



THE HENRY L.
STIMSON CENTER

**ON TRIAL:
THE US MILITARY AND THE
INTERNATIONAL CRIMINAL COURT**

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March 2006

Dear Reader,

I am pleased to present the newest report from the Henry L. Stimson Center, *On Trial: the US Military and the International Criminal Court*. This study, written by Senior Associate Victoria Holt and Research Associate Elisabeth Dallas, is an original and fresh assessment of the current and enduring concerns of US military personnel about the Court and the implications for the United States as the Court begins its first cases.

The study provides some surprising insights into how professional military officers, including those in the military justice system, perceive the Court, and how the history of US support and misgivings about the Court have affected their interests, in peacetime as well as in acute combat situations. The authors interviewed experts of very diverse perspectives in and out of the military, and have provided useful analysis for consideration not only by military leaders but by US policymakers, politicians, and concerned citizens.

This fine study makes an important contribution to the work of the Stimson Center, which is always committed to illuminating pragmatic solutions to security problems. We are grateful for the support of the MacArthur Foundation, and wish to thank all those who gave generously of their time to Ms. Holt and Ms. Dallas.

Sincerely,

A handwritten signature in black ink, appearing to read "Ellen Laipson". The signature is fluid and cursive, with a prominent loop at the end.

Ellen Laipson
President and CEO
The Henry L. Stimson Center

EXECUTIVE SUMMARY

As the International Criminal Court (ICC) takes on its first cases, there is little public debate in the United States over its moving forward to prosecute those who commit crimes against humanity, genocide and war crimes. The US is not a member of the Court and has opposed its jurisdiction over US citizens. Yet there are important reasons for a fresh assessment of US interests as it relates to the Court, today, as a non-state party. The Court is looking into atrocities in Darfur, Sudan, for example, with tacit US support, and is scheduled to issue its first indictments for crimes taking place in Uganda and the Democratic Republic of the Congo this year. US proponents and opponents of the ICC agree that the Court is designed in *theory* to prosecute the world's most ruthless war criminals, but disagree over how it will operate in *practice*. Now, as the Court moves into administering justice, how does the US relate to the Court?

This question can not be addressed without understanding a central US concern about the Court: its impact on those serving in the US armed forces, whether deployed in US missions or multinational peace operations. A better understanding of US military concerns is increasingly urgent as the ICC moves forward, and as US armed forces face difficult questions operating in places such as Afghanistan and Iraq where insurgents do not heed international humanitarian law or the laws of war. American military personnel are deployed in record numbers worldwide, but many have no understanding of how the Court does or should impact their operations or individual decisions. Some military leaders have expressed concern with limits on US international military assistance to countries that do not conclude bilateral agreements to protect US citizens from the Court, and the potentially damaging repercussions for military-to-military relations.

Given the focus on the Court's potential impact on the US military, it is worth considering what those within the services think about the Court. Proponents argue that it is critically needed to support human rights and prevent impunity for international atrocities. Opponents fear that the Court could operate without sufficient checks, become politicized and hamper the United States' ability to use military force. While frequently cited in political discussions, the views of US military personnel have been largely absent from this vigorous debate over the US position towards the Court.

This study looks at US military views regarding the ICC, identifies broad points and specific concerns, and offers options for moving forward. This report is based on interviews with US military personnel from each of the services and across senior and junior ranks, retired and active, with an emphasis on the operational and legal communities. This research was augmented by a comprehensive literature review, interviews with civilian experts and a workshop held at the Stimson Center in January 2006 on US military concerns with the Court.

BROAD VIEWS OF THE COURT WITHIN THE US MILITARY

Knowledge Gap

- Most interviewed within the military for this project – outside of the experts in the legal and academic military communities – had only a rudimentary understanding of how the Court is designed to operate. Many senior leaders were not conversant with the specific crimes the ICC is intended to investigate and prosecute, and did not demonstrate an understanding of how the Court would choose its cases. Few knew of or understood the legal concept of *complementarity*, where the Court is designed to encourage national institutions to administer justice, or how the Court’s jurisdiction relates to the US Uniform Code of Military Justice (UCMJ) and other US legal codes.
- Even within the legal and educational communities, there was little knowledge about the Court. Some individuals within the Judge Advocate community (JAGs), professors, and former officers had spent time looking at the Court, but they were far and away the exception. Within the military legal community, there were few who had studied the ICC or taught it in classrooms. Where the Court was addressed in war college curriculum, the discussion was usually within a larger lecture dedicated to the laws of war and international humanitarian law.

Perception and Reality: Little Understanding, Real Anxiety

- In general, many military leaders worried about the Court unfairly charging Americans with war crimes over legitimate actions taken in support of US policies that were unpopular with other countries. Numerous military officers suggested that either they or their colleagues could face arrest for actions they had taken in the line of duty (e.g., supporting the US position on the landmines treaty; directing operations; utilizing certain methods of warfare) if they traveled overseas. Others cited the accusations brought before the International Criminal Tribunal for the former Yugoslavia in the Balkans for NATO conducting air strikes, even though the Prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) found no validity in the accusations made.
- Some were concerned with fair or legitimate accusations that US military personnel had participated in war crimes – such as in Iraq, Afghanistan or Guantanamo – which also heightened fears about the Court and its jurisdiction. These examples were cited by those concerned that US military personnel had received poor guidance in handling of detainees, for example.
- For those focused on operations, some in the military are anxious about how the Court could affect them during their missions. Some raised concerns that they do not understand if their actions are in line with the Rome Statute for the International Criminal Court even as they serve the United States. They attributed this concern to the lack of discussion within general military ranks about the legal and operational issues posed by

the Court. Most know about the Court from the public media, which leaves them confused about how the Court can and can not evaluate their actions.

- Few understood the details of how, when and in what context the Court would review cases. Some military personnel asked “why should it apply to us” if the Court was intended to step in to hold accountable those individuals committing mass atrocities in places without a functioning judicial system. To fully embrace the Court, they desired one hundred percent assurance that no US military personnel could be tried by the Court.
- In general, many felt that the apparent benefits offered by the Court seemed insufficient to outweigh the risks the Court poses to US military personnel. That said, few interviewed expressed genuine concern that they would be apprehended. A number of officers saw the concerns as overblown, and even damaging to the US position internationally. One retired colonel said the US should be “first in line” to support the Court.

What problem is the Court solving?

- In general, those within the US military interviewed for the project understood the broad rationale for creating the International Criminal Court to investigate and punish those who commit mass atrocities including crimes against humanity, genocide, and war crimes. That understanding, however, did not lead to a view that those goals would actually be achieved or that the Court was the best means to punish such crimes.
- Very few in the military could describe a situation where they saw the Court helping to address a problem facing the United States, or where they saw the Court assisting the US military in meeting its goals. When a scenario was posed – such as capturing a leader who had committed war crimes or spawned civil war within a fracturing state – they recognized the importance of ending impunity and promoting the rule of law. Yet few thought the Court would serve as a deterrent for war criminals, arguing that a Court in The Hague was unlikely to stop individuals from committing crimes if it met their needs domestically. In framing their response, many pointed to the international community’s failure in capturing and bringing to justice several war criminals still at large from the ICTY and the Special Court for Sierra Leone.
- Conversely, the arguments offered by supporters of the Court generally did not address issues that directly concern US military personnel or military leaders. Reflecting its goals and its origins in the legal, human rights and non-governmental (NGO) communities, the Court is not advocated as a means of addressing questions that resonate with military leaders. Court supporters can explain the *unlikelihood* of US military personnel being investigated and prosecuted by the Court, offering the lack of a negative as a reason for the military to support the Court. Those most involved in advocating for the Court approach the prevention of war crimes, genocide and crimes against humanity from a moral, legal, and criminal justice point of view. The military supporters of the

Court viewed its main benefit as spreading the rule of law, but most were skeptical of its usefulness for reducing conflicts or the need to deploy US forces.

Overall, in the absence of a clear, strategic argument for the Court posited by the US administration, or sufficient evidence that the Court is benefiting US interests or providing an obvious service internationally, US military personnel predominantly see the ICC as an added risk. Simply put, it is another institution that could impinge on US military capabilities as it tries to execute inherently complicated operations. Some senior leaders, however, felt that the US relationship to the Court affects the US role in the world, and how we are perceived, and thus, how we behave. One former General said the ICC “adds to the necessity of doing things right.”

VIEWS OF THE COURT WITHIN THE MILITARY LEGAL AND EXPERT COMMUNITY

- For those within the military expert community familiar with the Court’s operations, there was a wider range of opinions about the problems and benefits of the Court. Some felt that there was merit in the US supporting the ICC in theory, but many were cautious about the Court in its current state. Nearly all, however, believed that the United States should remain engaged in the formation and development of the Court to guide it toward functioning in ways that were most effective and least damaging to US interests.
- Few believed there were wide differences between the crimes under the jurisdiction of the Court and crimes within the Uniform Code of Military Justice that would expose US personnel to the Court. Since US military lawyers were instrumental in drafting the elements of crimes outlined in the Rome Statute, they ensured that most of the crimes were consistent with those outlined in the UCMJ and gave strength to complementarity for the US. Small areas of potential gaps between the UCMJ and the Rome Statute, military experts argued, could be addressed through existing military laws. The larger questions are more likely to arise over how the crimes are interpreted, the severity of the penalty and how complementarity is applied to an opaque US military justice system, in particular, the use of certain weapons and methods of warfare employed (e.g., use of cluster bombs).
- There could be, however, gaps between US domestic law and the Court’s areas to investigate or prosecute. There are crimes within the ICC jurisdiction that may not match up with those specified in US national laws (e.g., apartheid). Nearly all military experts agreed that where gaps in non-military US laws existed, it might be valuable to clarify and consider a viable way for addressing, and closing, those gaps to ensure that US citizens are always protected.
- Within the military expert community, there was strong interest in US equities being addressed through US engagement in the upcoming 2009 review conference for the Court. Those familiar with the Court pointed out that the US cared deeply about its

future treatment of crimes, including defining the crimes of aggression, terrorism, and drug-trafficking. Other issues of importance to the US included a possible expansion of the definition of crimes against humanity; whether the seven-year opt-out clause for war crimes would be sustained; and other issues that could affect military coalitions. Nearly all felt that an effort to influence the Court as it moves forward could be fruitful. Few expressed any concern about engaging, indeed, many felt the Court was better because of US participation in the first place.

- Few in the military suggested that either the Court or the US role in the Court was currently being debated or discussed within their ranks at all. A few spoke of “hearing” more about the Court during the late 1990s and through 2002, and engaging in conversations at those times. Within the academic circles of military professionals, few reported that they taught about the Court or had this issue within their area of expertise.

RECOMMENDATIONS

Stimson found a genuine interest within military circles to develop a way forward to protect US interests and to relate better to the Court. Both critics and supporters of the Court felt that US equities were in play and that American interests would be best served by participating in discussions about the Court’s development. Likewise, many argued that US military personnel should not continue to be burdened with high anxiety about the Court, and that education was needed to clarify areas of uncertainty about the Court. Many recommendations were offered by those interviewed to address their concerns and to offer a way ahead in bridging gaps that exist today. The central points include:

- **Reduce military anxiety.** The US needs to reduce the fear and anxiety of American military personnel by providing them with information about the Court and increasing their understanding of what, if any, vulnerabilities they might face in being brought before the Court. A better understanding is needed of how compliance with US laws, including the rules of engagement and the Uniform Code of Military Justice, addresses their concerns about being subject to international courts such as the ICC.
- **Align perception and reality.** One way to reduce anxiety about the Court while reinforcing US goals is to develop educational tools for military leaders to clarify how the ICC operates and how it might affect military personnel at the operational, tactical and strategic levels. Briefings should include data about the goals of the Court and how it functions, and how that is related to US operations, if at all.
- **Address US interests directly.** The United States should engage in evaluating US interests as the Court moves forward, and participate in the preparatory meetings leading to the 2009 Review Conference for the Court, as well as the conference itself. The US should also evaluate how to support the Court’s efforts in cases of clear importance to the United States, such as the case of Sudan. The US should also consider organizing UN

Security Council resolutions in support of future ICC cases to give them clarity and authority.

- **Close any legal gaps.** The United States should identify any specific areas of difference between US law and the crimes within the Court’s jurisdiction, and consider how to strengthen US jurisdiction and close these gaps legislatively. Developing a clear “roadmap” of how a case would proceed could be a tool to further educate military personnel and to identify gaps between domestic law and the Court’s jurisdiction.
- **Evaluate longer-term implications of the US position on the Court.** In looking ahead, US military views need to be considered, including the repercussions of the US position on coalition operations, on funding for the International Military Education and Training program and military alliances, and for US interests strategically.

CHAPTER I

SEEKING UNDERSTANDING: RATIONALE FOR THE PROJECT

*Our nation expects and enforces the highest standards of honor and conduct in our military. That's how you were trained. That's what we expect. Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable international criminal court.*¹
– President George W. Bush, addressing the 10th Mountain Division, July 2002.

In the summer of 1998, the United States sent a delegation to Rome, Italy, to participate in negotiations to establish the International Criminal Court (ICC).² The meeting drew representatives from governments worldwide and raised hopes of creating a permanent institution to investigate and prosecute individuals accused of egregious crimes and mass atrocities. The US was a vigorous participant in the discussions, tabling positions and working late into the night. Indeed, after several weeks of intense negotiations, delegates at the Rome Conference succeeded in producing the Rome Statute of the International Criminal Court, which many countries pledged to support. The conference, however, also marked a turning point for the US government. While it came in support of the Court, the United States did *not* agree with several provisions of the treaty, and left Rome without signing the Statute.

The US kept working, however, to address its concerns with other nations. Three and a half years later, on his last day in office, President Bill Clinton signed the Rome Statute. He flagged his “deep reservations” about the ICC, but also urged that the US stay engaged to address key aspects and maintain influence over the direction of the Court. Coming into office in 2001, President George W. Bush did not share his predecessor’s cautious support for the Court. He moved to forcefully oppose the Court, announcing that the US had no intention of joining the ICC. In May 2002, the Bush Administration sent a letter to United Nations Secretary-General Kofi Annan, making this position clear and stating that the United States “has no legal obligations arising from its signature on December 31, 2000.”³ As more nations moved to ratify the Rome Statute and create the ICC, the

¹ George W. Bush, *President Salutes Troops of 10th Mountain Division*, 19 July 2002, available online: <http://www.whitehouse.gov/news/releases/2002/07/20020719.html>.

² The meeting was called the United Nations *Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, otherwise referred to as the “Rome Conference.”

³ John R. Bolton (US Under-Secretary of State for Arms Control and International Security), Letter to UN Secretary-General Kofi Annan, 6 May 2002.

United States stepped up its public opposition to the Court. Nevertheless, in July 2002, with the 60th ratification of the Statute, the treaty entered into force and the International Criminal Court was born.⁴

US CONCERN WITH ICC IMPACT ON US MILITARY PERSONNEL

In both the Clinton and Bush Administrations, US concerns about the Court centered on its potential impact on the activities and operations of the US military and its personnel. This view was reflected prior to the Rome Conference, during conference negotiations and in public dialogue post-Rome with both advocates and critics of the Court. Before 2001, the American delegations to the ICC talks made numerous proposals to shield US military personnel from ever being brought before the Court. In the press, coverage of the emerging Court revealed broad points of view about the ICC, with frequent debate over the potential implications for the US military. Critics of the Court suggested that the ICC could become a forum through which other nations could engage in politically motivated prosecutions of US military personnel falsely accused of committing crimes while conducting operations. Proponents argued that, with the numerous “safeguards” the US delegation had negotiated into the treaty, such a scenario was exceedingly unlikely.

When the Statute came into force on July 1, 2002, the Bush Administration cast its opposition in more specific terms, stating that the Court threatened the safety of US military personnel serving overseas in peacekeeping missions. The United States raised this issue at the United Nations, where it held up Security Council action on peace operations until its members granted an “immunity” agreement for all US peacekeepers in UN operations to be free of the Court’s reach.⁵ The President cast his opposition to the Court as providing protections and assurances for American military personnel:

As the United States works to bring peace around the world, our diplomats and our soldiers could be drug into this court and that’s very troubling to me, and we’ll try to work out the impasse at the United Nations, but one thing we’re not going to do is sign onto the International Criminal Court.⁶

Even as the United States only had 34 uniformed military deployed as peacekeepers in UN operations at the time, the Administration won support for the one year immunity agreement.⁷

The US then began to press nations to sign bilateral agreements as a means for providing assurances that no US citizens would be handed over to the Court for investigation and prosecution of alleged crimes that fell within the Court’s jurisdiction. Negotiating these agreements became a priority for the Bush Administration. In the post-9/11 environment, the Administration’s concerns touched on

⁴ The Rome Statute of the International Criminal Court (hereafter “Rome Statute”), Article 126 states that the Statute shall enter into force on the first day of the month after the 60th day following the 60th ratification of deposited with the Secretary-General. On 11 April 2002, 10 states simultaneously deposited their ratifications to the United Nations.

⁵ Council members protested they had no authority to grant such immunity, but passed a resolution nonetheless.

⁶ *Diplomatic License*, television program, *CNN International*, 6 July 2002.

⁷ Data from the UN Department of Peacekeeping Operations.

familiar fears, suggesting that Americans sent worldwide to serve their country and protect the nation from outside threats could potentially face being subject to scrutiny by a foreign court.

LOOKING FORWARD – PROTECTING US INTERESTS

Since the late 1990s, arguments about the International Criminal Court enjoyed lively participation from policymakers and non-governmental organizations, academics and legal scholars. Specific issues regarding the impact the Court could have on the military, or the military's concerns about the Court, are frequently utilized by civilian critics and proponents in making a case as to whether US nationals are potentially at risk of falling under the Court's jurisdiction. While frequently cited by civilian policymakers, the views of US military personnel have been largely absent from this vigorous debate over the US position towards the Court.

Today, however, policy debates over the ICC rarely make headlines. Domestic debates over whether to join the Court are virtually over, and the US position appears settled. Further, there is only a limited dialogue in the US about the Court's current activities and its role internationally; news stories are usually limited to the Court's investigations of the atrocities in Darfur, Sudan and prosecutions of the first cases in the Democratic Republic of the Congo (DRC) and Uganda.

What is missing is a discussion about how the United States should now conduct itself in relation to the Court today, as a non-state party. As the ICC takes on its first cases, there are important questions to answer about how the United States might best relate to the Court. Given the central concern over the Court's potential impact on the US military, it is useful to assess where concerns and questions exist within the military today.

First, from a practical standpoint, US military personnel continue to deploy in record numbers worldwide. While the armed services are but one component of the US government, their role is unique in serving as an instrument of US foreign policy. Many policymakers, international legal scholars and NGO advocates of the Court could benefit from a better understanding of US military views towards the Court and the challenges they see the Court posing. What is their potential exposure to the ICC and could their actions be investigated and prosecuted by the Court? Should US forces worry about the ICC when they make decisions in the course of their duties or are faced with enemy fire? What, if anything, is the US doing to guard against misunderstandings about the Court's operations and/or genuine areas of concern regarding crimes within its jurisdiction?

Second, US national interests may be impacted by the Court as it continues to develop the crimes within its jurisdiction and builds precedent through investigating and prosecuting cases. The evolution of the Court could affect the US even as a non-state party to the ICC. Given US interests, should the United States try to influence how the Court develops its capacity, applies its authority, and establishes precedents? In 2009, the ICC is scheduled to hold its seven-year review conference where amendments can be made to the Rome Statute, including the list of crimes within the Court's jurisdiction. Many issues that the US tried to address in the late 1990s remain. The conference is

likely to affect areas of interest to the US, so should the US plan to play a role in order to effectively pursue those interests?

Third, questions of policy will continue to arise as the Court investigates crimes in Sudan, northern Uganda, and in the DRC and monitors several other cases. When the UN Security Council voted to refer the case of Darfur, Sudan to the ICC, the US abstained, recognizing the situation in Darfur as dire. Will the US provide support to the Court's investigations into the crimes that are taking place in Sudan, given the referral by the Council and US public statements opposing the genocide?

Oddly, there is a growing discussion within military circles in one area about the US position on the ICC. As of May 2005, the Administration has signed bilateral agreements with 100 countries, 42 of which are states parties to the ICC, in which they pledged not to turn American citizens over to the Court. As urged by Congress, the US has cut off some US military assistance to select countries that do not sign these agreements, which has impacted the military's ability to run programs such as the International Military Education and Training (IMET) program. In turn, this has led some military leaders to seek relief from these restrictions, and to testify to the negative impact this policy is having on US interests and longer-term relations with military and political leaders in Latin America, Eastern Europe and Africa.

STIMSON'S PROJECT: ADDING MILITARY VOICES

The Stimson Center's project, *International Humanitarian Law and the Armed Services: Understanding Military Concerns Regarding the International Criminal Court*, looked at US military views toward the Court and identified concerns about the ICC in the context of conducting operations. What are the views of military personnel toward the ICC, and is the intended purpose of the Court worthy of US support? What issues – large and small – are of importance and what needs to happen to address these concerns? Stimson sought to better understand both general and specific views held by military thinkers, leaders, scholars and active personnel, as well as understand the expert opinions of military lawyers and those already familiar with the specifics of the Court.

The goal of this research is to inform how the US moves forward in its dealings with Court, and to enhance that discussion with a better understanding of what concerns are central to US military personnel. Further, this project aims to foster a richer discussion beyond traditional debates that have been well argued in public and policy circles, and to identify areas where common interests, if not agreements, lie between these two points of view.

Stimson used several tools when undertaking this project. First, Stimson conducted personal interviews with individuals from all the military services, representing varied perspectives and experience: active and retired; senior officers and junior officers; enlisted personnel; those with field experience; and military judge advocates and professors within the military education system. Interviews were also conducted with international legal experts and scholars; with members of the US delegation in Rome and to other negotiations over the Court; with individuals who worked in the Clinton and Bush Administrations; and with members of the NGO community and scholars. Stimson

met with active critics and advocates of the Court. Interviews were conducted on a not-for-attribution basis, to encourage candor, especially for those within the military. Although some current and former policymakers were included, they were not the focus of the research. The policy debates have been well-documented, and many individuals are less free to speak when representing the formal position of their offices.

Second, Stimson developed a short diagnostic test to better gauge general views of the Court held by fellows and students at military schools and colleges. What was the extent of their understanding of the Court's operations and the crimes within its jurisdiction? Where did they learn about the Court and did they believe that its work might impinge on US military operations?

Finally, Stimson held a two-day workshop, "The US Military and the International Criminal Court: Issues and Implications," with members of the legal and operational components of the military, criminal justice experts, international legal scholars, members of the US delegation at Rome, civilian experts on the subject and professors at US military institutions. The workshop focused on pivotal issues identified through the interviews, examining in more depth key questions and concerns for US military personnel regarding the ICC.

This project is a first step toward a better understanding of the issues involved. This report tries to present ideas to an audience unfamiliar with international law and offer suggestions to those schooled more deeply in this topic. We hope this report helps clarify areas of genuine concern for US military personnel and their leaders about the International Criminal Court. We also hope it clarifies areas of least concern, and offers a way forward.

The report begins with an introduction to the ICC, outlining the legal history leading up to the Court's creation and a review of its operations in Chapter II. US military views of the ICC and their concerns from operational, legal and strategic points of view are considered in Chapter III. Chapter IV addresses selected current US policies towards the Court raised by the research and their impact. Finally, the project's findings are offered in Chapter V together with a presentation of possible options for moving forward.

CHAPTER II

THE CREATION AND STRUCTURE OF THE INTERNATIONAL CRIMINAL COURT

In the 1990s, the United States championed the creation of *ad hoc* international war crimes tribunals established by the UN Security Council, in the hopes of prosecuting those who had committed atrocities during bloody civil conflicts. For the same reason, the US initially was an eager participant in multinational efforts to create a permanent International Criminal Court. The US recognized that such a court could help end impunity, bring about justice to some of the world's worst war criminals and provide a mechanism for encouraging national investigations and prosecutions of such crimes.⁸ US support for such an institution was also bolstered by the surge of civil conflicts taking place worldwide.⁹

Prior to and throughout the negotiations on the International Criminal Court at Rome, the United States expressed concerns regarding its potential impact on US citizens, especially those in uniform. The Clinton Administration sought full protections for US military personnel, worried that their international role made them inherently vulnerable, and negotiated the insertion of carefully crafted provisions that would serve as safeguards. David Scheffer, former Ambassador at Large for War Crimes Issues and head of the US delegation during negotiations over the Court, has written that the US position at the time was to find a way to protect US military personnel fully.¹⁰

By the conclusion of the 1998 Rome conference, several US proposals had been adopted, but not all; the US left without agreeing to the Statute. The Clinton Administration remained engaged in the negotiations over the ICC, however. The US set up bilateral discussions with senior military officials from other countries, briefing them on US trepidations and the fact that their troops could be held accountable to a judicial system that was not their own. The Bush Administration followed this policy toward the Court, casting its argument along the lines of needing to establish protections for Americans serving overseas in military deployments and international peacekeeping missions.

⁸ Ambassador David Scheffer, "Article 98(2) of the Rome Statute: America's Original Intent," *Journal of International Criminal Justice* 3 (2005), pages 333-353.

⁹ Interview with Rear Admiral (ret.), 25 August 2005.

¹⁰ Scheffer, page 341.

THE PUBLIC DEBATE

Public debate over the Court in the United States has a rich and interesting history – reflecting a broader view than that of the US delegation at Rome. At home, advocates of the ICC waged a vigorous campaign to win US support for the Court while critics decried it as a fundamental threat to US sovereignty. The Clinton Administration seemed pummeled from both sides.

Between the Rome conference and the creation of the Court in 2002, media attention often raised the potential impact of the Court on US military actions and personnel. Political leaders frequently focused on this question, and critics argued that the Court’s jurisdiction could be particularly damaging to American military personnel. Some leaders expressed a visceral fear that the Court fundamentally challenged US national sovereignty, raising scenarios of the Court being capable of trying American soldiers despite the United States not being a party to the Statute. Then Majority Leader of the US House of Representatives, Tom DeLay, captured many of the main political concerns:

*The ICC is a threat not only to the sovereignty of the United States and to the constitutional rights of American citizens; it is an overreaching distortion of the United Nations Charter and its mission. The ICC would, in effect, disregard not only Federal and State laws but also the Uniform Code of Military Justice, thereby establishing a rogue court in which foreign judges can indict, try, and convict American troops from broadly defined and openly interpreted crimes, all without any of the fundamental legal rights guaranteed by the United States Constitution.*¹¹

The Bush Administration initially took a similar view publicly. A fierce critic of the Court prior to serving in the Administration, then Under Secretary of State John Bolton sent a letter to Kofi Annan, declaring the United States to have “no legal obligations arising from its signature on December 31, 2000.”¹² Instead Bolton referred to the Court as a “product of fuzzy-minded romanticism...not just naïve, but dangerous.”¹³ Later in 2002, the Administration’s position began to shift, taking its first steps toward careful co-existence with the newly created Court by vigorously negotiating bilateral agreements with countries, citing its ability to do so under Article 98 of the Rome Statute.

To understand the issues raised by the Court, this section offers a short history of the legal background and description of the formal structure of the Court, highlighting the evolution of international humanitarian law, addressing the creation of the Court, and describing some central components of the Court’s design.

¹¹ Congressman Thomas DeLay (R-Texas), floor statement during the House of Representatives debate on the United Nations Reform Act of 2005, 16 June 2005.

¹² John Bolton’s letter sent to Secretary-General Kofi Annan was done in recognition of Article 18 of the Vienna Convention on the Law of Treaties, which states that “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

¹³ “Prudent ‘unsigning,’” *Copley News Service*, 8 May 2002.

ORIGINS OF LEGAL FRAMEWORK

Evolution of International Humanitarian Law

Countries have long sought to establish suitable mechanisms for punishing individuals responsible for violent atrocities during conflict, and in the modern era, gross violations of international humanitarian law. Attempts to limit the behavior of military forces in war can be traced back hundreds of years. These efforts accelerated in the 19th Century as the international community made significant steps towards defining and codifying modern international humanitarian law.¹⁴ Established through state practice and subsequent treaties, international humanitarian law today governs the conduct of actors during times of war, regulates the unnecessary destruction of non-military targets, limits actions against civilian populations, and codifies the rights and protections afforded to soldiers and non-combatants involved in armed conflict.

The principles of international humanitarian law are found in numerous treaties and conventions, but the Hague and Geneva Conventions together form the two most notable bedrocks of this body of international law. Drafted in 1899 and elaborated upon in 1907, the Hague Conventions define the laws of war and govern the conduct of states during hostilities.¹⁵ Recognizing that war between states is inevitable, these Conventions sought to reign in excessive destruction during conflict by defining authorized methods and means of warfare. After the horror of World War II, nations refined and adopted the four Geneva Conventions of 1949.¹⁶ Originally inspired by the founder of the International Committee of the Red Cross, Henri Dunant, the Geneva Conventions elaborated upon the laws of war and the responsibilities of those engaged in hostilities developed in the Hague Conventions. Unlike the Hague Conventions, the Geneva Conventions defined the rights of soldiers during hostilities, the appropriate treatment of the injured and prisoners of war, and the protection of non-combatants during armed conflict.

Each of the four Geneva Conventions is devoted to a particular class of “war victims.” The first three provide the legal framework by which combatants are to be treated if captured by enemy forces, while the fourth convention ventured into new territory, providing legal protections to civilians and non-combatants during international armed conflict.¹⁷ Article 3 of the Geneva Conventions, (identical in all four Conventions and hereafter referred to as “Common Article 3”) expanded the realm of individual criminal responsibility for war crimes committed by military forces during armed conflict, and is now seen as the primary provision outlining the humane treatment of civilians during conflict.

Following the establishment of the Geneva Conventions, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 (otherwise referred to as the Genocide Convention) and defined genocide as “acts committed with

¹⁴ See, for example: Society of Professional Journalists, “A Brief History of the Laws of War,” available online: <http://www.genevaconventions.org/>.

¹⁵ The Hague Conventions are often referred to as the Laws of Armed Conflict.

¹⁶ Françoise Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* (New York: Rowman & Littlefield Publishers, 2002), page 115.

¹⁷ The first three Geneva Conventions address the wounded and sick members of the armed forces in the field; the wounded, sick and shipwrecked members of the armed forces at sea; and prisoners of war.

intent to destroy, in whole or in part, a national, ethnic, racial or religious group...”¹⁸ The Convention forbids any such acts during times of peace or war, and prohibits immunity for anyone who commits such genocidal acts, whether “constitutionally responsible rulers, public officials or private individuals.”¹⁹ Due to the gravity of the crime of genocide,²⁰ there is no statute of limitations on prosecution so individuals may be held accountable long after the crime has been committed.²¹ In 1951, the International Court of Justice ruled that the Convention constituted international customary law and as such is binding on all states whether a party to the treaty or not. Today, 133 states have ratified the Genocide Convention.

Continuing to add to its international legal toolbox, the international community adopted two Additional Protocols to the Geneva Conventions in 1977, further strengthening protections for victims of armed conflict.²² Protocol I extended language codified in the fourth Geneva Convention by recognizing that civilians are often the victims of war and increased their protection in international conflicts.²³ Taking into account a growing number of civil wars, Protocol II elaborated on Common Article 3 by providing protection for victims of wars taking place *within* a state’s borders.²⁴

Evolution of Customary International Law

Since the first instruments of international humanitarian law were drafted in 1863, states have increasingly recognized the norms established by the Hague and Geneva Conventions. The endurance of these laws and the consistency of state practice have shifted the international humanitarian legal regimes into customary international law. The International Court of Justice identifies customary international law “as evidence of a general practice accepted as law,” thus, establishing it as binding on all states regardless of whether they ratify any of the specific treaties or conventions that codified these laws.²⁵

Due to largely underdeveloped mechanisms for handling crimes on a national scale, international humanitarian law is interpreted and enforced by a variety of international actors. National and international judicial institutions have been tasked with interpreting law contained in conventions and treaties, considering judicial precedent set by national courts, and recognizing customary procedures that have come to be accepted as law by states through enduring and consistent practice.

¹⁸ United Nations, General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, (A/Res/260 (III)), Article 2, 9 December 1948.

¹⁹ Genocide Convention, Article 4.

²⁰ Article 2 of the Genocide Conventions lists the acts that constitute genocide as: killing members of a group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part; imposing measures intended to prevent births within a group; forcibly transferring children of the group to another group.

²¹ United Nations, General Assembly, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (A/2391 (XXIII)), Article 1, 26 November 1968.

²² The two Additional Protocols of the Geneva Conventions are commonly referred to Protocol I and Protocol II.

²³ Protocol I, *Relating to the Protection of Victims of International Armed Conflicts*.

²⁴ Protocol II, *Relating to the Protection of Victims of Non-International Armed Conflicts*.

²⁵ United Nations, Statute of the International Court of Justice, (ST/DPI/1398), Article 38 (1), 24 October 1945.

The Predecessors to the International Criminal Court

The modern basis for charging individuals with war crimes and crimes against humanity was first recognized in the International Military Tribunals at Nuremberg (IMTN), constructed by allied forces after World War II, and the International Military Tribunal for the Far East, crafted by General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan. Designed to hold major military leaders of Germany and Japan responsible for their actions during the war, the trials captured worldwide attention and had a profound impact on international norms of humanitarian law.²⁶ The Charter of the International Military Tribunal for Nuremberg and the International Military Tribunal for the Far East only had jurisdiction over actions carried out by individuals, not states.²⁷

Among the lasting results of these trials was the evolution of individual criminal responsibility for violating the laws of war, in contrast to defining illegal actions undertaken by “the state.” This concept of individual criminal accountability was a relatively new component of international humanitarian law as the laws of war outlined within the Hague Conventions focused on conduct between military powers.²⁸ This raised new questions about what mechanisms were available for prosecuting individuals accused of war crimes, genocide and crimes against humanity. Subsequently, that led to a larger, more controversial issue as to whether it was appropriate for states to intervene to protect civilians in other nations who were victims of grave crimes under international law.

These questions remained open for another 50 years, as tension rose between maintaining respect for national sovereignty and a desire to prevent impunity for atrocities and war crimes. The idea of enforcing international humanitarian law to prevent such crimes by national actors grew slowly as states recognized the need for a suitable mechanism to hold individuals accountable for their actions.²⁹ Unlike rules applicable to armed conflict between national military powers, however, the laws of armed conflict was limited in its application to civil wars. Existing international legal provisions did not apply to national actors and thus, those responsible for crimes committed domestically were rarely brought to justice. With the UN Charter reinforcing state sovereignty, situations taking place within state borders were beyond the reach of international humanitarian law.³⁰ By the 1990s, however, the international community increasingly sought to apply international humanitarian norms to acts committed by national actors during intrastate conflicts.

In the aftermath of the ethnic cleansing that took place in the former Yugoslavia and the genocide in Rwanda, the international community put pressure on the UN Security Council to take action. Leaving investigations, prosecutions and punishment for acts committed during civil wars to national authorities proved an unrealistic option. More often than not those who held positions of power were

²⁶ Lawrence Weschler, “International Humanitarian Law: An Overview,” in *Crimes of War: What the Public Should Know*, Roy Gutman and David Rieff, editors, (New York: W.W. Norton & Company, 1999), page 21.

²⁷ The Fredrick K. Cox International Law Center War Crimes Research Portal, available online: http://www.law.case.edu/war-crimes-research-portal/res_gd.asp.

²⁸ Geoffrey S. Corn and Jan E. Aldykiewicz, “New Options for Prosecuting War Criminals in Internal Armed Conflicts,” *Parameters* 32 (Spring 2002), pages 30-44.

²⁹ Weschler, page 21.

³⁰ Charter of the United Nations, Article 2 (1) states that “The Organization is based on the principle of the sovereign equality of all its Members.”

engaged in some aspect of the criminal behavior. Hence, the former Yugoslavian and Rwandan conflicts led to one of the most profound developments in international humanitarian law since the end of World War II – the creation of international judicial mechanisms designed to bring to justice those who commit crimes against their own nationals.

Three modern tribunals have built on, and expanded, the crimes investigated by the earlier courts after World War II. The International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993 through the Security Council, expanded the Nürnberg and Far East Tribunals definition of crimes against humanity and war crimes to include rape, persecution, and other inhumane acts committed during the Yugoslav wars.³¹ Additionally, ICTY jurisdiction expanded upon crimes against peace (today referred to as crimes of aggression), which were originally included within the Nuremberg and Far East Statutes.³² The International Criminal Tribunal for Rwanda (ICTR), established in 1994, differed from the ICTY in that its main focus was on the crime of genocide and crimes against humanity, noting in particular the brutal nature and means of mass killing.³³ The Special Court for Sierra Leone, the third in the series of *ad hoc* tribunals established by the UN Security Council,³⁴ further expanded international humanitarian norms by elaborating on the definition of rape³⁵ and by identifying the military conscription of children under the age of 15 as a violation of international humanitarian law.³⁶

With the creation of each new *ad hoc* tribunal, the international community broadened the scope of international humanitarian law, identifying and condemning new means of warfare utilized by enemy combatants during armed conflict. The tribunals brought to the fore the question of state sovereignty and the circumstances under which the international community should, or could, intervene. Yet, with the three operating tribunals and others under consideration (such as for Cambodia and East Timor), the international community began experiencing what some legal scholars have referred to as “tribunal fatigue.”

Debates within the international community over the creation of a permanent international court had started to intensify in the mid-1990s, largely in response to the steep rise in violent internal conflicts after the Cold War and the lack of a sufficient permanent mechanism with which to respond. Thus, in the summer of 1998, the UN convened an international diplomatic conference to determine whether a permanent international criminal court with the jurisdiction to investigate and prosecute war criminals was possible.

³¹ United Nations Security Council, Resolution 827 (S/RES/827), 25 May 1993.

³² Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (S/25704/Add.1), Article 2 and Article 4.

³³ S/RES/955, 8 November 1994.

³⁴ S/RES/1315, 14 August 2000.

³⁵ Statute of the Special Court for Sierra Leone (S/2000/915), Article 2.

³⁶ *Ibid.*, Article 4.

The Creation of a Permanent International Criminal Court

In 1989 the General Assembly asked the United Nations International Law Commission to look into the feasibility of creating a permanent international criminal court with jurisdiction over violations of international humanitarian law.³⁷ In addition to crimes against humanity, the crime of genocide and war crimes, the General Assembly also tasked the International Law Commission to look into the crimes of drug trafficking and aggression. After receiving a draft statute from the Commission and reports from the *Ad Hoc Committee on the Establishment of an International Criminal Court* tasked with assessing substantive issues arising within the draft statute, the General Assembly created the *Preparatory Committee on the Establishment of an International Criminal Court*. The Preparatory Committee aimed to refine, consolidate and disseminate an operating text to be submitted to states prior to the convening of a diplomatic conference.³⁸ In the summer of 1998, 163 countries participated in the *United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court* in Rome. This conference reflected the international community's interest in sufficiently addressing internal conflicts, whether on the massive scale of Rwanda and the former Yugoslavia, or involving large-scale atrocities such as those witnessed in Cambodia, Liberia, Sierra Leone, and East Timor.

During the Rome Conference many issues involving the Court's operations and jurisdiction were debated. A majority of state delegations argued for creating a standing international court that was not directly part of the United Nations to avoid the possible politicization of the Court. In particular, state delegations opposed having the UN Security Council determine whether a case was sent to the Prosecutor or dismissed. These states argued that the Council was a political entity, and it should not have the ability to influence what many saw as a judicial decision better handled by experts in international criminal laws.³⁹ The five permanent members of the Security Council held significant political power with their veto rights, for example. In the end, those countries arguing for decisions to go through the Security Council were in the minority, and the Court was designed to be an independent international body whose actions are accountable only to the Assembly of States Parties that signed and ratified the Rome Statute.⁴⁰

The negotiations resulted in the creation of the *Rome Statute of the International Criminal Court*, which defined the scope of jurisdiction, the operations, and the duties of the International Criminal Court to promote the rule of law and ensure that the gravest international crimes not go unpunished. Unlike the earlier tribunals created by the Security Council, the Court was designed to be an international treaty-based institution, allowing for all states to participate in its development and influence its operations. Additionally, unlike the ICTY and ICTR, the ICC was not provided with primacy over cases that came forward, regardless of the crimes committed.⁴¹ Instead, the Court was

³⁷ United Nations, "Establishment of the International Criminal Court: Overview," available online: <http://www.un.org/law/icc/general/overview.htm>.

³⁸ *Ibid.*

³⁹ Interview with expert on international criminal justice, 5 July 2005.

⁴⁰ United Nations General Assembly, *Relationship Agreement between the United Nations and the International Criminal Court* (A/58/874), 20 August 2004 and (A/58/874/Add.1), 8 September 2004. While the Court is an institution independent of the United Nations, the relationship agreement, allows the Court to serve as an observer at the General Assembly and to report to the United Nations through the Secretary-General.

⁴¹ Bouchet-Saulnier, page 170.

designed to be a complement to national efforts by states to prosecute their own citizens domestically, while ensuring that the perpetrators of grave violations of international law would be brought to justice.

THE ICC IN ACTION

Crimes within the Court's Jurisdiction

As humanitarian law has evolved, so too have the definitions of what constitutes genocide, crimes against humanity and war crimes. The Rome Statute brought together the varied definitions of the elements of crimes from national laws; international principles highlighted within the Nürnberg and Far East Tribunals; the Statutes of the ICTY, ICTR and the Special Court for Sierra Leone; and those within conventions and treaties comprising the international humanitarian legal regime. With input from leading scholars from Islamic, civil and common legal systems, the Rome Statute provides the most comprehensive list of crimes.⁴²

Since the ICC came into being on July 1, 2002, it only has jurisdiction over those crimes committed after that date. To ensure that the ICC served only as a complement to national judicial institutions, states participating at the Rome Conference argued that the Court's powers to administer justice would only be authorized when national judicial institutions were unable or unwilling to act. Serving as a permanent institution within the international legal framework, the ICC was a solution for handling situations when those individuals committing such crimes against their own nationals included government officials, as seen with ICTY, ICTR and the Special Court for Sierra Leone.

Organs of the Court

The International Criminal Court has four organs: the Chambers, the Presidency, the Registry and the Office of the Prosecutor.

The Chambers is comprised of 18 judges divided into three divisions: the Pre-trial Chamber, the Trial Chamber and the Appeals Chamber. Each judge is elected by a two-thirds vote of the Assembly of States Parties to serve a term of either three, six, or nine years in office. The international character of the Court is demonstrated by the judges' legal training in Islamic, civil and common law, by their regional representation, and by an equitable gender balance. The Chambers also prepares the technical aspects of proceedings, in particular participation of witnesses and victims, disclosure of documents to the public, presentation of the evidence submitted, and ensuring the fairness of the trial on the behalf of the defense.⁴³

⁴² The crime of aggression will also be under the jurisdiction of the Court once the Assembly of States Parties defines the crime and the parameters for jurisdiction per Article 121 and 123 of the Rome Statute. Many interviewed for this project speculate that the crime of aggression will likely arise during the Court's Review Conference scheduled for 2009.

⁴³ United Nations General Assembly, *Report of the International Criminal Court (A/60/177)*, 1 August 2005, page 8.

The Presidency is composed of three judges, selected from the Chambers by a majority vote. The Presidency manages administration of the Court, oversees judicial actions of the Court, and maintains external relations with outside organizations and institutions that often involve negotiating agreements on behalf of the Court. As the official voice of the Court, the Presidency promotes awareness of Court activities with heads of state, parliamentarians, NGO representatives, the media and the public at large.

The Registry is responsible for all non-judicial proceedings of the Court by providing administrative and operational support to the Court under the direction of the Presidency. In particular the Registry is responsible for the financial management of the Court, developing Court policies and procedures pertaining to staff, providing assistance and security to witnesses and victims during the Court's investigations and prosecutions, as well as creating and overseeing the distribution of reparations to victims. Additionally, the Registry is responsible for establishing and staffing field offices in the areas where investigations are being undertaken. The Court has two field offices, one in the Democratic Republic of the Congo (Kinshasa) and one in Uganda (Kampala), as well as a field presence in Bunia in the DRC.⁴⁴

The Office of the Prosecutor (OTP) is responsible for receiving referrals and any substantiated information on crimes that fall within the jurisdiction of the Court, including evidence and witness testimony. The OTP evaluates these claims to determine their admissibility, initiates investigations into alleged crimes, and conducts prosecutions before the Court.⁴⁵

MECHANICS OF A CASE GOING BEFORE THE ICC

Referring a Case to the Court. There are three main ways in which a case can be referred to the Court for consideration.⁴⁶ First, a member of the Assembly of States Parties can refer a situation, requesting the Prosecutor to initiate an investigation to determine whether the crimes committed fall within the jurisdiction of the Court and if the situation warrants the issuing of indictments.⁴⁷ Second, the UN Security Council, acting under Chapter VII of the UN Charter, can refer a situation for consideration by the Prosecutor. Third, the Prosecutor may initiate investigations *proprio motu*, determining that the crimes fall within the Court's jurisdiction.⁴⁸ Additionally, non-states parties can voluntarily ask the Court to step in. Thus, except in cases where the Security Council refers a case to the Court, the ICC can only begin investigations into cases that are accepted by the state on whose territory the alleged crimes were committed or by the state of the accused person. This second provision is particularly relevant to non-party states.

Admissibility. To determine if a case is admissible, the Prosecutor must evaluate the gravity of the crimes committed, whether the state is able and willing to administer justice at the national level, and

⁴⁴ A/60/177, page 12.

⁴⁵ International Criminal Court, "Organs of the Court," available online: <http://www.icc-cpi.int/organs.html>.

⁴⁶ Rome Statute, Article 13, lays out the means by which cases may be referred to the Court for evaluation.

⁴⁷ *Ibid.*, Article 14.

⁴⁸ *Ibid.*, Article 15.

whether the pursuit of justice is in the best interest of the state at the time of the referral.⁴⁹ Admissibility depends largely on national judicial institutions – cases are not admissible if a country is able to assert complementarity and undertake investigations and prosecutions into the crimes on its own. Thus Court is intended to function as the “court of last resort,” designed to complement national systems of justice.⁵⁰ Under Article 17(1)(a), the ICC is only able to exercise jurisdiction over the most egregious crimes when it determines that national systems are “unwilling or unable genuinely to carry out the investigation and prosecution.” Even then, there will be crimes “that could theoretically meet the complementarity test for admissibility, yet remain beyond the scope of permissible ICC jurisdiction because of their minor or isolated nature and scope.”⁵¹

With a limited capacity to pursue all cases that meet the preconditions for admissibility – primarily due to a lack of resources and personnel – the Prosecutor analyzes the gravity of the crimes and utilizes that as the leading indicator for initiating investigations.⁵² Gravity is measured by the number and nature of the crimes committed, the reparations for victims affected by the atrocities and if pursuing prosecutorial channels would infringe upon the establishment of peace and justice in a country where the wounds of war are still fresh.⁵³

Complementarity. If the Prosecutor believes that the scope of the crimes are within the Court’s discretion and that investigations should be initiated, the Prosecutor must seek authorization from the Pre-Trial Chamber, which is the judicial body charged with evaluating and commencing investigations.⁵⁴ If the Pre-Trial Chamber believes there is a “reasonable basis to proceed with an investigation,” and that the case “appears to fall within the jurisdiction of the Court,”⁵⁵ the Prosecutor must notify those states and parties involved.⁵⁶ Notification by the Prosecutor to states or accused persons is confidential, to protect the identity of the accused and the victims involved.

Challenges to the initiation of investigations can then arise from accused persons, a state claiming jurisdiction over the case or a state from which the Court must receive an acceptance of jurisdiction.⁵⁷ It is at this time that a state, whether or not a member of the ICC, can exercise complementarity by informing the Court within one month of notification by the Prosecutor, that it chooses to investigate the case and, if sufficient evidence exists, to prosecute through its own national criminal justice systems. Under the Rome Statute, the Prosecutor must defer to the state’s request to investigate and

⁴⁹ Rome Statute, Article 17(1)(d) states “the case is not of sufficient gravity to justify further action by the Court.”

⁵⁰ Joshua Rozenberg, *The Court of Last Resort*, radio program, BBC Radio 4, 16 January 2006, available online: <http://www.bbc.co.uk/radio4/courtoflastresort/pip/c4hvh>.

⁵¹ Lieutenant Colonel Michael A. Newton, “Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court,” *Military Law Review* 167 (March 2001), page 39.

⁵² Rome Statute, Article 17.

⁵³ Luis Moreno-Ocampo, speech at a conference on International Criminal Tribunals in the 21st Century, American University’s War Crimes Research Office, 30 September 2005. In determining whether it is in the best interests of the victims to launch investigations, the Prosecutor must adhere to Article 53 of the Statute.

⁵⁴ Rome Statute, Article 18(4).

⁵⁵ *Ibid.*, Article 15(4).

⁵⁶ *Ibid.*, Article 18(1).

⁵⁷ *Ibid.*, Article 19.

prosecute at that national level⁵⁸ unless the Pre-Trial Chamber determines that the state is unable or unwilling to exercise jurisdiction effectively and decides to authorize the Prosecutor to investigate the claim.⁵⁹

The Pre-Trial Chamber utilizes numerous criteria to determine whether a state is unable or unwilling to investigate claims or carry out a prosecution. When determining if a state is able, the Pre-Trial Chamber considers whether “due to a total or substantial collapse or availability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”⁶⁰ The Pre-Trial Chamber uses the following standards to determine if a state is unwilling to carry out an investigation:

- the national proceedings are being conducted “for the purpose of shielding the person concerned from criminal responsibility;”
- there has been an “unjustified delay in the proceedings” which inhibits bringing the accused to justice; or
- “the proceedings are not being conducted independently or impartially.”⁶¹

Both the state and the Prosecutor can challenge the ruling of the Pre-Trial Chamber in regards to jurisdiction or admissibility and may submit an appeal to the Appeals Chamber to hear the case on an expedited basis.⁶² If the ruling is in favor of the state, the Appeals Chamber will suspend investigations or prosecution.⁶³

A case may also be deferred by the UN Security Council for a year under Article 16 of the Rome Statute, halting any ICC investigations or prosecution into a case. The Council may renew the deferment of the case by passing subsequent resolutions annually.⁶⁴ Should the Security Council choose not to defer the investigation or prosecution of a case, an appeal may be sent by the State to the Appeals Chambers.

Investigating and Prosecuting a Case. If the initiation of investigations is approved by majority vote of the Pre-Trial Chamber, the Prosecutor begins collecting evidence, seeks testimony from witnesses and victims of the crimes, and coordinates with international organizations and other states to provide any information into the alleged crimes. The Prosecutor may determine, after concluding investigations, that the allegations do not warrant prosecution. Causes for not proceeding to prosecution include: insufficient evidence or legal basis for the claim, inadmissibility, or if proceeding with the case is not in the interests of justice. In reaching this finding, the Prosecutor must notify the Pre-Trial Chamber, as well as referring parties, of its decision.⁶⁵ Conversely, if the

⁵⁸ Rome Statute, Article 18(3). Under this article, the Prosecutor may review a State’s investigation six months after deferring to a State’s request to initiate investigations at the national level.

⁵⁹ Ibid., Article 18(2).

⁶⁰ Ibid., Article 17(3).

⁶¹ Ibid., Article 17(2).

⁶² Ibid., Article 18(4).

⁶³ Ibid., Article 82(3).

⁶⁴ Ibid., Article 16.

⁶⁵ Ibid., Article 14.

Prosecutor, having evaluated all the available information and evidence, determines that the crimes committed fall within the ICC's jurisdiction, the Prosecutor may request the Pre-Trial Chamber to issue warrants for the arrest of individuals accused, summoning them to appear before the Court.

The Pre-Trial Chamber is required to inform the accused individuals of their alleged crimes and their rights before the case is sent to the Trial Chamber. Throughout the course of the trial, the Court must take appropriate measures to ensure the safety and well-being of all witnesses and those providing testimony. Additionally, the Court shall take precautions to protect any information that could possibly be deemed as jeopardizing the national security interests of the state whose nationals are appearing before the Court. If a state learns that certain documents are to be disclosed through the course of the proceedings, the state has the right to intervene to protect its security interests.⁶⁶ At that time, the state together with the Prosecutor, the Defense Counsel, the Pre-Trial Chamber or the Trial Chamber will work to resolve the matter by seeking an alternative source of evidence.

While unanimity is desired, a majority of judges render a decision in the Trial Chamber. Upon conclusion of the trial, decisions must be submitted in writing and reflect both the majority and minority opinions of the Chambers. If a guilty verdict is rendered or if the accused admits guilt, penalties are to be determined by the gravity of the crimes, the reparations entitled to the victims of the crimes, and the individual circumstances of the convicted person.⁶⁷ Penalties include imprisonment as stipulated by the Trial Chamber with the possibility of receiving a life-sentence. Other possible penalties include fines and forfeiture of property and assets, which are collected for a trust fund established on behalf of the victims.

CURRENT ACTIVITIES OF THE COURT

By January 2006, three cases had been referred to the Court by its States Parties: from the Republic of Uganda, the Democratic Republic of the Congo and the Central African Republic (CAR). A fourth case was referred by the Security Council, which directed the ICC to investigate the situation in Darfur, Sudan. The Prosecutor has yet to refer a case to the Court by his own accord.

Of those four cases, three are active: Uganda, DRC and Sudan. For the claim submitted by the Central African Republic, the Prosecutor indicated that he will monitor the situation, but encouraged the CAR government to conduct proceedings through its national prosecutorial channels which he concluded were capable of administering justice.

The Situation in the Republic of Uganda

In December 2003, the President of the Republic of Uganda, Yoweri Museveni, determined that the conflict taking place in Northern Uganda, where the Lord's Resistance Army (LRA) is terrorizing the population, was beyond the government's capacity and referred the case to the International Criminal Court. Although the conflict has plagued the country since 1987, the Court can only consider crimes since July 2002, when the Court became operational. The allegations include torture, mutilation,

⁶⁶ Rome Statute, Article 72.

⁶⁷ *Ibid.*, Articles 77 and 78.

child abduction, recruitment of child soldiers, systematic rapes, sexual abuse, forcible displacement and destruction of property. The Chief Prosecutor determined that there was a basis for launching an investigation into these alleged crimes, where there are hopes of bringing to justice those individuals responsible for the extensive suffering occurring within the Lango, Acholi, Iteso, and Madi communities.⁶⁸

After concluding investigations and collecting evidence within the region, with cooperation from the Ugandan People's Defense Force (UPDF), the Prosecutor issued sealed indictments to the Pre-Trial Chamber which were then opened on October 13, 2005. The five individuals indicted were the top leaders of the Lord's Resistance Army: Joseph Kony, leader of the LRA, and four of his senior commanders, Vincent Otti, Raska Lukwiya, Odhiambo Okot, and Dominic Ogwen. Kony faced 12 charges of crimes against humanity, including sexual enslavement and rape, as well as 21 charges of war crimes.⁶⁹

Since these investigations opened, several top LRA leaders fled to neighboring Sudan and the DRC. The Sudanese People's Liberation Army (SPLA), and the Sudanese Armed Forces joined together in an unprecedented partnership with the Uganda People's Defense Force, allowing the UPDF to carry out operations in Sudan to pursue the top leaders of the LRA who are indicted for war crimes.⁷⁰ Uganda and Sudan signed an agreement on November 19, 2005 linking together Uganda's ground security forces with intelligence gathered by UPDF, Sudanese Armed Forces and the SPLA. Sudan has authorized the UPDF to utilize the Sudanese airports and follow trails into LRA hideouts lodged deep into Sudanese territory. Nonetheless, documentation has surfaced indicating that communities within Sudan and the DRC are supporting the LRA, and that the conflict is spilling over the border into DRC and Sudan.⁷¹

While many argue that the arrest warrants will provide victims with a sense of resolve knowing justice is being served, others argue that the indictments have the potential for hindering the Ugandan peace process and could undermine what initiatives have already gained traction. Betty Bigombe, Chief Mediator for the Uganda peace process and a former Ugandan Minister, revealed frustration over the recent unsealing of the arrest warrants, arguing that confidence she had built with rebel leaders was now undercut. Several leaders of the LRA have indicated their fear that the peace talks are a mere smokescreen for the international community to arrest them, should they continue to

⁶⁸ International Criminal Court, "Background Information on the Situation in Uganda," 29 January 2004, available online: http://www.icc-cpi.int/library/press/pressreleases/Uganda_200401_EN.doc. The rebel group LRA emerged in response the election of President Yoweri Museveni, splintering off from the Ugandan People's Republic Army. According to documents received by the International Criminal Court, 85 percent of its army is composed of abducted children, ages 11-15, numbering roughly 20,000. The violence caused by the LRA includes: burning 1,946 houses and 1,600 granaries, looting 1,327 houses and 307 shops, and destroying 116 villages. The majority of the victims of the mass violence have been the Acholi population of the Gulu and Kigum/Pader districts in the north.

⁶⁹ David White, "ICC Charges 'hinder relief agency efforts' in North Uganda," *Financial Times*, 7 November 2005.

⁷⁰ Anne Mugisa and James Odong, "Three Forces to Attack Kony Rebels," *The New Vision*, 21 November 2005.

⁷¹ Edith Lederer, "Mediator Urges Security Council to Help End Civil War Between Uganda Government Rebels," *The Associated Press*, 20 October 2005.

participate in negotiations. Acting under the ICC rules of admissibility, the Prosecutor has assured the LRA that any demonstrated progress on their behalf in negotiating with the Ugandan Government will factor into the Court's decision regarding the possible suspension of prosecutions. The hunt continues for Kony, and his accomplices, yet for many in the Lango, Acholi, Iteso and Madi communities, justice will not come to Northern Uganda until they are in the hands of the International Criminal Court.

The Situation in the Democratic Republic of the Congo

The DRC ratified the Rome Statute in April 2002, making it a member of the Assembly of States Parties. In July 2003, Chief Prosecutor Luis Moreno-Ocampo held a press conference in The Hague to announce that he had received several communications regarding the ongoing violence taking place in Ituri, in the eastern DRC, and indicated then that the DRC was "the most urgent situation to be followed."⁷² However, not until a year later did the President of the DRC, Joseph Kabila, send a formal communication to the Prosecutor, requesting investigations into the crimes taking place in his country that fall within the jurisdiction of the Court.

Over 3.8 million people have lost their lives due to the violence taking place in the DRC and an additional 3.4 million people have been displaced.⁷³ Crimes being investigated include disappearances, torture, ritual cannibalism, mutilation, forced conscription of child soldiers, rape and sexual assault. Several mass graves have been discovered, where a majority of victims are women and children. Few disagree that DRC lacks the capacity to administer justice on its own. There is a shortage of trained lawyers, police and judges and many have fled due to threats on their lives. The UN-led peacekeeping mission, MONUC, is struggling to restore the rule of law to the region, but simply lacks the capacity and resources to rehabilitate both the police force and the judicial system. Extreme instability, insecurity and lack of a government presence make the situation all the more complex. The ICC has concluded a cooperative agreement with the Government and is negotiating an agreement with MONUC, both essential if the ICC is to conduct investigations. The ICC has undertaken over 50 trips to the region and its investigations into the situation have collected over 11,000 documents and 60 interviews, in addition to videos, photographs, and other evidentiary materials.⁷⁴

The Situation in Darfur, Sudan

At the urging of the UN's *International Commission of Inquiry on Darfur*, the Security Council determined the situation taking place in Sudan constitutes a threat to international peace and security. Issuing a report in January 2005, the *International Commission* charged that the Government of Sudan and the Janjaweed militia are responsible for "serious violations of international human rights law and humanitarian law," and determined that the "alleged crimes that have been documented in

⁷² Citizens for Global Solutions, *In Uncharted Waters: Seeking Justice before the Atrocities have Stopped*, June 2004.

⁷³ American Non-Governmental Organizations Coalition for the International Criminal Court, "The Current Investigation by the ICC of the Situation in the Democratic Republic of the Congo," 20 December 2005, page 3.

⁷⁴ A/60/177, pages 10-11.

Darfur meet the thresholds of the Rome Statute...”⁷⁵ The report stopped short of casting the situation in Darfur as genocide, determining that the necessary element of an “intent to destroy, in whole or in part a national, ethnical, racial or religious group” by government authorities was missing.⁷⁶

Nonetheless, the Commission noted that the crimes committed could qualify as crimes against humanity. On March 31, 2005, the Security Council adopted Resolution 1593 by a vote of 11-0 (the United States, Algeria, Brazil and China abstained), thereby referring the situation to the ICC. Unlike the DRC and Uganda, Sudan is not a State Party to the Court and did not show signs of consenting to the Court’s jurisdiction. Without the referral by the Security Council, the ICC would have been powerless to investigate crimes committed in the region and those committing atrocities would not face justice on the international stage.

Once the case was referred to the ICC, the Court Prosecutor, Luis Moreno-Ocampo, conducted a preliminary inquiry to determine the admissibility of the case and whether the crimes fell within the jurisdiction of the Court. In April 2005, the Prosecutor received over 2,500 documents, including a sealed list of 51 suspects named by the *International Commission* accused of committing grave international crimes in Darfur.⁷⁷ The African Union and other international organizations had also collected evidence, and submitted well over 3,000 documents to the Office of the Prosecutor. Soon after in June 2005, the Prosecutor announced the opening of formal investigations into the crimes. By August 2005, more than 50 people had been interviewed and over 100 groups contacted regarding the alleged crimes.⁷⁸

BEYOND THE ARCHITECTURE

The International Criminal Court is a product of modern times, but rooted in international humanitarian law that has evolved over the last two centuries. The Court is an attempt to extend protection and justice to the world’s most brutalized populations, and to provide some legal rights to citizens of countries that have only the most rudimentary judicial systems. The job is tough, and aimed at crimes that shock even those familiar with current conflicts. The ICC also reflects an effort to balance respect for state sovereignty and national legal institutions with an international capacity to investigate and prosecute individuals that have committed systematic and violent acts.

The Court’s architecture may be clear, but there are areas of ambiguity about how it will continue to evolve. Those ambiguities have worried the United States, laying grounds for arguing that the Court could hamper US military efforts and threaten American military personnel in conducting operations. While one Court advocate suggested that US opposition to the Court was “cruel” to the victims of such crimes, she nonetheless recognized the passion of those troubled by the Court and encouraged a

⁷⁵ United Nations, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005.

⁷⁶ *Ibid.*

⁷⁷ International Criminal Court, “Prosecutor receives list prepared by Commission of Inquiry on Darfur,” news release, 5 April 2005, available online: http://www.icc-cpi.int/pressrelease_details&id=99&l=en.html.

⁷⁸ A/60/177, page 11.

greater understanding of the legitimate concerns.⁷⁹ Those areas are explored next, specifically the views and concerns of US military personnel and experts on the Court.

⁷⁹ “The US Military and the International Criminal Court” workshop, The Henry L. Stimson Center, January 5-6, 2005 (hereafter “Stimson workshop”).

CHAPTER III

NOT ON THE RADAR SCREEN: CURRENT MILITARY VIEWS OF THE INTERNATIONAL CRIMINAL COURT

If a politicized ICC were to try to gain jurisdiction over alleged abuses of US soldiers, such as at Abu Graib, it could have a stifling impact on the ability and willingness of the US military to execute stability operations.⁸⁰

I hope many countries ratify the Rome Statute and the laws of war becomes more effective.⁸¹

The last thing I want to worry about is having an opposition party in said UN or the country I have just protected or liberated take me to the ICC for doing what I was told to do. It's a ploy, in my book, to tie down Gulliver, otherwise known as the great hegemon, the one and only hyper power...the United States of America.⁸²

This is not about the soldier.⁸³

When asked directly, most interviewed for this project cited concerns about the impact of the Court. Their concerns, however, led to varied judgments about whether or not the Court was an impediment to US interests, had no impact, or could be useful for meeting US goals. For some, the question of the US relationship to the Court was fundamentally a strategic, not tactical decision, and one that rested most squarely with civilian policymakers to determine. “Folks in the military don’t question policy,” pointed out one retired Air Force Colonel with policy experience. “It is not their job.”⁸⁴

Three points are noteworthy: First, most attributed their understanding and views of the Court to information they gained from *public* sources, rather than from briefings, educational courses, or from within their commands. More than one officer spoke passionately and at length about their views of the Court, and then noted that their understanding of the Court came primarily from public news sources. Second, no one interviewed found the Court to be a subject of much current discussion. The Court is not a hot topic – with the exception of those who follow the Court or were concerned with the impact it is having on limiting military assistance programs, such as the International Military

⁸⁰ Entry on a diagnostic quiz, 26 January 2006.

⁸¹ Entry on a diagnostic quiz, 12 February 2006.

⁸² Interview with US Navy Lt Commander, 27 February 2006.

⁸³ Interview with US Army General (ret.), 1 June 2005.

⁸⁴ Interview with US Army Colonel (ret.), 6 June 2005.

Education and Training program (IMET) discussed in Chapter IV. In the words of one career officer, a former Lieutenant General in the Marine Corps, the Court has not been “on my radar screen.”⁸⁵ Third, many of those interviewed had only rudimentary knowledge about the ICC, and their views of the Court often were based on a minimal understanding of how it was designed to operate. Within the expert community, those most familiar with the Court were generally the least fearful of its implications for the US military and its operations.

Concerns within the Military

This section aims to capture the basic themes and issues surrounding the ICC debate within the US military, based on interviews, expert meetings and extensive research and review of the literature. Arguments made on behalf of the US military are also considered. Where evident, points of view are separated from points of fact, and clear misunderstandings of the Court’s functions are noted.

The arguments most relating to the military – or raised by those in the military – fall into a few categories:

- *Fundamental concerns* that the Court has jurisdiction to investigate and judge behavior by US service personnel;
- *Specific operational issues* for the US military, such as a fear that the Court will hamper otherwise legal US military actions;
- *Broad political/strategic issues* raised by how the US military functions in contrast to how the Court is designed to function; and
- *Questions about trusted checks and balances* being undermined.

First things First: Are the Goals of the Court Important?

Nearly all interviewed felt that the basic goals of the Court are worthwhile. Few argued against the need for criminal accountability for those who commit systematic and grave violations of international humanitarian law, in particular war crimes, genocide and crimes against humanity.⁸⁶ In general, deterring and punishing such behavior was seen as laudatory. A few spoke directly to this point, suggesting that it was imperative to stop the ravages of war against non-combatants, since civilians today suffer the most in conflicts.⁸⁷ As one former Colonel stated, the Court made sense since there are “so many bad actors out there.”⁸⁸

An immediate question, arose, however, as to how *effective* the Court could be in achieving this goal, either as a deterrent or as a means of bringing about justice. Subsequently, the question also arose as

⁸⁵ Interview with US Marine Corps Lt. General (ret.), 27 May 2005.

⁸⁶ See also, Carolyn Willson (Minister Counselor for International Legal Affairs for the United States Mission to the United Nations), Statement on the Report of the International Criminal Court in the General Assembly, 23 November 2005.

⁸⁷ Interviews with General (ret.), 1 June 2005; Colonel (ret.), 18 January 2006.

⁸⁸ Interview with Colonel (ret.), 6 June 2005.

to how to balance that potential result with the potential risks posed to American citizens. Further, many saw benefits from going after war criminals, seeing it as the right thing to do, though few put it in the context of US national security interests. Thus, they reasoned, the Court's goals may be morally solid and praiseworthy, but the Court seemed to offer few tangible benefits to balance the potential risks US service members might face.

THE FUNDAMENTAL CONCERN: US PERSONNEL BEING JUDGED BY THE COURT

A consistent concern raised was that the Court would “look over the shoulder of a soldier” and judge his or her actions during the heat of battle. One military police officer cast it as having a “second bite of the apple,” where the Court could judge US actions, even after appropriate authorities had conducted an investigation domestically. This concern drove nearly all questions about the Court and its operations at some level. It also led to questions about the Court's accountability, its impact on future US missions, and its potential for being abused by America's critics and enemies.

Some military officers, including a few who recently served in leadership or policy positions, equated the ICC with European courts claiming universal jurisdiction, such as those in Belgium. They worried about being apprehended while traveling abroad by an institution that mirrors existing European national courts. One retired Colonel wondered if he could be “grabbed” in Spain for his work promoting US policies that differed with European views on landmines.⁸⁹

More than one officer familiar with the Court suggested that “everything changed” in 1998, when the ICTY considered cases about the NATO air strikes conducted during the Kosovo War. While the Court dismissed the charges, it served as a “wake-up call” to what the US could face with the ICC. Another retired Army officer said that at first he was “firmly” in favor of the Court, yet after word of accusations of war crimes against the US-led coalition in Kosovo, he said it “changed his mind” about the *potential* for there to be politically-based accusations made against the United States. He cautioned that this was not a display of US arrogance, asking, “Who are we to be special?”⁹⁰ For the same reason, another retired Colonel suggested that the US should be “first in line” to support the Court, in order to demonstrate US commitment to the laws of war and human rights internationally.⁹¹

Advocates of the Court argued that the charges against NATO were rightfully dropped, demonstrating the fairness of such tribunals and the future ICC.⁹² Yet, critics seized on the case to

⁸⁹ Interview with retired Army Colonel, 3 May 2005.

⁹⁰ Interview with retired Army Colonel, 6 June 2005.

⁹¹ Interview with retired Army Colonel, 18 January 2006.

⁹² See, for example, the argument by Steve Rickard: “In short, the ICC provides justice and financial support for the victims of the very worst crimes committed on the territory of countries that chose to join the Court or by the citizens of countries that join the Court. The Court only acts, however, if national authorities decline to investigate allegations of such crimes. Thus, the ICC is a safety net ‘below’ dictatorships and failed states, not an appeals court ‘above’ states. If a nation investigates an allegation in good faith – *even if it declines to prosecute* – the ICC may not intervene....For years ICC critics predicted that ‘rogue states’ like Iran, Sudan, and Syria would dominate the Court. Not one of those states has joined. In fact, of the 50 countries in the

demonstrate the opposite point: such courts were innately political and could be used again against other unpopular military actions.⁹³

Jurisdictional Reach of the Court

Although the Rome Statute stipulates that the Court is “complementary to national criminal jurisdictions,” the question is how the Court will function in practice.⁹⁴ Advocates of the Court point out that states that are able to investigate and prosecute atrocity crimes will not be brought before the Court. Critics argue that the Court is an independent institution, with few checks on its authority even from its member states, and there is no guarantee that American citizens will not be brought before the Court.

Part of the answer, obviously, lies in how the Court will operate in practice. This was of great interest to the US prior to the Court’s inception. The US helped create the concept of complementarity, which seeks to ensure that nationals are protected by justice administered domestically rather than through international channels. The argument for complementarity addressing the concerns of US military personnel, however, is not airtight and therefore, US personnel could be tried before the Court. They imagine scenarios where complementarity may not provide “protection” to US personnel from the reach of the ICC.

At Rome, the US was concerned with the definition of crimes, especially the definition of war crimes, and, to a lesser extent, the definition of crimes against humanity. The crime of genocide was the best defined and was deemed acceptable to the US delegation. Throughout the negotiations, the US stance was to seek 100 percent assurance that US service members would only be held accountable to US systems of justice.⁹⁵

The Court’s definitions of war crimes and crimes against humanity, however, leave some areas open to interpretation. The domestic laws of the United States and other countries do not cover *every*

world that Freedom House rates as ‘not free,’ only 7 are among the 97 parties to the Court,” Rickard, Stephen. “Protect U.S. Interests More Effectively by Supporting the International Criminal Court.” In *Restoring American Leadership: Cooperative Steps to Advance Global Progress*, New York: Open Society Institute and Peace and Security Institute, 2005, pages 31-36.

⁹³ See, for example, the argument by Lee Casey: “ICC supporters also have argued that the U.S. should sign and ratify the Rome Treaty because the Court would be directed against people like Saddam Hussein and Slobodan Milosevic, and not against the United States. Here, as pretty much everywhere, the past is the best predictor of the future. We already have seen this particular drama staged at the Yugoslav Tribunal. Even though that Tribunal was established to investigate crimes committed during 1991-1995 Yugoslav conflict, and even though NATO’s air war against Serbia was fought on entirely humanitarian grounds, and even though it was conducted with the highest level of technical proficiency in history, the Hague prosecutors nevertheless undertook a *politically motivated* investigation of NATO’s actions based upon the civilian deaths that resulted. At the end of this investigation, the prosecutors gave NATO a pass not because, in their view, there were no violations, but because “[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses.” In “The Case Against Supporting the International Criminal Court,” Lee A. Casey, <http://law.wustl.edu/igls/InternationalDebate/casepaper.html>.

⁹⁴ Rome Statute, Preamble, Article 1 and Article 17.

⁹⁵ Interviews with representatives of the US delegation in Rome, 28 June 2005 and 6 October 2005; comments from Stimson workshop.

crime listed within the jurisdiction of the Court. As such, many states during the negotiations requested additional time to “update” their domestic legal codes so that should any of their nationals be accused of war crimes, they would be able to assert complementarity without fear of second-guessing.⁹⁶

The Rome Statute provided those States that sign and ratify it an “opt-out” clause of seven years before they must accept the Court’s jurisdiction for war crimes charges, otherwise known as the Transitional Provision.⁹⁷ This allowed time to align the state’s domestic laws with those codified in the Statute, thereby strengthening the provision of complementarity. The United States had pushed for, but failed to win, an opt-out clause of ten years to negotiate further on the crimes outlined in the Statute; to establish more protections for US service members from exposure to prosecutions for war crimes and crimes against humanity; and to give the US more time to see what form the Court would begin to take operationally.

According to those involved, the elements of crimes laid out in the Rome Statute have been part of US military doctrine for decades. Yet the most dangerous circumstance in which a US military service member could be hauled before the court is when the actions of the US military during war are considered legitimate under US laws of war but a State Party to the ICC and/or the Office of the Prosecutor believes otherwise. One example suggested from interviews is the use of cluster bombs as a legitimate tool of war. If the US, during the process of military planning, authorizes the use of cluster bombs on what is determined to be a legitimate military target, but the result is the death of several civilians, some argue that the US could potentially be held liable for its actions under the Rome Statute for committing war crimes, based largely on the wording of Article 8. The definition for war crimes under that Article begins “The Court shall have jurisdiction in respect to war crimes in particular when committed *as part of a plan or policy* or as part of a large-scale commission of such crimes” (emphasis added).⁹⁸ If the US chose *not* to investigate allegations that military personnel had committed a war crime as part of a plan or policy, the US would forfeit its ability to assert complementarity.

Under the premise of complementarity, primary jurisdiction for any case lies first with the state’s national judicial systems.⁹⁹ If the state chooses not to launch an investigation, the case can effectively be turned over to the ICC Prosecutor. If the Prosecutor believes that the planning and act of using cluster bombs was in fact a war crime, he could assert that the US is “able but [genuinely] unwilling” to investigate. Many point out, however, that the US only needs to trigger a process of investigation to put off the Prosecutor from taking action. A counter scenario is if the US does

⁹⁶ Interview with member of US ICC negotiating team, who indicated that the French took the lead in arguing for the insertion of an “opt-out” clause, recognizing that there was second-guessing that could occur legitimately if there were no laws on their books that allowed them to prosecute for crimes that they were being accused of by the ICC.

⁹⁷ Rome Statute, Article 124.

⁹⁸ *Ibid.*, Article 8.

⁹⁹ In the Rome Statute, both the Preamble and Article 1 indicate the ICC is to be complementary to national criminal jurisdictions. Article 17(1) defines the issue of admissibility, outlining that the ICC will only step in where states are “unwilling or unable genuinely to carry out the investigation or prosecution.”

initiate investigations but takes the position that there was no proof a war crime was committed under US laws, the Prosecutor could argue that the investigation was not undertaken in good faith.

Such a scenario is unlikely as the Prosecutor would be effectively undermining the credibility of the Court by overriding a state's decision not to prosecute. Nonetheless, should a Prosecutor take the position of second-guessing a state's actions, he or she would still have to convince the Pre-Trial Chamber. Even if approved, the US would have the ability to appeal the ruling, or could seek support from the Security Council to step in and defer action on the case for a year, a deferral that can be renewed every year.¹⁰⁰

The Weight of Decision-making Made Heavier

One career officer at Stimson's workshop argued that he thought that his colleagues in the field were already worried about the Court. They have no "guarantee" that the Court will not investigate and prosecute them for doing their jobs, he argued. This launched a discussion, and military lawyers pointed out that, actually, if the soldier is doing his job, then nothing has changed. By following the chain of command and abiding by the rules of engagement (ROE), the soldier's actions on the ground are covered under the Uniform Code of Military Justice. Military personnel should fear investigation and prosecution under the UCMJ should they commit a crime while in the line of duty, but face little risk of any of their actions being second-guessed by the Court. Furthermore, if the Court was to ever step in, participants argued that the Court would be going after senior leadership personnel, not sergeants.¹⁰¹

The problem, he persisted, is that "perception is reality." Confusion about the Court among rank and file military personnel is real, and is not being assuaged on the ground. Another participant pointed out that a vague fear of the Court is the bottom line for many in the military, and until they understand how it functions both operationally and legally, they will continue to feel like their actions could be second-guessed. One advocate of the Court pointed out that this situation helped no one, and that the confidence of those deployed to do their job was paramount. Critics of the Court agreed: no one wants military personnel to carry an additional, unnecessary burden.

How to Bring Perception and Reality Together?

Prior to deployment, military personnel receive training to prepare them for their mission. This training aims to cover scenarios modeled after actual situations that units face while deployed in the field, such as in Iraq and Afghanistan.

Soldiers deployed overseas also carry with them a card detailing the ROE, which serves as guidance and keeps them within the bounds of legal action.¹⁰² The rules of engagement combine with an

¹⁰⁰ Rome Statute, Article 16 authorizes the Security Council to prevent or stop the ICC from investigating and prosecuting a crime for a period of one year and can renew such resolution under the same conditions.

¹⁰¹ Stimson workshop.

¹⁰² The Standing Rules of Engagement for US Forces are outlined as: "the Inherent Right to Self Defense: the authority and obligation to use all necessary means to protect his/her unit and other U.S. units from a hostile act or hostile intent; Unit Self Defense: Defending a particular unit of U.S. forces during any type of operations. Definitions: Hostile Act: An attack or other use of force by a foreign force or terrorist unit; Hostile Intent: Threat of imminent use of force by a foreign force or terrorist unit; Hostile Force: Any force or terrorist unit,

understanding of the mission and professional training to give military personnel an ability to respond to difficult situations in a disciplined way. When engaging the enemy, each soldier also draws on additional core principles: international human rights law; the law of armed conflict; the inherent right to self-defense; and the ethics of proportionality.¹⁰³ Internalizing these rules, soldiers then rely almost exclusively on their instincts and training as they operate. On the battlefield, personnel are trained to evaluate whether their response to an attack is excessive in relation to the concrete and direct military advantage gained by the use of force. Soldiers have “back-up” on the ground too: Judge Advocates deployed with forces can address issues related to the law of armed conflict. Yet there always remains a very human element in war. Soldiers make tactical decisions, based on the situation before them. In today’s conflicts, training aims to assure that the soldier upholds the norms and laws they are taught, even when an enemy is not.

In warfare, US armed forces often face “asymmetrical threats” from combatants who employ tactics considered illegal under US and international law. While the US must abide by the standards embodied within the Geneva and Hague Conventions, they face enemies who often misuse civilian property, such as schools or religious sites, and dress in civilian clothing, blending into the general population and otherwise endangering civilians. Military lawyers categorize these strategies as illegal and immoral forms of warfare. Troops face difficult choices, such as how to respond when a civilian at a checkpoint ignores a command to stop, or when a civilian waves a firearm. Given the stress placed on US forces facing enemies who are difficult to identify, it is ultimately dangerous for soldiers to start second-guessing their own actions during a mission or battle, fearful of potentially being evaluated by a Court that is not part of the domestic legal system to which soldiers are ultimately accountable.

OPERATIONAL AND LEGAL CONCERNS OF THE US MILITARY

Scenarios of Concern

Throughout discussions with those in the military, many people offered “what if” scenarios, including questions regarding tactical decisions, the use of weaponry, and situational responses as examples of how decisions made by US military personnel could be called into question by the ICC.

For senior military officials, there is broad concern that the international community might watch over the shoulder of the US military, critiquing strategic or tactical decisions. The principle of proportionality requires that the value of a military tactic be weighed against the incidental harm that it causes to innocent civilians. Such decisions require the balancing of objectives and therefore can be open to second-guessing. An outside actor may question whether the actions taken constitute a proportional response, but that actor may not have relevant military expertise to answer questions

with or without national identification, that has committed a hostile act, demonstrated hostile intent, or has been declared hostile. Principles of Application of Armed Force: Necessity: Armed force must be a response to a hostile act or hostile intent; Proportionality: Force used must be sufficient to decisively counter a hostile act or hostile intent, but be reasonable in intensity, duration and magnitude.” Available online: http://72.14.207.104/search?q=cache:tiPWvx2XAocJ:www.fas.org/man/dod-101/dod/docs/cjcs_sroe.pdf.

¹⁰³ *The Ethical Warrior*, Radio program, *The Connection*, WBUR, 4 March 2004.

such as those regarding other weapons that are available and can achieve the same result, while being safer and inflicting less damage to civilians.¹⁰⁴

Weaponry. The US military response to an offense, some argue, could raise questions over what weaponry is considered “legal” under the standards within the Rome Statute. Individuals interviewed offered examples such as landmines, the use of cluster bombs, and carpet bombing as cases where US judgments about legitimate use could be tested. Use of these weapons by the US military could be scrutinized internationally. More than 140 countries are party to the Ottawa Convention in support of banning the use of anti-personnel landmines, illustrative of the international community’s effort to discontinue the use of such weapons.¹⁰⁵ The United States has not signed the Convention, which came into force in 1999, but does adhere to a strict procedure when US armed forces employ landmines. Therefore, some interviewed wondered if the Court could prosecute an individual for authorizing the use of landmines.

Military officials also anticipated that the use of weapons such as cluster bombs and rocket artillery could potentially be questioned by the ICC. If munitions do not explode in the air or upon impact, they can result later in harm to civilians. Rocket artillery includes bomblets with a malfunction rate of two to three percent, suggested one expert, resulting in the potential for injuring civilians if they are found the following day.¹⁰⁶ Making decisions about using these weapons are the types of decisions that military personnel suggest could open them to scrutiny by the Court.

Training. Those charged with training US personnel try to ensure that training involves lessons learned from past and current situations, such as those facing soldiers fighting in Iraq and Afghanistan today. Training includes unconventional warfare exercises, reflecting today’s likely battlefield where the enemy uses tactics and strategies not employed by conventional soldiers. Some argue that the tactical calls made by those at the operational level require today’s military to rely more heavily on instinct and judgment, both of which are subject to scrutiny by others.

Military lawyers train constantly to determine what constitutes a lawful military target under the principles of the laws of war defined by the Hague Conventions. Yet there are always challenges, such as a case raised involving NATO’s decision to bomb the Radio Television of Serbia (RTS) Building in Belgrade in April 1999, a bombing which killed 16 civilian RTS employees. While many within the military have argued that the RTS building constituted a lawful military target, the highly complicated and calculated process used by US military leadership and lawyers to determine the legality and legitimacy of military targets is not transparent or open to outside scrutiny.¹⁰⁷

Yet the US military does go to great lengths to protect civilians when designing and executing their actions. One former policymaker recounted a briefing detailing a US military bombing campaign that took place in Afghanistan to bring down a Taliban headquarters. When the pictures from the

¹⁰⁴ See, for example, argument by Ruth Wedgwood, “Counterpoint: Is America’s Withdrawal from the New International Criminal Court Justified?” *Worldlink*, 2002.

¹⁰⁵ The treaty name is The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.

¹⁰⁶ Major Roger Carstens on *The Ethical Warrior*.

¹⁰⁷ Interview with Army JAG officer (ret.), 28 June 2005.

bombing were revealed, participants were impressed at the precision of the US strike. Determined to be a legitimate military target, the building was destroyed but every structure surrounding it stood unaffected. He noted that the US military ensured that no civilians nearby would be injured at the time of the bombing, and that the weaponry specifically was chosen for its ability to implode the building, keeping its exterior walls from collapsing into the street.¹⁰⁸

Questioning the US military's bombing practices remains the scenario most frequently offered in interviews as likely to come before the Court. Some critics argue that it is hard enough for military lawyers and combat command to agree, but that human rights lawyers would have even more trouble understanding the decision process. The point is fair, offered some Court advocates and outside critics, but the ICC is focused on the totality and intent of the actions involved, not on tactical decisions.

Scrutiny of Intelligence in an Opaque Process. Conversely, an international legal scholar argued that the lack of transparency and collaboration within US agencies and bureaus hinders the overall goal of succinctly gathering credible intelligence to inform strategic decisions by senior military leadership.¹⁰⁹ He highlighted the lack of cohesive interaction at the intelligence level to be one of the greatest weaknesses of the US military and an underlying reason for the US military leadership's adamant position against the Court.

The international legal scholar detailed discoveries made while serving on an Intelligence Task Force for the US government. The Task Force was tasked with, in particular, evaluating where gaps and weaknesses lay within US military interagency coordination and where there was duplication or potential overlap. Through interviews and research, the Task Force surmised that the leading fault lines within the US intelligence community lay in how information is gathered and assembled for senior military leaders to then apply that information more broadly in military operations. Simply put, the interagency structure suffers from being horizontal, rather than operating as a vertical hierarchy. Each of the agencies involved in protecting the country's national security interests through the collection of data and intelligence – the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, the Department of Defense, and the Federal Bureau of Intelligence – were responsible for providing accurate intelligence, and feeding that intelligence back to the Joint Chiefs of Staff.¹¹⁰

The Task Force revealed the infrequency with which the Directors of the agencies cross reference the accuracy and duplication of intelligence from other agencies. Even more striking, he noted, was the mere lack, bordering on avoidance, of agencies' willingness to collaborate on intelligence operations. As a result, the intelligence that is provided by one agency is directly contradictory to the intelligence gathered by another agency, including satellite photos, topography, and intercepts to other forms of intelligence.

¹⁰⁸ Interview with former US State Department official, 5 July 2005.

¹⁰⁹ Interview with international legal scholar, 5 October 2005.

¹¹⁰ Ibid.

An operational issue raised during Stimson's workshop was how the urgent nature of any military response made it difficult for the Joint Chiefs of Staff to double check the intelligence they received and based decisions on. Participants pointed to a particular example, that of the accidental bombing by NATO of the Chinese embassy in Belgrade, Serbia, in May 1999, a bombing which killed four civilians inside. Others commented that the US is still recovering from this grave mistake and does not want to be seen as conducting its military operations with erroneous data. The speed at which China, at an emergency meeting of the UN Security Council, accused NATO of committing war crimes remains fresh in the minds of many. This fear of being accused of war crimes by the ICC has, to some extent, kept some firmly opposed to the Court. The idea of being in a similar position brought up the acknowledgement that the US position toward the Court has some of its roots in the concern over being "politically embarrassed." The United States would not want to acknowledge that its intelligence – and therefore its decisions – is based on bad information, nor would it like to use that argument as a defense against accusations made by anyone, including at the Court.¹¹¹

Concerns over US Military Actions

When asked about the Court, many interviewed offered their concerns about current questions of US military conduct with prisoners held by the United States, in particular whether or not the US is abiding by the Geneva Conventions.

Some believed that the USA had put itself at risk of fair accusations of war crimes. For many within the international community, the acts committed against detainees both in Guantanamo and in Abu Graib fall under the definition of crimes as outlined in the Rome Statute, in particular war crimes and crimes against humanity. But the threshold for those crimes is high: the Statute requires that they be "committed as part of a plan or policy or as part of a large-scale commission" or are "widespread or systematic."¹¹² The Prosecutor is obligated to demonstrate that any action taken by a US service member was part of a large-scale commission, assuming first that all jurisdictional preconditions were satisfied.

Those interviewed offered differing opinions as to whether the US military has gone about the process of interrogating the prisoners of war held in the detention facility in Guantanamo in accordance with the Geneva Conventions. After Amnesty International equated Guantanamo to a Gulag in 2005, military commentators spoke out on the issue. In an interview on *Here and Now*, Commander Glenn Sulmasy cited that of the 2,400 interrogations in Guantanamo, only seven were confirmed by the Inspector General of the Navy as being potentially abusive, and all offenses were considered minor. Commander Sulmasy reported that the International Committee of the Red Cross (ICRC) had determined that the US was acting under the appropriate laws of the Geneva Conventions.¹¹³

A more pressing question raised about Guantanamo is the US slowness in setting up Article 5 tribunals (under Additional Protocol I) to determine if detainees should be afforded "prisoner of war"

¹¹¹ Stimson workshop.

¹¹² Rome Statute Article 7 details Crimes against Humanity; Article 8 details War Crimes.

¹¹³ *Here and Now*, Radio program, WBUR, 3 June 2005, available online: http://www.here-now.org/shows/2005/06/20050603_2.asp.

status. Some military lawyers are perplexed as to why the United States did not allow other countries to prosecute their nationals, a right the US would certainly expect were it to find US nationals in the same situation. Instead, the Bush Administration argued to the international community that the status of the prisoners as terrorists required that they be tried before US military commissions. Some interviewed expressed outrage at the US intransigence in moving forward, not launching the first military commissions until 2005 – after the first detainees were captured in 2002. These people expressed frustration at the resulting destruction to the US reputation internationally.

The US could not be tried by the ICC, however, for the recent acts conducted by reservists at the Iraqi detention facility at Abu Graib. Neither Iraq nor the United States is a State Party to the Court. The only means by which Abu Graib or a similar situation would come before the Court is through a referral from the Security Council. Yet, given the US seat on the Council and its veto power that will not happen.

Nevertheless, some senior military leadership were ashamed and appalled by what had occurred at Abu Graib. Retired members of the judge advocate community were horrified that the JAG corps, senior military commanders and senior civilian officials overseeing the operations taking place in the prison have yet to be held responsible for the actions of the prison guards. A few remarked that the Army military commanders' decision to assign untrained reservists to oversee the interrogation practices of the prison, rather than assign professionally trained interrogators, demonstrated an incredible lapse in judgment at higher ranks. Some shared the view expressed by eight retired generals and admirals who together wrote President Bush in September 2004, expressing their concern with the interrogation practices employed at both Abu Graib and Guantanamo.¹¹⁴ They argued that the ramifications of the US tactics of interrogation would make the United States vulnerable abroad and put US forces at greater risk of retaliatory acts.¹¹⁵

Culture and Training of the US Military

One retired General offered the view that the United States is one of the only nations remaining in the world where soldiers have a strong sense of nationalism.¹¹⁶ In choosing to enlist, US soldiers are embracing the “citizen-soldier mentality,” he argued, and as citizens, they believe in serving their country and see it as a duty when the nation is in a time of need. Understanding the mentality of Americans who sign up for the armed forces is important, he argued, and sheds light on the natural reaction to the idea that they could be subject to an alternative legal system with foreign judges. While he knew little about the Court, he felt that leaving room open for ICC prosecutions of Americans was a “dangerous road” to go down.

Fundamentally, many officers felt that discussions of the military concerns with the Court needed to be better understood and that the culture of the US military needed better appreciation. For example, the chain of command is the backbone behind the success of US military operations, one argued. Service members are taught to respect, not question, their superior's orders. Decisions made at the

¹¹⁴ General David M. Brahms (ret. USMC), General James Cullen (ret. US Army), et. al., Letter to President George W. Bush, 7 September 2004.

¹¹⁵ Interviews with Navy and Coast Guard lawyers, among others.

¹¹⁶ Interview with Marine Corps General (ret.), 19 October 2005.

tactical level reflect the orders of more senior leadership. Thus, if a mid-career military officer disagrees with a tactical decision and does not carry out orders, such a challenge to his Commander can be very damaging to his career. Conversely, if a tactical decision is seen as illegal or wrong, then the connection to senior leadership is almost always assured. Once you pull the bottom string on the chain of command by prosecuting those at the lieutenant-level or lower, offered one military interviewee, the chain is going to continue to unravel all the way up to the top. Those at the lower levels are responding and carrying out the orders of those above them.

This respect for leadership also impacts the willingness of military personnel to speak out. The military culture does not encourage questioning leadership, including political leadership. Those that do not follow this rule may find their career at a dead end, we were told, especially in senior ranks. One officer only chose to speak with us after his retirement, indicating that his ability to speak candidly on US involvement in the Court would have been curtailed while still in the service.¹¹⁷

Another retired officer further elaborated on this issue, and emphasized that the responsibility within a chain of command becomes more complex when a coalition of forces is involved. In coalitions, justice is administered by the national command but decisions can be made by those from outside one's nation. One senior officer offered an example from serving in a multinational force in Somalia. Canadians under his command were accused of crimes and as a result, they were sent home to be investigated by the Canadian judicial system. There was a trickle-up effect, however, where the US military was actively concerned about whether or not the top US officer would also be held responsible for the actions of the Canadian units since they were operating under his command. The argument was made that not only should the soldiers operating under his command be held accountable but that US legal advisors should be held responsible for violating international humanitarian law. This elicited another question in the context of the ICC: If Americans, in their capacity today training Iraqi military officers, have troops that do not adhere to the laws of war as they were instructed, will the US military face a potential for politically motivated prosecutions and exposure of American troops to the Court? While the US is protected in Iraq from the Court's reach (Iraq is not a State Party to the ICC), there are other countries where the US is training troops that are States Parties to the Court, demonstrating further the need to clarification.

Thus, the coalition command element invokes a different set of standards, responsibility, and accountability for possible crimes committed, with the potential for being both problematic and restrictive for troop contributing countries.

¹¹⁷ Interview with former Army JAG (ret.), 28 June 2005.

***Modern Warfare and the Geneva Conventions:
Time for a Change?***

Those interviewed raised the issue of modern warfare and the laws of war. Nearly all military officials talked about the comprehensive and extensive training that US armed services receive on Just War Theory and the Laws of War. There was significant disagreement, however, as to whether the international community needs to re-evaluate and “update” the laws under which militaries are required to act in support of international humanitarian law – primarily the Geneva Conventions. Many suggested that armed warfare has become significantly more asymmetrical than when the Conventions were drafted after World War II. The Geneva Conventions were created to address more conventional conflicts such as the First World War, a time when there was greater parity between military powers.

This issue faces the US and coalition forces in today’s operations in Afghanistan and Iraq, where the laws of war and the Geneva Conventions do not reflect the reality of combat with unconventional enemies. The weaponry of the insurgents is nowhere near the strength of the US, so as a result, they develop alternative methods of fighting that are not constrained by the laws of war understood by the US and other nations. Indeed, the whole purpose of such asymmetrical warfare is to delegitimize the other side, using whatever means to achieve an objective.

A number of people volunteered differing views on whether the Geneva Conventions required a reevaluation, lining up differently than on their views of the ICC. Some felt that because the Geneva Conventions were failing to keep up with the type of warfare US service members were facing, a third category of enemy combatants, comprising illegal combatants, should be created. If they were to be overhauled there is an inherent risk, however, that either fewer countries would agree to them or that they could be weakened. At a Law of Armed Conflict conference in Geneva and San Remo attended by military lawyers from various countries in July 2005, ICRC officials, government officials, and international NGOs discussed the “Global War on Terror” and strategies to adapt to this new kind of warfare. Significant pressure was put on US Judge Advocate representatives, who heard critiques of the US adherence to the Geneva Conventions, and the methods utilized by military leaders in the war colleges, JAG schools and academies.

US Military Law and the Uniform Code of Military Justice

In regards to military actions being lawful under the Statute, some within the military contend that within the broader US legal system, military lawyers are the most careful and credible law-abiding group, primarily due to the type of laws to which they adhere. Prior to the Hague Conventions signed in 1910 detailing the laws and customs of war, a soldier’s actions were critiqued only by his commander. Now the soldier’s actions are scrutinized by a military lawyer *and* his commander. While this has added another layer onto the review process and potentially another set of restrictions, the military argues that such level of review should allow the US some degree of exception from possible prosecution before the International Criminal Court.

Gaps and Differences between the UCMJ and the Rome Statute

Although there was disagreement, many US military judge advocates interviewed indicated that the strongest concerns lay largely within the civilian leadership of the Pentagon. One retired Colonel argued that if a senior JAG officer serving within the military were to read the Statute as it is written and was asked to comment on where US service members were possibly unprotected due to gaps between the Statute and the Uniform Code of Military Justice, they would take the position that there are none.

US service members are protected not only by the principle of complementarity, but also by the US being able to assert an “Article 32 investigation” under the UCMJ, allowing for a grand jury to be sufficient enough to block an investigation by the ICC Chief Prosecutor. US service members are also protected under the Commanders Preliminary Inquiry.¹¹⁸ If an allegation is brought forth to a Commander regarding one of his troop members, he is required, by law, to investigate that charge and if the allegations are credible, to put it forth for military court martial. By default, such investigations would trigger the protection of complementarity, affording US custody over the case.

One of the starkest differences between both the US Code and UCMJ in contrast to the Rome Statute is the absence of the death penalty in the Statute. According to the UCMJ, punishment for committing a war crime ranges from fining the accused to imprisonment to the death sentence. However, under the Rome Statute penalties include¹¹⁹ only imprisonment, fines and the forfeiture of proceeds, property, and assets.¹²⁰

Another area raised as a concern is the possibility that a US service member is charged for a crime that was not committed within his or her official capacity while deployed overseas. For example, the crimes of rape or beating are actions not protected under Status of Forces Agreements (SOFA), which are negotiated between a host country and a foreign nation with forces deployed in that country. Traditionally, SOFAs only cover a service member for actions they undertake within their military duties. Their actions outside their duties domestically fall under the US Constitution. Conversely, military judge advocates point out that the US Constitution does not follow any US national to foreign lands. Once a US national is on the soil of a foreign country, the national is held accountable to the jurisdiction of the host state. Therefore, actions taken by a service member, or any US national on foreign soil, could be tried before a foreign court unless the US has negotiated an agreement with the host state that designates that US nationals are to be held accountable to US judicial systems.¹²¹

¹¹⁸ Major Derek I. Grimes, Major John Rawcliffe and Captain Jeannine Smith, eds., *Operational Law Handbook 2006* (Charlottesville, Virginia: The Judge Advocate General’s Legal Center and School – US Army, 2006), pages 34-35.

¹¹⁹ Rome Statute, Article 77.

¹²⁰ US Code, Title 18, Part 1, Chapter 118, Section 2441, states “Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.”

¹²¹ Robinson Everett, “American Servicemembers and the ICC,” in *The United States and the International Criminal Court: National Security and International Law*, eds. Sarah Sewall and Carl Kaysen (New York: Rowan & Littlefield Publishers, 2000).

ICC Statute in Contrast to the US Code

In conversations with both proponents and opponents of the Court, many suggested that while the US has objected to the Court's potential authority over US service members, what really lies behind that concern is the recognition that those most vulnerable to the scrutiny of the Court are notably higher up in the chain of command: the civilian and senior military leadership.

Legal experts, both in the military and outside, pointed out that there were more likely to be "gaps" between the US Code and the Rome Statute than gaps with the Uniform Code of Military Justice. After retirement, military personnel are not covered by the UCMJ, but instead would be held accountable to the US Code, in particular Title 10 and Title 18. For some retired military personnel, this was an area of some concern.

These individuals offered that former leaders, in particular the "Henry Kissingers of the world," are most at risk. Indeed, they stressed that as the main concern for the US: that the Court will take up cases of former senior civilian leadership and military officials who, acting under the laws of war, are no longer covered by the UCMJ and therefore, potentially open to gaps in federal law where the US ability to assert complementarity is nebulous. The fear is that they could be subject to ICC prosecution for actions they did previously in uniform.

One legal scholar pointed out that several crimes defined within the Rome Statute do not appear on the US books (e.g., apartheid, persecution, enslavement, and extermination.) While similar laws exist, it would be within the competency of the Chief Prosecutor to argue before the Pre-Trial Chamber that in fact, the US does not have laws to prosecute for the crimes that have been committed. A similar situation arose in 1996, when Congressman Walter Jones (R-NC) determined through a series of investigations that civilians serving overseas under a contract with the US military were not covered under the UCMJ. It had been assumed that the US Code gave US primacy over civilians serving in a military capacity, but instead it was discovered that if a civilian serving with a military units deployed overseas is accused of a war crime, the foreign state whose territory the crimes were committed in would in fact have primary jurisdiction to try the case. Therefore, Rep. Jones authored the "War Crimes Act of 1996," which was designed to cover civilians serving in a military capacity.¹²²

To ensure that no gaps exist between the US Code, the UCMJ, and the crimes within the Court's jurisdiction, a similar effort could be made. This process would need to identify first where crimes exist in the Statute that are not covered in some context through Title 10 and Title 18 of the US Code and then draft legislation – modeled after the War Crimes Act – designed to fill gaps. This would protect former US service members and senior civilian leadership from ICC prosecution.

There is very little discussion today about the gaps in law. Scholars are aware of the potential gaps and see this area as one where the US might be able to move forward to clarify legal ambiguities that

¹²² He amended Article 18 section 2441 of the US Federal Code 2441. US Code, Title 18, Part 1, Chapter 118, Section 2441, states... "(b) Circumstances - The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

may exist, and to make corrections to US laws. This exercise would strengthen the US assertion of complementarity.

LARGER STRATEGIC IMPLICATIONS ON US MILITARY OPERATIONS

The United States holds a unique responsibility – vulnerability, some argue – as the most forward deployed nation in the world, with significant military forces in operations designed to preserve international peace and security.¹²³ Due to the size and sophistication of American capabilities, the United States often plays an active role worldwide in response to perceived threats. Some fear more situations where the US military actions are heavily scrutinized by the international community. This is especially likely when the US makes controversial decisions or takes action that is not presumed to adhere to the standards embodied within international humanitarian law and the laws of war.

While the Court is intended to promote justice and human rights around the world, Court critics have argued that it could do more harm than good in reducing threats to international peace and security if non-members fear being judged by the Court. With the Court's extended jurisdiction, some policymakers and military leaders suggest that states may be deterred from deploying forces in response to a large scale humanitarian crisis, for example. Such a "fear to respond" mentality could affect American personnel – soldiers, commanders or generals – if they believe their actions will be evaluated and critiqued by an international judge. US officials have argued that those called to serve in international interventions or peace enforcement operations deserve a certain amount of "exemption" from the court's jurisdiction, due to the current nature of war where often an unintended consequence is civilian casualties.¹²⁴ In addition to impacting strategic decisions, others have worried that fear of the Court could impact tactical decisions in the field, leading military personnel to consider limiting the use or type of fire power and/or the type of weapons that are employed.

These anxieties are often raised by those unfamiliar with the Court, although not exclusively.¹²⁵ Part of the concern is focused on how the Court would evaluate US decision-making. US military actions involve thousands of discussions and decisions relating to policy and planning. Each decision requires significant evaluation and assessment, and may use classified information from various agencies and individuals with expertise in operational law and doctrine. New threats to the United States emerge daily, and discussions about protecting national security interests with military actions must remain classified and carried out in a closed door setting. It is not possible for even a neutral body, such as the ICRC, to observe the process of determining targets, troop numbers and fire power.

Linked to this argument is the likely evaluation by both civilian and military leaders as to what constitutes a *vital* versus a *non-vital* mission, such as humanitarian interventions or peace operations, which could delay a response by the international community.¹²⁶ Conversely, a similar strategic

¹²³ William K. Lietzau, "International Criminal Law After Rome: Concerns from a U.S. Military Perspective," in *Cornell International Law Journal* 32, no. 3 (1999), page 482.

¹²⁴ Sarah B. Sewall and Carl Kaysen, "The US and the ICC the Choices Ahead," *American Academy of Arts and Sciences*, 1999.

¹²⁵ Comments during Stimson workshop.

¹²⁶ Telephone interview with Rear Admiral (ret.), 25 August 2005.

decision by commanders may be to limit the number of troops deployed within an operation or to withdraw troops entirely from a mission where significant civilian casualties are likely.

Several senior US military personnel raised the fear that military commanders will be forced to consider constraining their operations in order to protect their troops from possible ICC prosecution, and by doing so, may put US troops at risk if they act without sufficient force. While the Geneva Conventions are clear in qualifying a non-combatant as an unlawful military target, civilians are certainly used as shields or decoys by enemies utilizing unconventional tactics. Reining in American troops could result in the exposure of non-combatants to greater violence.¹²⁷

A former US diplomat articulated this concern that the US military will be evaluated in an international setting: Did the US apply just war theory? Has the response of the US military been proportional to the offenses committed? Was the target a legitimate military target? To a certain degree officials have noted that there is already an inherent questioning of the US military system within the larger international community along these lines. Other questions are likely about the aggressiveness of the US military during combat, the appearance of the use of excessive force, and the means by which the US has chosen to investigate and prosecute, where applicable, past offenses.

These concerns are broad, and relate to the fundamental concern about judgment of US actions on an operational basis, as discussed earlier. Most concerns are not directly related to specific gaps between US and ICC jurisdiction over American actions, but more characteristic of the deep anxiety military leaders have about the largely-unknown Court, whether realistic or not.

CHECKS & BALANCES: THE ACCOUNTABILITY OF THE COURT

Several senior military leaders interviewed for this project saw the lack of oversight and involvement by an outside institution over the actions of the Court as troubling and unacceptable. Indeed, its critics argue that the Court could be corrupted without such checks. Such a concern is inherent with all international institutions, but the ICC evokes this possibility by its independence.

The US questions the Court's overall ability to maintain impartiality and objectivity when faced with possible corruption on behalf of judges or prosecutors. Some US policymakers and Administration officials maintain that an international body that is not held accountable to other institutions, but instead relies on member states to serve as the checks and balances, will become inherently politicized. This could leave US personnel open to political prosecutions because the US lacks international support for many of its current policies and military actions. This, in turn, would leave those Americans carrying out US policy most vulnerable to exposure to the Court.

As designed, the Court is not accountable to other international bodies, leading to charges that it lacks sufficient checks and balances¹²⁸ to rein in a rogue ICC Prosecutor¹²⁹ or judge.¹³⁰ Participants raised

¹²⁷ Interview with Army General (ret.), 1 June 2005.

¹²⁸ Rome Statute, Article 46 allows for Assembly of States Parties to remove from office a judge, the Prosecutor, the Deputy Prosecutor, the Registrar, and the Deputy Registrar if they have been found to have

the question of the ICC facing political pressure from its member states that do not favor US unilateral actions – military or otherwise. The lack of checks and balances on the actions of the ICC, they argued, could too easily allow its Prosecutor to engage in politically-motivated investigations and prosecutions.

Those in support of the Court counter that an ICC Prosecutor who engaged in targeted behavior against one state would, by default, jeopardize not only the office's credibility but that of the ICC as a whole. A politically motivated case would have to have not only met the jurisdictional measures set in place by the Rome Statute, but also pass muster with the three judges in the ICC Pre-Trial Chamber.

Advocates point out that if the US became a State Party to the Court, it would be provided the opportunity to influence the nomination and election of judges and prosecutors to the Court.¹³¹ Today the US is unable to vote on decisions affecting the Court, but has a right to attend meetings and participate at some level. One legal scholar argued that the US still remained a signatory to the Statute, regardless of the US letter to Secretary-General Annan in May 2002 renouncing all US affiliation with the Court. In its capacity as a signatory to the Court, the US is afforded the opportunity to attend Assemble of Member States meetings, participate as an observer in discussions affecting the direction of the Court, and work with other voting Member States to help influence the direction of the Court as it moves towards trying its first cases in 2006.

Differences between the ICC and US Judicial System

The debate as to whether the US should join the ICC, for some interviewed, goes to the heart of the US Constitutional structure. US legal scholars and military lawyers opposed to the Court see it as a threat to traditional Constitutional protections afforded to American citizens since the ICC does not mirror US judicial systems, largely due to its composition being based on both common and civil law.

When US civilians choose to enlist in the military they swear an oath to uphold the Constitution of United States of America. Those in the military assert that in so doing, it is understood that as US service members representing the United States, they will be held accountable to the laws of the US and the Uniform Code of Military Justice. One retired Army General noted that were the US ever to join the Court, any US civilian who swears to uphold the US Constitution through their service to the military must also be alerted to the fact that they may be held accountable to another body – the

committed serious misconduct or a serious breach of his or her duties under the Statute or is unable to exercise the functions required by the Statute.

¹²⁹ Rome Statute, Article 42 states that the Prosecutor is to be elected through secret ballot by an absolute majority of the members of the Assembly of the States Parties and is to hold office for a term of nine years and shall not be eligible for re-election.

¹³⁰ There are three divisions (Appeals, Trial and Pre-Trial), with the 18 judges serving on the Court are spread across the three divisions. Nominations of judges are made only by State Parties to the Statute. There are two lists of candidates: List A contains judges with expertise in criminal law and procedure; List B contains judges with expertise in international humanitarian law, international human rights law as well as extensive professional legal capacity which are relevant to the judicial workings of the court. There must be equitable representation across geographical regions and gender. No two judges may be from the same country.

¹³¹ Rome Statute, Article 36 details the nomination and election of Judges. Article 42(4) details the election of the Chief Prosecutor by the Assembly of States Parties to the Court.

International Criminal Court. The General believed that fear over being tried before a foreign court could lead to recruiting and retention problem for the US.¹³² He wondered aloud how military officials enlisting soldiers will inform every mother and father that their sons and daughters could potentially be held accountable to a foreign court that is outside the US justice system.

There are certain safeguards that were drafted to maintain the honesty and integrity of the Court, but they do not replicate the traditional US system of checks and balances. With the ICC, the power of the Court is absolute as there is no other organization – or member state – that can override its ruling. Additionally, cases are heard by the Trial Chamber, a significant difference from the US federal and state system where cases are tried before a jury. While some argue that such a difference for a civilian tried before a foreign court is a violation of a US citizen's rights under the Constitution, trial before a panel of judges does parallel the US military judicial system.¹³³ Others argue that given the US military justice system and the Court's basis in complementing national systems, US military personnel will not face the Court but the US military justice system. Further, they point out that US civilians get no Constitutional protections for their actions overseas if they violate the laws of other nations. Civilians are subject to the laws of the land where they are visiting.

The Role of the UN Security Council: Safeguard or Hazard?

More than one senior officer asked why the US did not just send all cases to the ICC through the Security Council. This point was subsequently brought up during Stimson's workshop on the topic.

During the 1998 negotiations in Rome, a majority of states argued *against* the full-time involvement of the Security Council. They desired the Court to be an independent, international institution that, while having a relationship with the United Nations, should be accountable to the States Parties to the Court. The delegations opposed giving the Security Council the role of determining which cases would move forward through the prosecutorial channel, and with it, allowing its five permanent members a veto over cases for the Court. Many argued against granting the Security Council, an inherently political entity, with an ability to influence decisions by judges, in what they hoped would be an independent judicial body.

The US, however, was in strong support of the Security Council being the means by which a case could be referred to the Court. This position found little support by other state delegations. Looking at the former *ad hoc* war crimes tribunals as precedents, states acknowledged the politicking within the Security Council around the issue of war crimes. They expressed concern that the ICC could be denied the ability to be fair and impartial in investigating claims received from member states of the Court that are not authorized by the Council. For the Court to be truly international, they argued, all states, not just the five most powerful Security Council members, must have equitable representation and the ability to have a say in the governance of the Court.

During the 1998 negotiations, the US argued for having the Security Council determine the viability of a state's national judicial system and its ability to assert complementarity. The US sought to ensure that cases would not be second-guessed by the Court, especially if the US investigated and

¹³² Interview with Marine Corp General, 19 October 2005.

¹³³ Stimson workshop; See also Robinson Everett, "American Service members and the ICC."

determined that a case did not merit prosecution. Other delegations again disagreed, maintaining that such a decision – determining whether a national court system is able to effectively investigate, prosecute, and try an individual – should be done by those with competency in the legal system, not diplomats on the Security Council.

The United States expressed more fundamental concerns over the lack of Security Council involvement in areas of peace and security, namely, the ICC’s mandate over “the most serious crimes of concern”¹³⁴ that “threaten the peace, security and well-being of the world.”¹³⁵ The US saw this role as directly imposing on the authority of the UN Security Council, as provided by Chapter VII of the UN Charter for maintaining and restoring international peace and security.

Finally, during Rome, a compromise was met to establish a “relationship agreement” between the United Nations and the ICC that recognizes each institution’s objective to uphold peace and security, but defines the independent and cooperative nature whereby the Court and UN will interact.¹³⁶ The agreement details the means by which the Court will keep the UN up-to-date on its activities, in particular cases that have been referred to the Court by the Security Council.¹³⁷

In November 2005, ICC member states were briefed by the Court’s Committee on Budget and Finance as to the creation of an ICC liaison office at the United Nations. After several years of negotiations largely due to skepticism of several members of the Court when the proposal for a liaison office was first put forward, two working groups were established to evaluate whether a need was warranted for the creation of such an office. The Committee of Budget and Finance determined that in fact the office would facilitate the continued cooperation with the United Nations and the coordination with UN Mission representatives.¹³⁸

Looking at Policy

At the end of the day, some military people return to argue that decisions about the Court belong at the strategic policy level. A former military JAG officer suggested that the technical issues were “wagging the dog” about the Court – the bottom line, he said, is what did the US want to do?¹³⁹ Some senior leaders, however, felt that the US relationship to the Court affects the US role in the world, and how the US is perceived, and thus, how it behaves. The International Criminal Court “adds to the necessity of doing things right,” said one former General.¹⁴⁰

With all these military concerns on the table, a number of officers raised questions about US policy considerations. In particular, the military community noted US legislation and restrictions on US

¹³⁴ Rome Statute, Preamble and Article 5.

¹³⁵ *Ibid.*, Preamble.

¹³⁶ UN resolution A/58/874.

¹³⁷ United Nations Security Council Resolution 1593 (S/RES/1593), 31 March 2005 requires that the ICC Prosecutor report to the Security Council every six months on the actions taken by the Office of the Prosecutor.

¹³⁸ CICC, *Background Paper in Preparation for the Fourth Session of the Assembly of States Parties to the International Criminal Court*, 16 November 2005, available online: http://www.iccnw.org/documents/asp/aspdocs/2005/CICC_ASP4BackgroundPaper_16Nov05.pdf.

¹³⁹ Stimson workshop.

¹⁴⁰ *Ibid.*

military assistance because of concerns about the Court, as well as implications for US military personnel serving in UN peace operations. Those issues are addressed next.

CHAPTER IV

QUESTIONS OF CURRENT US POLICY TOWARD THE COURT

“...using IMET to encourage ICC Article 98 agreements may have negative effects on long-term US security interests in the Western Hemisphere, a region where effective security cooperation via face-to-face contact is absolutely vital to US interests...” – General Bantz Craddock, Commander of the US Southern Command, testimony to the House Armed Services Committee, 9 March 2005.¹⁴¹

While the United States is not debating whether to be a party to the International Criminal Court, there are areas where US policy and the Court intersect. These areas include US relationships with nations affected by the negotiation of Article 98 agreements; the impact of cutting US assistance to countries that do not sign these agreements; and the US relationship with the Court as it takes on cases that may complement US interests. The ramifications of potential isolation from the Court drew comments from several of those interviewed, who expressed concern about the US going to the Security Council to pursue immunity for US peacekeepers serving in UN operations, for example. Former and current officials pointed to areas of policy that the US should not ignore, such as closing any gaps in US laws to reinforce the US ability to assert complementarity and further protect US citizens, and considering how the ICC could further US strategic interests in the world.

The Court is moving forward with its first investigations, looking into genocide in Sudan, and investigating atrocities in northern Uganda and in the Democratic Republic of the Congo. With the US abstention during the UN Security Council vote to refer Darfur to the Court, the US demonstrated at least reluctant support for the Court when it aligned with American interests. The question now is will the US provide support to the Court’s investigations into Darfur, given the referral by the Council and US public statements opposing the genocide taking place?

BYPASSING COMPLEMENTARITY: US ATTEMPTS TO SEEK PROTECTIONS

Leading up to the Rome Conference, the Pentagon sent a letter to foreign military attaches in an effort to draw attention to how the proposed Statute could have a “profound affect on military troops and commanders.”¹⁴² The US provided talking points to use with government leaders and flagged areas

¹⁴¹ General Bantz J. Craddock, Regional Commander, US Southern Command, testimony before the House Armed Services Committee, 9 March 2005, available online at <http://www.house.gov/hasc/testimony/109thcongress/FY06%20Budget%20Misc/Southcom3-9-05.pdf>.

¹⁴² US Department of Defense, Letter to Military Attaches, 31 March 1998. Reportedly when foreign militaries were briefed on the Statute provisions that concerned US military officials, there was a strong response, and

of concern, such as possible infringement on national jurisdictions, the creation of an “independent prosecutor,” and a vague definition of war crimes. The Pentagon also sought to drum up support within the international military community against proposals that it saw as jeopardizing operations and capabilities.

After Rome, US concerns about the extended jurisdiction of the Court remained. Even with the deep involvement of US diplomats and military officials during the negotiations and their effective spearheading of numerous protections, the Rome Statute did not provide the US with an absolute guarantee that American uniformed personnel could not fall under the jurisdiction of the Court.¹⁴³ Court critics began a heavy campaign opposing the Court, drafting legislation to assure that the US would always maintain primacy over nationals serving overseas.

Bilateral Protections sought under Article 98

The United States has vigorously pursued agreements with more than 100 countries to protect Americans, military and civilian, from being handed over to the Court and has made the pursuit of agreements under Article 98 of the Rome Statute a priority. Termed “Bilateral Immunity Agreements” (BIAs) by Court supporters, these agreements are used by the United States to ensure that no US citizens could be surrendered or transferred to the International Criminal Court.¹⁴⁴ Relying on Article 98(2) of the Rome Statute, these bilateral agreements guarantee that no party will arrest or deport the other states’ citizens to the ICC.¹⁴⁵ In essence, they are intended to assure that any investigation or prosecution will be done by the national authorities of the accused. Because ICC jurisdiction extends to states that are not a member, the United States has sought these agreements from all countries, not just those that are party to the Court. The United States has negotiated over 100 agreements,¹⁴⁶ 42 with countries that are members of the ICC.¹⁴⁷ Of those agreements signed, only 21 have been ratified by Parliaments and 18 are considered executive agreements between heads of state and do not require ratification.

concern over what their foreign ministries have agreed to, and the potential impact on their own service members. Interview, 28 June 2005.

¹⁴³ According to interviews, delegates at the Rome negotiations noted that other State delegations did not have the same level of focus on the international laws of war as did the United States. Other states conceded a number of provisions, believing that the US would ensure suitable protections were added.

¹⁴⁴ Blas P. Ople (Secretary of Foreign Affairs, Philippines) to Ambassador Francis J. Ricciardone, Jr. (US), Note No. BFO-028-03, 13 May 2003. In this letter laying out the US agreement with the Philippines in May 2003, the language of the agreement states that no persons of one territory in the territory of another could be “surrendered or transferred by any means” to an international tribunal that was not established by the Security Council.

¹⁴⁵ Rome Statute, Article 98(2) states: “The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”

¹⁴⁶ US Department of State Press Release, “US Signs 100th Article 98 Agreement,” available at <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>. Also, see Coalition for the ICC, Summary of countries that have signed/ratified US bilateral immunity agreements, 8 January 2006, available at http://www.iccnw.org/documents/USandICC/2006/CICCFs_BIAstatus_08Jan06.pdf.

¹⁴⁷ Ibid. Of the 42 State Parties to the ICC that have signed agreements with the US, only 13 have ratified them legislatively; 8 are seen as “executive agreements” by January 2006.

In the view of many at Rome, Article 98(2) of the Statute was intended to provide States an ability to remain consistent with their international obligations under other bilateral or multilateral agreements, rather than have them conflict with the Rome Statute. There is an argument within the international community about the use of Article 98 agreements, as negotiated by the US since Rome, and whether they should be recognized as having precedent over the Court's authority.¹⁴⁸ This provision when originally included in the Statute was intended to cover Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs),¹⁴⁹ which establish the responsibilities of a nation sending troops to another country, as well as where jurisdiction lies between the United States and the host government over criminal and civil issues involving the deployed personnel.¹⁵⁰ SOFAs usually ensure that the US maintains primary jurisdiction over its troops and civilian personnel while they operate in an official capacity within a host country. SOMAs go into effect when a UN peacekeeping force or multinational operation is deployed.¹⁵¹

International legal scholars and members of the US JAG Corps involved in the drafting of the Rome Statute also express frustration with the expansive use of the Article 98 agreements to apply to *all* Americans, not just those individuals usually covered in SOFAs and SOMAs.¹⁵² This has been argued as a misinterpretation of the individuals covered by the term "sending state" in the Statute.¹⁵³ A large majority of the Article 98 agreements negotiated between the United States and other countries extend well beyond the traditional categories in a SOFA to include all US nationals, even those traveling overseas to conduct private business, not acting on behalf of the government.¹⁵⁴

Further, the ultimate judgment as to what agreements qualify as an Article 98 agreement as originally intended under the Rome Statute is determined by the Court's Chambers. There is a danger that post-Rome agreements that expand on a traditional understanding of "sending state" could put at risk the negotiated agreements the US has thus far concluded.¹⁵⁵

Some argue that the term "bilateral immunity agreements" implies that the agreements make individuals immune from investigation and/or prosecution, which is not accurate. They simply

¹⁴⁸ In comparing the language of several agreements with Article 98(2), some legal scholars have argued that the agreements are not faithful to the original intent of the drafters of Article 98(2) added to the Statute in 1998 and could compromise States Parties in meeting their obligations under the ICC Statute. Other US legal experts have argued the record is not so clear.

¹⁴⁹ AMICC, "Bilateral Immunity Agreements." Available online: http://www.amicc.org/usinfo/administration_policy_BIAs.html.

¹⁵⁰ Global Security, "Status of Forces Agreements," <http://www.globalsecurity.org/military/facility/sofa.htm>, 31 January 2005.

¹⁵¹ Amnesty International, "Article 98(2) Limited to Existing Status of Forces Agreements," <http://www.amnesty.org.il/reports/US2.html>. While most SOFAs are bilateral in nature, the United States has a multilateral SOFA with NATO members. The NATO SOFA served as a model for the United States when drafting bilateral agreements with countries post-Rome. The Model NATO SOFA is available at <http://www.nato.int/docu/basicxt/b510619a.htm>.

¹⁵² Stimson workshop.

¹⁵³ Ambassador David Scheffer, "Article 98(2) of the Rome Statute: America's Original Intent," *Journal of International Criminal Justice*, 3, 2005, page 339.

¹⁵⁴ *Ibid.*, page 333.

¹⁵⁵ Stimson workshop.

establish which country maintains jurisdiction over the accused individual.¹⁵⁶ The lead negotiator for the US delegation during the Rome Conference maintains that these agreements should instead be referred to as “bilateral non-surrender agreements,” arguing that establishing an Article 98 agreement simply ensures that any US individual will be surrendered to his or her national government and not the ICC. Once handed over to national authorities, the individual in question could be investigated, prosecuted, and brought to justice.¹⁵⁷

US LEGISLATION IN OPPOSITION TO THE COURT

American Servicemembers’ Protection Act and the Nethercutt Amendment

Citing concerns that American military personnel would be hauled before the Court, Congress passed legislation aimed at reducing cooperation with the ICC. The American Servicemembers’ Protection Act (ASPA) came into force in August 2002, shortly after the Court was created. Sponsored by House Majority Leader Tom DeLay, the legislation was a response to the functioning Court. The bill prohibits US cooperation with the Court, including communication and collaboration, extradition of individuals, funding, or sharing of classified information.¹⁵⁸ Additionally, ASPA prohibits US participation in UN peace operations in countries that are party to the Court but where the US has no Article 98 agreement, unless the UN Security Council has permanently exempted US members of the armed forces from criminal prosecution, in which case the President can waive the restriction. No such limit applies to US participation where the host country is not a party to the Court or if it is seen in the best interest of the US to participate in the peacekeeping operation. Finally, the ASPA prohibits some US military assistance – in particular foreign military financing and International Military Education and Training assistance – to countries that are party to the ICC but have not signed a bilateral agreement or executive agreement.¹⁵⁹ The President may waive this restriction once a country has entered into an agreement with the United States or if he views it as in US interests to provide the assistance. The more recent “Nethercutt amendment,” prohibits the US from providing Economic Support Funds (ESF) to countries that are a party to the Court but have not signed bilateral agreements.¹⁶⁰

¹⁵⁶ Stimson workshop.

¹⁵⁷ Scheffer, David, “Article 98(2),” page 335.

¹⁵⁸ *American Servicemembers’ Protection Act of 2002*, attached to HR 4775, Supplemental Appropriations Act of 2002.

¹⁵⁹ The bilateral agreements are treaties between the U.S. and other states, requiring legislative ratification to formally take effect. Executive Agreements, however, are guarantees against ICC prosecution signed by the respective heads-of-state. Some legal scholars contend that Executive Agreements do not carry the same weight under international law as a negotiated agreement, but until they are challenged and ruled upon, they are still sought by the Administration.

http://www.globalsolutions.org/programs/law_justice/icc/bias/legal_debate.html

¹⁶⁰ Similar to ASPA, the Nethercutt amendment allows the President, with prior notice to Congress, to authorize exemptions for NATO and major non-NATO allies from penalties, in addition to providing waivers from prohibitions to states that have concluded an agreement with the United States. Major non-NATO allies include Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea and New Zealand. The waivers were a change from the first Nethercutt Amendment that was in the fiscal year 2005 Appropriations bill where the vast majority of countries were not exempt from penalty, including NATO and major Non-NATO allies. Nethercutt

These limits on military assistance add a coercive element to US policy toward the Court. Numerous military officers and lawyers raised a concern about the impact of this strategy, arguing that it hurts US interests by limiting foreign military officers from participating in US programs and reduces longer-term connections to military leaders of other nations. Although NATO and major non-NATO allies are excluded from the restrictions and the President can waive the measures, at least 28 states are currently subject to ASPA restrictions.¹⁶¹

Military Concerns with ASPA and Article 98s: Harming US Interests and Alliances?

During discussions with faculty members at the US Army War College, some expressed frustration that notable, key countries such as Brazil could no longer send officers to participate in trainings or attend as students due to the ASPA limitations on countries without a bilateral agreement. Other military leaders pointed out that the US classroom program to train foreign military leaders in peacekeeping issues, funded through the IMET, no longer can welcome students from key countries such as South Africa, usually a strong participant and a leader of peace operations in Africa. Many military leaders see these programs as serving US interests in supporting training and building military-to-military relations. Examples include the reduction of illegal drug trafficking in Latin America and the Caribbean or efforts to stop the spread of terrorism.¹⁶² Several countries affected are in Latin America, in particular, Brazil, Costa Rica, Ecuador, Mexico, Paraguay, Peru, and Venezuela.¹⁶³

In a public expression of these frustrations, General Bantz Craddock, Commander of the United States Southern Command testified before the House Armed Services Committee about the unintended consequences these sanctions have caused for the United States:

*While the American Servicemembers' Protection Act (ASPA) provides welcome support in our efforts to seek safeguards for our service-members from prosecution under the International Criminal Court, in my judgment, it has the unintended consequence of restricting our access to and interaction with many important partner nations. Sanctions enclosed in the ASPA statute prohibit International Military Education and Training (IMET) funds from going to certain countries that are parties to the Rome Statute of the International Criminal Court. Of the 22 nations worldwide affected by these sanctions, 11 of them are in Latin America, hampering the engagement and professional contact that is an essential element of our regional security cooperation strategy...*¹⁶⁴

The IMET program, sponsored by the Department of State, provides education and training on a grant basis to military personnel from other countries here in the United States. A former professor at

Amendment, "Limitation on Economic Support Fund Assistance for Certain Foreign Governments that are Parties to the International Criminal Court," Sec 574.

¹⁶¹ Citizens for Global Solutions, "American Servicemembers' Protection Act," available online: http://www.globalsolutions.org/programs/law_justice/icc/aspa/aspa_home.html. Certain US allies are exempted under ASPA, including all NATO countries, Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, Philippines, the Republic of Korea, Taiwan, and Thailand.

¹⁶² Juan Forero, "Bush's Aid Cuts on Court Issue Roil Neighbors," *The New York Times*, 19 August 2005.

¹⁶³ Craddock testimony.

¹⁶⁴ *Ibid.*

the Naval War College spoke of the importance of having international military personnel in his classes.¹⁶⁵ He noted that often when the IMET students arrive they have general impressions, frequently false, as to what constitutes “Americanism” and what defines US military culture. The IMET program, he noted, is hugely important for dispelling those notions due to the interaction they have with US service members. As a result of the restrictions that are placed on the IMET program under ASPA and the Nethercutt amendment, the US ability to maintain some alliances is curtailed. Some expressed concern that other countries will move quickly to fill the void, such as China, stepping in to train foreign militaries that have traditionally been supported by US programs.¹⁶⁶

Many in the military welcome all genuine protections for service personnel from being brought before the ICC. Yet a common theme raised by those interviewed, in offering their views on US policy toward the Court, is the fact that ASPA and the Nethercutt amendment are emotive in tenor and lack substantive protections for military personnel.¹⁶⁷ In particular, ASPA is designed to “protect our service members” from politically motivated charges and from being tried before a foreign court, but some maintained that it heightened ill will toward the United States, and has the potential for undermining US efforts to reduce the risk of politically motivated prosecutions by denying assistance to states that are absolutely crucial in conducting US military operations.¹⁶⁸

Furthermore, interviews conducted by the project team and discussions during Stimson’s workshop revealed that one of the largest worries for the US military was the effect the economic and military sanctions would have on military-to-military alliances, especially in areas that have traditionally been a stronghold of the US. To further enhance his unease over the ramifications being felt by the ASPA legislation, General Craddock noted that the IMET program provides students from partner nations the opportunity to develop professional and personal military relationships that become invaluable in conducting future US military operations. “We now risk losing contact and inoperability with a generation of military classmates in many nations of the region [Latin America].”¹⁶⁹

A retired General noted that the military can be an important vehicle of foreign policy because of its deep military relationships from working with other nations and their leaders. He gave an example of helping reach out after 9/11 to a leader with whom the US government had few other ties.¹⁷⁰ A retired Rear Admiral concurred, cautioning that the US administration was being insensitive to the concerns of allies that have chosen to join the ICC. Bullying those nations by requiring bilateral agreements may only serve to build further resentment toward the US and fuel political accusations. He felt this approach is a grave misjudgment by the current administration as more countries will come to build alliances with other nations capable of providing them military assistance.¹⁷¹

¹⁶⁵ Interview with Commander, 4 August 2005.

¹⁶⁶ Craddock testimony; interviews, July 2005.

¹⁶⁷ Interview with Army General (ret.), 1 June 2005.

¹⁶⁸ Stimson workshop.

¹⁶⁹ Craddock testimony.

¹⁷⁰ Interview with Marine Corps General (ret.), 19 October 2005.

¹⁷¹ Interview with Rear Admiral (ret.)

UN Peacekeeping Operations

Debate over the Court has often focused on US military personnel serving in UN peacekeeping operations, and their potential vulnerability to the Court's reach. Concern for their safety has played a large role in arguments about the Court, and was raised in our interviews. Yet for all the concern that has been voiced, there are few US personnel in such UN missions. While there was considerable and heated debate over the status of US forces engaged in such missions when the Court came into existence in 2002, the United States has never provided more than a small contribution of personnel to UN operations. In June 2002, for example, the US had a total of 756 personnel serving as UN peacekeepers, of which 33 were unarmed military observers, 722 were police officers stationed primarily in Kosovo, and 1 soldier.¹⁷² By January 2006, the total number had dropped to 370 personnel, with 18 military observers, 346 police officers (still mostly in Kosovo), and 6 soldiers. The US personnel contribution amounted to less than one percent of the total UN forces deployed.¹⁷³

In spite of those low figures, US opposition to the ICC reached a boiling point in July 2002 in the UN Security Council. The US vetoed the extension of the mandate for the UN mission in Bosnia because of a lack of protections for peacekeepers from Court prosecution.¹⁷⁴ To resolve that crisis, the Security Council finally agreed to a resolution, granting immunity to individuals deployed in UN peacekeeping operations for a one year period.¹⁷⁵ This resolution was renewed for one year in July 2003, but the blanket immunities offered to UN peacekeepers expired on 1 July 2004.¹⁷⁶ Reflecting the frustration of many at the UN and internationally over US threats to block peacekeeping operations, an American advisor to the Secretary-General, UN Assistant Secretary-General John Ruggie said:

*“The United States is fully entitled not to want to join the International Criminal Court and indeed to oppose it. The problem here is not US opposition to the International Criminal Court, but the fact that UN peacekeeping has been hijacked as a tool to express America's opposition to the International Criminal Court.”*¹⁷⁷

The US sought renewal of the immunity resolution in 2004, but met strong resistance, especially on the heels of worldwide media coverage of US abuses of detainees at Abu Graib in Iraq. UN Secretary-General Kofi Annan opposed the extension, as did other Council members. Even with US

¹⁷² United Nations, Department of Peacekeeping Operations, “Monthly Summary of Contributions,” 30 June 2002.

¹⁷³ Data from the UN Department of Peacekeeping Operations. See also, “US Personnel Contributions to UN Peace Operations,” Peace Operations Factsheet Series, The Henry L. Stimson Center, Future of Peace Operations program, 31 January 2006, available online: <http://www.stimson.org/fopo>.

¹⁷⁴ The UN has a standard Status of Forces Agreement (UN DocA/45/594, 9 October 1990) which is the basis for a legal agreement between the United Nations and the host country, which defines the status of a peacekeeping operation and its members. UN personnel remain under their national laws when deployed with the UN and remain subject to those laws while serving overseas. If UN peacekeepers commit a criminal act, the standard practice is to send them home for prosecution.

¹⁷⁵ United Nations Security Council Resolution 1422 (S/RES/1422), 12 July 2002. The Council acted under Chapter VII of the UN Charter and invoked Article 16 of the Rome Statute.

¹⁷⁶ United Nations Security Council, Resolution 1487, S/Res/1487 (2003), 12 June 2002.

¹⁷⁷ *Diplomatic License*, 6 July 2002.

arguments that the 2004 renewal would be the last, the resolution failed to pass the Security Council. In its absence, the US has focused on seeking bilateral agreements and executive agreements on ICC protections, as well as providing protections through individual UN mandates for peace operations.¹⁷⁸ US policy seems more focused on establishing any possible legal protection against the Court, and will advocate whatever instrument seems best tailored to ensure such protections.

US POLICY IN CONTRAST TO MILITARY INTERESTS

Political and military goals are often at odds with one another, as pointed out by one military historian, and the strain between the two is reflected in discussions on US engagement with the Court. She noted that inevitably there are tensions that result from trying to “legalize war” and recognized that to move forward, many military service members argue that it is critical for those within US political circles to weigh the potential gains of maintaining current US policies toward the Court against the costs to the US role internationally, with a particular focus on what affects those costs have on maintaining military relationships around the world.¹⁷⁹ While many applauded efforts to prevent Americans from being vulnerable to the Court, especially post-9/11, those interviewed felt that limiting IMET and related programs was short-sighted and had hurt US interests, military and otherwise, in the long-run. In essence, the tool for leveraging Article 98 agreements was faulty, and policymakers misread how the use of coercion to win over international support for this US policy would in the end come back to hamper greater military capabilities and alliances.

As the United States continues to evaluate the Court’s actions, maintaining a skeptical, “wait-and-see” approach, it would be prudent for US policymakers to conduct an internal evaluation of their present policies and legislation that address the Court. In particular, they should evaluate the secondary effects of the US non-member status and the continuing push for Article 98 agreements world-wide, and efforts to create or re-vamp legislation hindering any US relations with the Court. In the eyes of many within the military, these policies have had adverse ramifications on areas vital to US national interests and American ability to conduct military operations.

¹⁷⁸ Ambassador James B. Cunningham, “Press Statement on the ICC at the Security Council,” 23 June 2004, available online: http://www.un.int/usa/04_111.htm.

¹⁷⁹ Stimson workshop.

CHAPTER V

LOOKING FORWARD: OPTIONS FOR NEXT STEPS

*Our greatest strength as a nation is not our military might, awesome as it is; it's not our strong economy, natural resources or even our historic individual spirit. Our greatest strength is the rightness of our cause. For generations, Americans have stood tall for the Rule of Law and in support of human rights. That's our strength; that's why other civilized nations look to us for leadership and then follow that lead. If we lose that, we will have lost our greatest weapon.*¹⁸⁰ – Admiral John D. Hutson (JAGC, US Navy, retired) in testimony to the Senate Armed Services Committee, 14 July 2005.

As the International Criminal Court takes on its first cases, the United States faces its own questions about how to relate to the Court. Leaving aside the polarized domestic and international political debates about the US joining the Court, the United States should consider what is in its best interests today, and what role it should play in forming the Court. This report has looked at key elements of that consideration, namely the views of members of the US armed forces. While many in the services may not see the Court as easing their burdens, they remain aware of both its important goals and its potential for misuse. How should the US proceed in light of US military concerns? Now, as the Court moves into administering justice, how does the US relate to the Court? There are subtle answers to these questions and good reasons for the US to be involved in its future evolution.

Given the focus on the Court's potential impact on the US military, it is worth considering what those within the services think about the Court. This better understanding of US military concerns is increasingly urgent as the ICC moves forward and as US armed forces face difficult decisions while operating in places such as Afghanistan and Iraq where insurgents do not heed the laws of war or international humanitarian law. American military personnel are deployed in record numbers worldwide, but many have no understanding of how the Court does or should impact their operations or individual decisions. Intensive US negotiations of bilateral agreements with other countries to protect US citizens from the Court have also had repercussions for military-to-military relations and international training programs. Finally, the US military shares a deep interest in the establishment of rule of law worldwide.

This chapter looks at the basic findings regarding military attitudes toward the ICC, and then considers ways forward for the United States in developing a relationship with the Court.

¹⁸⁰ Testimony, Senate Armed Services Committee, 14 July 2005. Rear Admiral Hutson is Dean and President of Franklin Pierce Law Center, Concord, New Hampshire.

BROAD VIEWS OF THE COURT WITHIN THE US MILITARY

Knowledge Gap.

Most interviewed within the military – outside of the experts in the legal and academic military communities – had only a rudimentary understanding of how the Court is designed to operate. Many senior leaders were not conversant with crimes within the ICC jurisdiction, how the Court chose cases, or the legal concept of complementarity and its relationship to the Uniform Code of Military Justice and the US Code. They attributed some of their concern to the lack of discussion within general military ranks and the fact that most of their knowledge comes from the public media. Even within the legal and educational communities, however, there was little knowledge about the Court. Some Judge Advocates, professors, and former officers had spent time looking at the International Criminal Court, but few taught it in classrooms.

Perception and Reality: Little Understanding, Real Anxiety.

Military leaders worried about the Court unfairly charging Americans with war crimes over legitimate measures taken in support of US policies that were unpopular with other countries. Numerous military officers thought that they or their colleagues could face arrest for actions they had taken in the line of duty if they traveled overseas. To fully embrace the Court, they desired full assurance that no US military personnel could be tried by the Court, and not “second-guessed.”

There also is concern that the ICC will receive legitimate accusations that US military personnel had participated in war crimes, such as in Iraq, Afghanistan or Guantanamo. Few understood the details of how, when and in what context the Court would review or pursue such cases. Some military personnel asked “why it should apply to us” if the Court was intended to step in to hold accountable those individuals committing mass atrocities in places without a functioning judicial system. Nevertheless, while many felt that the apparent benefits offered by the Court did not outweigh the risks, few expressed genuine concern that they would be apprehended. A number of officers saw the concerns as overblown, or damaging to the US position internationally.

What Problem is the Court Solving?

In general, the US military personnel interviewed understood the broad rationale for creating the International Criminal Court to investigate and punish those who commit mass atrocities including crimes against humanity, genocide, and war crimes. That understanding, however, did not lead to a view that those goals would actually be achieved or that the Court was the best means to punish such crimes. Very few in the military could describe a situation where they saw the Court helping to address a problem facing the United States, and more specifically, the US military in meeting its goals. When a scenario was posed – such as capturing a leader who had committed war crimes or spawned civil war within a fracturing state – they recognized the importance of ending impunity and promoting the rule of law. Yet few thought the Court would serve as a deterrent for war criminals, arguing that a Court in The Hague was unlikely to stop individuals from committing crimes if it met their needs domestically. Conversely, the supporters of the Court generally did not address issues that directly concern US military personnel or military leaders; many of their arguments did not resonate with military leaders.

Overall, in the absence of a clear, strategic argument for the Court postured by the US administration, or sufficient evidence that the Court is providing a useful service that benefits US interests or provides an obvious service internationally, US military personnel predominantly see the ICC as an added risk. Simply put, it is another institution that could impinge on US military capabilities when trying to execute inherently complicated operations. Some senior leaders, however, felt that the US relationship to the Court affects the US role in the world – how the military is perceived, affects how it behaves, globally. One former General said the ICC “adds to the necessity of doing things right.”

VIEWS WITHIN THE MILITARY LEGAL AND EXPERT COMMUNITY

For those within the military expert community familiar with the Court’s operations, there was a wider range of opinions about the problems and benefits of the Court. Some felt that there was merit in the US supporting the ICC in theory, but were cautious about the Court today. Nearly all, however, believed that the United States should be engaged in the development of the Court and help guide it toward functioning most effectively and with maximum support to US interests.

Few believed there were wide differences between the crimes under the jurisdiction of the Court and crimes within the Uniform Code of Military Justice that would expose US personnel to the Court. Since US military lawyers were instrumental in drafting the elements of crimes outlined in the Rome Statute, they ensured that most of the crimes were consistent with those outlined in the UCMJ and gave strength to complementarity for the US. Small areas of potential gaps, they argued, could be addressed through existing military laws. The larger questions are more likely to arise over how the crimes are interpreted, the severity of the penalty, and how complementarity is applied to an opaque US military justice system, in particular, the use of certain weapons and methods of warfare employed (e.g., use of cluster bombs).

There could be gaps between US domestic law and the Court’s areas to investigate or prosecute. There are crimes within the ICC jurisdiction that may not match up with those specified in US national laws (e.g., apartheid). Nearly all military experts agreed that where gaps in non-military US laws existed, it might be valuable to clarify and consider a viable way for addressing and closing those gaps to ensure US citizens are always protected.

Within the military expert community, there was strong interest in US equities being addressed through US engagement in the upcoming 2009 review conference for the Court. Those familiar with the Court felt that the US had major interests in its future treatment of crimes, including defining the crimes of aggression, terrorism, and drug-trafficking. Other issues included a possible expansion of the definition of crimes against humanity; whether the seven-year opt-out clause for war crimes would be sustained; and other issues that could affect military coalitions operating together. Nearly all felt that an effort to influence the Court as it moves forward could be fruitful. Few expressed any concern about engaging; indeed, many felt the Court was better for US participation in the first place.

Few in the military suggested that either the Court or the US role in the Court was currently being debated or discussed within their ranks at all, however. A few spoke of “hearing” more about the

Court during the late 1990s and through 2002, and engaging in conversations at those times. Within the academic circles of military professionals, there appeared to be little taught about the Court and few professors for whom this was an area of expertise.

MOVING FORWARD

Recognizing the legitimate concerns that exist for the military community today, the debate over the Court needs to look past old arguments to move ahead. Here we offer options for the US relationship with the Court that reflect the views of the military and their recommendations for moving forward.

The Court is designed to protect victims of large scale atrocities and to help restore justice in regions without functioning and accountable state systems, or where state institutions are unwilling to act in the face of great violence. To that end, some have argued that the US military should welcome the ICC out of pure self-interest. By strengthening and restoring the rule of law in states embroiled in violent conflict or suffering from entrenched government corruption, the Court could reduce the need for US military involvement in the world's hotspots.¹⁸¹ Advocates in the NGO community, in particular, have fervently argued that the Court is designed to administer justice and eliminate impunity for those who commit grave crimes under international law. They assert that the Court's mandate upholds the democratic values touted by the United States. On this point even some critics agree: a long term interest for the US is helping to promote transitional justice in post-conflict environments, and the Court offers one means of helping meet this goal of the United States in the long-term.

For their part, many senior US military leaders and government officials agree in principle about the promotion of international humanitarian law and the laws of war. They also maintain that the US will refuse to become a State Party as long as the Court operates without sufficient safeguards to ensure that the US maintains jurisdiction over its nationals and the Court provides assurance against unfair political accusations being taken up by the Court. This review reflects concern that because US service members frequently respond to large-scale crises and deploy to regions of instability, they are uniquely vulnerable to prosecution by an unaccountable Court. Such views often ignore or disregard the Court's actual, limited capacity today for prosecuting the kinds of crimes that might be committed by US service members, but they have nonetheless turned the Court into an international "boogey-man" for many and left the US wary of its reach.¹⁸²

Indeed, some military observers of the Court make a clear point: US military personnel should not be shielded from the full brunt of the law if they commit crimes, including atrocity crimes, but the vigorous prosecution they face will and should come from the United States government. Senior officers emphasized that there should be no argument against the US fairly and sternly prosecuting those who break American laws against torture, war crimes and the other crimes within the Court's jurisdiction. As one retired General suggested, capturing a common point: "Fear is good if it is fear

¹⁸¹ Interview with international criminal justice experts, 5 July 2005, 27 February 2006.

¹⁸² Stimson workshop.

of our own justice system in the face of legitimate charges.”¹⁸³ A former Bush Administration senior official agreed, arguing that the issue with the Court is *not* to defend Americans who break laws: “We don’t want to torture people.”¹⁸⁴

Therefore, the question becomes what is the best way forward and how might the US engage to support its equities? While a few within the US military community believe the US should sign onto the Court, most interest lies in ensuring that the US participate in the upcoming review process that is scheduled to take place in July 2009. The US has not shown an intention to participate, however. One Air Force JAG expressed concern that the US was taking an isolationist position toward the Court and jeopardizing its bargaining powers.¹⁸⁵ Even more troubling, he and others have argued, is that any amendments tabled in 2009 and adopted in the Statute will apply *only* to those states that ratify the Statute *after* 2009. Thus, they reason, the US needs to be there.

ISSUES AT THE 2009 REVIEW CONFERENCE

Article 123 tasks the United Nations Secretary-General with convening a conference of the Assembly of State Parties to review the Statute to consider amendments seven years after its entry into force. With 2009 fast approaching, States Parties are beginning to convene committees, craft definitions, and design proposals for consideration at the conference. Many supporters and opponents of the Court appear to agree that the 2009 review conference will have an important impact on the evolution of the Court as an international body, and for that reason alone, the US should be there to help influence its direction.

Senior military leaders, US diplomats, legal scholars and NGO advocates readily point out that the present Statute is as comprehensive and instructive as it is largely because of the extensive role played by members of the US delegation during each stage of the 1998 negotiations. In 2009, eleven years after the Rome Statute was drafted, the international community has an opportunity to think strategically about the future direction of the Court and several European states are looking to the US to play as instructive and influential a role as it did in Rome.

Without ratifying the Rome Statute, the US could still influence the direction of the Court and the scope of the crimes under its jurisdiction. Even in a limited observer role, with neither voting status nor the ability to table amendments, the US could be effective. The US could participate in the pre-negotiations leading up to the 2009 review conference, where representatives from the US military and diplomatic communities could address discussions defining crimes. Attending the conference, the US could help preserve protections for its service members and ensure that any new jurisdiction given to the Court does not infringe on future US military operations.

The Court is a permanent international institution, on a path toward redefining aspects of international humanitarian law. The risks incurred by non-participation, therefore, are great. Further,

¹⁸³ Interview with Army General (ret.), 24 January 2006.

¹⁸⁴ Interview with Ambassador (ret.), 28 January 2006.

¹⁸⁵ Interview with Air Force officer (ret.), 31 August 2005.

some critics and advocates have even argued that the US ought to consider the benefits of becoming a State Party – such as gaining use of the opt-out clause and full participation in Court decisions – rather than reject it solely altogether on principle.¹⁸⁶

Efforts by States Parties to Define the Crime of Aggression

Article 5 of the Rome Statute outlines the four crimes within the jurisdiction of the Court. While the Statute decisively spells out the first three—genocide, crimes against humanity, and war crimes—it is mostly silent on the fourth—aggression. Nor have conditions been outlined as to how the Court will exercise its jurisdiction over this crime.¹⁸⁷

During the 1998 Rome Conference, there were extensive debates regarding inclusion of aggression in the Statute. Many states argued that important precedents supported its inclusion, such as the Nuremberg and Far East Tribunals after World War II, where international “crimes against peace” were identified as prosecutable.¹⁸⁸ In 1967, the General Assembly convened a Special Committee which considered the issue of the crime of aggression and drafted its definition. In 1974, the General Assembly adopted that definition and clarified the role of the Security Council in determining “threats to international peace and security.”¹⁸⁹ Despite the General Assembly’s action, the States Parties to the Rome Statute did not reach consensus on a definition.¹⁹⁰ Some countries were concerned that sending military forces into a country to prevent escalating violence or to avert a humanitarian disaster could be viewed as acts of aggression, especially if it threatened the “sovereignty, territorial integrity or political independence of another state.”¹⁹¹

The US has a particularly significant stake in whether the crime of aggression is defined and adopted as part of the Rome Statute, given its high number of forward-deployed forces. Should State Parties to the Statute use the 1974 definition of aggression adopted by the General Assembly, a number of US military activities abroad could possibly become prosecutable under international law.

Many observers believe that the 2009 review conference will involve serious attempts to define aggression through an amendment to the Rome Statute. To succeed, an amendment will require extensive pre-negotiations – and ultimately the support of a two-thirds majority vote of the States

¹⁸⁶ Interviews with former Army JAG officers, June 2005.

¹⁸⁷ Rome Statute, Article 5.

¹⁸⁸ Charter of the International Military Tribunal for Nuremberg, Article 6, states “Crimes against peace: namely, planning, preparation, initiation or waging war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing acts.”

¹⁸⁹ United Nations General Assembly, “Definition of Aggression,” A/RES/3314(XXIX), 14 December 1974.

¹⁹⁰ Rome Statute, Article 5 states, “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” The relevant provisions within the United Nations Charter include Article 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendation, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security.”

¹⁹¹ UN Resolution A/RES/3314(XXIX), Article 1.

Parties.¹⁹² Furthermore, the amendment will need to be consistent with the authorities of the Security Council, which under Article 39 of the UN Charter gives the Council the power to determine what constitutes an act of aggression.

Possible Other Crimes that may be up for Review in 2009

In addition to the crime of aggression, other crimes may be proposed by member states to be included within the Court's jurisdiction, most notably corruption, drug-trafficking, and terrorism. The US has a particular interest in helping create a workable definition of terrorism. Likewise, the US could embrace a new definition of corruption and use it to promote accountability within the United Nations.¹⁹³

The 2009 conference could also include efforts to expand the definition of crimes against humanity to include non-state actors. Crimes against humanity are identified as acts "committed as part of a widespread or systematic attack directed against any civilian population...pursuant to or in furtherance of a State or organizational policy to commit such attack." Some have argued that the word "organizational" effectively extends criminal jurisdiction over groups outside government. Others believe the language is too vague and want to ensure that it extends unambiguously to non-state actors.¹⁹⁴ A final concern for the US is that the Conference could consider new crimes involving the use of specific weapons (e.g., cluster bombs, depleted uranium) that could impact the United States.¹⁹⁵

Efforts by Some States to Remove the Transitional Provision (Article 124)

While much attention has been paid to the potential *expansion* of the Statute in 2009, relatively little consideration has been put toward articles that might be *removed*, such as provisional safeguards that the US delegation negotiated into the treaty. During the 1998 negotiations, several states argued in favor of providing member states with a seven-year exemption from Article 8, which details war crimes within the Court's jurisdiction.¹⁹⁶ France took the lead in pushing for this transitional provision in order to give states time to align their domestic legal codes with the Rome Statute, thereby maintaining primary jurisdiction over their nationals under the auspices of complementarity.¹⁹⁷ While adopted at Rome, there have been preliminary discussions about its removal in 2009. The impact would be felt by the United States if it ratified the Statute and found an important grace period for reworking US law eliminated.

¹⁹² Rome Statute, Article 121, addresses the rules for amending the Statute.

¹⁹³ Stimson workshop.

¹⁹⁴ Argument offered by the Chairman of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court Drafting Committee. Stimson workshop.

¹⁹⁵ Interview with Army JAG Colonel (ret.), 27 February 2006.

¹⁹⁶ Under the Rome Statute, Article 5, "A State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory."

¹⁹⁷ Stimson workshop.

LOOKING AHEAD – CASES BEFORE THE COURT

Few disagree that some uncertainty remains as to how the Court will operate in the future. To date, the only cases that have come before the Court are three self-referrals – one which was dismissed by the Prosecutor due to the referring state’s inability to conduct domestic investigations – and one referral by the Security Council. The US does not dispute that the cases in Uganda, Democratic Republic of the Congo and Sudan demonstrate grave crimes against civilian populations; that the states in question lack sufficient capacity to investigate and prosecute; and that those accountable need to be brought to justice. Instead, the US has argued that an *ad hoc* tribunal modeled after those in Rwanda and Yugoslavia should be created and utilized instead of the Court arguing that sending cases to the ICC is “outsourcing” the deliverance of justice to The Hague.¹⁹⁸

The largest US fear about the Court has always been the potential for political prosecutions, in particular investigations launched through *proprio motu*.¹⁹⁹ Such concerns are not wholly irrational given the number of claims already sent to the Court. But advocates of the Court point out that US fear of political *prosecution* – versus *accusations* – are overblown. Yes, over 1,500 communications have been received by the Office of the Prosecutor, and close to half accuse the United States of committing crimes within the jurisdiction of the Court.²⁰⁰ Yet well over 800 have been dismissed – for insufficient evidence, lack of jurisdiction, or states’ ability to initiate their own internal investigations. In a recent press release, the Office of the Prosecutor acknowledged that it had received 240 communications concerning the situation in Iraq, but after reviewing each claim, it found that none fell within the jurisdiction of the Court.²⁰¹ Moreover, due to limited financial and human resources, the Court must prioritize its cases. It is not designed – and has little incentive – to investigate and prosecute individuals from states with comprehensive and effective domestic legal capacities.

There has been much debate over whether the ICC will serve as an effective deterrent for future crimes. If perpetrators of crimes on a massive scale are brought before a world court and prosecuted successfully, will this instill enough fear in future would-be killers to alter their behavior? Timing may affect this answer. Under *ad hoc* tribunals, the Security Council mandates were for a limited duration. Indicted war criminals such as Radovan Karadzic, Ratko Mladic and Charles Taylor remain at large still, letting the clock tick down on the mandates of the courts pursuing them. With a permanent institution, however, this equation changes: any crime committed after the Rome Statute entered into force on July 1, 2002 can be prosecuted.

¹⁹⁸ Ambassador Pierre-Richard Prosper, “Darfur, War Crimes, the International Criminal Court, and the Quest for Justice,” (lecture at The Brookings Institution), 25 February 2005.

¹⁹⁹ Rome Statute, Article 15.

²⁰⁰ While the Rome Statute stipulates that the Office of the Prosecutor must inform the Assembly of States Parties of each claim it evaluates and investigates, the Prosecutor is under no obligation to report on the number of claims filed, the details of the communications received, or whether the crimes fall within the jurisdiction of the Court.

²⁰¹ International Criminal Court, Office of the Prosecutor, “Letter to senders regarding Iraq,” 9 February 2006, available online: http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

A former US State Department official suggested that the Bush Administration's policy towards the Court is entering a cautionary, yet more progressive stage. This is an evolution from its initial approach, which was characterized by active campaigning to stop the Court in its tracks and adoption of the *American Servicemembers' Protection Act*, legislation intended to deter countries from signing the Rome Statute. When ASPA was first introduced, there were only 39 signatories to the Rome Statute. By the time it passed Congress, the Statute had already garnered 60 requisite signatures and entered into force, too late to succeed in dissuading states from joining the Court. The next phase of the Administration's policy involved simply ignoring the Court's existence, except for negotiating bilateral agreements and implementing ASPA limitations on selected countries that do not negotiate such bilateral agreements.

This US position is changing, however. Referral of the Darfur case to the Court has opened the door for the United States to relate to the Court in a new way, called "objective evaluation" by one former government official.²⁰² The Security Council resolution also directed that personnel from contributing states which are not a party to the Court, but are participating in operations in Sudan, shall not be subject to its reach, setting a precedent for Council action.²⁰³ Because the Court's activities have been well-documented since 2002, the US can now base its policy on more than mere speculation. The Court will also influence the development of the international legal system. If referral of a case to the Court is seen as in the US national interest, as is the case with Darfur, then monitoring the actions of the Court as the case proceeds will help the US determine what relationship to develop with the Court.

The US needs to think not only of what risks are involved in developing a relationship with the Court, but also what advantages would be gained if the US were to help influence its work and direction. The US could evaluate the realistic avenues for a US service member to ever be tried before the Court today and ways to further close those avenues. This could lead to clearer understanding and better lens through which to view the Court. Additionally, the US would be viewed more positively by the international community as being a "global player" were it to engage with the Court, either by assisting with the investigations in Darfur or participating in the 2009 review conference. Indeed, many close US allies are parties to the Court and influence its direction.

In addition to the possible expansion of crimes under the Court's jurisdiction, the cases that the Court will likely consider in the future are not so clear-cut. Opponents of the ICC argue that the Court is an unknown entity and therefore the US maintains its right to be exceedingly cautious when and if it chooses to become a member. Supporters of the Court acknowledge this fact yet maintain that its role was designed to uphold international humanitarian law. Therefore the minute that the ICC is viewed internationally as politicized in nature, it will jeopardize its own credibility and lose all effectiveness as a means for holding the worst criminals accountable for their actions. Yet, like all international institutions, the ICC will always be embedded with vulnerabilities. "New institutions must be given time to be seen as a natural part of the international scene," writes the President of the

²⁰² Stimson workshop.

²⁰³ UN resolution S/RES/1593.

Court, Judge Philippe Kirsch, of Canada.²⁰⁴ The survival of the Court depends entirely on its ability to maintain impartiality and uphold the vision and mission of those who saw its need and value in upholding international justice.

RECOMMENDATIONS

Identifying Solvable Problems

Stimson found a genuine interest within military circles to develop a way forward for US interests and to relate to the Court better. Both critics and supporters of the Court felt that US equities were in play and that American interests would be best served by participating in discussions about the Court's development. Likewise, many argued that US military personnel should not continue to be burdened with high anxiety about the Court, and that education was needed to clarify what, if any, vulnerabilities they faced. Dozens of individuals offered ideas for how the US could move forward in this area and with the Court.

One proposal was to establish a high-level committee of US leaders to evaluate the current activities of the Court, US interests, and the best way for the US to develop its relationship with the Court today, including an assessment of how the US should involve itself in the 2009 conference. Such a group could closely examine potential changes to the Statute in 2009, and areas where the US should focus its efforts. Under the present Statute, new crimes will automatically apply to States that sign and ratify the Statute after the conference, but not to previous States Parties.

Many recommendations were suggested by those interviewed to address their concerns and to offer a way ahead in bridging gaps that exist today. Their central points include:

- **Reduce military anxiety about the Court.** The United States needs to reduce the fear and anxiety of American military personnel by providing them with information about the Court and increasing their understanding of what, if any, vulnerabilities they might face in being brought before the Court. A better understanding is needed of how compliance with US laws, including the rules of engagement and the Uniform Code of Military Justice, addresses their concerns about being subject to international courts such as the ICC.
- **Align perception and reality.** One way to reduce anxiety about the Court while reinforcing US goals is to develop educational tools for military leaders to clarify how the ICC operates and how it might affect military personnel at the operational, tactical and strategic levels. Briefings should include data about the goals of the Court and how it functions, and how that is related to US operations, if at all.
- **Address US interests directly.** The United States should engage in evaluating US interests as the Court moves forward, and participate in the preparatory meetings leading to the 2009 Review Conference for the Court, as well as the Conference itself. The US should

²⁰⁴ Philippe Kirsch, "The International Criminal Court: Current Issues and Perspectives," *Law & Contemporary Problems* (vol. 64, Winter 2001).

also evaluate how to support the Court's efforts in cases of clear importance to the United States, such as for the case of Sudan. It should consider organizing UN Security Council resolutions in support of future ICC cases to give them clarity and authority.

- **Close any legal gaps.** The United States should identify any specific areas of difference between US law and the crimes within the Court's jurisdiction, and consider how to strengthen US jurisdiction and close these gaps legislatively. One tool is developing a clear "roadmap" of how a case would proceed and use it to further educate military personnel and to identify gaps between domestic law and the Court's jurisdiction.

- **Evaluate longer-term implications of the US position on the Court.** In looking ahead, US military views need to be considered, including the repercussions of the US position on coalition operations, on funding for the International Military Education and Training program and military alliances, and for US interests strategically.

This report and its recommendations offer but a few of the many avenues for moving forward in the US developing a relationship with the Court. At the end of the day, the United States strives to be a leader in its support for international humanitarian law and human rights, while also working to protect both US citizens and those who serve in the US armed forces. While there are tough questions about balancing US national goals and interests, the US military itself has offered views of the Court and ways in which to work with it in the future. Their ideas offer sensible options for the United States to remain strong in its defense of American interests while also providing support to efforts to end impunity for atrocity crimes and to bring justice against those who demonstrate the worst of humankind.

APPENDIX A:

ROME STATUTE ELEMENTS OF CRIME

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

1. For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;
 - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;
 - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are

universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8**War crimes**

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or

- transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
 - (xii) Declaring that no quarter will be given;
 - (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
 - (xvi) Pillaging a town or place, even when taken by assault;
 - (xvii) Employing poison or poisoned weapons;
 - (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
 - (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
 - (ix) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (x) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xi) Taking of hostages;
 - (xii) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;

- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xiii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

APPENDIX B:

MILITARY DIAGNOSTIC ON THE INTERNATIONAL CRIMINAL COURT

1. *What is the International Criminal Court (ICC)?*
2. *Is the ICC*
 - a. Part of the United Nations
 - b. An independent international institution
 - c. Part of the United States justice system
 - d. Part of another international tribunal (Yugoslav Tribunal, Rwandan Tribunal, Special Court of Sierra Leone)
 - e. Other:
3. *What is the intended purpose of the ICC and what kind of crimes is it designed to investigate and prosecute?*
4. *In what context have you heard about the ICC?*
 - a. Coursework
 - b. Conversations
 - c. Chain-of-Command
 - d. Newspapers and media
 - e. Other:
5. *What jurisdiction does the ICC have?*
6. *Is the United States a member state of the ICC?* Y N
7. *Do you think the ICC impacts the daily operations of those in the US military?
If so, in what way? Does it impact certain services/branches more than others?*
8. *How might a decision by the ICC affect an American unit's ability to execute its mission,
either positively or negatively? Please explain.*
9. *Have you heard of any cases being considered by the ICC?* Y N
10. *Can you cite any reasons used to argue for the ICC?*
11. *Are there any reasons to argue against the ICC?*
12. *Do you have concerns (operational, legal, strategic, or otherwise) about the ICC?*
13. *Do you believe the ICC can serve a useful purpose? Why or why not?*
14. *Does the U.S. support the ICC?*
15. *Are there any additional thoughts about the ICC you would like to share?*

APPENDIX C: WORKSHOP AGENDA

THE US MILITARY AND THE INTERNATIONAL CRIMINAL COURT: ISSUES AND IMPLICATIONS

January 5 - 6, 2006
The Henry L. Stimson Center

Thursday, January 5, 2006

WELCOME Introduction of Participants and Overview of the Project. Each working session will open with the moderator asking for short remarks by members of the workshop to launch the roundtable discussion.

SESSION I. Impact of the Court on US Armed Forces: The Rome Statute, Complementarity and US Domestic Jurisdiction

- *Article 17 of the Rome Statute and the concept of complementarity:* A review of US concerns during negotiations
- *Consideration of US legal codes:* Are the Uniform Code of Military Justice and the US Code aligned with the elements of crime outlined within the Rome Statute?
- *Identification of legal gaps:* Where are there gaps between the jurisdiction of the ICC and the US Code? What options or additional safeguards would ease US military concerns about complementarity, admissibility and related issues?

SESSION II. US Equities and the ICC: How could the Court affect US interests as it continues to develop?

- *Expanding the Court's jurisdiction:* What additional crimes might be put forward in years to come? What current safeguards might be abolished? How would this affect US military engagements or personnel?
- *Developing precedent:* How will the first cases of Uganda, Sudan, and the Democratic Republic of the Congo further define the Court? Is the case of Sudan, referred to the Court by the UN Security Council, an example where the US could see value in supporting the Court?
- *Whether to engage:* What will be considered at the 2009 Review Conference of the International Criminal Court? Does the US have an interest in the preparatory meetings and possible amendments offered to the Rome Statute at the conference?

PRELIMINARY CONCLUSIONS

- Should the US have an instrumental role in steering the Court? How might the US influence the direction of the Court as it continues to develop?

Friday, January 6, 2006

SESSION III. The Court and US Policy Issues Affecting the Military

- *Peacekeeping Operations:* Does the ICC pose unique challenges for US military personnel serving in UN, NATO or coalition-led peace operations? What are these challenges and what are the best options for handling those issues? Do Status of Forces Agreements and Status of Mission Agreements sufficiently provide the US with jurisdiction over acts committed by armed forces serving overseas?
- *Article 98s:* What is the impact of the US negotiating Article 98 agreements worldwide? How do they impact US military personnel?
- *Military Programs and Relations:* What limitations have US military assistance programs (e.g., IMET) faced when participating nations do not sign Article 98 agreements with the United States? How has that impacted US interests with allies and with countries that no longer participate in US-funded programs?

SESSION IV. Looking Forward for the US Military and the ICC

- What do workshop participants believe to be the major areas of concern for the US military as the ICC continues to develop?
- What are the avenues for addressing these concerns? Are there other areas where the US should engage?
- What is the central recommendation of every workshop participant?

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Victoria K. Holt and Elisabeth W. Dallas
Authors

ABOUT THE HENRY L. STIMSON CENTER

The Henry L. Stimson Center, a community of scholars devoted to enhancing international peace and security through rigorous, nonpartisan analysis and results-oriented outreach on many of the most enduring and challenging problems of national and international security. The *Future of Peace Operations* program serves as a vital conduit between the academic and policymaking communities, bringing high-quality research and analysis to bear on critical issues of the day. To that end, the program engages with a wide variety of actors ranging from US and UN officials to military officers and university professors, national and international non-governmental organizations (NGOs), fellow researchers, and Congressional staff. It has a proven track record in facilitating dialogue among policymakers, researchers and practitioners; of encouraging US policy support for peace operations; and of supporting better public understanding and education through its outreach work.

ABOUT THE AUTHORS

Victoria K. Holt is a senior associate at the Henry L. Stimson Center, where she co-directs the *Future of Peace Operations* program. She has co-authored a study of peacekeeping reforms at the United Nations, analyzing the implementation of the 2000 Brahimi Report recommendations, and recently completed reports on African capacity for peace operations and the protection of civilians by military forces. Ms. Holt joined the Stimson Center in 2001, bringing policy and political expertise on UN and peacekeeping issues from her work at the US Department of State, in the NGO community and on Capitol Hill. She served as Senior Policy Advisor at the US State Department (Legislative Affairs), where she worked with Congress on issues involving UN peacekeeping and international organizations. Prior to joining State, she was Executive Director of the Emergency Coalition for US Financial Support of the United Nations, and also directed the Project on Peacekeeping and the UN at the Center for Arms Control and Nonproliferation in Washington, DC. From 1987 to 1994, Ms. Holt worked as a senior Congressional staffer, focusing on defense and foreign policy issues for the House Armed Services Committee. She served as Legislative Director for Rep. Thomas H. Andrews and as Senior Legislative Assistant to Rep. George J. Hochbrueckner. Ms. Holt is a graduate of the Naval War College and holds a B.A. with honors from Wesleyan University.

Elisabeth W. Dallas is a research associate with the Henry L. Stimson Center's *Future of Peace Operations* program and is focusing her work on the restoration of the rule of law in post-conflict settings. In particular, she is analyzing what legal mechanisms are required to allow for international criminal jurisdiction within UN peace operations. Prior to working at the Stimson Center, Ms. Dallas was a Senior Fellow with the Public International Law & Policy Group in Washington, DC, where she served as a political and legal advisor for parties during international peace negotiations taking place in the Middle East, the Balkans and South Asia. Ms. Dallas earned an MA from Tufts University's Fletcher School of Law & Diplomacy with a concentration in International Negotiation & Conflict Resolution and Public International Law, as well as a Certificate in Human Security and Rule of Law. She earned her BA from Haverford College.