includes data that investigators acquire from a physical device such as a hard drive or wireless phone. The second category includes data divorced from a device, but accessible from a service provider. For example, a video that is stored in a publicly available online service, such as YouTube, or evidence emailed to an investigator from the scene of a crime, would each fall into this category. The third category includes evidentiary data held by a service provider, and not otherwise available. Email messages held by a service such as Gmail or Yahoo! Mail and photographs held in a cloud storage service such as Dropbox are each examples of data in this category.

<sup>25</sup> ASPA § 2004.

## ii. Location of Data in Cyberinvestigations

Data relevant to investigations may be located solely within the United States, solely outside of the United States, or in multiple locations at the same time. U.S. service providers have located their data centers worldwide, in order to gain efficiency, speed up user access to data, and to comply with local requirements. Accordingly, data may be available without access to a server located within the United States. Complications, however, can arise in terms of where the data is stored and what jurisdiction governs access to that data.

Data may be stored outside of the United States, or may be available in multiple jurisdictions. For example, if an American student travels to Europe to attend a workshop, her Gmail cloud-based e-mail service may copy the archive of her email to servers in Europe to improve access. Obtaining data located in a foreign jurisdiction like this may involve identifying and following that country's local rules and procedures. These may be straightforward to follow or not, depending on the situation at hand.

However, the greatest difficulty may actually be pinpointing the location of the data, which has to be conducted on a case-by-case basis and may be constantly changing. Section III of the workshop paper "Digital Evidence: Investigatory Principles" further elaborates on indentifying the location of the data and processes for obtaining data from U.S. service providers.

In theory, digital evidence should be obtainable from service providers, but a variety of factors may complicate any particular investigation. Outstanding questions include whether service providers consider themselves to be bound or limited by ASPA's restrictions, locating the data, and developing protocols for obtaining data from U.S.-based or foreign servers owned by U.S.-based service providers.

## IV. Special Exceptions to ASPA's Prohibitions

There are some statutory exceptions to the prohibitions on U.S. cooperation with the ICC. First, the Dodd Amendment allows U.S. agencies to share information with the Court.<sup>26</sup> Second, the President may cooperate with or transfer national security information to the ICC when the cooperation is pursuant to his duties as Commander in Chief of the Armed Forces.<sup>27</sup> Third, the President may waive restrictions, for one-year periods, on both U.S. participation in U.N. peacekeeping operations and on U.S. military assistance to States Parties.<sup>28</sup> All of these exceptions, however, are accompanied by limitations and are examined in this section.

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<sup>26</sup> *The State Department's Rewards Programs: Performance and Potential: Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade, 112th Cong. 1 (2012)* [hereinafter *Rewards Programs Hearings*] (statement of Stephen Rapp, Ambassador-at-Large, Office of Global Criminal Justice).

<sup>27</sup> ASPA § 2011.

<sup>28</sup> ASPA §§ 2003, 2005, 2007.

## A. The Dodd Amendment

Section 2015 of the Act, also known as the Dodd Amendment, counteracts ASPA's otherwise broad prohibition on ICC support. Because the Amendment applies to ICC investigations of *foreign* nationals, it can serve, in the view of some commentators, as a "catch-all exception authorizing the U.S. government to participate in a wide range of international justice efforts"<sup>29</sup> so long as U.S. persons are not at risk of prosecution. The Amendment, which is contained in a section entitled "Assistance to International Efforts," provides:

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.<sup>30</sup>

The Amendment ensures that U.S. cooperation with the ICC is possible when (1) the ICC has jurisdiction over an international crime, (2) when a foreign national (as opposed to U.S. national) is being investigated or prosecuted, and (3) when there is no U.S. objection to that jurisdiction (such as when U.S. nationals—or, potentially, U.S. allies—could be prosecuted).<sup>31</sup>

At this time, the Dodd Amendment is the primary exception the United States has invoked to directly assist the investigative efforts of the ICC. The Amendment operates on a case-by-case basis. For each ICC request for information that is within the control of a United States public entity, the ICC submits a request to the U.S. embassy at The Hague. The embassy then transmits the requests to the State Department, where they are reviewed internally and within an interagency process.<sup>32</sup> For a typical request, an internal memorandum will be circulated to relevant agencies, allowing for an opportunity to object to case-specific information sharing. Absent objection, the request will be approved. For atypical requests, the relevant agencies and authorities may meet face-to-face to weigh competing policy considerations. Though limited in scope, this approach permits U.S. cooperation with the ICC, while also allowing the U.S. to retain control over the the extent of its cooperation.

## B. Presidential Waivers

Various Presidential waivers exist that circumvent prohibitions of ASPA. Section 2011 of ASPA permits the President, pursuant to his powers as Commander in Chief, to share information in his control with the ICC.<sup>33</sup> According to the research for this paper, the President has not yet invoked this waiver. However, members of Congress have already spoken to how this waiver would be implemented. Speaking on the floor of the House of Representatives in 2002, Senator Henry Hyde, who introduced ASPA in the House, explained that this exception turns on the

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<sup>29</sup> 148 CONG. REC. 15,659 (2002). Recall that the purpose of ASPA is to protect against ICC prosecutions of *U.S.* nationals.

<sup>30</sup> ASPA § 2015.

<sup>31</sup> 148 CONG. REC. 15,659 (2002).

<sup>32</sup> *Rewards Programs Hearings*, *supra* note 26.

<sup>33</sup> 148 CONG. REC. 14,050 (2002).

“parameters of the President’s authority under the Constitution,”<sup>34</sup> and is decided on a “case-by-case basis” by the President.<sup>35</sup> He also clarified that this waiver can be used to facilitate the transfer of foreign nationals to the ICC.<sup>36</sup> Importantly, he noted that this provision also allows the President to provide classified national security information to the ICC.<sup>37</sup> However, this waiver cannot be used by the President to order state and local governments to undertake any action vis-à-vis the ICC, a power not within the President’s executive authority.<sup>38</sup> In his remarks, Representative Hyde also stated that there may be other situations, not yet explored, where this presidential waiver could be used.<sup>39</sup>

Other waivers also exist in ASPA that govern the participation of U.S. Armed Forces in peacekeeping missions. First, a waiver in section 2003 authorizes the President to waive restrictions on peacekeeping in section 2005. This waiver also applied to section 2007, before it was removed in the 2008 amended version of ASPA.<sup>40</sup> Second, section 2003 also waives prohibitions in sections 2004 and 2006 that govern United States cooperation with an investigation or prosecution of a named individual by the International Criminal Court.<sup>41</sup> However, the entire section 2003 waiver may not be executable on its face. The waiver requires that the ICC enter into a binding agreement with the United States “that prohibits the [ICC] from seeking to exercise jurisdiction” over U.S. personnel.<sup>42</sup> Such a binding agreement could be non-achievable in practice, given it would require the ICC to relinquish its own jurisdiction.

In regards to peacekeeping efforts, section 2005 still allows for U.S. participation if the President obtains a “national interest certification.”<sup>43</sup> This certification requires that U.S. Armed Forces participating in peacekeeping efforts be immunized from risk of criminal prosecution or other assertion of the jurisdiction of the ICC,<sup>44</sup> and it relies on “factual judgments made by the President.”<sup>45</sup> A sample of such an agreement is attached in the Appendix of this paper. Both Presidents Bush and Obama have obtained national interest certifications to allow U.S. Armed Forces to participate in U.N. peacekeeping efforts.<sup>46</sup>

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<sup>34</sup> Id. at 14,049.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id. at 14,050.

<sup>39</sup> Id. at 14,050.

<sup>40</sup> ASPA §§ 2001-2015.

<sup>41</sup> ASPA § 2003.

<sup>42</sup> ASPA § 2003(a)(2).

<sup>43</sup> ASPA § 2005(c), (2008); 148 Cong. Rec. 14,049 (2002).

<sup>44</sup> ASPA §§ 2003-2005 (2008).

<sup>45</sup> 148 CONG. REC. 14,049 (2002).

<sup>46</sup> President Bush authorized the participation of U.S. Armed Forces in the United Nations-African Union Mission in Darfur (UNAMID), while also declaring U.S. Forces immune from ICC jurisdiction. Memorandum from the President to the Secretary of State, *Certification Concerning U.S. Participation in the United Nations-African Union Mission in Darfur Under Section 2005 of the American Servicemembers' Protection Act* (March 26, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/print/20080327-1.html>. See Appendix A (Sample

Before the 2008 amendment to ASPA, section 2007 restricted military aid to parties to the Rome Statute.<sup>47</sup> Article 98 waivers were obtained to waive the restriction on military assistance.<sup>48</sup> These agreements immunized U.S. personnel from ICC prosecution in exchange for a waiver on restrictions to U.S. military aid.<sup>49</sup> However, the 2008 amendment to ASPA removed section 2007 and the restrictions on military aid.<sup>50</sup>

### C. Unresolved Questions Regarding Penalties for Breach

Currently, there are no explicitly defined penalties for breach of ASPA in the text, or stated through Congressional interpretation of the Act. Neither intra-governmental penalties nor penalties for private individuals or institutions exist within the text. Further, to the best of our knowledge, no breaches of ASPA have been found, or penalties for breach imposed.

### V. The Current Extent of U.S. Cooperation with the ICC

The current U.S. administration is increasing cooperation with the ICC, while still maintaining reservations and control over information it shares. On March 23, 2010, at a meeting of the Assembly of States Parties in New York, Ambassador Stephen Rapp, the Ambassador-at-Large on War Crimes Issues at the U.S. Department of State,<sup>51</sup> delivered a speech in which he indicated that the United States wished to strengthen and improve its relationship with the ICC.<sup>52</sup>

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Presidential Waiver). In 2012, President Obama authorized U.S. participation in the United Nations Mission in South Sudan. Memorandum from the President to the Secretary of State, *Certification Concerning U.S. Participation in the United Nations Mission in South Sudan Consistent with Section 2005 of the American Servicemembers' Protection Act* (January 10, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/10/presidential-memorandum-certification-concerning-us-participation-united>. Additionally, national interest certifications have been used to authorize the involvement of U.S. Armed Forces in the United Nations Stabilization Mission in Haiti (MINUSTAH) and the United Nations Mission in Liberia (UNMIL). Memorandum from the President to the Secretary of State, *Certification Concerning U.S. Participation in the United Nations Stabilization Mission in Haiti Consistent with Section 2005 of the American Servicemembers' Protection Act* (June 14, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040614-10.html>; Memorandum from the President to the Secretary of State, *Certification concerning U.S. participation in the U.N. mission in Liberia consistent with Section 2005 of the American Servicemembers' Protection Act* (October 20, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031020-9.html>.

<sup>47</sup> ASPA § 2007 (2002).

<sup>48</sup> A list of the waivers can be found at Georgetown Law Library, *International Criminal Court - Article 98 Agreements Research Guide*, [http://www.law.georgetown.edu/library/research/guides/article\\_98.cfm](http://www.law.georgetown.edu/library/research/guides/article_98.cfm).

<sup>49</sup> *Id.*

<sup>50</sup> Office of the Press Secretary, *President Bush Signs H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 into Law*, (January 28, 2008); ASPA §§ 2001-2015 (2008).

<sup>51</sup> Biography, U.S. DEPARTMENT OF STATE, Stephen J. Rapp, <http://www.state.gov/r/pa/ei/biog/129455.htm> (last visited Oct. 9, 2013).

<sup>52</sup> Stephen J. Rapp, *Statement by Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes, Regarding Stocktaking at the Eighth Resumed Session of the Assembly of States Parties of the International Criminal Court* (March 23, 2010), available at <http://usun.state.gov/briefing/statements/2010/138999.htm>.

President Obama has since taken steps toward improving relations with the ICC. In March 2010, President Obama affirmed his commitment to “support[] the ICC’s prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.”<sup>53</sup> Further, in October 2012, Susan Rice, then-U.S. Ambassador to the United Nations, said the U.S. had “actively engaged with the ICC Prosecutor and Registrar” to support “specific prosecutions already underway” and has “responded positively to informal requests for assistance.”<sup>54</sup>

The Obama Administration has also taken direct action to improve cooperation with the ICC. The President signed into law a State Department program that issues rewards for information regarding certain ICC suspects-at-large.<sup>55</sup> Ambassador Rapp stated the program “would be *crime*-specific, not court-specific and would allow the United States to engage more fully in pursuit of . . . foreign nationals.”<sup>56</sup> In May 2013, the State Department announced that it was offering monetary rewards for information leading to the arrest and surrender of Joseph Kony and other commanders of the Lord’s Resistance Army—all of whom have been indicted by the ICC.<sup>57</sup> The U.S. has also facilitated the transfer of ICC suspect Bosco Ntaganda to The Hague when he appeared at the U.S. embassy in Kigali, Rwanda.<sup>58</sup> These actions fall within the scope of the Dodd Amendment as they concern ICC prosecution of foreign nationals.

The Obama Administration has also taken actions apart from direct cooperation with the ICC (and outside of ASPA’s reach) that may align with the interests of the Office of the Prosecutor. On August 4, 2011, President Obama issued Presidential Study Directive 10, establishing an interagency Atrocities Prevention Board (“the Board”).<sup>59</sup> According to the Directive, the “primary purpose of the Atrocities Prevention Board shall be to coordinate a whole of government approach to preventing mass atrocities and genocide.”<sup>60</sup> Further, the Board ensures increased monitoring and capacity to prevent and respond to atrocities.<sup>61</sup> Importantly, it will examine protocols to share intelligence with institutions in response to atrocities.<sup>62</sup> In a

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<sup>53</sup> United States National Security Strategy, THE WHITE HOUSE, (May 27, 2010), *available at* [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

<sup>54</sup> Susan E. Rice, Ambassador, U.S. Permanent Representative to the United Nations, *Remarks at a UN Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court* New York, NY (October 17, 2012), <http://usun.state.gov/briefing/statements/199261.htm>.

<sup>55</sup> Department of State Rewards Program Update and Technical Corrections Act of 2012, on January 15, 2013 (S.2318A), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112s2318enr/pdf/BILLS-112s2318enr.pdf>. See Statement by the President on Enhanced State Department Rewards Program (January 15, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/15/statement-president-enhanced-state-department-rewards-program>.

<sup>56</sup> *Rewards Programs Hearing*, *supra* note 26, at 112-129.

<sup>57</sup> *U.S. offers \$5 million for information leading to Joseph Kony, top associates*, CNN (Apr. 4, 2013, 5:23 AM), <http://www.cnn.com/2013/04/03/us/kony-reward-money/index.html>. See *Wanted: Joseph Kony*, U.S. DEPARTMENT OF STATE, OFFICE OF GLOBAL CRIMINAL JUSTICE, <http://www.state.gov/j/gcj/wcrp/206078.htm> (last visited Oct. 6, 2013).

<sup>58</sup> *Id.*

<sup>59</sup> Presidential Study Directive/PSD-10, Presidential Study Directive on Mass Atrocities (August 4, 2011).

<sup>60</sup> *Id.*

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

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

recent fact sheet on the Board, an affirmation of support for “national, hybrid, and international mechanisms (including, among other things, commissions of inquiry, fact finding missions, and tribunals)” was made.<sup>63</sup> As well, it detailed actions like “the passage of UN Security Council Resolutions 1970 and 1973, which authorized—in an unprecedented combination of measures—referral of the situation in Libya to the International Criminal Court,” and the support to capture “priority figures wanted by international tribunals (including Goran Hadzic and Ratko Mladic).”<sup>64</sup>

## VI. Conclusion

The Obama Administration has increased efforts to cooperate with the ICC, as well as to improve U.S. responses to atrocity crimes. This increased American openness to aiding in the prosecution of crimes at the international level suggests that a thorough review should be undertaken, in order to consider how public and private entities in the United States can lawfully respond to digital information requests from the ICC. In particular, U.S.-based ISPs can review their responses to the sharing of data with the ICC, although the ICC may not be able to directly request information from private entities.

ASPA already provides some tools for increased responsiveness to the ICC. First, the Dodd Amendment can continue to be invoked in the case-by-case manner in which it is currently used to share information and otherwise support particular cases proceeding before the ICC. Second, the President can invoke the section 2011 waiver, which allows use of executive Commander in Chief powers. This waiver could potentially be used to assist in the apprehension of suspects and their subsequent transfer to the control of the ICC. It could also be used to provide relevant, classified national security information to the ICC. Third, the President can increase usage of section 2005 to further U.S. participation in U.N. peacekeeping operations. The President need only provide to Congress the “national interest certification” that ensures the operation aligns with U.S. interests and that U.S. personnel will not be subject to prosecution by the ICC. Finally, cooperation external to the ICC can be expanded, such as through development of the Atrocities Prevention Board and the State Department’s Rewards Program.

Changes to or clarifications of internal interpretations of ASPA could make the extent of its reach regarding digital evidence much clearer. This would include defining any application of ASPA to private entities, such as ISPs, since it appears ASPA currently only extends to public entities. Clarity is also needed regarding whether or not the Act extends to data outside of the U.S. that is controlled by U.S.-based companies, especially considering that U.S. companies control the vast majority of digital information. Furthermore, any potential penalties for breach of ASPA should be made clear.

As Senator Dodd has stated, ASPA is very complex, and “[t]here are waivers within waivers which turn out not to be waivers at all because the conditions of the waivers are

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<sup>63</sup> The White House, *Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities* (Apr. 23, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro>.

<sup>64</sup> *Id.*

unattainable in many instances.”<sup>65</sup> Further clarification is required to understand how the Act applies to digital evidence and the circumstances surrounding increased U.S. engagement with the ICC.

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<sup>65</sup> 148 CONG. REC. 9591 (2002).

## VII. Appendix

### SAMPLE PRESIDENTIAL WAIVER

Consistent with section 2005 of the American Servicemembers' Protection Act (Public Law 107-206; 22 U.S.C. 7421 et seq.), concerning the participation of members of the Armed Forces of the United States in certain United Nations peacekeeping and peace enforcement operations, I hereby certify that members of the U.S. Armed Forces participating in the United Nations-African Union Mission in Darfur (UNAMID) are without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court (ICC) because the United Nations Security Council has permanently exempted members of the U.S. Armed Forces participating in UNAMID from criminal prosecution or other assertion of jurisdiction by the ICC for actions undertaken by them in connection with UNAMID by deciding, in Resolution 1593 (2005), that "personnel from a contributing state outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State."

Memorandum for the Secretary of State, Certification Concerning U.S. Participation in the United Nations-African Union Mission in Darfur Under Section 2005 of the American Servicemembers' Protection Act (March 26, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/print/20080327-1.html>.