

H.R.1794

American Servicemembers' Protection Act of 2001 (Introduced in House)

May 10, 2001

Mr. DELAY (for himself, Mr. MURTHA, Mr. HYDE, Mr. GILMAN, and Mr. SMITH of New Jersey) introduced the following bill; which was referred to the Committee on International Relations

A BILL

To protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an international criminal court to which the United States is not party.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'American Servicemembers' Protection Act of 2001'.

SEC. 2. FINDINGS.

Congress makes the following findings:

- (1) On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, meeting in Rome, Italy, adopted the 'Rome Statute of the International Criminal Court.' The vote on whether to proceed with the Statute was 120 in favor to 7 against, with 21 countries abstaining. The United States voted against final adoption of the Rome Statute.
- (2) As of April 30, 2001, 139 countries had signed the Rome Statute and 30 had ratified it. Pursuant to Article 126 of the Rome Statute, the Statute will enter into force on the first day of the month after the 60th day following the date on which the 60th country deposits an instrument ratifying the Statute.
- (3) Since adoption of the Rome Statute, a Preparatory Commission for the International Criminal Court has met regularly to draft documents to implement the Rome Statute, including Rules of Procedure and Evidence, Elements of Crimes, and a definition of the Crime of Aggression.
- (4) During testimony before the Congress following the adoption of the Rome Statute, the lead United States negotiator, Ambassador David

Scheffer stated that the United States could not sign the Rome Statute because certain critical negotiating objectives of the United States had not been achieved. As a result, he stated: 'We are left with consequences that do not serve the cause of international justice.'

(5) Ambassador Scheffer went on to tell the Congress that: 'Multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.'

(6) Notwithstanding these concerns, President Clinton directed that the United States sign the Rome Statute on December 31, 2000. In a statement issued that day, he stated that in view of the unremedied deficiencies of the Rome Statute, 'I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied'.

(7) Any **American** prosecuted by the International Criminal Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury.

(8) Members of the Armed Forces of the United States deserve the full **protection** of the United States Constitution wherever they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by United Nations officials under procedures that deny them their constitutional rights.

(9) In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government deserve the full **protection** of the United States Constitution

with respect to official actions taken by them to protect the national interests of the United States.

SEC. 3. WAIVER AND TERMINATION OF PROHIBITIONS OF THIS ACT.

(a) **AUTHORITY TO INITIALLY WAIVE SECTIONS 5 AND 7-** The President is authorized to waive the prohibitions and requirements of sections 5 and 7 for a single period of one year. Such a waiver may be issued only if the President at least 15 days in advance of exercising such authority--

- (1) notifies the appropriate congressional committees of the intention to exercise such authority; and
- (2) determines and reports to the appropriate congressional committees that the International Criminal Court has entered into a binding agreement that--

(A) prohibits the International Criminal Court from seeking to exercise jurisdiction over the following persons with respect to actions undertaken by them in an official capacity:

- (i) covered United States persons;
- (ii) covered allied persons; and
- (iii) individuals who were covered United States persons or covered allied persons; and

(B) ensures that no person described in subparagraph (A) will be arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court.

(b) **AUTHORITY TO EXTEND WAIVER OF SECTIONS 5 AND 7-** The President is authorized to waive the prohibitions and requirements of sections 5 and 7 for successive periods of one year each upon the expiration of a previous waiver pursuant to subsection (a) or this subsection. Such a waiver may be issued only if the President at least fifteen days in advance of exercising such authority--

- (1) notifies the appropriate congressional committees of the intention to exercise such authority; and
- (2) determines and reports to the appropriate congressional committees that the International Criminal Court--

(A) remains party to, and has continued to abide by, a binding agreement that--

(i) prohibits the International Criminal Court from seeking to exercise jurisdiction over the following persons with respect to actions undertaken by them in an official capacity:

- (I) covered United States persons;
- (II) covered allied persons; and
- (III) individuals who were covered United States persons or covered allied persons; and

(ii) ensures that no person described in clause (i) will be arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court; and

(B) has taken no steps to arrest, detain, prosecute, or imprison any person described in clause (i) of subparagraph (A).

(c) **AUTHORITY TO WAIVE SECTIONS 4 AND 6 WITH RESPECT TO AN INVESTIGATION OR PROSECUTION OF A NAMED INDIVIDUAL-** The President is authorized to waive the prohibitions and requirements of sections 4 and 6 to the degree they would prevent United States cooperation with an investigation or prosecution of a named individual by the International Criminal Court. Such a waiver may be issued only if the President at least 15 days in advance of exercising such authority--

(1) notifies the appropriate congressional committees of the intention to exercise such authority; and

(2) determines and reports to the appropriate congressional committees that--

(A) a waiver pursuant to subsection (a) or (b) of the prohibitions and requirements of sections 5 and 7 is in effect;

(B) there is reason to believe that the named individual committed the crime or crimes that are the subject of the International Criminal Court's investigation or prosecution;

(C) it is in the national interest of the United States for the International Criminal Court's investigation or prosecution of the named individual to proceed; and

(D) in investigating events related to actions by the named individual, none of the following persons will be investigated, arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court with respect to actions undertaken by them in an official capacity:

(i) Covered United States persons.

(ii) Covered allied persons.

(iii) Individuals who were covered United States persons or covered allied persons.

(d) **TERMINATION OF WAIVER PURSUANT TO SUBSECTION (c)-** Any waiver or waivers exercised pursuant to subsection (c) of the prohibitions and requirements of sections 4 and 6 shall terminate at any time that a waiver pursuant to subsection (a) or (b) of the prohibitions and requirements of sections 5 and 7 expires and is not extended pursuant to subsection (b).

(e) **TERMINATION OF PROHIBITIONS OF THIS ACT -** The prohibitions and requirements of sections 4, 5, 6, and 7

shall cease to apply, and the authority of section 8 shall terminate, if the United States becomes a party to the International Criminal Court pursuant to a treaty made under article II, section 2, clause 2 of the Constitution of the United States.

SEC. 4. PROHIBITION ON COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT.

(a) CONSTRUCTION- The provisions of this section--

(1) apply only to cooperation with the International Criminal Court and shall not be construed to apply to cooperation with an ad hoc international criminal tribunal established by the United Nations Security Council before or after the date of the enactment of this Act to investigate and prosecute war crimes committed in a specific country or during a specific conflict; and

(2) shall not be construed to prohibit--

(A) any action permitted under section 8;

(B) any other action taken by members of the Armed Forces of the United States outside the territory of the United States while engaged in military operations involving the threat or use of force when necessary to protect such personnel from harm or to ensure the success of such operations; or

(C) communication by the United States to the International Criminal Court of its policy with respect to a particular matter.

(b) PROHIBITION ON RESPONDING TO REQUESTS FOR COOPERATION-

No agency or entity of the United States Government or of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to Part 9 of the Rome Statute.

(c) PROHIBITION ON SPECIFIC FORMS OF COOPERATION AND

ASSISTANCE- No agency or entity of the United States Government or of any State or local government, including any court, may provide financial support or other cooperation, support, or assistance to the International Criminal Court, including by undertaking any action described in the following articles of the Rome Statute with the purpose or intent of cooperating with, or otherwise providing support or assistance to, the International Criminal Court:

(1) Article 89 (relating to arrest, extradition, and transit of suspects).

(2) Article 92 (relating to provisional arrest of suspects).

(3) Article 93 (relating to seizure of property, asset forfeiture, execution of searches and seizures, service of warrants and other judicial process, taking of evidence, and similar matters).

(d) RESTRICTION ON ASSISTANCE PURSUANT TO MUTUAL LEGAL

ASSISTANCE TREATIES- The United States shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters, multilateral conventions with legal assistance provisions, and extradition treaties, to which the United States is a party, and in connection with the execution or issuance of any letter rogatory, to prevent the transfer to, or other use by, the International Criminal Court of any assistance provided by the United States under such treaties and letters rogatory.

(e) PROHIBITION ON INVESTIGATIVE ACTIVITIES OF AGENTS- 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.

SEC. 5. RESTRICTION ON UNITED STATES PARTICIPATION IN CERTAIN UNITED NATIONS PEACEKEEPING OPERATIONS.

(a) POLICY- Effective beginning on the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

(b) RESTRICTION- Members of the Armed Forces of the United States may not participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations, the creation of which is authorized by the United Nations Security Council on or after the date that the Rome Statute enters into effect pursuant to Article 126 of the Rome Statute, unless the President has submitted to the appropriate congressional committees a certification described in subsection (c) with respect to such operation.

(c) CERTIFICATION- The certification referred to in subsection (b) is a certification by the President that members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution by the International Criminal Court because--

(1) in authorizing the operation, the United Nations Security Council permanently exempted, at a minimum, members of the Armed Forces of the United States participating in the operation from criminal prosecution by the International Criminal Court for actions undertaken by them in connection with the operation;

(2) each country in which members of the Armed Forces of the United States participating in the operation will be present is either not a party to the International Criminal Court and has not invoked the jurisdiction of the International Criminal Court pursuant to Article 12 of the Rome Statute, or has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against

members of the Armed Forces of the United States present in that country; or

(3) the United States has taken other appropriate steps to guarantee that members of the Armed Forces of the United States participating in the

operation will not be prosecuted by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

SEC. 6. PROHIBITION ON DIRECT OR INDIRECT TRANSFER OF CERTAIN CLASSIFIED NATIONAL SECURITY INFORMATION TO THE INTERNATIONAL CRIMINAL COURT.

(a) DIRECT TRANSFER- Not later than the date on which the Rome Statute enters into force, the President shall ensure that appropriate procedures are in place to prevent the transfer of classified national security information to the International Criminal Court.

(b) INDIRECT TRANSFER- Not later than the date on which the Rome Statute enters into force, the President shall ensure that appropriate procedures are in place to prevent the transfer of classified national security information relevant to matters under consideration by the International Criminal Court to the United Nations and to the government of any country that is a party to the International Criminal Court unless the United Nations or that government, as the case may be, has provided written assurances that such information will not be made available to the International Criminal Court.

(c) CONSTRUCTION- The provisions of this section shall not be construed to prohibit any action permitted under section 8.

SEC. 7. PROHIBITION OF UNITED STATES MILITARY ASSISTANCE TO PARTIES TO THE INTERNATIONAL CRIMINAL COURT.

(a) PROHIBITION OF MILITARY ASSISTANCE- Subject to subsections (b) and (c), no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.

(b) WAIVER- The President may waive the prohibition of subsection (a) with respect to a particular country--

(1) for one or more periods not exceeding one year each, if the President determines and reports to the appropriate congressional committees that it is vital to the national interest of the United States to waive such prohibition; and

(2) permanently, if the President determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against United States personnel present in such country.

(c) EXEMPTION- The prohibition of subsection (a) shall not apply to the government of--

(1) a NATO member country;

(2) a major non-NATO ally (including, inter alia, Australia, Egypt, Israel, Japan, the Republic of Korea, and New Zealand); or

(3) Taiwan.

SEC. 8. AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES AND CERTAIN OTHER PERSONS HELD CAPTIVE BY OR ON BEHALF OF THE INTERNATIONAL CRIMINAL COURT.

(a) **AUTHORITY-** The President is authorized to use all means necessary and appropriate to bring about the release from captivity of any person described in subsection (b) who is being detained or imprisoned against that person's will by or on behalf of the International Criminal Court.

(b) **PERSONS AUTHORIZED TO BE FREED-** The authority of subsection (a) shall extend to the following persons:

(1) Covered United States persons.

(2) Covered allied persons.

(3) Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government.

(c) **AUTHORIZATION OF LEGAL ASSISTANCE-** When any person described in subsection (b) is arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court, the authority under subsection (a) may be used--

(1) for the provision of legal representation and other legal assistance to that person (including, in the case of a person entitled to assistance under section 1037 of title 10, United States Code, representation and other assistance in the manner provided in that section); and

(2) for the provision of exculpatory evidence on behalf of that person.

(d) **BRIBES AND OTHER INDUCEMENTS NOT AUTHORIZED-** Subsection (a) does not authorize the payment of bribes or the provision of other incentives to induce the release from captivity of a person described in subsection (b).

SEC. 9. ALLIANCE COMMAND ARRANGEMENTS.

(a) **REPORT ON ALLIANCE COMMAND ARRANGEMENTS-** Not later than 6 months after the date of the enactment of this **Act**, the President shall transmit to the appropriate congressional committees a report with respect to each military alliance to which the United States is party--

(1) describing the degree to which members of the Armed Forces of the United States may, in the context of military operations undertaken by or pursuant to that alliance, be placed under the command or operational control of foreign military officers subject to the jurisdiction of the International Criminal Court because they are nationals of a party to the International Criminal Court; and

(2) evaluating the degree to which members of the Armed Forces of the United States engaged in military operations undertaken by or pursuant to

that alliance may be exposed to greater risks as a result of being placed under the command or operational control of foreign military officers subject to the jurisdiction of the International Criminal Court.

(b) DESCRIPTION OF MEASURES TO ACHIEVE ENHANCED PROTECTION FOR MEMBERS OF THE ARMED FORCES OF THE UNITED STATES- Not later than one year after the date of the enactment of this Act, the President shall transmit to the appropriate congressional committees a description of modifications to command and operational control arrangements within military alliances to which the United States is a party that could be made in order to reduce any risks to members of the Armed Forces of the United States identified pursuant to subsection (a)(2).

(c) SUBMISSION IN CLASSIFIED FORM- The report under subsection (a), and the description of measures under subsection (b), or appropriate parts thereof, may be submitted in classified form.

SEC. 10. WITHHOLDINGS.

Funds withheld from the United States share of assessments to the United Nations or any other international organization during any fiscal year pursuant to section 705 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (as enacted by section 1000(a)(7) of Public Law 106-113; 113 Stat. 1501A-460), are authorized to be transferred to the Embassy Security, Construction and Maintenance Account of the Department of State.

SEC. 11. NONDELEGATION.

The authorities vested in the President by sections 3, 5(c), and 7(b) may not be delegated by the President pursuant to section 301 of title 3, United States Code, or any other provision of law.

SEC. 12. DEFINITIONS.

As used in this Act and in sections 705 and 706 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001:

(1) APPROPRIATE CONGRESSIONAL COMMITTEES- The term `appropriate congressional committees' means the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate.

(2) CLASSIFIED NATIONAL SECURITY INFORMATION- The term `classified national security information' means information that is classified or classifiable under Executive Order 12958 or a successor Executive order.

(3) COVERED ALLIED PERSONS- The term `covered allied persons' means military personnel, elected or appointed officials, and other persons

employed by or working on behalf of the government of a NATO member country, a major non-NATO ally (including, inter alia, Australia, Egypt, Israel, Japan, the Republic of Korea, and New Zealand), or Taiwan, for so long as that government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the International Criminal Court.

(4) COVERED UNITED STATES PERSONS- The term 'covered United States persons' means members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court.

(5) EXTRADITION- The terms 'extradition' and 'extradite' include both 'extradition' and 'surrender' as those terms are defined in article 102 of the Rome Statute.

(6) INTERNATIONAL CRIMINAL COURT- The term 'International Criminal Court' means the court established by the Rome Statute.

(7) MAJOR NON-NATO ALLY- The term 'major non-NATO ally' means a country that has been so designated in accordance with section 517 of the Foreign Assistance Act of 1961.

(8) PARTY TO THE INTERNATIONAL CRIMINAL COURT- The term 'party to the International Criminal Court' means a government that has deposited an instrument of ratification, acceptance, approval, or accession to the Rome Statute, and has not withdrawn from the Rome Statute pursuant to Article 127 thereof.

(9) PEACEKEEPING OPERATION UNDER CHAPTER VI OF THE CHARTER OF THE UNITED NATIONS OR PEACE ENFORCEMENT OPERATION UNDER CHAPTER VII OF THE CHARTER OF THE UNITED NATIONS- The term 'peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations' means any military operation to maintain or restore international peace and security that--

(A) is authorized by the United Nations Security Council under chapter VI or VII of the charter of the United Nations; and

(B) is paid for from assessed contributions of United Nations members that are made available for peacekeeping or peace enforcement activities.

(10) ROME STATUTE- The term 'Rome Statute' means the Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998.

(11) SUPPORT- The term 'support' means assistance of any kind, including financial support, material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals.

(12) UNITED STATES MILITARY ASSISTANCE- The term 'United States military assistance' means--

(A) assistance provided under chapters 2 through 6 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2311 et seq.);

(B) defense articles or defense services furnished with the financial assistance of the United States Government, including through loans and guarantees; or

(C) military training or education activities provided by any agency or entity of the United States Government.

Such term does not include activities reportable under title V of the National Security Act of 1947 (50 U.S.C. 413 et seq.).