



## **Analysis of Waivers and Exceptions in the American Servicemembers' Protection Act**

**American Servicemembers' Protection Act signed into law on August 2, 2002, does not require the U.S. President to take any actions and does not restrict U.S. cooperation with the ICC. Any claims by Bush Administration officials that they are required to restrict military assistance to States Parties to the ICC without Article 98 agreements are false.**

**Section 2015 Permits U.S. Cooperation with Court for Foreign Nationals:** Section 2015 is an amendment by Senator Dodd (D-CT), adopted by unanimous consent in the Senate, and insisted upon by Senate negotiators in conference committee deliberations (See Senator Dodd's statement of July 24, on page S7266 of the Congressional Record, and Senator Leahy and Senator Byrd on Pages S7859-60). The amendment specifically permits cooperation with the ICC for prosecutions of non-U.S.

citizens. It reads, " Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity." As Senator Leahy said, "Congress wanted to be clear that the U.S. can cooperate with international efforts, including those by the ICC, to bring foreign nationals to justice for genocide, war crimes, and crimes against humanity."

**President Granted Broad Authority to use Constitutional Powers to Cooperate with ICC:** Section 2011 grants the President the capacity to cooperate with the ICC or provide national security information to the Court, requiring only a notification of Congress within 15 days. It reads, "Sections 2004 and 2006 shall not apply to any action or actions with respect to a specific matter involving the International Criminal Court taken or directed by the President on a case-by-case basis in the exercise of the President's authority as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the United States Constitution or in the exercise of the executive power under article II, section 1 of the United States Constitution."

**Waiver for Military Assistance Requires only Presidential Certification of National Security Interest:** Section 2007(a) prohibits military assistance to parties to the ICC, but is limited by the Section 2007(b), which reads: "The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition." Thus, the President need only certify to Congress that military assistance is in the national security interest of the U.S., putting the decision to withhold assistance squarely in the hands of the President. This provision also exempts key allies of the U.S.

**Waiver for Peacekeeping Requires only Presidential Certification of National Security Interest:** Section 2005 (b) permits U.S. participation in UN peacekeeping if the President submits a certification to congressional committees. However, Section 2005(c) spells out three different certifications that the President can make to Congress to waive the restriction, namely: 1) the Security Council has granted a permanent exemption to members of the U.S. armed forces; 2) the ICC does not have jurisdiction over the countries in which the peace operation is in effect, *or* 3) it is in the national security interest of the U.S. The "or" language is important: it means that the President only needs to certify one of the three conditions. Therefore, the U.S. may participate in any UN peacekeeping mission if the President thinks that it is in the U.S. national interest to do so.

**Phony Waiver Up Front for Peacekeeping and Military Assistance:** Section 2003 waivers are contingent upon the ICC entering into a non-achievable, binding agreement with the United States that it will not exercise jurisdiction over US and other personnel.