

# The 2013 Salzburg Workshop on Cyber Investigations: Digital Evidence and the American Servicemembers' Protection Act

By **Aida Ashouri** and **Caleb Bowers**

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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 important provisions and their exceptions, and how the Act affects investigations by the International Criminal Court (ICC).**

**International criminal prosecutions increasingly rely on cyber investigations to uncover digital evidence that can be subsequently admitted in court proceedings. The 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, and given the information-gathering and information-storage capacities of the U.S. government, information touching upon or residing in the United States often can be of assistance to ICC cyber investigations. This article examines the current administration's increased engagement with the ICC within the scope of the ASPA, as well as whether or not this engagement suggests that revisions should be made to the Act. These questions serve as the starting point for examining the nexus of cyber investigations, the ASPA, and the International Criminal Court.**

## Introduction

This paper examines the American Servicemembers' Protection Act 22 U.S.C. §§ 2004(h), 2013(12) (2008), which was signed into law by then-President George W. Bush on 2 August 2002. The Act contains a broad prohibition on cooperation between the United States

and the International Criminal Court, strictly prohibiting U.S. "support" to the ICC and limiting ICC "investigative activity" within the United States. Notwithstanding these broad restrictions, the ASPA 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, in accordance with ASPA § 2015.

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 the 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 digital information is controlled by U.S.-based Internet Service Providers (ISPs). Furthermore, building working relationships with U.S.-based ISPs is critical to engaging the technology industry in cooperating with the ICC and to utilizing the vast resources and expertise the industry has to offer the ICC.

Accordingly, this paper examines (1) the political environment at the time the Act was passed; (2) the Act's influence 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 ICC in general; (4) what potential considerations might be involved if the ICC were to request information from a U.S. entity; and (5) the unresolved questions regarding the functions of the Act and its reach.

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. The findings are based on primary and

secondary research on the ASPA, as well as interviews conducted with government officials with knowledge of the ASPA's operations.

### 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>1</sup> However, as the conference approached a final vote on the statute (the Rome Statute), U.S. officials realized certain critical negotiating objectives would not be achieved, and U.S. support for the Rome Statute quickly diminished.<sup>2</sup> David Scheffer, former Ambassador-at-Large on War Crimes Issues at the U.S. Department of State and lead U.S. negotiator in Rome, unsuccessfully attempted to stall to allow the U.S. to have more time to reconsider the Statute before the conference voted on deliberations.<sup>3</sup> On 1 July 2002, after receiving the necessary sixty ratifications for implementation, the Rome Statute of the International Criminal Court entered into force.<sup>4</sup>

There were a number of American concerns about the new international court. 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>5</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>6</sup> Second, the lack of prosecutorial accountability, as well as the potential for prosecutions based on political considerations, raised concerns about the possibility that investigations might be specifically directed at

American citizens.<sup>7</sup> Although the U.S.—during the closing 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>8</sup> The U.S. thereby relieved itself of an obligation not to defeat the Statute's object and purpose.<sup>9</sup> U.S. concerns then set the stage for subsequent legislation in the American Servicemembers' Protection Act.

The American Servicemembers' Protection Act became law in August 2002, supplementing already existing legislation that placed a prohibition on use of U.S. funds to support the ICC.<sup>10</sup> Senator Jesse Helms introduced the ASPA legislation,<sup>11</sup> which the Senate adopted as an amendment to the Supplemental Defense Appropriations Act of 2002.<sup>12</sup> Senator Helms and other legislators argued that the legislation was necessary because the ICC threatened U.S. sovereignty.<sup>13</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 ICC, as well as other provisions restricting cooperation with the ICC.<sup>14</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>15</sup> This mixed result reflected divided Congressional opinions as to whether there should be cooperation with the ICC with respect to cases involving individuals accused of committing serious international crimes.

<sup>7</sup> Jennifer K. Elsea, *U.S. Policy Regarding the International Criminal Court* 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: Jennifer K. Elsea, *U.S. Policy Regarding the International Criminal Court* at 8-11.

<sup>8</sup> William H. Taft, IV and others, *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement* (American Society of International Law, March 2009), 30-31.

<sup>9</sup> Vienna Convention on the Law of Treaties, article 18, opened for signature on 23 May 1969, 1155 U.N.T.S. 331.

<sup>10</sup> The Foreign Relations Authorization Act serves as a continuous and current prohibition on U.S. funding of the ICC. It provides: "None of the funds authorized to be appropriated by this or any other Act may be obligated for use by, or for support of, the International Criminal Court unless the United States has become a party to the Court ...." 22 U.S.C. § 7401 (2008).

<sup>11</sup> 147 CONG. REC. 24,377 (2001).

<sup>12</sup> 148 CONG. REC. 14,051 (2002).

<sup>13</sup> 148 CONG. REC. 9589 (2002).

<sup>14</sup> ASPA § 2008.

<sup>15</sup> 148 CONG. REC. 9590 (2002).

<sup>1</sup> David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), 192.

<sup>2</sup> David Scheffer, *All the Missing Souls*, 207.

<sup>3</sup> David Scheffer, *All the Missing Souls*, 207.

<sup>4</sup> 2187 U.N.T.S. 90.

<sup>5</sup> 111th Congress, 2nd Session, Bill number H. R. 5351, House of Representatives, 20 May 2010, section 2(3) Findings, at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr5351ih/xml/BILLS-111hr5351ih.xml>.

<sup>6</sup> Jennifer K. Elsea, Congressional Research Service, *CRS Report for Congress: U.S. Policy Regarding the International Criminal Court* (29 August 2006), 5-6, available at <https://www.fas.org/sqp/crs/misc/RL31495.pdf>.

### Functions and Operations

The 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 prohibits the sharing of intelligence and law enforcement information with the ICC or with any State Parties to the Rome Statute.<sup>16</sup>

#### 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>17</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>18</sup> Furthermore, “[n]o classified national security information can be transferred directly or indirectly to the ICC.”<sup>19</sup> Senator John Warner, discussing the 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>20</sup>

#### Defining “investigative activity within the United States”

The prohibition on investigative activities of agents limits the activities of the ICC 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>21</sup> Although an authoritative interpretation of the statute from the Office of Legal Counsel, Department of Justice, has not been made public,<sup>22</sup> a restrictive reading of “investigative activity” could prohibit virtually any ICC activity within the United States. Both the clauses, “investigative activity” and “in 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 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, the provisions of the 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 focuses on the physical location of the ICC investigator. The investigative activity provision of the ASPA then would not be affected until the ICC investigator enters U.S. territory, and so a telephone call to a potential witness may not be prohibited. Or, if the telephone 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 cyber investigations and the ASPA.

#### Obtaining digital evidence from service providers

The extent to which considerations related to the ASPA limit the ability of the ICC to gather digital evidence from U.S. service providers remains unclear. This is important for investigations because a large amount of information flows through U.S. service providers. As described below, there is nothing in the

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

<sup>17</sup> ASPA §§ 2004(e), (h), 2013(12)

<sup>18</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, 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>19</sup> ASPA § 2006; 148 CONG. REC. 9589 (2002).

<sup>20</sup> 148 CONG. REC. 9589 (2002).

<sup>21</sup> ASPA § 2004(h).

<sup>22</sup> Furthermore, research for this paper has not found any interpretation of ASPA in this context by any court of the United States.

statutory language to suggest that U.S. service providers that hold digital evidence 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, ICC investigators will need to develop protocols for accessing digital evidence from service providers.<sup>23</sup>

### The jurisdiction of the ASPA and private legal entities

On its face, the 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>24</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 Rome Statute does not bind the United States.

There exist important threshold questions as to how private companies might respond to requests for information from the ICC. There is the possibility of a discouraging effect, where private legal entities may be unwilling to cooperate because of political considerations surrounding the ASPA and related fears of governmental retribution for cooperation with the ICC. This effect is also recognised regarding other complex U.S. 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. Most importantly, ISPs will question the release of private information pertaining to account

holders to an investigative agency. There are strict requirements under U.S. law for release of such information, and ISPs have formal processes for making and complying with requests; absent strict compliance, information generally will not be released.<sup>25</sup>

### Location of data in cyber investigations

Data relevant to investigations may be difficult to locate. U.S. service providers have placed their data centers across the world in order to gain efficiency, speed up user access to data, and to comply with local legal 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 the data.

The location of data may not be available, due to the difficulty in knowing precisely where the data is located. This is partly because the data is copied throughout different servers, and service providers may not want to or be able to provide location information. For data that may be stored outside the United States, however, obtaining the data may involve identifying and following the legal and procedural requirements of the local jurisdiction.<sup>26</sup> For example, if an American student travels to a country in Europe, her cloud-based e-mail service may copy the archive of her e-mail to servers in the country to which she travels to improve access to the data. This scenario, however, may be limited to situations where data is known to be copied or stored outside of the United States. The greatest difficulty in obtaining the data may actually be determining its location.

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 the restrictions the ASPA imposes, difficulties surrounding locating

<sup>23</sup> Possible routes for obtaining information, if not prohibited by the “investigative activity” prohibition of the ASPA are: 1) the Mutual Legal Assistance Treaty (MLAT) process or the similar letters rogatory process; 2) requests made pursuant to 28 U.S.C. 1782, which allows U.S. federal district courts to provide assistance to foreign and international tribunals; 3) relationships with U.S. law enforcement agencies, which may allow those agencies to obtain information through U.S.-domestic channels and share information with the ICC on a case-by-case basis; and 4) retrieving information available through States Parties to the Rome Statute (but note the issue of retrieving the large amounts of data stored solely in the United States would remain if exercising this option). A more complete discussion of these alternatives is outside the scope of this paper, as it is limited to identifying the background issues associated with gathering of digital evidence by the ICC.

<sup>24</sup> ASPA § 2004.

<sup>25</sup> See, e.g., Yahoo! Compliance Guide for Law Enforcement, <http://cryptome.org/isp-spy/yahoo-spy.pdf>.

<sup>26</sup> The Terms of Service agreement of an individual user’s account will determine the jurisdiction that governs requests for information pertaining to that user’s account. For non-U.S. accounts, the ICC should make requests to the specified jurisdiction. However, users outside the United States may have accepted the same Terms of Service as a user in the United States, thereby necessitating that a request for information be sent to a U.S. jurisdiction. The specified jurisdiction varies based on the structuring of each company and its Terms of Service agreements.

the data, and developing protocols for obtaining data from U.S.-based or foreign servers owned by U.S.-based service providers.

### Special exceptions to prohibitions in the ASPA

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 ICC.<sup>27</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>28</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>29</sup> All of these exceptions, however, are accompanied by limitations, and are examined in this section.

#### The Dodd Amendment

Section 2015 of the Act, also known as the Dodd Amendment, counteracts the broad prohibition on supporting the ICC. 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>30</sup> provided 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>31</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>32</sup>

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>33</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. In the absence of any objection, the request will be approved. For atypical requests, the relevant agencies and authorities may meet face-to-face to weigh competing policy considerations. Although limited in scope, this approach permits U.S. cooperation with the ICC, while also allowing the U.S. to retain control over the extent of its cooperation.

#### Presidential waivers

Various Presidential waivers exist that circumvent the prohibitions of the ASPA. For instance, section 2011 of the ASPA permits the President, pursuant to his powers as Commander in Chief, to share information in his control with the ICC.<sup>34</sup> It does not appear that the President has invoked this waiver at the date of writing. However, members of Congress have already indicated how this waiver could be implemented. Speaking on the floor of the House of Representatives in 2002, Senator Henry Hyde, who introduced the

<sup>27</sup> *The State Department's Rewards Programs: Performance and Potential: Hearing Before the Subcommittee on Terrorism, Nonproliferation, and Trade*, 112th Cong. 1 (2012) (statement of Stephen Rapp, Ambassador-at-Large, Office of Global Criminal Justice).

<sup>28</sup> ASPA § 2011.

<sup>29</sup> ASPA §§ 2003, 2005, 2007.

<sup>30</sup> 148 CONG. REC. 15,659 (2002). The purpose of the ASPA is to protect against ICC prosecutions of U.S. nationals.

<sup>31</sup> ASPA § 2015.

<sup>32</sup> 148 CONG. REC. 15,659 (2002).

<sup>33</sup> *The State Department's Rewards Programs: Performance and Potential: Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade*, 112th Cong. 112-29 (2012) (statement of Stephen Rapp, Ambassador-at-Large, Office of Global Criminal Justice).

<sup>34</sup> 148 CONG. REC. 14,050 (2002).

ASPA in the House, explained that this exception turns on the “parameters of the President’s authority under the Constitution,” and is decided on a “case-by-case basis” by the President. He also clarified that this waiver can be used to facilitate the transfer of foreign nationals to the ICC. Importantly, he noted that this provision also allows the President to provide classified national security information to the ICC. 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. In his remarks, Representative Hyde also stated that there might be other situations, not yet explored, where this presidential waiver could be used.<sup>35</sup>

Other waivers also exist in the ASPA that govern the participation of U.S. Armed Forces in peace keeping missions. First, a waiver in section 2003 authorizes the President to waive restrictions on peace keeping in section 2005. This waiver also applied to section 2007, before it was removed in the 2008 amended version of ASPA.<sup>36</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>37</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>38</sup> Such a binding agreement would not be possible to achieve in practice, given it would require the ICC to relinquish its own jurisdiction.

Regarding peace keeping efforts, section 2005 still allows for U.S. participation if the President obtains a “national interest certification.”<sup>39</sup> This certification requires U.S. Armed Forces participating in peace keeping activities to be the subject of immunity, from risk of criminal prosecution or other assertion of the jurisdiction of the ICC,<sup>40</sup> and it relies on “factual judgments made by the President.”<sup>41</sup> Both Presidents Bush and Obama have obtained national interest

certifications to allow U.S. Armed Forces to participate in U.N. peacekeeping efforts.<sup>42</sup>

Before the 2008 amendment to the ASPA, the provisions of section 2007 restricted military aid to parties to the Rome Statute.<sup>43</sup> Article 98 waivers were obtained to waive the restriction on military assistance.<sup>44</sup> These agreements provided immunity to U.S. personnel from ICC prosecution in exchange for a waiver on restrictions to U.S. military aid. However, the 2008 amendment to the ASPA removed section 2007 and the restrictions on military aid.<sup>45</sup>

### Unresolved questions regarding penalties for breach

Currently, there are no explicitly defined penalties for breach of the 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.

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<sup>42</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* (26 March 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/print/20080327-1.html>. 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* (10 January 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* (14 June 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* (20 October 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031020-9.html>.

<sup>43</sup> ASPA § 2007 (2002).

<sup>44</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>45</sup> Office of the Press Secretary, *President Bush Signs H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 into Law*, (28 January 2008); ASPA §§ 2001-2015 (2008).

<sup>35</sup> 148 CONG. REC. 14,049-14,050 (2002).

<sup>36</sup> ASPA §§ 2001-2015.

<sup>37</sup> ASPA § 2003.

<sup>38</sup> ASPA § 2003(a)(2).

<sup>39</sup> ASPA § 2005(c), (2008); 148 CONG. REC. 14,049 (2002).

<sup>40</sup> ASPA §§ 2003-2005 (2008).

<sup>41</sup> 148 CONG. REC. 14,049 (2002).



Further, it does not appear that any breaches of the ASPA have occurred, or penalties for breach been imposed.

### The current extent of U.S. cooperation with the ICC

The current U.S. administration is increasing cooperation with the ICC, while maintaining reservations and control over the information it shares with the ICC. On 23 March 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, delivered a speech in which he indicated that the United States wished to strengthen and improve its relationship with the ICC.<sup>46</sup>

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>47</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>48</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>49</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>50</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>51</sup> The U.S. also facilitated the transfer of suspect Bosco Ntaganda to The Hague when he appeared at the U.S. embassy in Kigali, Rwanda.<sup>52</sup> These actions fall within the scope of the Dodd Amendment, concerning, as they do, prosecution of foreign nationals by the ICC.

The Obama Administration has also taken actions apart from direct cooperation with the ICC (and outside of ASPA’s reach) that may support the interests of the Office of the Prosecutor. On 4 August 2011, President Obama issued Presidential Study Directive 10, establishing an interagency Atrocities Prevention Board (“the Board”).<sup>53</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.” Further, the Board ensures increased monitoring and capacity to prevent and respond to atrocities. Importantly, it will examine protocols to share intelligence with institutions in response to atrocities. In a 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>54</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

<sup>46</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> .

<sup>47</sup> *United States National Security Strategy*, The White House, (27 May 2010), 48, 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>48</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 (17 October 2012), <http://usun.state.gov/briefing/statements/199261.htm> .

<sup>49</sup> Department of State Rewards Program Update and Technical Corrections Act of 2012, on 15 January 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 (15 January 2013), <http://www.whitehouse.gov/the-press-office/2013/01/15/statement-president-enhanced-state-department-rewards-program> .

<sup>50</sup> *The State Department’s Rewards Programs: Performance and Potential: Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade, 112th Congress 112-29* (2012) (statement of Stephen Rapp, Ambassador-at-Large, Office of Global Criminal Justice).

<sup>51</sup> ‘U.S. offers \$5 million for information leading to Joseph Kony, top associates’, *CNN* 4 April 2013, <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> .

<sup>52</sup> ‘U.S. offers \$5 million for information leading to Joseph Kony, top associates’, *CNN* 4 April 2013.

<sup>53</sup> Presidential Study Directive/PSD-10, Presidential Study Directive on Mass Atrocities (August 4, 2011).

<sup>54</sup> The White House, *Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities* (23 April 2012), available at <http://www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro> .

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>55</sup>

### 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 could 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.

The 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 to 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 use of section 2005 to further U.S. participation in U.N. peacekeeping operations. The President only needs to provide to Congress the "national interest certification", which ensures the operation supports U.S. interests and that U.S. personnel will not be subjected 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 the ASPA could make the extent of its reach regarding digital evidence much clearer. This would include defining any application of the ASPA to private entities, such as ISPs, since it appears the 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 the ASPA should be made clear.

As Senator Dodd has stated, the 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 unattainable in many instances."<sup>56</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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**Aida Ashouri** is a Judicial Law Clerk for the U.S. Department of Justice at the Executive Office for Immigration Review. She received her J.D. from the University of California, Berkeley, School of Law, where she was a clinical student in the Samuelson Law, Technology & Public Policy Clinic.

[AidaAshouriJD@gmail.com](mailto:AidaAshouriJD@gmail.com)

**Caleb Bowers** is a J.D. Candidate, 2015, at the University of California, Berkeley, School of Law. In law school, Caleb has focused on both human rights and consumer protection. Upon graduation, he will enter the United States Army and hopes to develop experience as a trial attorney.

<sup>55</sup> The White House, *Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities* (23 April 2012).

<sup>56</sup> 148 CONG. REC. 9591 (2002).