

Access Denied? The International Criminal Court, Transnational Discovery, and The American Servicemembers Protection Act

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ABSTRACT

This paper addresses how international criminal tribunals can obtain content and non-content data held in electronic storage by private companies incorporated in the United States for use as evidence. We primarily focus on the International Criminal Court (ICC) for two reasons: first, the ICC faces hurdles above and beyond those of other international criminal tribunals—including barriers created by the 2002 passage of the American Servicemembers' Protection Act (ASPA)—and thus represents the most restrictive case; second, as the world's first permanent international criminal court, it is crucial to analyze how the court is functioning and establish a legal infrastructure to facilitate the ICC's long-term operation.

We conclude that, with regard to the ICC, and contrary to conventional understanding and practice, ASPA is not a barrier to the ICC's investigations in the United States so long as the ICC limits any requests for assistance to investigations of crimes against humanity, war crimes, and genocide allegedly perpetrated by foreign nationals. Second, we conclude that tribunals such as the ICC have five options for securing privately-held electronic information: (1)

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submitting requests directly to tech companies; (2) filing requests for assistance in U.S. district courts; (3) requesting assistance from the executive branch; (4) asking foreign governments to submit Mutual Legal Assistance (MLA) requests on the ICC's behalf; and (5) partnering with joint law enforcement bodies, like INTERPOL, to make foreign-to-domestic law enforcement requests.

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INTRODUCTION

In 2003, a petite, auburn-haired woman—Natasa Kandic—could often be spotted in the cafés of Sid, a small town in northern Serbia. A sociologist by training, the fifty-seven-year-old Serbian native had founded the Humanitarian Law Center in Belgrade in 1992 to investigate and expose atrocities that had been committed during the breakup of Yugoslavia. She had thrown herself full-force into her investigations, earning the contempt—even hatred—of the Serbian military and other powerful leaders in the region. In the midst of her most recent investigation, one rumor in particular had caught her attention—that a videotape existed somewhere in town and documented war crimes committed by the Serbs.¹

1. See Daniel Williams, *Srebrenica Video Vindicates Long Pursuit by Serb Activist*, WASH. POST (June 25, 2005), <http://www.washingtonpost.com/wp->

The video was rumored to show four young men, ranging in age from sixteen years old to their early twenties, clothed in camouflage and red berets decorated with the Serbian flag,² shooting six emaciated Bosnian male civilians, several of whose arms were tied.³ After the first four captives were executed, the other two were forced to dispose of the bodies. Then, they, too, were shot.⁴

The killers were purportedly members of the Skorpions, a shadowy paramilitary unit under the command of Slobodan Milosovic, then-President of Serbia. The footage was believed to have been taken by one of the Skorpions' members. Twenty copies had been made as souvenirs. At one time, copies could even be rented in Sid, where the Skorpions were based—that is, until the unit's commander caught wind of the tapes, realized they could be incriminating, and ordered all twenty copies to be destroyed.⁵ However, a disgruntled member of the unit,⁶ who was not involved in the killings, had apparently made a backup copy and kept it carefully hidden.⁷ If Natasa could get hold of that videotape, it could be used to tie Milosovic to the commission of war crimes and provide some of the first documentary evidence of Serbian atrocities—critical footage for beginning to counter the impassioned denial by locals that Serbs had ever committed such crimes.

A race to find the tape began: members of the Skorpions had also heard the rumor and were determined to get to it first.⁸ But Kandic beat them to it. She waited until the copy's owner fled the country, made copies of her own, and then passed some of the tapes along to media outlets and to the Yugoslavia tribunal in The Hague,⁹ which had recently been established to investigate and prosecute crimes that had been committed during the wars in the region.¹⁰

Milosevic's trial opened at the International Criminal Tribunal for the former Yugoslavia (ICTY) on February 12, 2002. On June 1, 2005, the Skorpions' "massacre video," as it came to be known, would finally be shown in court.¹¹

dyn/content/article/2005/06/24/AR2005062401501.html.

2. See Alissa J. Rubin, *Video Alters Serbs' View of Bosnian War*, L.A. TIMES (June 13, 2005), <http://articles.latimes.com/2005/jun/13/world/fg-bosnia13>.

3. See Beti Bilandzic, *Serbs are Stunned by Video of Srebrenica*, WASH. POST (June 3, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/02/AR2005060201720.html>.

4. See Prosecutor v. Milošević, Case No. IT-02-54, Trial Transcript, 40278 (Int'l Crim. Trib. for the Former Yugoslavia June 1, 2005), http://www.icty.org/x/cases/slobodan_milosevic/trans/en/050601IT.htm (*hereinafter* Milošević Trial Transcript).

5. See Rubin, *supra* note 2.

6. See Williams, *supra* note 1.

7. See Rubin, *supra* note 2.

8. See Williams, *supra* note 1.

9. See Rubin, *supra* note 2.

10. See generally U.N. Int'l Crim. Tribunal for the Former Yugoslavia, *The Tribunal—Establishment*, <http://www.icty.org/en/about/tribunal/establishment>.

11. See Milošević Trial Transcript, *supra* note 4; see also Associated Press, *Bosnia Agonizes Over Release of Massacre Video*, CNN NEWS (June 3, 2005), http://www.nbcnews.com/id/8085091/ns/world_news/t/bosnia-agonizes-over-release-massacre-

While Milosevic died before his case concluded, a portion of that video and others, along with a series of screen shots from those videos, would be used in other ICTY cases to establish the crimes that had occurred and to link the highest-level perpetrators to those crimes. The most important trial was that of Serbian General Ratko Mladic.¹² For Mladic's case, the prosecution created a compilation from twenty-five different source videos, including the Skorpions' footage and a related binder of stills,¹³ which the prosecution arranged chronologically to depict the story of the murder and expulsion of the Muslim population from Srebrenica between the 10th and 20th of July 1995.¹⁴ The four and a half hours of footage had been acquired in disparate, painstaking ways: in addition to being passed along by activists like Kandic at great personal risk, videos were acquired during a search of Mladic's home, as well as a sweep of properties owned by Milan Milutinovic, Serbia's second president.¹⁵

The most infamous of those clips showed Mladic, late in the day on the 11th of July 1995, exuberantly strutting through the streets of Srebrenica, pausing to greet and embrace each of his officers; Srebrenica had just fallen to his men. Finally, he stopped and turned to face the camera; "[o]n the eve of yet another great Serb holiday," he declared, "we present this city to the Serbian people as a gift. Finally the time has come to take revenge on the Turks."¹⁶

Another clip showed the commander of the Drina Wolves, a paramilitary group, ordering his men to hit the Srebrenica victims "hard" and crowing "I want to hear wolves howl!"¹⁷ while yet another featured the Skorpions killing.¹⁸ In the Mladic case, Erin Gallagher, an investigator for the ICTY's prosecutor, testified as to the locations and people depicted in the footage, as well as the recordings'

video/.

12. See Sense Tribunal, 'Wolves' and 'Scorpions' at Ratko Mladic's Trial, SENSE NEWS AGENCY (Apr. 19, 2013), http://www.sense-agency.com/icty/%E2%80%98wolves%E2%80%99-and-%E2%80%98scorpions%E2%80%99-at-ratko-mladic%E2%80%99s-trial.29.html?news_id=14880.

13. See Interview by Alexa Koenig with Sun Kim, a former legal officer with the United Nations International Criminal Tribunal for the Former Yugoslavia (Aug. 18, 2016) (describing the binder of still shots as particularly beneficial to the case by making it particularly easy for the judges to understand what was happening in the videos).

14. See Prosecutor v. Mladić, Case No. IT-09-92, Trial Transcript, 10096 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19 2013), <http://www.icty.org/x/cases/mladic/trans/en/130419IT.htm>.

15. See *id.* at 10129.

16. See ERIC STOVER & GILLES PERESS, THE GRAVES: SREBRENICA AND VUKOVAR 122-24 (Scalo ed., 1998); Interview with Eric Stover, Faculty Director, Human Rights Center at UC Berkeley (August 9 & 22, 2016). Stover and Peress had first seen the video in Tusla while visiting a local human rights organization. Their interpreter had told them, "You have to see this video," handing Stover a copy, which the two popped into a computer. Realizing what they were seeing and the potential value of the footage, Peress photographed seven frames, which they passed along to prosecutors at the ICTY.

17. Kate Ferguson, An Investigation into the Irregular Military dynamics in Yugoslavia, 1992-1995 74 (2015) (unpublished Ph.D thesis, University of East Anglia), https://ueaeprints.uea.ac.uk/59455/1/FINA_SUBMISSION_KFERGUSO.pdf.

18. See Sense Tribunal, *supra* note 12.

sources and dates.¹⁹ Based on her testimony, the videos and stills could be authenticated and entered into evidence.

So-called perpetrator footage and other videos continue to serve as critical linkage and lead evidence²⁰ to support legal accountability for war crimes and other atrocities. However, today, such documentary evidence is as likely to be acquired from the relative safety of a desk hundreds or even thousands of miles from the site of a crime. A careful search through YouTube or Facebook can uncover footage of a crime, versus the painstaking legwork conducted by investigators such as Kandic or Gallagher. In such cases, what becomes most difficult to acquire is not the footage itself, but the metadata behind it—the date, time, location, and other information relevant to its creation—which is helpful to authenticate the videos and support their admissibility in court.²¹ Service providers are frequently the gatekeepers of that information, and investigators must often overcome a series of hurdles—including compliance with domestic law and corporate policy—to gain the necessary access.

Overcoming these hurdles is crucial. While witness testimony is often central to trials, documentary evidence can be especially helpful in international cases, where not only the base crimes must be proven (the fact that a rape or a murder occurred) but additional “chapeau elements” which establish that the wrongdoing is not just a domestic crime, but an international one.²² For example, in order to qualify as an international crime against humanity, a series of murders must be systematic or widespread and target a civilian population.²³ Genocide requires that killers have the requisite intent to destroy a population based on the victims’ national, ethnic, religious, or racial group.²⁴ Because of their additional complexity, international crimes are particularly difficult to prove, and thus, it can be especially helpful for prosecutors to be able to present diverse forms of evidence—including documentary evidence, such as video footage—to provide key linkage evidence that ties the crimes committed by subordinates to their

19. *See id*; *see also* Sense Tribunal, *Identification in Srebrenica Court Video*, SENSE NEWS AGENCY, Nov. 11, 2010, http://www.sense-agency.com/icty/identification-in-srebrenica-court-video.29.html?news_id=12246&cat_id=1 (discussing how Gallagher similarly testified in court about the video footage during the trial of Zdravko Tolimer, Mladic’s assistant for security and intelligence, attesting to “when and where the videos were recorded” and identifying “locations, persons and items in the footage”).

20. Linkage evidence is information that ties perpetrators to alleged crimes; lead evidence is information that leads to further evidence.

21. For an overview of the basic evidentiary principles at international tribunals such as the International Criminal Court *see, e.g.*, GLOB. RIGHTS COMPLIANCE LLP, *BASIC INVESTIGATIVE STANDARDS FOR FIRST RESPONDERS TO INTERNATIONAL CRIMES* 4 (2016), http://www.globalrightscpliance.com/wp-content/uploads/2016/07/GRC_BIS_ENG.pdf (explaining that before evidence may be used at trial, it must be ruled admissible; before evidence can be ruled admissible, it needs to be shown to be authentic and its provenance should be demonstrated).

22. *See* RONALD C. SLYE & BETH VAN SCHAACK, *INTERNATIONAL CRIMINAL LAW* 216 (2009).

23. *Id.*

24. *See, e.g.*, Rome Statute of the International Criminal Court, A/CONF.183/9, Part II, art. 6 (July 16, 2002), https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

commanders, to corroborate witness testimony, and sometimes even to supplant that testimony when witnesses' lives are at risk.

In addition, in recent years, video and photographic evidence have assumed increasing importance. Thanks in part to the expanding distribution of internet-connected mobile devices and the popularity of media sharing services like YouTube, Facebook, Snapchat and others, tribunals have turned to the internet as a source of evidence.²⁵ This "digital" evidence includes traditional documentary evidence such as videos, audio, images, emails, memoranda, reports, and other documents, in digitized form.

A significant proportion of this new kind of documentary evidence is in the possession of, or otherwise controlled by, technology companies incorporated in the United States.²⁶ To date, the ICC, as one example, has been unable to obtain much of this evidence for a variety of reasons. In 2002, Congress passed a statute—at a time of heightened Congressional hostility towards the Court—that governs the United States' relationship with the ICC. ASPA, as it is known, contains several prohibitions on U.S. government cooperation that render it difficult for the ICC to gain assistance from the United States in its investigations and prosecutions. Congress's predominate concern was ICC prosecutions of U.S. servicemembers or government officials, however its effect has been much broader.²⁷

At first blush, ASPA would appear to stymie potential efforts by the ICC to obtain data from American companies via American legal processes. As a further complication, some American data companies, like Google and Facebook, require a subpoena or warrant issued from an American court in order to turn over data,²⁸ even though ASPA does not prevent private entities' voluntary cooperation with the ICC.

In this article, we sketch a way forward for the ICC and other international or regional criminal tribunals that may face similar obstacles to obtaining evidence stored as data by American companies. In Part I, we explore the history and importance of documentary evidence to international criminal tribunals generally and the ICC specifically. In Part II, we analyze the ASPA provisions

25. See Avi Asher-Schapiro, *YouTube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals*, INTERCEPT (Nov. 2, 2017), <https://theintercept.com/2017/11/02/war-crimes-youtube-facebook-syria-rohingya/>; Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L.J. 323 (2016); Alexa Koenig, *Harnessing Social Media as Evidence of Grave International Crimes*, MEDIUM (Oct. 23, 2017), <https://medium.com/humanrightscenter/harnessing-social-media-as-evidence-of-grave-international-crimes-d7f3e86240d>.

26. See Avi Asher-Schapiro, *YouTube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals*, INTERCEPT (Nov. 2, 2017), <https://theintercept.com/2017/11/02/war-crimes-youtube-facebook-syria-rohingya/>.

27. JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT, at CRS-5 (2006), <https://fas.org/sgp/crs/misc/RL31495.pdf>.

28. See Google Transparency Report Help Center, *Legal process for user data requests FAQ*, <https://support.google.com/transparencyreport/answer/7381738?hl=en>; *Information for Law Enforcement Authorities*, FACEBOOK, <https://www.facebook.com/safety/groups/law/guidelines/>.

that bar U.S. government cooperation with the ICC to identify how and in what contexts the ICC can legally secure linkage and lead evidence and other critical information from U.S.-based technology companies. In Part III, we discuss the thicket of statutes and mechanisms that—even without ASPA’s bar—complicate discovery requests by international courts. We conclude that there are five avenues through which international criminal tribunals, American courts, and American companies can legally work together to further accountability for war crimes, crimes against humanity, and genocide. International courts such as the ICC can (1) request data directly from technology companies; (2) file requests for assistance directly in U.S. district courts; (3) request assistance from the executive branch; (4) ask foreign governments to submit Mutual Legal Assistance requests on their behalf; and (5) partner with joint law enforcement bodies.

I. PART I

While witnesses are the “lifeblood” of criminal trials,²⁹ documentary evidence (like physical evidence) can be critical to successful prosecutions. Documentary evidence can be used to corroborate witness testimony, provide linkage evidence that ties the highest-level defendants to crimes perpetrated by their subordinates, point to additional evidence, and even replace witnesses, for example when testifying would be disproportionately dangerous for the witness and/or her family.³⁰

A. Brief History of Documentary Evidence in International Criminal Tribunals

Documentary evidence has played a central role in the evolution of international criminal investigations. The prosecution team at Nuremberg, led by U.S. Supreme Court Justice Robert Jackson, relied almost exclusively on documentary evidence. Jackson was determined to show the world that war crime-related cases could be decided based on the rule of law as opposed to the emotions he felt survivor-witnesses would inevitably bring into the courtroom.³¹ Documentary evidence also offered strategic advantages, such as lessening the risks affiliated with faulty memories³² and perjury.³³ Jackson was determined that

29. See, e.g., Patricia Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (2014).

30. See, e.g., INT’L BAR ASS’N, EVIDENCE MATTERS IN ICC TRIALS 19–20 (2016), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=864b7fc6-0e93-4b2b-a63c-d22fbab6f3d6>; see generally NANCY A. COMBS, FACT FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

31. See MICHAEL SALTER, NAZI WAR CRIMES, US INTELLIGENCE AND SELECTIVE PROSECUTION AT NUREMBERG 404 (2007).

32. See generally ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979); NANCY A. COMBS, FACT FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

33. SALTER, *supra* note 31, at 404.

the prosecution “put on no witnesses the [team] could reasonably avoid,”³⁴ instead “try[ing] the case by indisputable documentary proof.”³⁵

The International Criminal Tribunal for the former Yugoslavia (ICTY) also relied heavily on documentary evidence. As illustrated by the *Mladic* case discussed above, the ICTY’s Office of the Prosecutor (OTP) introduced a broad array of evidence, including “expert testimony from military commanders and scientists; eyewitness evidence; forensic investigations, including crime scene analysis, exhumations and DNA analysis, photographic and video evidence; documentary evidence; insider evidence from subordinates who testified against their superiors; and interrogation of the accused.”³⁶ The ICTY struggled, however, under the challenge of organizing and analyzing significant quantities and diversities of documentary evidence, including videos, faxes, audio files, and aerial photographs.³⁷ At the International Criminal Tribunal for Rwanda, documentary evidence also proved helpful, such as video footage that was used as linkage evidence to tie the defendants to underlying crimes.³⁸

Documentary evidence has been particularly helpful in the Extraordinary Chambers in the Courts of Cambodia (ECCC), which was established in 2006 as a national court with a mandate to try senior members of the Khmer Rouge. Evidence there included copious photographs; lists of executed prisoners; prisoner “confessions” (often secured under duress); and the painstaking documentation of thousands of mass graves and prison sites.³⁹ Starting in 1994, participants in the Cambodian Genocide Program at Yale University and at the Documentation Center of Cambodia⁴⁰ began gathering and preserving primary documents related to the mass killings in order to establish the facts underlying the genocide and help establish complicity in those deaths. By the 21st century, the program and center had amassed more than 1 million pages of “primary

34. *Id.*

35. *Id.* at 409.

36. PEGGY O’DONNELL ET AL., BEYOND REASONABLE DOUBT: USING SCIENTIFIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT 4 (2012), https://www.law.berkeley.edu/files/HRC/HRC_Beyond_Reasonable_Doubt_FINAL.pdf [*hereinafter* HRC, BEYOND A REASONABLE DOUBT]

37. *See* Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgement, ¶ 63 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012), <http://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>.

38. *See, e.g.*, Prosecutor v. Karemera, Case No. ICTR-98-44-T, Judgement and Sentence, ¶¶ 169-73 (Feb. 2, 2012); Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement and Sentence, ¶¶ 2029-31 (Dec. 18, 2008); Prosecutor v. Bagosora, Case No. ICTR-98-41-A, Judgement, ¶ 460 (Dec. 14, 2011).

39. For an overview of the evidence collection process and the kinds of evidence collected, see Rachel Louise Snyder, *Dispatches From Cambodia*, SLATE, (Feb. 19, 2004), http://www.slate.com/articles/news_and_politics/dispatches/features/2004/dispatches_from_cambodia/gatheringthe_evidence.html.

40. The work of these related entities was made possible by passage of the Cambodian Genocide Justice Act, which the U.S. Congress passed in 1994. *See* CRAIG ETCHESON, AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE 54 (2005).

documentary holdings, along with some 25,000 photographs and many other types of materials.”⁴¹

Other modern-day courts, such as the Special Tribunal for Lebanon (STL), have recognized the increasingly important role of digitized and digital information for successful prosecutions. The STL built on earlier tribunals’ use of remote sensing and satellite imagery to include data pulled from cell phones.⁴² Similarly, satellite imagery and social media posts have been critical to monitoring and uncovering recent atrocities in Syria and will likely be crucial to legal accountability.⁴³

Today, citizen-journalists, first responders, victims, bystanders, perpetrators, and others are increasingly capturing information about war crimes and human rights abuses—often on smartphones—that may be helpful as corroborating evidence or as leads to additional evidence. However, despite the abundant information available to support such cases, investigators and prosecutors must often secure the underlying metadata, and/or be able to document chain-of-custody, to ensure such images are admissible in court.

B. *Brief History of the ICC*

In July of 1998, just two years before the first camera would be embedded in a cellphone,⁴⁴ representatives of more than 160 countries convened in Rome, Italy to finalize a set of laws that would bring into being the world’s first permanent international criminal court.⁴⁵ Known as the Rome Statute, that treaty declared the ICC’s mandate as ensuring an end to impunity for the perpetrators of “the most serious crimes of international concern.”⁴⁶ State Parties, those countries that signed on to and ratified the Rome Statute, would be responsible for the court’s funding and governance.⁴⁷

41. *Id.* at 55–56.

42. *See, e.g.*, Prosecutor v. Ayesh, Case No. STL-11-01/I/PTJ, Indictment, ¶ 17 (June 10, 2011); KATHLEEN O’NEILL ET AL., BERNARD AND AUDRE RAPOPORT CTR. FOR HUMAN RIGHTS AND JUSTICE, NEW WINE IN OLD WINESKINS? NEW PROBLEMS IN THE USE OF ELECTRONIC EVIDENCE IN HUMAN RIGHTS INVESTIGATIONS AND PROSECUTIONS, 40–44 (2012), <http://www.crl.edu/sites/default/files/d6/attachments/pages/Rapoport-E-evidence-report.pdf>.

43. *See, e.g.*, BELLINGCAT, <https://www.bellingcat.com> (a consortium of investigative journalists led by Eliot Higgins that has been investigating potential war crimes in Syria).

44. *See* Simon Hill, *From J-Phone to Lumia 1020: A Complete History of the Camera Phone*, DIGITAL TRENDS (Aug. 11, 2013), <http://www.digitaltrends.com/mobile/camera-phone-history/>.

45. *See* Coalition for the International Criminal Court, *History of the ICC: Rome Conference*, <http://www.iccnw.org/?mod=rome>.

46. Rome Statute of the International Criminal Court, art. 1, U.N. Doc. A/CONF.183/9 (July 17, 1998) [*hereinafter* Rome Statute]. The Court’s first trial was that of Thomas Lubanga Dyilo, leader of the Lord’s Resistance Army, a rebel group that terrorized northern Uganda, South Sudan, the Central African Republic and the Democratic Republic of the Congo. The investigation commenced in 2004. The trial began in 2009 and culminated in March of 2012. Since its inception in 2002, the Court has commenced a number of investigations, most in Africa.

47. *See* American Non-Governmental Organization Coalition for the International Criminal Court, *The ICC: Assembly of State Parties*, <https://www.amicc.org/understanding-the-icc>.

The ICC's work was, from the outset, designed to complement national prosecutions.⁴⁸ As a result, the ICC acquired jurisdiction over cases only when states either could not or would not investigate if those cases otherwise satisfied the ICC's admissibility requirements.⁴⁹ Cases could come in to the court in any of three ways: 1) a referral by a state party; 2) a referral by the Security Council; or 3) an investigation initiated by the Prosecutor with authorization from the Pre-Trial Chamber.⁵⁰

On July 17, 1998, 120 nations voted to adopt the Rome Statute.⁵¹ Twenty-one countries abstained.⁵² Although the United States had originally supported the court's creation, when the vote finally came, the United States voted against adoption, protesting the omission of a Security Council-based right to control future cases.⁵³ While President Clinton signed the treaty at the end of 2000,⁵⁴ he failed to push for ratification—a ratification that has never come.

From the beginning, the United States was a fickle friend: "Washington supported a global war crimes court, but only as long as it could ensure that the United States and its allies stood beyond the reach of prosecutorial scrutiny as perpetrators of war crimes."⁵⁵ This was consistent with past practice, as explained by David Scheffer, then-war crimes ambassador for the United States and chief negotiator at the Rome conference: "[T]he United States has a tradition of leading other nations in global treaty-making endeavors to create a more law-abiding international community, only to seek exceptions to the new rules of the United States because of its constitutional heritage of defending individual rights, its military responsibilities worldwide requiring freedom to act in times of war . . . or just stark nativist insularity."⁵⁶ One U.S. Senator, in debating the possibility of joining the ICC, was far less ambivalent, and simply declared the court "a Monster."⁵⁷

Despite the United States' hostility towards the court, within a year the ICC's four primary units—the Presidency, the Judicial Division, the Registry, and the Office of the Prosecutor (OTP)—were functional, and the first judges, registrar,

48. See generally INT'L CRIMINAL CT. REGISTRY, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT (2015), <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

49. Rome Statute, *supra* note 46, art. 17.

50. Rome Statute, *supra* note 46, arts. 13, 15.

51. See ERIC STOVER ET AL., HIDING IN PLAIN SIGHT: THE PURSUIT OF WAR CRIMINALS FROM NUREMBERG TO THE WAR ON TERROR, 284 (2016).

52. See *id.*

53. See G. BASS ET. AL. THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW (2000).

54. President Bill Clinton, Statement Authorizing the U.S. Signing of the Rome Statute of the International Criminal Court (Dec. 31, 2000), <http://www.iccnw.org/documents/USClintonSigning31Dec00.pdf>.

55. STOVER, *supra* note 51, at 283.

56. *Id.*

57. *Is a UN International Criminal Court in the US National Interest: Hearing Before the S. Subcomm. on Int'l Operations of the Comm. on Foreign Relations*, 105th Cong. 2 (1998) (statement of Sen. Grams, Chairman, S. Subcomm. on Int'l Operations).

and chief prosecutor had been sworn in.⁵⁸ By the court's one-year anniversary, the chief prosecutor had announced the conflict in the Democratic Republic of Congo as "the most urgent situation" his office would be following.⁵⁹

When investigating and prosecuting cases, the OTP is tasked with gathering and presenting both incriminating and exculpatory evidence.⁶⁰ As a court of last resort, the OTP takes on cases that countries are either unwilling or unable to prosecute themselves, which means that the OTP's cases are some of the most difficult in the world to investigate—especially when they focus on crimes in countries that are hostile to the ICC's efforts. Further complicating evidence collection, the OTP's budget is relatively tiny compared with its expansive mandate to investigate and prosecute serious crimes from all over the world.⁶¹ Thus, the office often has to depend on nongovernmental organizations and other external partners to provide lead and linkage evidence and other information relevant to its cases.⁶²

C. Evidentiary Challenges at the ICC

The court's early investigations were plagued with evidentiary inadequacies. First, the OTP initially relied on testimony from victims and other witnesses to the exclusion of most other types of evidence.⁶³ While powerful, witness testimony can also be incredibly dangerous for the testifier and his or her family, and witnesses can be tampered with, bullied into recanting, or discredited.⁶⁴ Thus,

58. See Int'l Criminal Ct., *How We are Organized*, <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#organization>; American Bar Association, *Structure of the ICC*, AM. BAR ASS'N, ICC PROJECT, <https://www.aba-icc.org/about-the-icc/structure-of-the-icc/>. Importantly, the ICC is not a government actor. Instead, the ICC is an independent tribunal established to account for wrongs that are often committed by state officials and quasi-state actors against individuals who possess far less formal power than those who have harmed them. Unlike intelligence organizations, the court does not pursue information to prevent future crimes, but rather seeks information about crimes that have already taken place in order to hold perpetrators accountable.

59. Press Release, Int'l Criminal Ct., Communications Received by the Office of the Prosecutor of the ICC, PIDS.009.2003-EN (July 16, 2003) [*hereinafter* ICC Press Release].

60. Rome Statute, *supra* note 46, art. 54.

61. See, e.g., Niklas Jakobsson, *The 2016 ICC Budget—More Money, More Problems?*, JUSTICE HUB (Sept. 17, 2015), <https://justicehub.org/article/2016-icc-budget-more-money-more-problems> (explaining how the OTP has been "under-resourced").

62. See generally, e.g., ANDREA LAMPROS ET AL., HUMAN RIGHTS CTR., FIRST RESPONDERS: AN INTERNATIONAL WORKSHOP ON COLLECTING AND ANALYZING EVIDENCE OF INTERNATIONAL CRIMES (2014), https://www.law.berkeley.edu/files/HRC/First_Responders_final_with_cover4.pdf; INT'L CRIMINAL CT., OFFICE OF THE PROSECUTOR, STRATEGIC PLAN 2016-2018 (2015), https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf.

63. See generally STEPHEN CODY ET AL., HUMAN RIGHTS CTR., BEARING WITNESS AT THE INTERNATIONAL CRIMINAL COURT: AN INTERVIEW SURVEY OF 109 WITNESSES (2014), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Bearing-Witness-at-the-International-Criminal-Court-June-2014.pdf>; Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L.J. 323 (2016).

64. See STEPHEN CODY, ALEXA KOENIG, ROBIN MEJIA & ERIC STOVER, BEARING WITNESS AT THE INTERNATIONAL CRIMINAL COURT: AN INTERVIEW SURVEY OF 109 WITNESSES (June 2014), [https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL\(3\).pdf](https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL(3).pdf).

in addition to a lack of corroborating evidence, the court sometimes struggled to retain witnesses.⁶⁵ In reviewing the OTP's challenges in successfully prosecuting its earliest cases, researchers at the University of California, Berkeley School of Law found that the ICC's Pre-Trial Chamber had dismissed charges against four defendants out of fourteen "because the judges did not find 'sufficient evidence to establish substantial grounds to believe' that the accused committed the alleged crimes"⁶⁶ and that part of this could be explained by the OTP's lack of scientific evidence, which was defined as including digital evidence.⁶⁷ Judge Bruno Cotte, presiding judge in the *Katanga* case, explicitly advised the OTP to rely more heavily on non-testimonial evidence, explaining that "the court should be able to improve in this area in order to present evidence likely to reinforce the testimonies that we know are often fragile."⁶⁸ Similarly, in the *Sang* case, the trial chamber vacated the charges, in part, due to the fact that the prosecutor was unable to obtain any recordings from the radio show from which Sang allegedly incited violence.⁶⁹ The chamber specifically cautioned against the use of witness testimony alone with respect to recordings.⁷⁰

In their report, the UC Berkeley researchers concluded that the prosecutor's office could and should offset some of these potential vulnerabilities by corroborating witness testimony with a greater use of scientific, forensic, and digital evidence, the latter of which was warned to be a "coming storm."⁷¹ As noted by the researchers, "Improving the collection and analysis of digital information can enhance the Office of the Prosecutor's ability to secure quality evidence that results in convictions, as well as diversify evidence coming into the courtroom [to better] corroborate witness testimony or authenticate documentary or physical evidence."⁷²

65. See International Bar Association, *Witnesses Before the International Criminal Court* (July 2013), [file:///Users/maribeth.hunsinger/Downloads/ICC%20Witness%20report%20\(July%202013\).pdf](file:///Users/maribeth.hunsinger/Downloads/ICC%20Witness%20report%20(July%202013).pdf).

66. HRC, BEYOND A REASONABLE DOUBT, *supra* note 36, at 3.

67. See *id.* Digital evidence has been defined as "information transmitted or stored in a digital format that a party to a case may use at a proceeding;" Aida Ashouri et al., An Overview of the Use of Digital Evidence in International Criminal Courts 5 (2013) (unpublished manuscript) (on file with the International Human Rights Law Clinic at the University of California, Berkeley, School of Law) <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Digital-Evidence-and-the-American-Servicemembers-Protection-Act-Salzburg-Working-Paper.pdf>.

68. Franck Petit, *Interview with ICC Judge Bruno Cotte, presiding judge at the second trial at the ICC*, RADIO NETHERLAND WORLDWIDE (May 2013), <http://www.rnw.nl/international-justice/article/judge-cotte-%E2%80%9Cwe-are-making-progress%E2%80%9D>.

69. See Prosecutor v. Ruto, Case No. CC-01/09-01/11, Public Redacted Version of Decision on Defense Applications for Judgments of Acquittal, ¶ 141 (Apr. 5, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04384.pdf.

70. See *id.*

71. PEGGY O'DONNELL ET AL., BEYOND REASONABLE DOUBT, *supra* note 36, at 7; see generally ALEXA KOENIG ET AL., HUMAN RIGHTS CTR., DIGITAL FINGERPRINTS: USING ELECTRONIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT (Feb. 2014), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Digital-Fingerprints-.pdf>.

72. *Id.* at 3 (discussing the collapse of the ICC's case against President Uhuru Kenyatta of

Based in part on concerns with its dependency on witness testimony, in its 2016-2018 Strategic Plan, the OTP focused on the need to collect more diverse evidence than previously.⁷³ Specifically, the Plan “emphasized three essential shifts in strategy to improve the quality and efficiency of the Office’s work,” one of which was “adopting a new prosecutorial policy.” That new policy included “collecting diverse forms of evidence.”⁷⁴ The OTP nodded to the importance of collecting digital and digitized evidence by explaining that “[t]he high pace of technological evolution changes the sources of information, and the way evidence is obtained and presented in court.”⁷⁵ The emphasis on diverse evidence reflected an attempt to capture advice from outside partners as well as recent evidentiary successes. For example, in the *Jean-Pierre Bemba Gombo* case, the OTP successfully introduced ten audio recordings that provided critical background and other information, demonstrating that such evidence could be effective in court.⁷⁶

As this history suggests, the OTP has increasingly committed itself to diversifying its evidentiary base. While the OTP has begun to make significant strides towards collecting and utilizing digital evidence, including satellite imagery and social media, it has not yet fully mined these potential sources. There are a number of stumbling blocks; for one, longstanding tensions with the United States have been perceived as presenting a barrier to requesting assistance and information from U.S. corporations. With many of the companies that process and store digital information based in the United States, the ICC has also found its access to some of that information complicated by the existence of the American Servicemembers’ Protection Act (ASPA or the Act).⁷⁷

II. PART II

Although its passage reflects long-standing concerns about the potentially abusive power of an international criminal court, ASPA was further influenced by the atmosphere of fear and confusion immediately following the September 11, 2001 terrorist attacks on the United States.⁷⁸ On September 25, just months before

Kenya in 2014 due to a lack of linkage evidence, such as emails, phone records, and texts, underscores the critical importance of improving the court’s access to and ability to utilize digital evidence).

73. See ICC Press Release, *supra* note 59, at 5.

74. *Id.*

75. *Id.* at 6.

76. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute ¶ 9 (Oct. 8, 2012).

77. 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (to be codified at 22 U.S.C. §§ 7421-7433) [hereinafter ASPA] (ASPA was passed as Title II of this legislation).

78. See, e.g., 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> [hereinafter *Hague*

the ICC commenced operations, North Carolina Senator Jesse Helms, then-ranking Republican on the Senate Foreign Relations Committee, took to the Senate floor to voice his concerns that American military personnel could someday be dragged in front of the ICC for actions taken in response to the attacks.⁷⁹ In the wake of recent events, Senator Helms said, America's military must be ready to protect "the miracle of America."⁸⁰ As it commenced an aggressive fight against terror, Helms argued, America's military needed to be free from the worry that it might become targeted by the court, forced to stand trial for its actions in war should it push (or cross) the bounds of legally-permissible interrogation and investigation tactics.⁸¹ After all, as Cofer Black, then-chief of the CIA's Counterterrorism Center, announced to the Senate Select Committee on Intelligence during those first raw days, U.S. civilian and military personnel were being directed to go all out in waging that war: "[A]ll I want to say is there was 'before' 9/11 and 'after' 9/11. After 9/11 the gloves come off."⁸²

Denouncing the ICC as a bogeyman and citing the potential for politicized prosecutions, Helms insisted that legal protections needed to be put in place to protect American soldiers, and quickly: "Mr. President, . . . I am among those of their fellow countrymen who insist that these men and women who are willing risk their lives to protect their country and fellow Americans should not have to face the persecution of the International Criminal Court—which ought to be called the International Kangaroo Court. . . . Mr. President, . . . [i]nstead of helping the United States go after real war criminals and terrorists, the International Criminal Court has the unbridled power to intimidate our military people and other citizens with bogus, politicized prosecutions."⁸³ He argued that "[i]f the signatories to the Rome Treaty proceed to establish a permanent International Criminal Court, we need an insurance policy against politicized prosecution of American soldiers and officials. It is easy to imagine the US or Israel becoming a target of a UN witch hunt, with officials or soldiers being sent before judges handpicked by undemocratic countries."⁸⁴

Holmes followed his list of concerns with a request for six "assurances" from the Secretary of State.⁸⁵ Those six assurances became the seeds of ASPA,⁸⁶ which

Invasion Act) (noting that ASPA was passed as part of the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States).

79. 47 Cong. Rec. 18026-28 (2001) (statement of Sen. Helms).

80. *Id.*

81. *See id.*

82. Joint Investigation into September 11th: Fifth Public Hearing, 'Unclassified Testimony of Cofer Black to the Joint House/Senate Intelligence Committee Hearing', Sept. 22, 2002 https://fas.org/irp/congress/2002_hr/092602black.html; *See also* MARK DANNER, *SPIRAL: TRAPPED IN THE FOREVER WAR* (2016).

83. 47 Cong. Rec. 18026-28 (2001) (statement of Sen. Helms).

84. 147 Cong. Rec. 7871 (2001) (statement of Sen. Helms).

85. 47 Cong. Rec. 18026-28 (2001) (statement of Sen. Helms).

86. *See* M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VA. J. OF INT'L L. 405, 441-42 (2003).

was soon passed as a subset of the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States.⁸⁷ Just one month after the ICC began operations on July 1, 2002, having finally gained the requisite number of ratifications, President George W. Bush signed ASPA into law.⁸⁸

At the Act's heart are a number of sweeping prohibitions against cooperation between U.S. government entities, including U.S. courts, and the ICC. These include prohibitions against specific conduct such as responding to a request for cooperation from the ICC, transmittal of letters rogatory from the ICC, and using appropriated funds to assist the ICC.⁸⁹ The Act also includes a very broad general prohibition against U.S. support of the ICC.⁹⁰ In addition to prohibiting U.S. cooperation, the act also bars the ICC and its "agents" from engaging in investigative activities in the U.S.⁹¹

The sweeping nature of ASPA's prohibitions, along with a provision that empowers the U.S. military to invade the court's detention facilities should any American end up there, led to the legislation's unusual nickname:⁹² the *Invalidate The Hague Act*. As reported in the *Chicago Tribune*, two weeks before ASPA's passage, "the U.S. seems poised to enact what's known in the Netherlands as The Hague Invasion Act . . . which will allow Bush to use 'all means necessary' to liberate the citizens of the U.S.—and those of allies—from the clutches of the court."⁹³

One provision, which has since been repealed, went so far as to bar the United States government from providing military aid to the ICC's States Parties unless those States Parties entered into "Article 98" or "bilateral immunity" agreements.⁹⁴ Per those agreements, countries were forced to pledge to never turn over a United States national to the ICC in exchange for financial aid that would otherwise be granted.⁹⁵

87. ASPA, *supra* note 77; see *Hague Invasion Act*, *supra* note 88.

88. See, e.g., *Hague Invasion Act*, *supra* note 88.

89. ASPA, *supra* note 77, at §§ 7423(c), (d), (f).

90. *Id.* at § 7423(e).

91. *Id.* at § 7423(h).

92. See *Hague Invasion Act*, *supra* note 88.

93. Lauren Comiteau, *The International Criminal Court: In Dutch With America*, CHI. TRIB., (July 14, 2002), http://articles.chicagotribune.com/2002-07-14/news/0207140459_1_dutch-parliament-nato-international-criminal-court/.

94. See AMICC, *Bilateral Immunity Agreements*, <https://www.amicc.org/bilateral-immunity-agreements-1>; see generally HUMAN RIGHTS WATCH, *BILATERAL IMMUNITY AGREEMENTS (2003)*, <https://www.hrw.org/legacy/campaigns/icc/docs/bilateralagreements.pdf>.

95. See generally AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT'L. CRIMINAL CT., *PROPOSED TEXT OF ARTICLE 98 AGREEMENTS WITH THE UNITED STATES*, <http://www.amicc.org/docs/98template.pdf>. These agreements have been the source of controversy. One issue has been whether they violate international law and are therefore void because they directly contradict states' obligations under the Rome Statute when those agreements were signed after the country becomes a party to the court. They were also criticized on moral grounds. Kenneth Roth, Executive Director of Human Rights Watch, declared the practice of pressuring "small, vulnerable

To explore the potential for selective cooperation to help advance a range of United States foreign policy objectives, Congress adopted an amendment proposed by Senators Chris Dodd and Patrick Leahy. The last-minute addition to ASPA was designed to be a “catch-all exception authorizing the United States government to participate in a wide-range of international justice efforts.”⁹⁶ The relevant passage reads “Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, 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.”⁹⁷

In the years that followed ASPA’s enactment, the initial hard line against the United States cooperating with the ICC—and with State Parties—proved too extreme, raising unanticipated barriers to an array of United States foreign policy objectives. As Condoleezza Rice, then-United States Secretary of State, explained in 2006, using ASPA to cut off military aid to foreign entities—for example to Latin American countries that refused to sign Article 98 agreements but were attempting to collaborate with the United States to limit terrorism and drug trafficking—was “sort of the same thing as shooting ourselves in the foot.”⁹⁸ As a result, the Dodd Amendment, and the flexibility it potentially offered, would prove both prescient and critical.

ASPA’s most problematic provisions for purposes of ICC-United States evidence sharing are contained in 22 U.S.C. § 7423 and fall under two categories. First, as stated above, there are a number of provisions prohibiting United States government entities, including courts, from cooperating with the ICC.⁹⁹ Broadest among them is a prohibition against providing support to the ICC, which reads: “Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.”¹⁰⁰ Second, as described in greater detail below, ASPA also prohibits the ICC itself from conducting investigations in the United States.¹⁰¹

and often fragile democratic governments” into signing such agreements “unconscionable” and a “raw misuse of U.S. power,” simultaneously noting the harm such practices could do to United States objectives in seeking support for its fight against terrorism. See Letter from Kenneth Roth, Exec. Dir., Human Rights Watch, to Colin Powell, Sec’y of State, US Bully Tactics Against the International Criminal Court (June 30, 2003), <https://www.hrw.org/news/2003/06/30/letter-us-secretary-state-colin-powell-us-bully-tactics-against-international>. The issue became moot in 2008 with the conclusion of the funding sources to which the agreements had been tied, as the United States no longer has leverage to compel compliance.

96. AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT’L. CRIMINAL CT., *supra* note 96, at 283.

97. ASPA, *supra* note 77, at § 7433.

98. S. R. Weisman, *U.S. Rethinks Its Cutoff of Military Aid to Latin American Nations*, N.Y. TIMES (Mar. 12, 2006), http://www.nytimes.com/2006/03/12/politics/12rice.html?_r=0.

99. ASPA, *supra* note 77, § 7423(b)-(g).

100. *Id.* at § (e).

101. *Id.* at § (h).

Despite the sweeping language of these two provisions, ASPA offers several exceptions to its ban on aiding investigations, which could prove helpful to the ICC. The first is a series of presidential waivers.¹⁰² The second is the Dodd Amendment, which qualifies ASPA's prohibition by allowing the United States government to provide assistance to international efforts to "bring to justice" certain named individuals,¹⁰³ as well as several broad categories of potential suspects, including "foreign nationals accused of genocide, war crimes or crimes against humanity."¹⁰⁴

On its face, this provision seems to create an exception to § 7423, permitting cooperation so long as investigations are limited to facilitating the prosecution of "foreign nationals" (and not United States citizens) who are suspected of having committed the three listed atrocity crimes.¹⁰⁵ As discussed below, this reading of the Dodd Amendment is supported by the Amendment's plain meaning, its legislative history, and the views of both Congress and the Executive Branch.

A. Plain Meaning

First, a text-based analysis of the Dodd Amendment strongly suggests that investigations of foreign nationals are exempt from ASPA. Thus, most (and probably all) of the ICC's cases—none of which have focused on United States citizens—would fall outside ASPA's ambit.¹⁰⁶ The plain language of the Dodd Amendment states that nothing in ASPA, including § 7423, shall prevent the United States from "rendering assistance to international efforts to bring to justice . . . foreign nationals accused of genocide, war crimes or crimes against humanity."¹⁰⁷ Assuming that the phrase "international efforts to bring to justice" includes the ICC, this language strongly suggests that the cooperation of the American government is permissible so long as the accused is a foreign national charged with committing war crimes, crimes against humanity, or genocide.

The Dodd Amendment, however, does not mention the ICC, which creates some ambiguity as to whether the ICC is included within the exception. However, the Dodd Amendment does refer to "international efforts" to bring to justice to "foreign nationals accused of genocide, war crimes or crimes against humanity," all of which are crimes that fall within the ICC's jurisdiction.

102. See 22 U.S.C § 7422(a)–(c) (explaining that the President can waive the provisions of § 7423 on a case-by-case basis). The President can similarly waive § 7425, which prohibits the transfer of classified national security and law enforcement information to the ICC. *Id.* As far as can be determined, no § 7423 or § 7425 waivers have yet been issued. *Id.*

103. 22 U.S.C § 7433.

104. ASPA, *supra* note 77, § 7433.

105. Notably, the crime of aggression—over which the ICC will likely assume jurisdiction in 2017—is not listed, and therefore does not fall within the Dodd exception.

106. For an overview of the ICC's current cases, including a complete list of defendants, see *Cases*, INT'L CRIMINAL CT., <https://www.icc-cpi.int/cases>.

107. ASPA, *supra* note 77, § 7433.

B. Legislative History

Second, the Amendment's legislative history also suggests that the Dodd Amendment extends to the ICC. Although the ICC is not mentioned in the Dodd Amendment, Senator Dodd himself noted on the record that, "[m]y amendment merely says that despite whatever else we have said when it comes to prosecuting [foreign nationals], we would participate and help [the ICC], even though we are not a signatory or a participant in the International Criminal Court."¹⁰⁸

Senator Leahy, who helped draft the Dodd Amendment, has also explained that the Amendment was meant to cover the ICC. Noting his involvement in both the drafting and original co-sponsorship of the Amendment, Leahy argued that he "specifically added the phrase 'and other foreign nationals accused of genocide, war crimes or crimes against humanity' to ensure that this section would apply to the International Criminal Court" which "has jurisdiction over these three crimes."¹⁰⁹ Leahy went on to explain that:

the importance of this phrase was not lost on the House, and opponents of the Dodd-Warner amendment tried repeatedly to nullify or remove it. It was even reported to me that, at the eleventh hour, House staff members sought, unsuccessfully, to insert the word 'other' before the phrase 'international efforts to bring to justice', in an attempt to prevent the Dodd-Warner amendment from applying to the ICC.¹¹⁰

Leahy has further emphasized that no other provision in that title prevents the United States "from cooperating with the ICC in cases involving foreign nationals." He argued that "[n]o one disputes the fact that Congress has serious concerns about Americans coming before the ICC, which is the reason that ASPA was passed. . . . However, through the Dodd-Warner amendment, Congress sets a different standard with respect to non-Americans."¹¹¹ As Leahy has explained, the Amendment "makes unequivocally clear that no provision in ASPA prevents the US from cooperating with the ICC in cases involving foreign nations."¹¹² Instead, "[t]he Dodd-Warner amendment simply ensures that the United States can assist the ICC, or other international efforts, to try foreign nationals accused of war crimes, genocide, or crimes against humanity. It is not difficult to think of a number of instances when it would be in the interest of the United States to support such efforts."¹¹³

Leahy has further outlined that in passing the amendment, "Congress decided that it did not want to tie the President's hands if he determined that it makes sense for the United States to cooperate with any international body, including the ICC,

108. *Id.*

109. 147 CONG. REC. S7859 (daily ed. Aug. 1, 2002) (statement of Sen. Leahy).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

in prosecuting foreign nationals accused of genocide, war crimes and crimes against humanity.”¹¹⁴

A few legislators, however, have taken the position that the Dodd Amendment was not intended to apply to the ICC. For example, Representative Henry Hyde has argued that the Amendment applies only to non-ICC international efforts to prosecute foreign nationals accused of genocide, war crimes, or crimes against humanity. He has reasoned that if helping the ICC had been intended, Congress would have simply struck the relevant provisions from ASPA.¹¹⁵

However, Hyde’s argument that the Dodd Amendment applies only to non-ICC international investigations makes the Dodd Amendment superfluous. If Hyde is correct, the Amendment would merely reiterate that ASPA does not apply to non-ICC international efforts. Since statutory provisions are supposed to be interpreted so as not to render any provision superfluous, this would not be an appropriate reading.¹¹⁶ Dodd and Leahy’s interpretation avoids this problem.

Finally, when considering legislative history, courts will more heavily weigh the statements of a bill’s sponsor than the statements of its opponents.¹¹⁷ This further suggests that Dodd and Leahy’s interpretation should trump.

C. Congressional Action

In addition to the plain language and legislative history, later actions by Congress suggest the Dodd Amendment is a general exception to the prohibitions set out under § 7423 and thus, that it permits ICC investigations of non-nationals.

After ASPA was enacted, Congress clarified that ASPA’s prohibitions on United States and ICC cooperation are not applicable to cases committed by foreign nationals. Specifically, in 2012, Congress enacted the Department of State Rewards Program Update and Technical Corrections Act (the Rewards Act), which allows the Secretary of State to authorize the payment of rewards to any person who provides the United States government with information that could lead to “the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal (including a hybrid or mixed tribunal), of any foreign national accused of war crimes, crimes against humanity, or genocide, as defined under the statute of such tribunal.”¹¹⁸

114. *Id.*

115. 147 Cong. Rec. H5220 (daily ed. Jul. 23, 2002) (statement of Rep. Hyde).

116. *See Corley v. United States*, 556 U.S. 303, 314 (2009).

117. *See, e.g., National Woodwork Mfrs. Ass’n v. Nat’l Labor Relations Bd.*, 386 U.S. 612, 640 (1967); *Shell Oil Co. v. Iowa Dep’t of Revenue*, 488 U.S. 19 (1988).

118. *See* Department of State Rewards Program Update and Technical Corrections Act of 2012, Pub. L. No. 112-283 (codified as 22 U.S.C. § 2708 (2013)) (stating “(b) the Secretary may pay a reward to any individual who furnishes information leading to – (10) the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal (including a hybrid or mixed tribunal), of any foreign national accused of war crimes, crimes against humanity, or genocide, as defined under the statute of such tribunal.”).

Thus, the Rewards Act created financial incentives for individuals to assist in international cases related to the arrest or conviction of foreign nationals for any of the three stated international crimes.¹¹⁹ This most likely includes ICC cases. Congress enacted the Rewards Act while aware of ASPA *and* the Department of State's intent to use the Rewards Act to encourage and otherwise facilitate the capture of ICC defendants. The Senate Committee on Foreign Relations considered the propriety of cooperating with the ICC and explicitly found that there is no conflict with ASPA where a case involves crimes committed by a foreign national, even when the case is brought by the ICC:

The committee notes that, by authorizing rewards in connection with proceedings of international criminal tribunals, S. 2318 could provide authority for rewards with respect to foreign nationals indicted by the International Criminal Court (ICC). The committee wishes to stress that S. 2318 limits the rewards authority to cases of crimes committed by "foreign nationals" and that section 5 of the legislation expressly states that nothing in this Act or amendments made by the Act shall be construed as authorizing the use of activity precluded under the American Servicemembers' Protection Act of 2002.¹²⁰

Thus, Congress seems to read the Dodd Amendment as permitting cooperation where investigations involve crimes committed by foreign nationals, borrowing language from the Amendment, including reference to "war crimes, crimes against humanity, or genocide" and "foreign nationals."

D. Executive Branch Views

Various bodies within the U.S. government's executive branch have also read ASPA as permitting cooperation with the ICC in cases involving foreign nationals. For example, since 2009, the Department of State has actively cooperated with the ICC. The scope of cooperation has been broad, and has included the Department of State adopting explicit policies aimed at supporting the ICC, meeting with ICC prosecutors, and advocating for the prosecution of war criminals at the Court.¹²¹ Indeed, the White House's National Security Strategy of 2010 states:

119. See Michael A. Newton, *Introductory Note to the Department of State Rewards Program Update and Technical Corrections Act of 2012*, 52 I.L.M. 861, 863 (2013). The act's previous iteration provided for rewards to be issued for the ICTY, ICTR and the Special Court for Sierra Leone.

120. S. REP. NO. 112-232, at 5 (2002) (emphasis added).

121. See, e.g., WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010), <http://nssarchive.us/NSSR/2010.pdf>.

Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern *and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.*¹²²

This position, with its reference to consistency with U.S. law, suggests that the government has examined ASPA and determined that—in certain cases—supporting the ICC does not contravene the statute.

In practice, the Department of State has publicly and positively engaged with the ICC. For example, U.S. Ambassador-at-Large for War Crimes, Stephen Rapp, began attending the annual Assembly of State Parties (ASP) meeting as an observer in 2009.¹²³ In 2010, statements by Harold Koh, then Legal Advisor at the Department of State, and Ambassador Rapp, suggested the United States had adopted a policy of “principled engagement” with the ICC and that the United States would continue a “strategy of engagement” with the court.¹²⁴

Ambassador Rapp has also suggested that the permitted level of engagement with the ICC under U.S. law is fairly broad:

We have been meeting with the ICC Prosecutor and Registrar and are working to furnish the greatest possible assistance that is permitted under our law for ICC investigations and prosecutions. *This can include information sharing and help with witness protection and witness relocation. Also, we are providing diplomatic and political support for the arrest and transfer to the The Hague of all ICC fugitives.*¹²⁵

Additionally, the Department of Justice (DOJ) has reportedly provided support for the argument that the Dodd Amendment permits cooperation with the ICC. A DOJ memo, which is not publicly available but has been referenced in publicly-available documents, claims that based on the DOJ's analysis, “diplomatic support or ‘informational support’ for ‘particular investigations or prosecutions’ by the ICC would not violate existing laws.”¹²⁶ This presumably includes ASPA.

Since 2009, cooperation and engagement between the United States and the ICC has been extensive. This engagement has included direct meetings with ICC

122. *See id.* (emphasis added).

123. Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep Up with the Criminals?* 34 SUFFOLK TRANSNAT'L L. REV. 1, 64 (2011).

124. *U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference*, U.S. STATE DEP'T (2010), https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm.

125. Geraldine Coughlan, *U.S. Supports International Justice*, INT'L JUST. TRIB., (Mar. 30, 2011), <https://www.justicetribune.com/articles/us-supports-international-justice> (emphasis added).

126. ALEXIS ARIEFF ET. AL., CONG. RESEARCH SERV., INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES (2011), <https://www.fas.org/sgp/crs/row/RL34665.pdf>.

prosecutors,¹²⁷ the offering of support specific to prosecutions already underway,¹²⁸ publicly acknowledging and encouraging the work of the ICC,¹²⁹ voting in favor of and co-sponsoring a resolution at the Security Council to refer the Libya situation to the ICC,¹³⁰ supporting a resolution to refer Syria to the ICC,¹³¹ and adopting a policy of opposing invitations and travel support to individuals indicted by the ICC.¹³²

The White House, the Department of State and the Department of Justice have all conveyed, both expressly and through their actions, that ASPA does not prevent cooperation with the ICC where such cooperation would further U.S. interests and where the subject of investigation is a foreign national. Although at the time of writing it is not yet clear what the relationship between the Trump administration and the ICC will be like, the analysis should not change given the plain language of the statute, the legislative history, and subsequent congressional actions.

E. ASPA As Applied to ICC Investigations: Section 7422(h)

As previously mentioned, in addition to its prohibitions against the U.S. government supporting and cooperating with the ICC, ASPA also prohibits the ICC from conducting investigations in the United States. That provision reads: “No 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.”¹³³ Because the language of the Dodd Amendment specifically addresses U.S. actions (“[n]othing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice. . . foreign nationals. . .”), its application to the §7422(h) prohibition against the ICC conducting investigations in the United States is less clear.

127. *Id.*

128. *See, e.g.,* U.S. Mission to the United Nations, *Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at a UN Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court*, U.S. DEP’T OF STATE (2012), <https://2009-2017-usun.state.gov/remarks/5542>.

129. *See* Press Release, White House, Statement by President Obama on the International Criminal Court (Dec. 15, 2010), <https://www.whitehouse.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement>.

130. *See* Barack Obama, David Cameron, Nicolas Sarkozy, *Libya’s Pathway to Peace*, N.Y. TIMES (Apr. 14, 2011), http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html?_r=0.

131. *See* Press Release, U.N. Sec. Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution (SC/11407) (May 22, 2014), <https://www.un.org/press/en/2014/sc11407.doc.htm>.

132. *See Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at a UN Security Council Debate on Peace & Justice, with a Special Focus on the Role of the International Criminal Court*, U.S. MISSION TO THE U.N. (Oct. 17, 2012), <https://2009-2017-usun.state.gov/remarks/5542>.

133. ASPA, *supra* note 77, at § 7423(h).

While the unambiguous language of the Dodd Amendment likely trumps any provision within ASPA (“[n]othing in this subchapter”), including §7422(h), because §7422(h) addresses assistance by the United States, the Dodd Amendment can only be read to apply to subsection (h) with respect to ICC investigative activities conducted in the United States that involve the assistance of any of the branches of the United States government. But it is unclear how the ICC could legally conduct *any* investigative activity in the United States without some form of assistance. Even within the context of a treaty-based mutual legal assistance mechanism, individuals cannot operate in the United States at the direction or control of a foreign government or official without providing prior notification to the United States government.¹³⁴ Any investigative activity in the United States by the ICC implies some form of assistance by the United States and therefore brings §7422(h) within the purview of the Dodd Amendment.

F. Summary

Ultimately, the plain meaning of the Dodd Amendment, its legislative history, and the views of both Congress and the President all clarify that the amendment was drafted to be a general exception to the prohibitions set forth in ASPA, in cases involving foreign nationals charged with genocide, crimes against humanity or war crimes. Although much has been written about ASPA and the anti-ICC policies of past U.S. administrations and Congress, very little literature squarely addresses ASPA’s scope. However, where the issue *is* addressed by other legal scholarship, authors seem to view ASPA as permitting cooperation between the United States and the ICC when the subject of the prosecution is a foreign national.¹³⁵ Ultimately, the Dodd Amendment “ensures that U.S. cooperation with the ICC is possible when (1) the ICC has jurisdiction over an international crime, (2) a foreign national (as opposed to U.S. national) is being investigated or prosecuted, and (3) there is no U.S. objection to that jurisdiction (such as when U.S. nationals—or, potentially, U.S. allies—could be prosecuted).”¹³⁶

III.

PART III

In order to obtain vital evidence from companies located within the United States, international tribunals—including the ICC—have a number of

134. See 18 U.S.C. § 951; 28 C.F.R. § 73.3.

135. See, e.g., Newton, *supra* note 119, at 863; Stephen E. Smith, *Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court During the Obama Administration*, 22 FLA. J. INT’L L. 155, 187 (2010); Jonathan P. Tomes and Michael I. Spak, *Practical Problems with Modifying the Military Justice System to Better Handle Sexual Assault Cases*, 29 WIS. J.L. GENDER AND SOC. 377, 408 (2014).

136. See Aida Ashouri & Caleb Bowers, *Digital Evidence and the American Servicemembers’ Protection Act 7* (Oct. 2013) (unpublished manuscript), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Digital-Evidence-and-the-American-Servicemembers-Protection-Act-Salzburg-Working-Paper.pdf>

mechanisms available to them. There are five approaches that could be utilized by tribunal personnel to secure information from U.S. service providers: (1) a direct request to those U.S. service providers (a voluntary, tribunal-to-corporation approach); (2) a direct request for judicial assistance from U.S. District Courts (a court-to-court approach); (3) a request for judicial assistance through diplomatic channels (a court-to-country based approach); (4) a mutual legal assistance request (a country-to-country-based approach); and (5) a joint investigation (an investigator-to-investigator based approach). Each is discussed below. Where relevant, ICC specific barriers such as ASPA will be addressed.

A. Requests to U.S. Service Providers

In the gathering of vital evidence, international tribunals can make direct requests to the companies from which they hope to acquire desired information.

With respect to electronically stored data, the first key legal consideration is the scope of the Electronic Communications Privacy Act (ECPA),¹³⁷ which protects wire, oral, and electronic communications from disclosure, including when such communications are stored electronically. Barring some exceptions, ECPA generally prohibits service providers from voluntarily disclosing the contents of a customer's communications held in electronic storage to "any person or entity,"¹³⁸ which would include international courts. The term "content" is defined to include "any information concerning the substance, purport, or meaning" of the communication.¹³⁹ ECPA also includes a more limited prohibition against the voluntary disclosure of customer non-content information, such as metadata, to "any government entity."¹⁴⁰ Interestingly, the definition of a government entity excludes international tribunals as it is limited to "a department or agency of the United States or any [U.S.] State or political subdivision thereof."¹⁴¹ Consequently, although a service provider cannot voluntarily disclose content data to international tribunals, they are permitted to disclose metadata.¹⁴²

The key barrier international criminal tribunals face in their attempts to obtain metadata via corporate requests is internet service providers' internal policies. As explained by Kate Westmoreland of the Stanford Center for Internet and Society, how companies respond to such requests—at least as made by

¹³⁷ Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

¹³⁸ 18 U.S.C. § 2702(a)(1).

¹³⁹ *Id.* at § 2510(8).

¹⁴⁰ *Id.* at § 2702(a)(3), (c)(6).

¹⁴¹ *Id.* at § 2711(4).

¹⁴² Although the terms "metadata" and "content" are used in this paper in the context of ECPA, it is important to note that ECPA does not have this distinction. Rather, it differentiates between subscriber information, transactional information, and content. For more information on these classifications, see The U.S. Internet Service Provider Association, *Electronic Evidence Compliance-A Guide for Internet Service Providers*, 18 BERKELEY TECH. L.J. 945, 949 (2003).

foreign governments—“is largely a matter of company discretion.”¹⁴³ While international tribunals are not foreign governments, their judicial function is analogous to a foreign country’s law enforcement authorities. Therefore, their requests should fall within the penumbra of a corporation’s internal policies, which would be used to manage requests from foreign governments. The degree to which service providers are willing to disclose information to foreign governments varies across companies.¹⁴⁴

Westmoreland also notes that “big Internet companies have committed to five principles for...access to their information.”¹⁴⁵ While the fifth and most relevant principle for purposes of this Article focuses on each company having a “‘robust, principled and transparent framework to govern lawful requests for data across jurisdictions’ [it] does not provide any detail about how this should be achieved or what companies are doing in the meantime.”¹⁴⁶ Ultimately, there is significant variability across companies with regard to their response to lawful requests for data. Per Westmoreland, rejections can result from requests that are overly broad, include information that does not exist or that is no longer held by the company, exceed legal parameters, or raise policy concerns.¹⁴⁷ Additional factors that impact company responses include company values and priorities, and scale (the larger the company, the greater the pressure to comply).¹⁴⁸

Noting that “there is [currently] no efficient, effective, formal way for foreign governments to access user data from U.S. internet companies,” Westmoreland explains that this has resulted in an increase in governments

¹⁴³ Kate Westmoreland, *Are Some Companies Yes Men When Foreign Governments Ask for User Data?*, STANFORD CTR. FOR INTERNET AND SOC^YY (May 30, 2014), <http://cyberlaw.stanford.edu/blog/2014/05/are-some-companies-yes-men-when-foreign-governments-ask-user-data>.

¹⁴⁴ Kate Westmoreland & Gail Kent, *International Law Enforcement Access to User Data: A Survival Guide and Call for Action*, 13 C.J.L.T 235, 239–240 (2015) (explaining “Different companies adopt different policies on this issue. For example, Google acknowledges that ‘[o]n a voluntary basis, we may provide user data in response to valid legal process from non-U.S. government agencies, if those requests are consistent with international norms, U.S. law, Google’s policies and the law of the requesting country.’ LinkedIn, Twitter, and Facebook take a similar approach. Dropbox previously required that all data requests go through the US judicial system, but changed their policy in 2013 to allow voluntary disclosure. LinkedIn states that they ‘generally’ require that requests come through MLA or a letter rogatory. Twitter also states that they respond to requests that properly come through MLA or letter rogatory.”); *see also* Nate Cardozo, *Who Has Your Back? The Electronic Frontier Foundation’s Seventh Annual Report on Online Service Providers’ Privacy and Transparency Practices Regarding Government Access to User Data* (Jul. 2017), https://www EFF.org/files/2017/08/08/whohasyourback_2017.pdf.

¹⁴⁵ Westmoreland, *supra* note 143.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

reaching out directly to U.S. internet companies to create ad hoc arrangements, with varying results.¹⁴⁹

With respect to the ICC specifically, while ASPA limits the U.S. government's cooperation with the court, "there is nothing in [ASPA's] statutory language to suggest that U.S. service providers that hold digital evidence are bound by its restrictions."¹⁵⁰ While service providers may hesitate to cooperate for "practical, political or other reasons,"¹⁵¹ ASPA is not a barrier.

Although direct corporate requests are an available option for tribunals seeking evidence held by service providers in the United States, this option is limited in three significant ways. First, this option is fairly unreliable and dependent on international tribunals developing individualized relationships with each of the corporations from which they might seek information and potentially raises issues of arbitrariness, as well as lack of transparency and consistency in decision-making, which could have serious privacy ramifications. Second, this option is limited to requests for metadata, as content data cannot be voluntarily disclosed by service providers. Metadata, however, is extremely important as a means of authenticating evidence because it can provide critical information regarding people (such as the potential creator of the data), places (through geo-tagging), and when something occurred (through time and date stamping). It can also potentially corroborate other evidence. Third, and finally, while arguably analogous to that of foreign law enforcement requests and therefore potentially worth exploring, any direct request from an international tribunal such as the ICC would be one of first impression and thus it's difficult to predict how companies would respond.¹⁵²

¹⁴⁹ *Id.*

¹⁵⁰ Aida Ashouri & Caleb Bowers, *2013 Salzburg Workshop on Cyberinvestigations: Digital Evidence and the American Servicemembers' Protection Act*, 11 DIGITAL EVIDENCE & ELECTRONIC SIGNATURE L. REV. 107, 109 (2014).

¹⁵¹ *Id.* at 110.

¹⁵² Berkeley Law Human Rights Workshop, *War Crimes: Defending Human Rights Against Gross Abuses of State Power* (2014) (unpublished manuscript) (on file with the authors). On March 3, 2014, a group of internet service providers and human rights organizations met with OTP investigators and prosecutors in San Francisco, California, to take part in the War Crimes Workshop on Defending Human Rights Against Gross Abuses of State Power and Crimes Against Humanity. Acknowledging the ICC's unique challenges, which many of the companies were learning about for the first time, tech company representatives provided human rights organizations and ICC representatives with a basic overview of the framework under which they operate. Outside of a narrow set of circumstances, internet service providers do not voluntarily provide user data to law enforcement. However, they explained there are several other ways to secure or otherwise preserve information including emergency exceptions; compliance with corporate policies to facilitate take down and preservation requests; using public search tools; partnering with local law enforcement; approaching non-government or media organizations that might have independently acquired the information; and approaching end users directly.

B. Requests to U.S. District Courts

A second option for accessing vital evidence is for international tribunals to make a direct request for judicial assistance or a request for information via a letter rogatory—a formal request from one court to another for assistance in evidence gathering. Section 1782 of Title 28 of the U.S. Code —“Assistance to foreign and international tribunals and to litigants before such tribunals” —permits foreign tribunals to transmit a letter rogatory directly to the district court in which the person from whom they seek testimony or other evidence can be found.¹⁵³ Section 1782 empowers such district courts to order individuals to give testimony or statements, or to produce documents “for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.”¹⁵⁴ Such court orders would be “pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person.”¹⁵⁵

The statute’s “twin aims” are “providing efficient assistance to participants in international litigation and encouraging foreign countries, by example, to provide similar assistance to our courts.”¹⁵⁶ As argued below, the phrase “foreign or international tribunal” almost certainly qualifies the ICC or other ad hoc international tribunals to use these tools under 28 U.S.C. §1782.

The U.S. Supreme Court case *Intel Corp. v. Advanced Micro Devices, Inc.*, in which the petitioner applied to a U.S. District Court under 28 U.S.C. §1782 for an order requiring a U.S. tech company to produce documents relevant to an antitrust complaint in a tribunal at the European Commission, established that the statute may be used by any “interested person” and that discovery can take place even before foreign courts initiate formal proceedings. These proceedings do not have to be “imminent” so long as they are “within reasonable contemplation.”¹⁵⁷ Thus, even preliminary investigations would likely qualify.

However, the statute exempts “privileged material”: “a person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.”¹⁵⁸ Thus, so long as tech companies do not have a legally-applicable privilege that they choose to exercise, that provision should not bar proceeding with providing information to the tribunal.

Notably, district courts have broad discretion when deciding whether to order an action based on a letter rogatory.¹⁵⁹ The statute “leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse

¹⁵³ See generally 28 U.S.C. § 1782.

¹⁵⁴ 28 U.S.C § 1782(a).

¹⁵⁵ *Id.*

¹⁵⁶ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252 (2004).

¹⁵⁷ *Id.* at 259.

¹⁵⁸ *Id.* at 260.

¹⁵⁹ *United Kingdom v. United States*, 238 F.3d 1312, 1319 (2001).

to issue an order or may impose conditions it deems desirable.”¹⁶⁰ Higher courts may only overturn a district court’s decision if that lower court had abused its discretion,¹⁶¹ a standard that has been deemed identical to district courts’ ordinary discovery rulings.¹⁶²

Factors that district courts may consider when deciding whether to grant the foreign court’s request for information include the nature of the foreign tribunal, the proceedings’ character, and the receptiveness of the international tribunal to U.S. federal-court judicial assistance.¹⁶³ Since at the time of writing the ICC has never issued a letter rogatory to a district court, any forthcoming ICC case would be one of first impression. However, there is reason to think that these factors would weigh in the foreign court’s favor.

Because the Supreme Court has defined a tribunal broadly—encompassing any “first instance decisionmaker”¹⁶⁴—most international tribunals, including the ICC, should be able to use this statute. In *Intel Corp.*, the petitioner filed a request under 28 U.S.C. §1782 at a U.S. District Court requesting documents relevant to an antitrust complaint at the Directorate-General for Competition of the Commission of the European Communities (European Commission).¹⁶⁵ In their decision, the Supreme Court explained that the term tribunal “includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts.”¹⁶⁶ Ultimately, the Court held that the European Commission qualified as a tribunal under 28 U.S.C. §1782. Because international tribunals, including the ICC, are as well established as the European Commission, and are globally-recognized as *bona fide* courts, the ICC will likely be considered a tribunal for purposes of §1782 requests.

The type of electronic evidence that a district court can compel via 28 U.S.C § 1782 is limited by ECPA. Generally, both ECPA and subsequent case law work to prevent any government entity from compelling the production of content data, absent a search warrant or an emergency.¹⁶⁷ Therefore, as Section 1782 does not authorize district courts to issue warrants in connection with a request by an

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See Intel Corp.*, *supra* note 156, at 264.

¹⁶⁴ *Id.* at 243.

¹⁶⁵ *Id.* at 246.

¹⁶⁶ *Id.* at 258.

¹⁶⁷ ECPA, which was enacted in the 1980s, did not impose this requirement to all content data as it drew an antiquated distinction between two types of storage – electronic storage and remote computing services – and treated content data differently with respect to warrant requirements based on the type of storage and the length of time it is in storage. Subsequent case law has clarified that the Fourth Amendment requires the use of a warrant for content information regardless of where such content is stored. *See Westmoreland & Kent*, *supra* note 137, at 238–39.

international tribunal, content data cannot be obtained through this mechanism. However, as stated above, under §2702(a)(3), ECPA allows service providers to disclose metadata to entities so long as they are not an “agency or department of the United States.”¹⁶⁸ Therefore, if a court chooses to exercise its discretion to order the production of metadata for use by an international tribunal via 18 U.S.C. §1782, ECPA would not be a barrier.

In addition, U.S. District Courts have in fact granted requests under §1782 to compel metadata from tech companies in the United States for use in foreign tribunals.¹⁶⁹

Therefore, as long as the ICC’s request for information via a letter rogatory concerns the investigation of a foreign national for war crimes, crimes against humanity, and/or genocide, and the case is otherwise justiciable, ASPA should not be a barrier. Thus, assuming the proceedings are legally sound, there should be solid grounds for a district court to decide in favor of the ICC’s request.

In conclusion, the main advantage of the direct court-to-court mechanism is that it allows for tribunals to avoid having to rely on the timely cooperation of the United States’ executive branch. The main disadvantage, however, is that this option does not allow for access to content data, and is also potentially complicated in practice: it requires the request to be made in the district court in which the person or the evidence is located.

C. Requests Through U.S. Diplomatic Channels

A letter rogatory or request for assistance can also proceed through diplomatic channels. Established by Congress in 28 U.S.C. §1781, this mechanism gives the Department of State the power to receive a letter rogatory and to transmit it to the U.S. tribunal to which it is addressed.¹⁷⁰ The Department of State executes requests for judicial assistance, including letters rogatory, based on treaty obligations or “international comity and courtesy.”¹⁷¹ Such letters

¹⁶⁸ 18 U.S.C. §2702(a)(3), (c)(6); 18 U.S.C. §2711(4).

¹⁶⁹ See e.g., *London v. Does 1-4*, 279 Fed. App’x. 513 (9th Cir. 2008) (affirming a District Court decision to grant a §1782 request to subpoena Yahoo! to produce metadata on e-mail accounts and usernames, including IP addresses, for use in a foreign divorce case); *In re Request for Subpoena by Ryanair Ltd.*, 2014 WL 5088204 (N.D. Cal. Oct. 9, 2014) (granting a §1782 request to subpoena Google and Twitter to produce metadata for use in legal proceeding in Ireland); *In re Application for Appointment of a Comm’r re Request for Judicial Assistance for the Issuance of Subpoena Pursuant to 28 U.S.C. 1782*, 2011 WL 2747302 (N.D. Cal. Jul. 13, 2011) (granting a §1782 request to subpoena Wordpress.com to produce metadata, including user names and addresses, for use in a Spanish legal proceeding); *Ex parte Application of Am. Petroleum Inst. for Order to Obtain Discovery for Use in Foreign Proceedings*, 2011 WL 10621207 (N.D. Cal. Apr. 7, 2011) (granting a §1782 application requiring Google to produce documents, including search terms and other non-content data, for use in six cases in China.).

¹⁷⁰ 28 U.S.C. § 1781(a)(1).

¹⁷¹ U.S. DEPT OF STATE, 7 FOREIGN AFFAIRS MANUAL 963, CRIMINAL MATTERS, REQUESTS FROM FOREIGN TRIBUNALS, AND OTHER SPECIAL ISSUES (2013),

rogatory are generally referred to the Department of Justice's Office of International Affairs (OIA).¹⁷² It has also become common for assistance requests to be directly transmitted to OIA through informal or formal arrangements.¹⁷³

OIA has two distinct mechanisms to request the relevant evidence or testimony from a district court:

[W]hen [letters rogatory or request for judicial assistance] are transmitted directly to the U.S. Department of Justice, or when they are transmitted to it through diplomatic channels, they will be processed by the Office of International Affairs (OIA) of the Department's Criminal Division.... When the use of compulsory measures is necessary, an assistant United States attorney will submit the request to the district court pursuant to 28 U.S.C. § 1782 or 18 U.S.C. § 3512[.]¹⁷⁴

OIA can rely on 28 U.S.C. § 1782—as described previously—to request evidence from the district court in which the person from whom they seek testimony resides or is found. From the perspective of the foreign tribunal, there are two key differences between transmitting a letter rogatory directly to a district court and transmitting a letter in a diplomatic manner through the Department of State and OIA. First, the use of diplomatic channels is generally more time consuming than a direct court-to-court approach, as the process of executing a letter rogatory by the Department of State could take up to a year or more.¹⁷⁵ Second, a request under 28 U.S.C. § 1782 through OIA has the substantial weight of the federal government behind it, which could impact how the court exercises its discretion.

Alternatively, the OIA can use 18 U.S.C. § 3512—the Foreign Evidence Request Efficiency Act—an even more expansive statute that empowers the Department of Justice to request federal judges to “issue such orders as may be necessary to execute a request from a foreign authority for assistance in the investigation or prosecution of criminal offenses, or in proceedings related to the prosecution of criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution.”¹⁷⁶ Under this statute, not only can federal judges order the appearance of witnesses or the production of documents, they can issue warrants.¹⁷⁷

<https://fam.state.gov/fam/07fam/07fam0960.html>.

¹⁷² See MICHAEL ABBEL, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES 242 (2010).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 272.

¹⁷⁵ *Id.* at 273; *Preparation of Letters Rogatory*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assistance-obtaining-evidence/Preparation-Letters-Rogatory.html>.

¹⁷⁶ 18 U.S.C. § 3512(a)(1).

¹⁷⁷ 18 U.S.C. § 3512(a)(2) (stating “(2) **Scope of orders:**--Any order issued by a Federal judge pursuant to paragraph (1)

may include the issuance of--

(A) a search warrant, as provided under Rule 41 of the Federal Rules of Criminal Procedure;

Congress enacted § 3512 in 2009 in order to address the inefficiencies associated with the 28 U.S.C. § 1782 mechanism described above.¹⁷⁸ Because § 1782 can only be used in the district court in which the person or evidence exists, it requires that a request be made in each district in which there is evidence. This approach has led to time consuming and inefficient investigations in cases involving evidence in multiple districts. Congress highlighted these inefficiencies when enacting the statute:

“[U]nder current law, over a dozen different U.S. attorneys' offices could have to work on an evidence request for a single case. Several district courts would also have to be involved. This process is inefficient, it's burdensome, and makes little sense for Federal prosecutors across the country or for the interests of justice. The Foreign Evidence Request Efficiency Act would rectify this situation by allowing foreign evidence requests to be handled centrally, ideally by one or two U.S. attorney offices.”¹⁷⁹

Section 3512 allows for the appointment of an Assistant United States Attorney as a commissioner to collect evidence and perform other necessary actions to implement a request for assistance.¹⁸⁰ More importantly, unlike 28 U.S.C. § 1782, a request for assistance under § 3512 does not have to be filed in the district court where the witness or evidence is located. The statute specifically allows for the filing of a request in the District of Columbia, regardless of where the evidence may be found.¹⁸¹

However, the issue of whether a § 3512 is applicable to requests made by international tribunals has not been tested. Unlike 28 U.S.C. § 1782, § 3512 does not explicitly refer to foreign or international tribunals. Instead, it addresses requests from a “foreign authority.” This term is defined as follows:

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- (B) a warrant or order for contents of stored wire or electronic communications or for records related thereto, as provided under section 2703 of this title;
 - (C) an order for a pen register or trap and trace device as provided under section 3123 of this title; or
 - (D) an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both.”)

¹⁷⁸ 155 CONG. REC. S6807-01, S6810 (daily ed. Jun. 18, 2009) (letter from U.S. Department of Justice, Office of Legislative Affairs to Hon. Sheldon Whitehouse, U.S. Senate).

¹⁷⁹ 155 CONG. REC. H10092-01, H10093 (daily ed. Sep. 30, 2009).

¹⁸⁰ 18 U.S.C. § 3512(b); *see, e.g.*, *Palmat Int'l, Inc. v. Holder*, 2013 WL 594695, at 1 (S.D. Fla. Feb. 14, 2013).

¹⁸¹ 18 U.S.C. § 3512(c)(3) (stating “(c) Filing of Requests. -- Except as provided under subsection (d), an application for execution of a request from a foreign authority under this section may be filed--... (3) in any case, the district in which a related Federal criminal investigation or prosecution is being conducted, or in the District of Columbia.”)

The term “foreign authority” means a foreign judicial authority, a foreign authority responsible for the investigation or prosecution of criminal offenses or for proceedings related to the prosecution of criminal offenses, or an authority designated as a competent authority or central authority for the purpose of making requests for assistance pursuant to an agreement or treaty with the United States regarding assistance in criminal matters.¹⁸²

A plain reading of this language suggests that an international tribunal is indeed a foreign authority under the first two formulations: either (1) “a foreign judicial authority” or (2) “a foreign authority responsible for the investigation or prosecution of criminal offenses or for proceedings related to the prosecution of criminal offenses.”¹⁸³ An international tribunal such as the ICC would therefore likely fall under the purview of § 3512.

Because § 3512 grants the Department of Justice a broad set of tools for aiding international investigations—including requests for the issuing of warrants from a district court—this option does not limit the *type* of electronic communications that can be obtained. Under ECPA, content data can be compelled through a warrant.¹⁸⁴ In fact, the definition of a “court of competent jurisdiction,” under ECPA, and thus the types of court that may issue a warrant under it, specifically includes any district court “acting on a request for foreign assistance pursuant to § 3512 of this title.”¹⁸⁵

The letter rogatory option is a particularly powerful one. If held to be open to international tribunals, this option would allow them to obtain both metadata and content data. The advantages of this option, however, are counterbalanced by one key challenge: it depends on the cooperation and discretion of the Department of Justice.

D. Requests for Mutual Legal Assistance

Mutual Legal Assistance (MLA) requests are a government-to-government mechanism for information and evidence-sharing between countries. Under the MLA regime, foreign countries that hope to acquire stored electronic communications and/or other digital data from private technology companies based in the United States and have an MLA treaty in place with the United States would make a request for assistance to the secretary of state, the U.S. attorney general, or their designees.¹⁸⁶

Unfortunately, the ICC cannot make MLA requests on its own. The MLA regime works on the basis of reciprocity, or treaties entered into between countries.¹⁸⁷ As the ICC is not a country, and thus does not qualify as a “central

¹⁸² 18 U.S.C. § 3512(h).

¹⁸³ *Id.*

¹⁸⁴ 18 U.S.C. §2703(a).

¹⁸⁵ *Id.* at §2711.

¹⁸⁷ *See, e.g.,* Mutual Legal Assistance Treaties, *Frequently Asked Questions*, ACCESS NOW, <https://mlat.info/faq> (explaining that MLATs are agreements

authority” for treaty purposes, it cannot be a party to any MLA treaty. Furthermore, an MLA based on more informal reciprocity would not be an option, as it is unclear what reciprocation would even mean between a tribunal and the United States.

However, the ICC can ask an ICC State Party that has an MLA agreement with the United States to request the desired information on its behalf. In some cases, this may be a viable option, particularly where the State in question has self-referred a situation to the ICC, and is gathering evidence of the commission of crimes for domestic prosecutions. While certain provisions of ASPA, such as §7423(g), barring foreign countries from submitting MLA requests for the ICC, and §7425, prohibiting the indirect transfer of law enforcement information to the ICC through a third party, appear to foreclose this option, the Dodd Amendment likely qualifies these potential bars for investigations of foreign nationals. One potential obstacle with such MLA requests is that many MLA treaties require the requested State’s permission before using any sought information for purpose that go beyond the scope of the MLA.

Of course, the downside of the MLA process is that it is notoriously time consuming, sometimes taking as long as a year or more.¹⁸⁸ While this might not matter given the length of many ICC investigations, it is not a great option for securing information quickly.

E. Joint Investigations

A fifth option for information gathering is for the ICC to partner with domestic law enforcement. Either in the United States or abroad, the ICC can work with domestic investigators to conduct joint investigations where there are suspects who are of interest to both that state and the ICC.¹⁸⁹ By placing an ICC investigator in the offices of a complementary investigations team, information can be shared relatively quickly and informally. This has been done effectively in the United States (bringing together state and federal law enforcement when there is overlapping jurisdiction) and overseas.¹⁹⁰ Similarly, INTERPOL—the

between countries).

¹⁸⁸ See Gail Kent, *The Mutual Legal Assistance Problem Explained*, STANFORD CTR. FOR INTERNET AND SOC’Y (Feb. 23, 2015), <http://cyberlaw.stanford.edu/blog/2015/02/mutual-legal-assistance-problem-explained> (explaining that even for the United Kingdom, which has a relatively good working relationship with the United States when it comes to cooperating on investigations, MLA requests for privileged information can take as long as 13 months).

¹⁸⁹ See, e.g., Rome Statute, *supra* note 46, art. 86 (establishing the obligation of states parties to “cooperate fully with the Court in its investigations and prosecution of crimes within the jurisdiction of the Court”); see also HRC, BEYOND A REASONABLE DOUBT, *supra* note 36, at 8–9 (discussing the ability of the ICC to work with government agencies in the United States to support investigations).

¹⁹⁰ See Press Release, U.S. Dep’t of Justice, Joint Federal-State-Local Law Enforcement Action: Operation “Spring Clean” – 17 Search Warrants And 6 Arrests Related To Crimes Against Children (Jun. 1, 2013), <https://www.justice.gov/usao-edva/pr/joint-federal-state-local-law-enforcement->

international police organization—is structured to aid information sharing, including joint investigations.¹⁹¹

Europe has also created an EU-based mechanism for conducting joint criminal investigations.¹⁹² EU members that are State Parties to the ICC can conduct investigations in partnership with the ICC through that mechanism, requesting the information the ICC needs from those EU members' investigatory partners. In some cases, even non-EU members are allowed to participate in the program, if all parties agree, meaning that non-EU State Parties could potentially request information through that mechanism on the ICC's behalf, as well.¹⁹³

Therefore, it appears that the ICC has a number of options for securing documentary evidence held in electronic storage by private companies incorporated in the United States. They can submit requests directly to those companies; file letters rogatory or requests for assistance in U.S. courts; request assistance from the United States' executive branch; benefit from third party governments' MLA requests; or partner with other investigative bodies.

CONCLUSION

The digital world brings with it both challenges and opportunities for documenting serious international crimes. Today, much documentary evidence, including digital photographs, videos, emails, and internet postings, resides on the servers of U.S. corporations. International courts, including the ICC, cannot fulfill their mandate to prosecute the most serious crimes of concern to the international community unless they have some way of locating, acquiring, preserving, analyzing, and presenting such information for trials.

The overarching issue that this Article addresses—“when and through what mechanisms might the ICC legally and appropriately seek information from private and government entities in the United States to advance their investigations?”—will only increase in salience. As the ICC increasingly conducts investigations in technologically-sophisticated countries, and as growing communities across the globe use digital platforms to communicate, it is imperative that the parameters of potential cooperation be clarified.

Based on the above analysis, it appears there are several contexts in which information sharing with the ICC would be both legal and appropriate for entities

action-operation-spring-clean-17-search (providing one example, Operation “Spring Clean,” was a joint federal, state and local operation to combat the sexual exploitation of children).

¹⁹¹ See *Fugitive Investigations*, INTERPOL, <https://www.interpol.int/Crime-areas/Fugitive-investigations/Fugitive-investigations> (last visited Nov. 12, 2017) (discussing investigative and other support that they provide to member countries).

¹⁹² See *Joint Investigation Teams (JITS)*, EUROPOL, <https://www.europol.europa.eu/content/page/joint-investigation-teams-989> (last visited Nov. 12, 2017).

¹⁹³ *Id.*

within the United States. To that end, there are several mechanisms that can be used to enable the legal transfer of information: initially, the ICC can reach out to tech companies to obtain the desired information.¹⁹⁴ There, any barrier to disclosing such information would come from corporate policy. If a company's policies, however, require court intervention in the form of a warrant (as many of them likely would), the ICC has two more options: it could see if a State Party would request the information on its behalf using that state's Mutual Legal Assistance treaty with the United States, or it could use a letter rogatory to ask a U.S. district court to facilitate discovery. The ICC could also use its diplomatic channels to engage the U.S. State Department in order to have the request come from the State Department to the U.S. district court, likely strengthening its chance of successfully accessing the information. In none of these cases is ASPA a bar to U.S. cooperation so long as the prosecution in question is for a foreign national accused of war crimes, crimes against humanity, or genocide.

Since ASPA's passage in 2002, ICC-U.S. relations have thawed considerably. In 2009, the United States, through its representatives, began formally participating in the annual meeting of States Parties, and, in 2010, took part in the Rome Statute's review conference in Kampala, Uganda, where the United States made its intended support of ICC cases explicit.¹⁹⁵ Both President Barack Obama and former Secretary of State Hillary Clinton have echoed that statement, the latter even stating her "great regret" that the United States is not a party to the Court.¹⁹⁶ While it is unlikely the United States will become a party to the Rome Statute any time soon, the United States has already taken several steps to facilitate cooperation where such cooperation is deemed mutually advantageous. Facilitating the collection of evidence to further accountability for the world's most egregious human rights abuses and war crimes is the next logical step in this evolution.

¹⁹⁴ Publicly-available information is, of course, less of an issue than private information. The ICC, like any institution or individual, is free to use publicly-available tools to scour public sources, such as public Facebook pages, Twitter sites, etc. There, the barriers relate more to capacity—including knowledge regarding how to optimize such searches—than corporate policy or law.

¹⁹⁵ See ARIEFF ET AL., *supra* note 126, at 3.

¹⁹⁶ *Id.*