



**STRATEGY  
RESEARCH  
PROJECT**

The views expressed in this paper are those of the author and do not necessarily reflect the views of the Department of Defense or any of its agencies. This document may not be released for open publication until it has been cleared by the appropriate military service or government agency.

**THE INTERNATIONAL CRIMINAL COURT: AN ANALYSIS AND  
IMPLICATIONS FOR THE UNITED STATES MILITARY**

**BY**

**LIEUTENANT COLONEL WALTER E. LIPPINCOTT**  
United States Army National Guard

**DISTRIBUTION STATEMENT A:**  
**Approved for Public Release.**  
**Distribution is Unlimited.**

**SENIOR SERVICE COLLEGE FELLOW**  
AY00



**U.S. ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013-5050**

**DTIC QUALITY INSPECTED 4**

**20000801 060**

USAWC STRATEGY RESEARCH PROJECT

**The International Criminal Court: An Analysis and Implications for the  
United States Military**

by

Lieutenant Colonel Walter E. Lippincott  
Army National Guard

COL Joseph Russelburg  
Project Advisor

The views expressed in this academic research paper are those of the author and do not necessarily reflect the official policy or position of the U.S. Government, the Department of Defense, or any of its agencies.

U.S. Army War College  
CARLISLE BARRACKS, PENNSYLVANIA 17013



## ABSTRACT

AUTHOR: Walter E. Lippincott, Lieutenant Colonel, ARNG, Judge Advocate General's Corps  
TITLE: The International Criminal Court: An Analysis and Implications for the United States Military  
FORMAT: Strategy Research Project  
DATE: 4 April 2000 PAGES: 50 CLASSIFICATION: Unclassified

This paper analyzes the International Criminal Court (ICC) and its implications for the United States military. The ICC is a permanent judicial body with worldwide jurisdiction to indict and try persons for violations of international humanitarian law, including war crimes. The origins, evolution, structure, procedures, jurisdiction, constitutionality, and other significant issues surrounding the ICC are reviewed. The paper demonstrates that the ICC will have potential implications in five areas for the United States military; military doctrine, national security decision making, training, support roles, and rules of engagement. These potential implications are premised on the ICC treaty entering into force, even though the United States did not sign the ICC Treaty in Rome in July of 1998.



## TABLE OF CONTENTS

|                                                                                                        |     |
|--------------------------------------------------------------------------------------------------------|-----|
| ABSTRACT .....                                                                                         | III |
| THE INTERNATIONAL CRIMINAL COURT: AN ANALYSIS AND IMPLICATIONS FOR THE<br>UNITED STATES MILITARY ..... | 1   |
| THE HISTORY AND EVOLUTION OF THE ICC .....                                                             | 3   |
| COMPOSITION OF THE ICC .....                                                                           | 6   |
| INVESTIGATION AND PROSECUTION OF MATTERS AT THE ICC .....                                              | 7   |
| THE JURISDICTION OF THE ICC .....                                                                      | 8   |
| SUBJECT MATTER JURISDICTION .....                                                                      | 8   |
| TIME .....                                                                                             | 10  |
| PERSONAL JURISDICTION .....                                                                            | 10  |
| THE CONSTITUTIONALITY OF THE ICC .....                                                                 | 11  |
| THE UNITED STATES POSITION ON THE ICC .....                                                            | 13  |
| IMPLICATIONS OF THE ICC ON THE UNITED STATES MILITARY .....                                            | 14  |
| UNITED STATES MILITARY DOCTRINE .....                                                                  | 15  |
| NATIONAL SECURITY DECISION MAKING .....                                                                | 16  |
| TRAINING .....                                                                                         | 18  |
| ROLES .....                                                                                            | 20  |
| RULES OF ENGAGEMENT .....                                                                              | 24  |
| SUMMARY AND CONCLUSION .....                                                                           | 24  |
| ENDNOTES .....                                                                                         | 27  |
| BIBLIOGRAPHY .....                                                                                     | 41  |



## THE INTERNATIONAL CRIMINAL COURT: AN ANALYSIS AND IMPLICATIONS FOR THE UNITED STATES MILITARY

The condition of the world requires morality to be defined and degraded into compulsory law.

— Ulrici<sup>1</sup>

On 17 July 1998, the first permanent international tribunal for the trial of war crimes and other serious breaches of humanitarian law was proposed. This new tribunal is called the "International Criminal Court" (ICC). The ICC is based on a treaty, the "Rome Statute of the International Criminal Court". (Rome Statute)<sup>2</sup> 120 nations voted in favor of the Treaty. The United States, along with China, Iraq, Israel, Libya, Qatar and Yemen voted against the Treaty. There were 21 nations abstaining.<sup>3</sup> Before the creation of the ICC, the notion of a permanent international criminal tribunal with worldwide jurisdiction was only a stated intention given that all previous and current tribunals for the trial of war crimes were ad hoc in creation.<sup>4</sup>

Historically, war crimes prosecution and the creation of tribunals for their prosecution has been left to the victor of wars.<sup>5</sup> However, today, primarily due to media coverage and technology advancements, the world has entered a new modern era for war crimes and their prosecution. The Cable News Network (CNN), the Internet, other types of instant worldwide news, the presence of international non-governmental organizations representatives and their on-site reports have all changed the world view and expectations on the prosecution of war crimes.<sup>6</sup> In the modern era, there is a recognized interest in individual human rights and human dignity, which some ICC writers argue may override the sovereignty of a nation.<sup>7</sup> The modern era of war crimes prosecution is complex. No longer is it just the soldier or the victim of war crimes that views the atrocities. In the modern era atrocities are broadcast into the living rooms of citizens throughout the world through television and the computer of anyone with access to the Internet. The modern era of war crimes and their prosecution includes internal conflicts and international disputes. In the modern era, there is recognition that the victor of internal disputes may not want to try the war criminal(s) and then nothing, short of a massive political and monetary effort by an international organization creating an ad hoc tribunal, can be done to bring the perpetrator to justice. In addition, the world's largest international organization, the United Nations (UN), has problems in funding and in exerting a common standard of human rights on the world.<sup>8</sup>

All these factors led the world to consider the creation of a permanent court to try war crimes. As this paper will demonstrate, the United States Government (USG) supports the principle of establishing a permanent war crimes tribunal to try individuals, however, the USG does not support and did not sign the Rome Statute. The reasons for non-signature by the USG involve the jurisdiction and case referral process of the ICC as set out in the Rome Statute and other factors are analyzed further in this paper. The most serious objection of the USG involves the Rome Statute jurisdictional provisions.<sup>9</sup> As presently legislated, the ICC can try individuals from any nation, even if that nation did not sign and/or ratify the

Rome Statute. USG civilian and military officials involved in national security decision making and implementation are subject to the jurisdiction of the ICC under its current legislative framework. At the present time, the ICC has not entered into force (EIF). The Rome Statute set out that EIF would take place after sixty nations ratified the treaty.<sup>10</sup> To date, seven nations have ratified the treaty.<sup>11</sup> This paper is written with the expectation that the Rome Treaty will EIF.<sup>12</sup>

The questions that arise from an analysis of the ICC as to possible implications for the United States military involve five areas. The first is United States military doctrine. When the Rome Statute is fully ratified by sixty nations, and begins its process of indicting and trying accused criminals, the United States will need to evaluate its military operational doctrine. This is especially true for operations other than war.<sup>13</sup> Can full force protection be achieved without the possibility of a nation member state or an ICC prosecutor referring a case to the ICC to request that individuals from the United States be indicted and tried before the ICC for their actions in support of national security interests? If not, then how does the United States tailor its missions?

National security decision making is the second analysis area. Will national security decision making be affected by the possibility of an ICC indictment?<sup>14</sup> In operations other than war, the United States is involved in peacekeeping and humanitarian missions throughout the world. It is these types of missions where the United States must evaluate the national interests to become involved. Are the operations other than war that the United States military currently conducts worth conducting in an ICC world? Are all operations other than war in our national interest in an ICC world? Will the indictment possibility provide a chilling effect on the United States Government to become involved in these types of operations? And if the United States does not act, what then? Can an indictment issue because of a failure to act? Will the possibility of being indicted for taking peacekeeping, peace enforcement or humanitarian actions subject our leaders or commanders and the military personnel in the field, in the air or on the seas to prosecution by an entity that the United States Government did not recognize or agree is legitimate? How these areas affect national security decision making will be reviewed in this paper.

The third analysis area is training. In the area of training, the United States must evaluate and modify its training of United States military personnel in the law of war.<sup>15</sup> The ICC's definition of a war crime and other crimes within its jurisdiction, some of which according to the Rome Statute are still in the process of being defined or possibly added in later years pursuant to an amendment, must be completely understood by civilian leaders, military commanders and all military personnel. In addition, the Department of Defense (DOD) Law of War Program must be modified and instruction and guidance must be developed on the ICC and its definitions and jurisdiction of war crimes.<sup>16</sup>

The fourth analysis area involves roles the United States military may have involving the ICC. This paper will assert that the United States Government may be called upon to assist the investigation and prosecution of an ICC case. The United States Government will be requested to support the ICC with intelligence information, security and protection forces, transportation and logistics, technology and other forms of military and United States Government interagency support. The United States Government is

all over the world with the best equipped, trained and supported forces. The United States Government has the capability, equipment, and resources to make an ICC investigation complete and thorough. Other nations may have some of the capabilities as listed above to assist and support an ICC investigation, but no other nation in the world is in as many countries and with the supporting assets as the United States Government. If the United States Government is in a position to aid and support the ICC, will it? Does the United States Government's non-signature of the ICC mean that the United States Government will refuse to provide information or support when an allegation of a war crime, genocide or crime against humanity has occurred? The fifth and last area of implication is Rules of Engagement (ROE). Will the ICC's definitions of crimes and defenses change the formulation of ROE? Will the ICC make ROE formulation more complex?

This paper will analyze all these questions by beginning with a discussion of the history and evolution of the ICC.

### **THE HISTORY AND EVOLUTION OF THE ICC**

The earliest efforts to create an international war crimes court can be traced to 1872 when one of the founders of the International Committee of the Red Cross made a proposal to establish an international war crimes court for the atrocities committed during the Franco – Prussian War. This proposed court never materialized.<sup>17</sup>

After World War I, "The Great War", where the soldiers on the battlefield and the rest of the world witnessed weapons and methods of war which were of a horrific nature, attempts were again made to establish an international war crimes tribunal.<sup>18</sup> At the end of World War I, the Treaty of Versailles allowed for a post World War I international war crimes tribunal to try the individuals responsible for war crimes committed during the war, however, as with the Franco – Prussian War proposal, no international tribunal materialized.<sup>19</sup>

After World War II, the Nuremberg and Tokyo War Crimes tribunals brought nations to again discuss a permanent war crimes tribunal and to set in motion the creation of a permanent international criminal court.<sup>20</sup> This was the case, even though the Nuremberg and Tokyo war crimes tribunals differed in many ways from a permanent, standing international criminal court. They were prior to the creation of the UN, were ad hoc in composition and were "victors courts".<sup>21</sup> The Nuremberg Trials established a legacy for future war crimes tribunals in the area of individual responsibility for war crimes in the conduct of warfare.<sup>22</sup>

Following the Nuremberg Trials, the International Law Commission (ILC) of the United Nations, (UN) was required to codify the legal precedents from the Nuremberg Trials.<sup>23</sup> Subsequently, the UN General Assembly, at it's first session, adopted a resolution which became known as the "Nuremberg Principles". The Nuremberg Principles consist of five general statements of international law. These principles set the basic jurisdictional principles for the ad hoc tribunals in existence today and for the ICC. Most nations have accepted the Nuremberg Principles.<sup>24</sup>

The current concept of a permanent standing international criminal court started with the creation of the UN in 1946.<sup>25</sup> In 1947, the ILC was established by the UN General Assembly. This UN body served as the organizer for the current Rome Statute. The ILC was initially tasked to develop an international criminal code. In 1948, the new UN changed the ILC's task to study the possibility of creating a permanent international criminal tribunal.<sup>26</sup> Subsequently, in 1948, the UN adopted the Convention on Prevention and Punishment of the Crime of Genocide (Genocide Convention). It was within this convention that the UN made the first formal pronouncement for establishing a permanent international war crimes tribunal.<sup>27</sup> Also the Genocide Convention, for the first time in history, codified international criminal law concerning "acts with the intent to destroy a national, ethnic, religious, or racial group".<sup>28</sup> From 1948 until the late 1980's, other than two initial drafts which were not forwarded for approval, nothing materialized on creating a permanent international war crimes tribunal. The Cold War is blamed for this lack of progress on establishing a permanent court.<sup>29</sup> Conversely, the end of the Cold War is regarded as the primary reason for the discussions and agreement leading to the Rome Statute and the creation of the ICC.<sup>30</sup>

In 1989, progress was made on establishing permanent international criminal court when the Republic of Trinidad and Tobago raised the issue before the UN General Assembly. This Republic was experiencing significant drug trafficking and it wanted a forum to prosecute worldwide drug dealers.<sup>31</sup> The result of this effort was for the UN General Assembly to again request the ILC to draft a statute to create a permanent international criminal court.<sup>32</sup> In 1993, the UN Security Council established the ad hoc War Crimes Tribunal for the Former Yugoslavia, and in November of 1994, an ad hoc War Crimes Tribunal for Rwanda was established. These two tribunals were in response to atrocities committed in the Former Yugoslavia and surrounding territories and in Rwanda. Both of these tribunals were ad hoc creations and both provided further momentum towards establishing a permanent war crimes tribunal.<sup>33</sup>

Also in November 1994, the ILC presented the final draft of the International Criminal Court statute to the Sixth Committee of the 49<sup>th</sup> Session of the UN General Assembly.<sup>34</sup> The ILC recommended to the UN General Assembly that a conference of plenipotentiaries be called to draft a treaty to create a new statute for a permanent international criminal court. In response to the recommendation, the UN General Assembly created an Ad Hoc Committee to review the ILC's final draft statute.<sup>35</sup> In 1995, the committee met for two, two week sessions to review the draft ILC statute. All member states of the UN and interested organizations were invited to attend. In the preliminary sessions, the majority of representatives favored the creation of a permanent international criminal court. In these preliminary sessions, certain nations, including the United States were opposed to the creation of the International Criminal Court as detailed in the ILC draft statute. Many nations were also undecided. This did not stop further negotiations.<sup>36</sup>

In December of 1995, the UN General Assembly created a Preparatory Committee (Prep Com). The Prep Com was scheduled to meet for two sessions in 1996 to draft the wording for the treaty "with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court

as a next step towards consideration by a conference of plenipotentiaries".<sup>37</sup> The first session of the Prep Com met in New York during the period 25 March – 12 April 1996. Many issues, to include jurisdiction and the definition of crimes were discussed. The representatives present drafted recommended wording for the text of the ILC's draft statute.<sup>38</sup>

The second session of the Prep Com met in New York during August 12 – 30, 1996. The issues covered at the second session concerned court procedures, organization, establishment of the court, and the ICC's relationship to the UN and the UN Security Council.<sup>39</sup>

On 17 December 1996, the UN General Assembly adopted a resolution that proposed nine additional weeks of Prep Com sessions. This allowed for four additional Prep Com sessions. In addition, the resolution adopted the position that a diplomatic conference would be scheduled for sometime in 1998. The Nation of Italy offered to host the conference in a past Prep Com session. Italy put forth the suggestion that the conference be scheduled for June 1998 in Rome.<sup>40</sup> The third session of the Prep Com was held on 11-21 February 1997.<sup>41</sup> The fourth session of the Prep Com was held on 4-15 August 1997.<sup>42</sup> The fifth session of the Prep Com was held on 1-12 December 1997.<sup>43</sup> The sixth session of the Prep Com was held 16 March – 3 April 1998.<sup>44</sup> At this Prep Com, the final one prior to the diplomatic treaty conference, a draft statute was adopted.<sup>45</sup>

The diplomatic treaty conference to establish the ICC was held 15 June – 17 July 1998 in Rome, Italy.<sup>46</sup> On 17 July 1998, 120 countries voted in favor and created the International Criminal Court.<sup>47</sup> The idea to establish a permanent court with world-wide jurisdiction which began before World War I was now a reality. The United States sought to maintain discussions concerning the ICC after the Rome Conference. Although the United States did not sign the Rome Statute and thus is not a party to the international agreement, the United States signed the "final act" of the Conference. The "Final Act" is a "ceremonial summary" of the Rome Statute.<sup>48</sup> The signing of the final act by the United States keeps the United States at the table with the parties during post Rome Statute discussions concerning operations of the Court. This also allows the United States to lobby for changes to the Court.<sup>49</sup>

A total of four post Rome Statute meeting sessions have taken place. These sessions are also referred to as Prep Coms. After the vote on the Rome Statute, the UN established the "Preparatory Commission for the International Criminal Court". These sessions differ from the prior Prep Com sessions in that they were termed Preparatory Committees and dealt with pre Rome Statute matters. The current Preparatory Commission Prep Coms are for post Rome Statute matters. The mandate for the Commission is to draft rules of procedure for the Court, and the Assembly of States Parties, elements of crimes, financial rules, budgets, and other "practical arrangements for the establishment and coming into operation of the Court". The Commission is also tasked with "drafting proposals for a provision on aggression, including the definition and elements of crimes of aggression".<sup>50</sup> The UN General Assembly resolved for the Preparatory Commission to convene on three occasions in 1999, 16 to 26 February, 26 July to 13 August and 29 November to 17 December 1999. There has been one meeting in 2000. The four post Rome Statute Prep Coms were held in New York. At these sessions, basic administrative

functions of the Prep Coms were adopted including election of officers, setting of the agenda and organization for work. Also, substantive matters such as rules of procedure and elements of crimes were developed.<sup>51</sup> The third and fourth and subsequent sessions of the Preparatory Commission continue discussion of substantive matters such as the definition and construction of elements for crimes. Two additional Prep Coms are scheduled for 2000.<sup>52</sup>

## COMPOSITION OF THE ICC

The Rome Statute spells out the composition and administration of the ICC. According to the Rome Statute, the ICC will be based at The Hague.<sup>53</sup> The ICC will be divided into "organs". An organ is an independent element of the ICC.<sup>54</sup> The four organs of the Court are "The Presidency", the "Chambers", the "Prosecutor" and "The Registry".<sup>55</sup> The ICC is an independent international judicial body and will be financed by contributions from member states and the UN.<sup>56</sup> An "Assembly of States Parties" will supervise the ICC and will elect the judges and serve as the body to review amendments to the Rome Statute.<sup>57</sup> There will be eighteen judges of the ICC. The Presidency may propose an increase in the number of judges. ICC judges are elected and will be available to serve as full-time members of the ICC. The qualifications for judges, include "established competence in criminal and international law" and "no two judges may be nationals of the same State".<sup>58</sup>

The Presidency is elected by a majority of the judges. The Presidency consists of "The President and the First and Second Vice-Presidents". Their terms are for three years and they are eligible for reelection once. The Presidency has responsibility for the administration of the ICC, except for the Office of the Prosecutor. The Presidency must coordinate with and seek the concurrence of the Office of the Prosecutor "on all matters of mutual concern".<sup>59</sup> The ICC court organ is organized into divisions which consist of a Pre-Trial Division, a Trial Division, and an Appeals Division. Judicial functions of the court within each division are accomplished by "Chambers".<sup>60</sup>

The Registry is the component of the ICC "responsible for the non-judicial aspects of the administration and servicing of the Court . . .".<sup>61</sup> The Registry is headed by a Registrar who exercises authority under the President of the Court. The judges of the ICC elect the Registrar and a Deputy Registrar. Besides administrative functions, the Registrar is responsible for establishing a "Victims and Witnesses Unit" in the Registry.<sup>62</sup> This unit consults with the Office of the Prosecutor. The Registrar oversees the Rome Statute's strong victims protection provisions including reparations to victims of crimes.<sup>63</sup> The Judges, Prosecutor and Deputies, and the Registrar have "the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity". Other personnel have a lesser privilege and immunity status "necessary for the performance of their functions".<sup>64</sup>

There are six "official languages" of the Court. There are two "working languages of the Court. . . . Other languages may be authorized as working languages."<sup>65</sup> The Rules of Procedure and Evidence for the ICC are adopted when two-thirds majority of the members of the Assembly of States Parties adopt

them.<sup>66</sup> In addition to the Rules of Procedure and Evidence, the ICC shall adopt Regulations for the Court's "routine functioning".<sup>67</sup>

### **INVESTIGATION AND PROSECUTION OF MATTERS AT THE ICC**

The Office of the Prosecutor for the ICC is an independent organ of the court. The Prosecutor's Office is "responsible for receiving referrals and any substantial information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the court".<sup>68</sup>

The Office of the Prosecutor will have a Prosecutor, who serves as the director of the office and Deputy Prosecutors. All prosecutors are elected.<sup>69</sup> The Prosecutor for the ICC has the authority to independently begin investigations "ex-officio".<sup>70</sup> In addition, cases may be referred by the UN Security Council or member states.<sup>71</sup> For individuals accused of a crime, the ICC has protections of judicial warrant,<sup>72</sup> presumption of innocence,<sup>73</sup> public hearing,<sup>74</sup> and "minimum guarantees, in full equality" of a number of individual rights.<sup>75</sup>

The ICC Prosecutor is required to review all matters, whether received by referral or initiated "ex-officio" to ensure that a reasonable basis exists to investigate.<sup>76</sup> If an investigation is commenced and there is not sufficient evidence for prosecution, the ICC Prosecutor has the discretion to stop the proceedings. The "interests of justice" are the discretionary guide for the ICC Prosecutor in this area.<sup>77</sup> If the ICC Prosecutor decides not to proceed, the Pre-Trial Chamber of the Court must be informed. If the situation came to the ICC Prosecutor by a referral from the UN Security Council or a member state, the referring entity must also be informed. The UN Security Council or the referring member state may request the Pre-Trial Chamber to review the ICC Prosecutor's decision. If the decision not to proceed was based only on the "interests of justice", the Pre-Trial Chamber can review the ICC Prosecutor's decision without a request.<sup>78</sup>

A case may only proceed if the Pre-trial Chamber confirms the case as sufficient. If the case is confirmed and will proceed, the ICC Prosecutor is limited in exercising investigative authority. This limitation comes from the wording of the Rome Statute and the Prosecutor's limitation in investigative resources and procedures.<sup>79</sup> The ICC Prosecutor cannot conduct an independent investigation unless personnel are "not available" to investigate the situation.<sup>80</sup> If the local investigative authorities are available, then the ICC Prosecutor cannot perform an independent investigation without consultation with local authorities. Local law has to allow for the presence and participation of the ICC Prosecutor.<sup>81</sup> The Rome Statute places an obligation to cooperate on state parties. The "International Cooperation and Judicial Assistance" provisions of the statute mandate that states will "cooperate fully with the court" in investigations and prosecutions.<sup>82</sup> Such cooperation is initiated by the ICC making a "Request for Cooperation". The request is made through diplomatic or other appropriate channels.<sup>83</sup>

National security information procedures are covered by Article 72 of the Rome Statute. This Article spells out steps a member state must follow when objecting to disclosure of information on national security grounds and for the processing of such objections.<sup>84</sup>

In the determining an individual's guilt, a decision of the ICC "should be" unanimous. In a unanimous decision cannot be reached, then a decision may be made "by a majority of the judges". There is no right to a jury trial.<sup>85</sup> A convicted individual may be sentenced and imprisonment may be imposed. The maximum punishment that may be imposed is a life sentence. A sentence of imprisonment for a specific term is limited to a maximum term of 30 years.<sup>86</sup> Appeals may be made against the "decision of acquittal or conviction or against sentence".<sup>87</sup> The Appeals Chamber has broad powers to act on an appeal.<sup>88</sup>

The UN Security Council has the power to defer any ICC investigation and prosecution.<sup>89</sup> If the UN Security Council resolves under Chapter VII of the UN Charter that an investigation or prosecution should be deferred, the Rome Statute allows for deferral for a renewable period of twelve months.<sup>90</sup>

## **THE JURISDICTION OF THE ICC**

Three jurisdictional components must be in place for ICC jurisdiction to attach; subject matter jurisdiction (those crimes defined by the Rome Statute), time (the alleged act must be committed after a certain time for the ICC to have jurisdiction), and personal jurisdiction over the individual.<sup>91</sup>

## **SUBJECT MATTER JURISDICTION**

The ICC has limited subject matter limited jurisdiction.<sup>92</sup> Its jurisdiction is limited "to the most serious crimes of concern to the international community as a whole".<sup>93</sup> Specifically, the ICC will have subject matter jurisdiction "with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression".<sup>94</sup> The crime of genocide, crimes against humanity, and war crimes are defined in the Rome Statute.<sup>95</sup> The elements for these crimes are not yet defined. The elements are in the process of being defined during post Rome Statute Prep Com meetings and they will be adopted when "a two-thirds majority of the members of the Assembly of State's Parties" agree.<sup>96</sup>

The Court also has jurisdiction over intentional "offences against the administration of justice".<sup>97</sup> Such offenses include giving false testimony, false evidence, witness or official tampering and bribery.<sup>98</sup> The Court can also sanction individuals if they engage in misconduct.<sup>99</sup>

The definition of genocide in the Rome Statute is the same as the definition in the 1948 Genocide Convention.<sup>100</sup> The definition provides criminal prosecution for an "act intended to destroy a group in whole or in part".<sup>101</sup>

For crimes against humanity, the Rome Statute requires that a crime against humanity must be committed pursuant to a "widespread or systematic attack".<sup>102</sup> This means that a crime against humanity must take place in an environment that includes "multiple commission of acts" and carried out "pursuant to a state or organizational policy".<sup>103</sup> A crime against humanity includes the crime of murder,

extermination, enslavement, deportation, or forcible transfer, severe arbitrary deprivation of liberty, and torture".<sup>104</sup> It also includes "rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization or any other form of sexual violence of comparable gravity" and persecution based on "political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law". The crime of persecution must be committed "in conjunction with another crime under the statute". The enforced disappearance of persons, apartheid, and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to . . . body or health" are also included within the definition of crimes against humanity.<sup>105</sup>

The war crimes that the ICC has jurisdiction over include a total of fifty crimes, divided into two lists. One for international conflicts including thirty-four crimes and the other for internal conflict which includes sixteen crimes.<sup>106</sup> The war crimes areas of the Rome Statute require that injuries to civilians must be "clearly excessive" to the military advantage that is to be gained by the attack.<sup>107</sup> This provision "redefined the proportionality rule", a rule of international law that balances the possibility of civilian collateral damage in military actions.<sup>108</sup>

The crime of aggression was left undefined in the Rome Statute. The ICC's jurisdiction is based on the future adoption of provisions in accordance with Articles 121 and 123 which will define the crime of aggression and the court's jurisdiction related to such a crime.<sup>109</sup> The undefined crime of aggression was stated as one of the most serious objections after jurisdiction, that the United States had to the ICC.<sup>110</sup>

For all criminal acts within the ICC's jurisdiction, detailed "elements of offenses must be developed and adopted by the Assembly of State Parties" <sup>111</sup>

The Rome Statute's jurisdiction extends to non-parties. This appears to be in direct contradiction to established international law involving treaties.<sup>112</sup> Proponents of the ICC argue that the Rome Statute codifies existing customary international law and thus would be binding on nation states that are not parties.<sup>113</sup> However, at the current time, the ICC and participation in proceedings is not part of customary international law, it is a new proposed international forum. It is too early to tell whether the ICC and its future jurisprudence will become customary international law. The possibility appears strong given the history of Nuremberg and the other war crimes tribunals and their pronouncements.

For non-parties to the Rome Statute, like the United States, subject matter jurisdiction is broader than for parties.<sup>114</sup> Ratification of the Rome Statute requires a nation state to accept the ICC's jurisdiction over all crimes defined in it, however, the Rome Statute allows for a nation to opt-out of war crimes and future amendments. There is an opt-out period for nations that ratify the Rome Statute. The member nation may choose to opt out and exclude "war crimes" from the jurisdiction of the ICC when the war crimes were committed within the nation or by one of its nationals.<sup>115</sup> This "opt-out" provision in the Rome Statute lasts for seven (7) years after entry in force.<sup>116</sup> The opt-out period is non-renewable.<sup>117</sup> A nation may choose to opt-out of the war crimes anytime during the first seven years the Rome Statute is in force. This opt-out procedure is not available to non-member nations such as the United States.

Citizens from non-member nations are subject to investigation and prosecution by the ICC for war crimes from the Rome Statute's initial date of entry into force.<sup>118</sup>

The Rome Statute includes a provision that allows for amendments after "the expiry of seven years from the entry into force".<sup>119</sup> The amendments provision allows for amendments to the Rome Statute to add new crimes or to change the definition of an existing crime. The Rome Statute allows a member state to opt-out of subject matter jurisdiction for crimes added to the Rome Statute by the amendment process. For an amended crime, there is an "immunity" provision for parties to the Rome Statute to elect to "immunize" its nationals from prosecution for the new or amended crime(s).<sup>120</sup> Nationals of non-parties, however, are subject to potential prosecution for the new or amended crime(s) and are not able to immunize their nationals from prosecution for the new or amended crime(s). Nations that are not member states, like the United States, are subject to the ICC's jurisdiction for the amended crimes.<sup>121</sup>

The Rome Statute does not allow for "reservations". Reservation provisions in a treaty allow a member nation to pick and choose to opt-out of various provisions when the treaty is ratified. What the Rome Statute did was adopt specific up-front, opt-out provisions and incorporate them into the Rome Statute at the time of signing.<sup>122</sup> The combination of no opt-outs and not allowing reservations makes for a unique, broad subject matter jurisdiction for the ICC, especially for non-member nationals.<sup>123</sup>

There is no Statute of Limitations for crimes within the ICC's jurisdiction.<sup>124</sup>

## **TIME**

Timing of an act alleged to violate the Rome Statute is controlled by Article 11. For an act to be within the jurisdiction of the ICC, it must take place after the Rome Statute Enters into Force.<sup>125</sup>

## **PERSONAL JURISDICTION**

The Rome Statute is unique in international law personal jurisdictional principles. The potential for individual criminal responsibility arising from a treaty is new to international law. Previous international agreements have placed responsibility on nations, not on individuals.<sup>126</sup> This global jurisdiction to prosecute individuals from any nation which the ICC is capable of exercising does not exist anywhere else in any other judicial forum. Similar to the expansive subject matter jurisdiction for crimes by persons from a nation that is not a party to the Rome Statute, the personal jurisdiction area has broader provisions for non-parties than parties.<sup>127</sup>

The primary jurisdiction provision in the Rome Statute is Article 12.<sup>128</sup> Article 12 states the "Preconditions to the exercise of jurisdiction". The Rome Statute sets out three methods for the ICC to obtain personal jurisdiction of a case. First, personal jurisdiction may be obtained by a UN Security Council referral pursuant to Chapter 7, Article 2 of the UN Charter. Second, personal jurisdiction may be established by a referral by a State Party to the Rome Statute and third, personal jurisdiction may be achieved by the ICC Prosecutor *ex officio*.<sup>129</sup>

In the first method, the ICC will obtain personal jurisdiction to investigate and prosecute an individual when a case is referred by the United Nations Security Council. If the case is referred by the

UN Security Council, the referral will bind all member states of the United Nations, even though they did not sign or ratify the ICC Statute. Jurisdiction can be exercised over individuals even if their nations are not signatories to the Rome Treaty. A UN Security Council referral does not require any additional requirements for the ICC to take jurisdiction. The Court may proceed with investigation and if warranted, prosecution of a UN Security Council referred case.<sup>130</sup>

The second circumstance of ICC personal jurisdiction is when a member nation state makes a referral of a case to the ICC. This referral process involves "situations". Under this jurisdictional provision, the ICC has jurisdiction to investigate and prosecute individuals involved in situations under the jurisdiction of the ICC. A situation is a factual circumstance where it appears that a crime under the jurisdiction of the ICC has been committed.<sup>131</sup>

The third method of ICC personal jurisdiction is when the ICC Prosecutor exercises "proprio motu" jurisdiction. The ICC Prosecutor is determined to have ex officio prosecutorial powers. The ICC Prosecutor is not limited to UN Security Council referral cases nor member state referrals. The ICC Prosecutor may begin an investigation and prosecute matters through information provided to the prosecutor from victims, witnesses and other sources. If after information is provided by independent sources, the Prosecutor declines to initiate an investigation or prosecution, the source must be informed of this declination decision. If however, the Prosecutor decides to investigate and prosecute, the prosecutor must obtain approval to proceed from the Pre-trial Chamber before action can be commenced. If the Pre-trial Chamber of the ICC finds that the information is credible and that a case may proceed, a member state may object.<sup>132</sup>

The personal jurisdiction of the ICC is structured to be complementarity. Complementarity jurisdiction allows the national government of the accused to have the first opportunity to investigate and prosecute the criminal act. The principle of complementarity is cited as the protection mechanism to counter United States concerns that rogue nations could initiate a referral or a politicized prosecution could be initiated by the ICC independent prosecutor.<sup>133</sup> The principle of complementarity is stated in the preamble of the Rome Statute.<sup>134</sup>

Pursuant to complementarity principles, the ICC has worldwide jurisdiction to prosecute crimes only when a nation refuses or is "unable" or "unwilling" to investigate the situation. The Rome Statute defines both inability and unwilling.<sup>135</sup> Under the Rome Statute, a nation has the ability to challenge the ICC, should a decision be made that the nation was unable or unwilling to investigate. Under the issues of admissibility provisions of the Rome Statute, the pre-trial chamber of the court determines whether a nation state is unable or unwilling to investigate and prosecute a case. If a determination is made that a nation is able and willing to investigate and prosecute a case, then the case is "inadmissible" before the ICC.<sup>136</sup>

## THE CONSTITUTIONALITY OF THE ICC

There are several questions concerning the constitutionality of the ICC as applied to United States citizens. The threshold constitutional issue with the ICC is whether it would be constitutional for

the United States to ever sign and ratify the Rome Statute? If the Rome Statute is in any form other than a full guarantee of all United States Constitution rights, arguments exist that it would be unconstitutional to enter into such an agreement.

There are two basic arguments in this threshold constitutional area. The first is that the United States Supreme Court interpretations of the United States Constitution's supremacy over a treaty would prevent the trial of a United States citizen before the ICC.<sup>137</sup>

The second threshold argument is that the ICC is not an Article III Court and therefore, a United States citizen cannot be subject to such a forum by the United States.<sup>138</sup> The starting point for United States negotiations concerning the ICC should have been the United States Constitution and the Bill of Rights.<sup>139</sup> Instead the assumption was made that the United States Constitution rights of a United States citizen are not applicable in an absolute fashion with an International Tribunal.<sup>140</sup> Such an assumption may be falsely based, however, only a future case in controversy to the United States Supreme Court will yield the answer.

As to specific constitutional issues, a comparison by a foreign policy analyst of the Former Yugoslavia War Crimes Tribunal's (ICTY) practices with the provisions of the Rome Statute identifies a number of specific United States Constitutional concerns with the ICC.<sup>141</sup> A review of the analysis identifies the following areas of constitutional concern: First, there are Fifth Amendment concerns as to due process for undefined and vague definitions of crimes in the Rome Statute and the possibility of double jeopardy. Second, there are Sixth Amendment concerns with the rights to trial by jury, confrontation of witnesses, and the compulsory process right of an accused to obtain witnesses.<sup>142</sup>

Other analysts have identified additional specific constitutional concerns. These specific concerns are identified as the right to reasonable bail and speedy trial and the general organization of the court with the various chambers that have the power to investigate, prosecute, try, sentence and hear appeals is inconsistent with basic United States Constitution framework where these functions are separated.<sup>143</sup> The United States Constitution established the United States judicial branch as consisting of the Supreme Court and inferior courts. These courts are the constitutional minimum standard for United States citizens. The constitutionality of a United States citizen being tried by a court that does not have the required constitutional protections especially when a United States citizen never "sets foot outside the United States" is extremely questionable from a constitutional standpoint.<sup>144</sup>

United States citizens have protection against double jeopardy based on the Fifth Amendment, however, the possibility of being placed in double jeopardy through ICC procedures still exists.<sup>145</sup> For the United States, the complementarity procedure can be in direct violation of the constitutional protection of not placing a citizen in double jeopardy. The principle of "Non Bis In Idem" which is the protection against double jeopardy, is included in the Rome Statute, however, if the United States were to try an accused who has the charges dismissed with prejudice or whose trial results in an acquittal, the ICC could possibly view those actions as being unable or unwilling to prosecute the individual and then take jurisdiction.

Although extreme, the possibility of placing a United States citizen in double jeopardy nonetheless still exists.<sup>146</sup>

#### **THE UNITED STATES POSITION ON THE ICC**

The position of the current United States Government administration is that the United States will support "an appropriately constituted criminal court".<sup>147</sup> This position was recently affirmed in a statement to the United Nations General Assembly Sixth Committee in October 1999.<sup>148</sup>

The United States Government position has remained relatively consistent over the eight years that the current ICC discussions have taken place. How the court will operate is the main issue of contention for the United States Government.<sup>149</sup> At the time of meeting in Rome for the treaty conference, the United States had three objectives; first, to accomplish a successful conference that resulted in a treaty [with a United States signature], second, to have international criminal court procedures recognize the increased responsibilities that the United States has in international peace and security throughout the world and third, ensure that the referral process included the United Nations Security Council or a state party to the treaty, not simply prosecutorial discretion.<sup>150</sup> These three objectives were not achieved.

The United States position on the ICC is worked day-to-day by David J. Scheffer, Ambassador-at-Large for War Crimes Issues. He leads the United States delegation, which includes representatives from the Departments of Defense, State, Justice and the Joint Chiefs of Staff.<sup>151</sup>

What would be required for the United States to support and sign the Rome Statute? Presently, the United States main objection concerning the ICC is that the ICC does not afford protection for United States personnel engaged in official actions.<sup>152</sup> Because this protection is not part of the current structure of the Rome Statute, the United States cannot support the proposed ICC.<sup>153</sup> The question remains; what should the United States Government do now? There are many approaches.<sup>154</sup> First, the United States can continue discussions with member nation states with the hope that the United States position on the ICC can be achieved through further negotiation and amendment of the Rome Statute.

The areas for amendment negotiation mainly address jurisdictional areas. The areas to pursue an amendment concern changing the provisions of the Rome Statute to except out non-member accused from the personal jurisdiction of the ICC, particularly non-member accused who are engaged in official acts. Another area for negotiation concerns amending the Rome Statute to add in full opt-out provisions that would provide for nations to choose which crimes they would allow the ICC to prosecute. Another would require the United States to negotiate a change to the ICC's ability to decide on complementarity decisions. Under the current Rome Statutory scheme, the ICC itself determines whether the nation of the accused is unable or unwilling to prosecute. The amendment for this area involves a removal of that power from the ICC and the transfer of the power to another body such as the United Nations Security Council. There are other areas of concern and amendment for the United States, however, protection for personnel engaged in official actions is the main objective and negotiation is the current course of action by the United States Delegation. Since the Rome Statute prohibits amendments that are other than

institutional in nature for the first seven years that it is in force, this seems at best, to hamper the negotiation course of action.<sup>155</sup>

The second course of action for the United States to pursue is to stop negotiation and actively oppose the Rome Statute and the ICC. The United States can withhold financial and other types of support, refuse to refer any cases to the ICC through United Nations Security Council veto, request other nations to not ratify the Rome Statute, or refuse to participate in any operations with any nations that support the ICC.<sup>156</sup>

The third course of action is to adopt a policy of benign neglect. Doing so would require the United States to stop negotiations and do nothing and let the Rome Statute and the ICC drift in the international community.<sup>157</sup>

The United States Congress passed legislation which prohibits the United States from becoming "a party to any new international criminal tribunal, nor give legal effect to the jurisdiction of such Tribunal" unless the process is done by a treaty in compliance with United States Constitution requirements or by additional congressional legislation.<sup>158</sup> In addition, Congress recently passed a law that precludes the use of any federal funds for use or support of the ICC unless the U.S. becomes a party and prohibits the use of any U.S. funds to extradite a U.S. citizen to any foreign country that is under an obligation to surrender persons to the ICC or to a third country that is under an obligation to the ICC, unless the third country confirms that the person will not be extradited to the ICC.<sup>159</sup>

There are many arguments against the United States position. The most persuasive arguments against the current United States position put forth the proposition that United States interests are better served by signing and agreeing to the Rome Statute in its current form. The United States it is argued, received many concessions from nations negotiating the Rome Statute and that with the concessions, the United States can properly serve its own interests by helping to shape the court to do its job. As a member of the ICC, the United States can shape the court to be a fair and impartial adjudicator of international criminal matters. As a non-member, it cannot.<sup>160</sup> The ICTY and its current adjudication of cases is used in support of this argument. Another argument states that the ICC will increase, not lessen American security, by contributing to international stability. It is argued that the ICC enhances broad, long range American national security interests by creating a "peaceful, liberal democratic, and economically integrated international system that allows America to flourish". It continues that American leadership must exhibit "legitimacy" to justice and human rights values and norms that America established for others to follow. By not supporting the ICC, the United States loses its legitimacy in relations with other nations and thus, a loss in long term "future security".<sup>161</sup>

#### **IMPLICATIONS OF THE ICC ON THE UNITED STATES MILITARY**

From an analysis of the resources available on the ICC, there are five principle areas where the ICC will have implications on United States military forces. The first is in doctrine, the second national security decision making, the third is training, the fourth is the roles that United States military forces may have in support of the ICC and the fifth is rules of engagement.

## UNITED STATES MILITARY DOCTRINE

The United States is the most militarily engaged nation in the world. The Rome Statute provisions raise the issue of whether the United States can continue to participate in military intervention actions at the current level without favorable resolution of the ICC issue.<sup>162</sup>

The United States military planners expect that the engagement of the United States will expand and continue "for the next 15 to 20 years".<sup>163</sup> The prediction of an expansive and continuing engagement of the United States military, especially in peacekeeping, peace enforcement and humanitarian operations is based on expected United Nations requests for United States involvement and support of such operations.<sup>164</sup>

Concerning doctrine, the issue for the United States is found in the question; do we deploy our forces in an ICC world? Ambassador David Scheffer raised this issue of United States military doctrine when he stated "we constantly have troops serving abroad on humanitarian missions, rescue operations or missions to [prevent the proliferation or use] of weapons of mass destruction".<sup>165</sup> Currently, United States deployments are primarily for operations other than war (OOTW) such as peacekeeping operations and humanitarian missions. When the United States deploys its military forces for these missions, it prefers to do so in a "UN – sanctioned multilateral, or unilateral fashion".<sup>166</sup>

The primary problem with United States doctrine for deployment of United States military forces implicated by the ICC is the extraordinary jurisdiction provisions of the ICC. Within the jurisdictional framework of the ICC, if a national from a nation that has signed and ratified and opted out of the war crimes provisions for the initial seven year period, commits a war crime, that person cannot be prosecuted. However, if the United States were to follow its current doctrine and send peacekeeping troops to that country to restore international peace and security, the United States peacekeepers would be subject to the jurisdiction of the ICC should allegations of crimes within the ICC's jurisdiction arise during the deployment.<sup>167</sup> If there is any doubt as to whether these issues will arise, one only needs to look at the recent United States deployment of peacekeeping troops to Kosovo.<sup>168</sup> Such a result may require the United States to amend its doctrine and not deploy United States military forces to a nation that has signed or ratified the Rome Statute. Ambassador Scheffer stated that the Rome Statute could "inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives".<sup>169</sup>

This analysis yields a sobering point. Doctrine must support strategy that is militarily and politically feasible and desirable. It is not militarily or politically feasible or desirable to place a United States soldier in the position of being tried before an international criminal tribunal without the consent of the United States. The best course of action for the United States may be that engagement and intervention will not take place in nations that sign and ratify the ICC. This means that troop withdrawals may be necessary from nations where the United States has troops engaged in intervention missions.<sup>170</sup> This implication must be examined further and reviewed as part of preparing doctrine to implement a new National Military Strategy.<sup>171</sup>

## NATIONAL SECURITY DECISION MAKING

Article 12, the universal jurisdiction article of the Rome Statute complicates national security decision making by imposing a risk of criminal prosecution for the use of military force. The chief concern of the United States in this area is that "rogue states could use the court to launch politically motivated charges against other governments".<sup>172</sup>

Upon fully establishing the ICC as the Rome Statute outlines, the implications on both the decision making authorities and on United States military forces could be significant. The establishment of the ICC will add complexity to national security decision making. The complexity involves the potential indictment of United States decision makers for their decisions on the use of military force.<sup>173</sup> The current National Military Strategy of "prepare, shape and respond", is driven by analysis that the United States military forces will be globally engaged for ten to fifteen years.<sup>174</sup> The types of operations are small scale contingencies, security assistance, peacekeeping and enforcement and humanitarian assistance operations.<sup>175</sup> These operations require decisions of National Command Authorities, Cabinet Heads, CINC's and other high-level United States civilian government officials and military personnel in some of the most complex crisis situations that exist. If a decision to deploy forces has the possibility to subject any of these authorities to criminal prosecution for their official exercise of authority, they must factor this possibility into their decision making on the use of military force. Could such a possibility chill United States military action and the use of force? Can the ICC Treaty create a chilling effect on United States engagement and involvement in global military operations? The answers appear to be yes. The possibility of being indicted by the ICC for decisions made in support of national security will be a significant factor in national security decision making. Now civilian leaders and military personnel must document their decisions with legally supportable, provable and releasable information on why they made the decisions and took the actions that followed.

The ICC complicates, at best, national security decision making by placing leaders, both military and civilian, in the position of having the potential to be indicted for their leadership decisions in support of United States national security. The main area of concern with national security decision making is the crime of aggression and it's potential for political or prosecutorial misuse.<sup>176</sup> As discussed earlier in this paper, the crime of aggression has yet to be defined for the ICC. In developing the possible definitions, most proposed text incorporate wording known as "Option 1".<sup>177</sup> Option 1 states that "any individual in a position of exercising control or capable of directing, planning, preparing, ordering, initiating, or carrying out an armed attack against another state when this attack is in contravention of the UN Charter is subject to investigation, trial, conviction and punishment by the ICC".<sup>178</sup> It is argued that "in effect, this would require the United States to receive prior UN Security Council approval . . . of the legality of a proposed military action". Should the United States not obtain approval, "every U.S. official involved in the operation, up to and including the President, could be charged, tried, convicted, and sentenced merely for protecting U.S. interests".<sup>179</sup>

The definition and inclusion of the crime of aggression in the Rome Statute is an important aspect of implication on national security decision making. Especially when the United States acts in support of

saving non-American lives or in other humanitarian matters not directly related to United States national security.<sup>180</sup> Most vulnerable to ICC review and jurisdiction would be actions threatened or taken unilaterally by the United States to directly defend United States interests.<sup>181</sup>

When the crime of aggression is included in the Rome Statute, it will present significant implications on United States national security decision making.<sup>182</sup> The crime of aggression is different from the other crimes within the ICC's jurisdiction in that the crime of aggression "poses a direct threat to the country's leaders".<sup>183</sup> The working examples of a crime of aggression include culpability for the leaders of a nation that directs, or plans or orders an act of aggression.<sup>184</sup> The United States has strongly opposed including the crime of aggression in the ICC. Inclusion of the crime of aggression was one of the main reasons for the United States representatives to refuse to sign the Rome Statute.<sup>185</sup> In a statement before the Senate Foreign Relations Subcommittee, Senator Helms indicated that the crime of aggression would be defined as the following; "it will be a crime of aggression when the United States of America takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations".<sup>186</sup>

Recently, the concerns of the United States that United States military officials could be subject to prosecution were strengthened by actions taken at the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY completed a report that analyzed the seventy-eight day NATO campaign in Kosovo.<sup>187</sup> The report was for internal use and was completed in December 1999. The report provided a "legal analysis of the possibility that the NATO allies had committed war crimes during the 78-day campaign against Yugoslavia".<sup>188</sup> The ICTY review was initiated when members of the Russian Parliament and others met with the former ICTY Chief Prosecutor and requested the ICTY to review NATO actions.<sup>189</sup> One could argue that this review was politically motivated since Russia was allied with Yugoslavia and politically supported Yugoslavia during the crisis.

An argument also follows that the ICC's potential for indicting national security decision makers will lead to increased or prolonged conflicts. If a military decision maker were indicted in the midst of a conflict, that leader may decide to continue the action due to anger or a need to prove that taking the action is the right decision. Such was not the case, however, concerning the recent indictment of the leader of Yugoslavia, Slobodan Milosovic, during the Kosovo crisis.<sup>190</sup> An issue that needs to be addressed concerning national security decision making is non-action, especially given the position that some political leaders have taken that the United States will not support the ICC. If the Rome Statute enters into force as currently structured, could United States national leaders/decision makers, military commanders and troops be prosecuted for not taking action? Again, the answer appears to be yes. This area of criminal law, failure to act where there is a duty to act, has established precedent in international war crimes tribunals.<sup>191</sup> Also, the substantive criminal law concerning individual criminal responsibility for the ICTY provides for criminal prosecution when an individual fails to act where he/she had a duty to act.<sup>192</sup> There is no reason to prohibit the ICC from adopting a failure to act criminal theory on genocide, crimes against humanity, aggression or war crimes. It could reasonably and logically be argued that for

individuals from a nation, such as the United States, that have the capability to stop atrocities, such as an individual's failure to act (possibly due to the chilling effect of a possible ICC indictment), could in itself be a crime prosecutable by the ICC. This is especially true for internal conflicts, where ordinarily little may be done to control the internal forces from committing crimes, crimes that in the future will be within the ICC's jurisdiction. Genocide, along with other crimes within the jurisdiction of the ICC can be committed by failing to take action and allowing atrocities to happen. The international community may seek to deter such a passive approach by using the ICC to spur action.<sup>193</sup>

The Rome Statute provides for the development of new crimes in its amendment provisions as developing rules of international law.<sup>194</sup> Further, the Rome Statute sets forth a precedential hierarchy of law which allows for "general principles of law" derived from national systems.<sup>195</sup> These provisions alone would allow for the prosecution of such crimes as criminal non-action by individuals.

The possibility for prosecution by the ICC for failing to take action is supported by developments at the ICTY. In one matter, France refused to comply with subpoenas and allow French officers to testify before the Tribunal.<sup>196</sup> The French Defense Minister's reason was that French officers and other military personnel would be exposed to adversarial questioning about their actions for allegedly not stopping war crimes that they witnessed.<sup>197</sup> Analysis of the French Defense Minister's position indicates that he believed that future French commanders of peacekeeping troops would be influenced to place their soldiers in a position to respond with force when the current rules of engagement may indicate another course of action. The reason for a commander's decision to act would be the concern of being compelled before a tribunal, like the ICC, and having to face criminal consequences for failing to act.<sup>198</sup>

## TRAINING

Armed forces throughout the world are mandated to instruct military personnel on the law of war by dissemination requirements in treaties.<sup>199</sup> The principal guide for instruction of United States military forces is DOD Directive 5100.77.<sup>200</sup> The individual services have regulations that implement the DOD Directive.<sup>201</sup> This paper will focus on the DOD Law of War Program and the United States Army's implementation of that program, as the Army serves as the DOD Executive Agent for implementation of the Law of War Program.<sup>202</sup> The Army's obligation to train soldiers in the Law of War is specified in Army Regulation (AR) 350-41.<sup>203</sup> Another regulation, AR 350-1 "Army Training", provides Army commanders with guidance on training management and the Army's Common Military Training (CMT) program.<sup>204</sup> Under AR 350-1, all Army personnel receive initial entry training in the law of war with annual briefing updates. AR 350-1, Table 4-1 lists "Geneva-Hague" as a subject within the Army's CMT program. In AR 350-1, the corresponding AR cited as the basis for Geneva-Hague training, AR 350-216, is no longer applicable because it was rescinded.<sup>205</sup> The DCSOPS is listed as the proponent and the training is listed as "program" for "Resident Training" courses and as "Refresher" for "Training in Units". Program training is structured training "in accordance with an approved program of instruction (POI)". This type of training has a prescribed number of hours, specific learning objectives and concludes with an evaluation of proficiency or knowledge". Program training is "conducted on a continuing or cyclical basis, and includes

a periodic evaluation of proficiency". "Refresher training is used when periodic or recurring emphasis is required". It is frequently "left to the commander's discretion".<sup>206</sup> Other publications cover the training of U.S. Army soldiers in the law of war. They include Field Manuals and Training Circulars.<sup>207</sup> In the Army, in most areas of instruction, the Training and Doctrine Command (TRADOC) is responsible for doctrine development and training. Under TRADOC regulation, the process of developing training in the Army is systematic. TRADOC Regulation 350-70 is the principal guidance for preparation of curricula for most Army training.<sup>208</sup> In the area of law of war training, however, the Department of Defense has issued detailed training guidance. "The law of war is one of the few areas where DoD has issued specific training guidance to the Services".<sup>209</sup>

The DoD Directive that establishes the DoD Law of War Program and requires the reporting of law of war violations also establishes a "DoD Law of War Working Group".<sup>210</sup> The Working Group is established by the General Counsel of the Department of Defense (DoD General Counsel). It consists of "representatives from the General Counsel of the Department of Defense (GC, DoD), the Legal Counsel to the Chairman of the Joint Chiefs of Staff, the International and Operational Law Division of the Office of the Judge Advocate General of each Military Department, and the Operational Law Branch of the Office of the Staff Judge Advocate to the Commandant of the Marine Corps".<sup>211</sup> The Working Group is tasked to develop and coordinate "law of war initiatives and issues, manage other law of war matters as they arise, and provide advice to the General Counsel on legal matters covered by this Directive".<sup>212</sup>

Pursuant to DoD Directive 5100.77, the DoD General Counsel is also responsible to "coordinate and monitor the Military Department's plans and policies for training and education in the law of war".<sup>213</sup>

Just as the ICC makes national security decision making more complex, there is also a complexity effect on law of war training. What are the standards you train to? Do you use customary and international convention definitions in your training or will the ICC's definitions of the various crimes control? What is the status of the United States and its national security decision makers and armed forces? Are we subject to ICC jurisdiction or not? What about ICC future precedents and the sharing of information or the providing of support that would aid the ICC? These questions, not inclusive of all the issues surrounding the ICC, demonstrate the complexity involved in training military forces in the law of war post-ICC.

The current doctrine on law of war teaching prescribes teaching all soldiers a "minimum body of basic knowledge". This minimum body of basic knowledge currently consists of rules of engagement, human rights familiarization and code of conduct training.<sup>214</sup>

Once the ICC enters into force, does the United States have to adjust its training of military personnel in the law of war? It would appear so. With the signing of the Rome Statute by so many other countries, the definition of war crimes, crimes against humanity and genocide may achieve a customary international law status.<sup>215</sup> Prior to the Rome Statute, various international conventions and customary laws governed definitions in these areas, now arguably, it is the Rome Statute that may control. If the

ICC is the controlling precedent, even without United States signature, Department of Defense law of war training programs will have to be modified to include the definitions of crimes as defined by the ICC.

The best way to accomplish ICC coverage in training programs is to integrate the ICC into existing law of war training. With the ICC coming onto the international horizon, the United States military must take proactive measures to ensure that its members are aware of the ICC, its jurisdiction and its definitions of crimes. The ICC will cause a necessity for broader coverage in law of war instruction, lengthen instruction time and alter current law of war training for military forces. For high-level decision makers, this broader area of proactive ICC education is crucial. Deployment, threat of force, actual use of force, ROE, and targeting are all areas where the ICC's jurisdiction and future cases will impact. The high-level decision makers must have a complete understanding of the ICC to properly make their decisions with full knowledge of ICC coverage and precedents. The ICC coverage areas that might have to be incorporated into law of war training are an overview of the ICC, especially its definition of crimes and defenses, the jurisdiction of the ICC, the United States policy on the ICC and any effects on our relations with countries that are members of the ICC. Also, law of war training must include the precedents that the ICC and other war crimes tribunals establish by adjudication of cases.

Even the use of the phrase "law of war" must be evaluated. Research on the law of war term shows that its meaning includes international law that "governs the initiation and conduct of hostilities between nations".<sup>216</sup> The modern and arguably more descriptive phrase is the Law of Armed Conflict. The Law of Armed Conflict "reflects that ... international laws apply in any armed conflict, regardless of whether there is a formal declaration of war."<sup>217</sup> Research does indicate however, that the term law of war is understood by soldiers. It lessens the complexity in training by being a clear term that soldiers relate to and understand, thereby, increasing the probability of compliance.<sup>218</sup>

## ROLES

This paper will review the roles that the United States military has in support of war crimes investigations and war crimes tribunals in general. These areas are relevant to the ICC, however, the research for this paper indicated that the likelihood of providing direct or indirect assistance to the ICC at present is highly unlikely.

In a statement to the United States Senate, Committee on Foreign Relations, Subcommittee on International Operations, concerning the question of whether the International Criminal Court is in the U.S. National Interest, Senator Helms strongly indicated that the United States "will not provide any assistance whatsoever to the Court or to any other international organization in support of the Court either in funding or in-kind contributions or other legal assistance".<sup>219</sup> Senator Helms also stated that "the United States shall not extradite any individual to the Court or directly or indirectly refer a case to the Court."<sup>220</sup> In the same hearing, Senator Ashcroft affirmed Senator Helm's statements and further indicated "some complicit cooperation in the operation of a court in which we did not fully participate in forming could be as damaging as full participation. Therefore, our need to be vigilant in this respect is

continuing".<sup>221</sup> If the United States does not change its position, the United States may limit or prohibit support to the ICC.

Congress has gone further than subcommittee hearings. There has been proposed and enacted legislation to prohibit support to those nations that ratify the Rome Statute.<sup>222</sup> Proposed legislation was introduced in the House of Representatives and referred to the Committee on International Relations. The Bill proposed to "prohibit economic assistance for countries that ratify the ... Rome Statute".<sup>223</sup> This proposed legislation clearly set the tone of the many Congressional Representatives who supported this legislation. The proposed legislation stated that the "sense of Congress relating to referral by United Nations to ICC" was for "the President to instruct the United States representative to the United Nations to veto any attempt by the United Nations Security Council to refer a matter to the International Criminal Court for investigation".<sup>224</sup> Recently, a law was enacted that placed constraints on the United States in its relationship with the ICC. The United States cannot use federal funds or provide any type of support to the ICC unless the United States becomes a party to the ICC. Nor can the United States extradite a United States citizen to the ICC or to a third country unless that country confirms that the United States citizen will not be extradited to the ICC.<sup>225</sup>

This policy of lack of support concerning the ICC places the United States military in a dilemma in planning and preparing for roles concerning future war crimes tribunals. The military should prepare for the roles that it will have in support of war crimes tribunals. The need to have trained, ready to investigate war crimes units is further bolstered by the ICC. An argument is made that increased preparation, planning, roles and investigations will be necessary when the ICC comes on line because of the complementarity jurisdiction of the ICC. Increased investigations and prosecutions will be necessary to prevent the ICC from inappropriately assuming jurisdiction.<sup>226</sup> Identifying roles that the military can provide to support a war crimes tribunal is important for the future when the ICC is in existence, because it will allow the United States military to properly complement the jurisdiction of the ICC, which is the United States military's best deterrent to ICC jurisdiction.<sup>227</sup>

If the ICC comes into existence, there is a possibility that the United States military may have roles to support and enforce the power of the Court. The ICC, when fully functioning, will require support from military forces, directly or indirectly, to accomplish its mission of bringing the most notorious criminals to justice. The role predictions, however, are diminished because the United States did not sign the Rome Statute. Therefore, the question of roles for the United States military is one that cannot be fully answered until the ICC comes into existence and the United States military is tasked to support the ICC. Given the current objections to support, the following support analysis is presented in a "what if" format. This paper reviews what support requirements may be requested by the ICC in the future. From interviews of ICTY and Department of State personnel and a review of writings and articles concerning the investigation of war crimes for the ICTY, the following eight roles of the United States military could support the administration of justice for the Court.

First, is the investigation of war crimes. Just as with training, the starting point is the Department of Defense's "DoD Law of War Program".<sup>228</sup> This directive establishes "the Secretary of the Army as DoD Executive Agent for the investigation and reporting of reportable incidents".<sup>229</sup> A reportable incident is "a possible, suspected, or alleged violation of the law of war".<sup>230</sup> As DoD Executive Agent, the Army's investigative assets for investigation of violation of the law of war include "organic assets and legal support, using AR 15-6 or commander's inquiry procedures".<sup>231</sup> The Army's Criminal Investigative Division (CID) may be used as an investigative asset for suspected war crimes in two instances. The first is when the suspected offense is one of the violations of the UCMJ listed in Appendix B to AR 195-2, Criminal Investigation Activities, and the second is when the investigation is directed by HQDA under paragraph 3-3a(7) of Army Regulation, 195-2.<sup>232</sup> Additional investigative assets are identified as "the military police, counterintelligence personnel, and judge advocates".<sup>233</sup> For law of war investigations, assets are also available in the reserve components. Law of war investigative assets are augmented by the use of reserve component Judge Advocate General Service Organization (JAGSO) Teams. International JAGSO teams consist of judge advocate attorneys and support personnel and they can provide legal advice and on-the-ground law of war investigations, documentation and report assistance.<sup>234</sup>

The ICC may acquire its own assets for investigation. The ICTY, Office of the Prosecutor (OTP) recently hired forensics investigators and other staff personnel to investigate war crimes.<sup>235</sup> Even if the ICC were to develop its own investigative resources, the U.S. military would still be among the first on the ground in most situations involving war crimes allegations. Therefore, training in investigation of war crimes and support of a war crimes tribunal is essential to the proper prosecution of such matters.<sup>236</sup>

Second, the United States Government may provide intelligence support.<sup>237</sup> The location of war crime sites, the location of war crimes suspects and the scope of their crimes are all viable intelligence information. In Bosnia, Kosovo, and in other international and internal conflicts, intelligence assets have been used to pinpoint mass gravesites, the location of war criminals and the activities of these individuals.<sup>238</sup> In the area of intelligence, the United States can provide the full spectrum of intelligence support to the Court. Signal intelligence (SIGINT), in the form of interception of signal transmissions which indicate that war crimes were ordered or discussed and imagery intelligence (IMINT) are the most probable forms of intelligence support to the Court.<sup>239</sup> IMINT in the form of aerial reconnaissance and surveillance missions can support a war crimes tribunal by identifying mass gravesites, herding of non-combatants and other types of activities that are direct evidence of war crimes. These IMINT missions identify specific target areas for further observation by either aerial or ground reconnaissance means.<sup>240</sup> In addition, the United States can provide Human Intelligence, (HUMINT) in the form of interviews of persons who witnessed or allegedly perpetrated war crimes.

The third role is the apprehension and arrest of war criminals. The arrest and apprehension of war criminals has historically been handled by the military.<sup>241</sup> In World War II, Nazi and other war criminals were apprehended by United States and other nation's military personnel.<sup>242</sup> In the modern era of peacekeeping, North Atlantic Treaty Organization (NATO) and UN forces have made arrests of both

suspected and indicted war criminals.<sup>243</sup> The United States position on the arrest of indicted war crimes suspects is that if the suspects are encountered they will be arrested, however, they will not be tracked down.<sup>244</sup> This policy appears to have significant advantages for U.S. military forces. U.S. peacekeeping forces are not trained police forces. Force protection would be jeopardized and the issue of a lack of evenhandedness in treatment would pervade arrests.<sup>245</sup>

The fourth role is security. Security for various aspects of a war crimes investigation is necessary and may be provided by United States military personnel.<sup>246</sup>

The fifth role is forensics support. The United States military may provide forensics investigators, pathologists and other forensics professionals to assist war crimes tribunals with mass grave exhumation and body recovery. These experts can "establish the date and cause of the victim's death and their identities".<sup>247</sup>

The sixth role is logistics support and transportation. The United States military may provide substantial logistics support needed by the individuals involved in war crimes investigation and prosecution. Military transportation will be necessary, especially in areas where free travel is restricted due to the war torn state and mine emplacement. Also transportation of the accused after arrest to the tribunal, has been accomplished primarily through military ground and air transport capabilities.<sup>248</sup>

The seventh role is engineer support. Engineer units/assets can provide heavy excavation of gravesites and a variety of engineer resources.<sup>249</sup>

Lastly, the eighth role is financial assistance. The United States has provided approximately one hundred million dollars in financial assistance to the Yugoslavia tribunal.<sup>250</sup> Use of the United States military to provide support to a war crimes tribunal for any role is expensive. If United States troops were deployed to the area, most of the roles identified above would be provided as a related part of the mission of the United States troops on the ground. Cost sharing or reimbursement arrangements could be established, however, most roles would be provided as part of ongoing missions and direct expenditures by the war crimes tribunal would not be required. This defacto amounts to financial aid to the war crimes tribunal.<sup>251</sup> In addition to purely military roles, interagency, civilian and non-governmental agencies have support roles with the ICTY.<sup>252</sup>

The list of roles is not all inclusive of all the roles that the United States military would have in support of a war crimes tribunal such as the ICC. It does provide a framework for the United States military in preparing for and planning support for future missions that require support of war crimes tribunals or, if political and legal circumstances change, the ICC itself. Military support of a war crimes tribunal may be subject to a Posse Comitatus Act review. Extraterritorial application of the Posse Comitatus Act is not settled in the law. It appears that necessary support services to the Court would be allowed, however, "direct involvement in the execution of the laws" may require express authorization by Act of Congress.<sup>253</sup> Lastly, the United States military should specifically plan for war crimes roles and support to war crimes tribunals in every type of mission it conducts, whether combat or operations other than war.<sup>254</sup> Perhaps due to the fact that war crimes tribunals were relatively new at the beginning of the

Bosnia mission, or the experience of troops in Bosnia with the ICTY, the current Kosovo operation has better defined roles, and streamlined support for the war crimes tribunal.<sup>255</sup>

## **RULES OF ENGAGEMENT**

Rules of Engagement (ROE) will be affected by the ICC and its rulings on cases. ROE "are the primary tool used to regulate the use of force" for the military.<sup>256</sup> The ROE are written to comply with domestic and international law, and may be more restrictive than such laws require the use of force.<sup>257</sup> ROE purposes are: "(1) Provide guidance from the National Command Authority (NCA) to deployed units on the use of force; (2) Act as a control mechanism for the transition from peacetime to combat operations (war); and (3) Provide a mechanism to facilitate planning. ROE provide a framework which encompasses national policy goals, mission requirements, and the rule of law".<sup>258</sup>

The starting point for United States ROE and the law of war is the Chairman of the Joint Chiefs of Staff (CJSC), Standing Rules of Engagement for U.S. Forces (SROE).<sup>259</sup> The SROE in applicable portion state that "U.S. forces will always comply with the Law of Armed Conflict".<sup>260</sup> ROE specifically include provisions on the use of force concerning detention of suspected and indicted war criminals.<sup>261</sup> In OOTW, ROE on the use of force are usually more restrictive than in other types of operations. Units involved in or anticipating a deployment for an OOTW currently use standardized ROE training programs that cover in detail the "self-defense measures contained in the [SROE]".<sup>262</sup> Soldiers trained in these programs "are trained to the baseline ROE training standard".<sup>263</sup> "Commanders and their staffs [are trained] on the procedures for receiving, disseminating and supplementing ROE by using ROE conditions or ROE CONS".<sup>264</sup>

Future ROE may be affected by decisions of the ICC. Based on past and current ROE, when the ICC comes into existence, ROE concerning suspected or indicted war criminals must be included in future ROE. In addition, definitions of crimes, elements of crimes and defenses have the likelihood of being controlled by the Rome Statute and subsequent ICC decisions. Future ROE formulation process must take these ICC definitions and rulings into account when future ROE are drafted.<sup>265</sup> Certainly, issues of self defense for individuals, units and the nation could be impacted by decisions of the ICC. Hostile intent and acts which currently allow the right to use proportional force in self defense to deter, neutralize, or destroy a threat would also be addressed by future ICC decisions.<sup>266</sup>

## **SUMMARY AND CONCLUSION**

In summary, this paper presented that the ICC has the potential to be a unique international judicial body. It's evolution grew out of the most outrageous and serious criminal acts ever committed against human beings. The intent behind the creation of the ICC is a very noble one, however, the future of the ICC and the unresolved issues and implications surrounding it may, without change, cause it's organizational demise. The issues raised by the ICC involve it's quasi-independent structure and composition, it's potential for broad, encroaching jurisdiction, questions of constitutionality on the potential to try a United States Citizen before an ICC trial and the direction of the United States concerning policy

on the ICC. The structure and composition of the ICC, without change, can lead to either an ineffectual court that has little or no resources to carry out its stated mission of prosecuting persons responsible for the most serious international crimes or one of little or no cooperation or assistance. The prosecutor proprio motu composition provides a danger from a politicized prosecution against persons acting solely in United States Interests. If the current ICC jurisdictional provisions enter into force, the United States is subject to a legal morass of problematic, jurisdictional and cooperation issues and disagreements with the ICC. The jurisdictional provisions of the ICC that allow for the prosecution of non-signatories of the Rome Statute are in contravention to long established international law non-intervention principles. If the crime of aggression is defined broadly and/or other amendments are added to the Rome Statute to increase the jurisdiction of the ICC, the potential for the ICC to violate the national sovereignty of the United States and its citizens is significant. The questions concerning the constitutionality of the ICC are also significant. It is an open threshold question as to whether the United States Government could agree to the ICC in any composition other than one that assures a full guarantee of all United States Constitutional rights. Beyond the threshold question, the individual constitutional issues that the ICC raises are numerous.

The ICC raises implications for the United States military in the areas of military doctrine, national security decision making, training, roles that the United States military would have in support of the ICC and rules of engagement. The implications of the ICC on United States military doctrine are substantial. The United States military's doctrine on operations other than war must be reviewed to ensure that United States civilian leaders and military commanders and the soldiers that follow their orders are not deployed to an area that will allow the ICC jurisdiction for actions involving that mission. The United States must determine whether these types of missions complement United States military doctrine for deployment in an ICC world. Without United States support and the possibility of the United States changing its military doctrine to eliminate missions to nations where the ICC would have jurisdiction, the ICC will not accomplish its mission of prosecuting those individuals charged with the most serious of international crimes.

The ICC will have implications on national security decision making because the decisions involving individual nation security may provide a chilling effect in an ICC world, especially where the national security interests are indirect. The ICC may also lead to a forum for rogue nations, non-governmental organizations, and individuals who believe action should have been initiated and where harm results from inaction. This area of criminal liability has precedent in international war crime tribunal prosecutions, but, could become a reality with a standing, permanent ICC.

There are implications on the DoD Law of War Program, especially in instruction in the law of war and use of force principles. These areas must be reviewed and revised to provide for ICC instruction on definitions and legal principles. The Rome Statute adopted definitions which differ from some incorporated into the DoD program and the ICC, when it begins adjudicating cases, will issue decisions interpreting the definitions and international law principles. These decisions and rules they set must be incorporated into future law of war instruction for the United States Military.

The implications of the ICC on the United States military will include requests to the United States to provide support roles to the ICC. The present status of the Rome Statute and the current United States political position on the ICC will inhibit and possibly prohibit support to the ICC. The rules of engagement that United States military forces operate under will be affected and their formulation shaped by ICC definitions and decisions.

In conclusion, the United States is in a serious dilemma over the ICC. Is the ICC good law or not? The current United States position is that the Rome Statute, as currently written, is not good law and therefore, the United States cannot agree to become a member of the ICC. Is this the right decision? It appears so at this point in time. Especially since the United States is still able to negotiate and remain at the ICC table. The hard work, skill, strength in the face of adversity, and dedication of the members of the United States Delegation proves the point that the United States has always been and will continue to be a leader in recognizing, training, shaping, supporting, and enforcing the law of war. This will not change no matter what the policy or position is concerning the ICC.

WORD COUNT = 13,879

## ENDNOTES

<sup>1</sup> Ephraim, London, ed., The Law in Literature (New York, NY; Simon and Schuster, 1960), p. 1.

<sup>2</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998. Hereinafter Rome Statute; available from the United Nations; <http://www.un.org/law/icc/statute/romefra.htm>; Internet; accessed on 15 October 1999.

<sup>3</sup> Ellen Grigorian, Congressional Research Service, CRS Report for Congress: The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns (Washington, D.C.: Congressional Research Service, Library of Congress, 6 January 1999), p. 5.

<sup>4</sup> Mark A. Bland, "An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects," Global Legal Studies Journal II 12 (Spring 1999): p. 15.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., p. 4.

<sup>7</sup> Globalissues, "Geopolitics," October 1999; available from <http://www.globalissues.org/Geopolitics/ICC.asp>; Internet; accessed 13 October 1999.

<sup>8</sup> Bland, p. 15.

<sup>9</sup> Gregorian, p. 1.

<sup>10</sup> Rome Statute, Article 126.

<sup>11</sup> Human Rights Watch, "Rome Statute Signature & Ratification Chart," 29 February 2000; available from <http://www.hrw.org/campaigns/icc/icc-main.htm>; Internet; accessed 29 February 2000.

<sup>12</sup> Human Rights Watch, "Non-Governmental Organization Action Alert," May 1999; available from <http://www.hrw.org/campaigns/icc/mav99aa-1.htm>; Internet; accessed 28 September 1999. (Internet site alerts Non-governmental organizations to shift their campaigns to achieve early EIF).

<sup>13</sup> Department of the Army, Peace Operations, Field Manual 100-23 (Washington, D.C.: U.S. Department of the Army, 30 December 1994), p. 2-0.

<sup>14</sup> Department of the Army, Training, Army Regulation 350-1 (Washington, D.C.: U.S. Department of the Army, 1 August 1981), p. 4-5.

<sup>15</sup> Department of Defense, DoD Law of War Program, Department of Defense Directive 5100.77 Hereinafter DoD Directive 5100.77 or DoD Law of War Program (Washington, D.C.: U.S. Department of Defense, 9 December 1998), p. 1.

<sup>16</sup> Department of Defense, DoD Law of War Program, Department of Defense Directive 5100.77 Hereinafter DoD Directive 5100.77 or DoD Law of War Program (Washington, D.C.: U.S. Department of Defense, 9 December 1998), p. 1.

<sup>17</sup> Beth K. Lamont, "Establishing an International Criminal Court," Humanist 58 (Nov./Dec. 1998): p. 16.

<sup>18</sup> Gregorian, p. 3.

- <sup>19</sup> Carroll Bogert, "Pol Pot's Enduring Lesson," Financial Times, 16 March 1998, p. 16.
- <sup>20</sup> Gregorian, p. 4.
- <sup>21</sup> Brigid O'Hara-Forster and Lauren Comiteau, "Justice Goes Global," Time Canada, 27 July 1998, p. 32.
- <sup>22</sup> Bland, p. 5.
- <sup>23</sup> Ibid.
- <sup>24</sup> Leslie C. Green, "War Crimes, Crimes against Humanity, and Command Responsibility," Naval War College Review L (Spring 1999): p. 31.
- <sup>25</sup> Ibid.
- <sup>26</sup> Ibid, p. 33.
- <sup>27</sup> CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Adopted December 9, 1948. 78 U.N.T.S. 277. Hereinafter the Genocide Convention.
- <sup>28</sup> Ibid.
- <sup>29</sup> Lamont, p. 1.
- <sup>30</sup> Bryan F. MacPherson, "Building an International Criminal Court for the 21<sup>st</sup> Century," Connecticut Journal of International Law 13 (1998): p. 12.
- <sup>31</sup> Giulio M. Gallarotti and Arik Y. Preis, "Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court," Australian Journal of International Affairs, 53 (April 1999): p. 1.
- <sup>32</sup> Ibid.
- <sup>33</sup> Bland, p. 8.
- <sup>34</sup> Andrew J. Amigo, "The International Criminal Court and the Triggering of Prosecutorial Action," 10 October 1999; available from <http://miser.suffolk.edu/law/ihrhlp/docs.amigo.html>; Internet. accessed 10 October 1999.
- <sup>35</sup> Ibid.
- <sup>36</sup> Ibid.
- <sup>37</sup> United Nations General Assembly Resolution, 50/46, U.N. GAOR, 50<sup>th</sup> Session, U.N. Doc. A/Res/50/46, 1995.
- <sup>38</sup> Christopher Keith Hall, "The first two sessions of the UN Preparatory Committee on the establishment of an International Criminal Court," The American Journal of International Law 91 (January 1997): p. 179.
- <sup>39</sup> Ibid., p. 183.
- <sup>40</sup> United Nations Resolution A/51/207 (12/17/96).
- <sup>41</sup> Christopher Keith Hall, "The third and fourth sessions of the UN Preparatory Committee on the establishment of an International Criminal Court," The American Journal of International Law 92 (January 1998): p. 124.

<sup>42</sup> Ibid., p. 130.

<sup>43</sup> Human Rights Watch, "The Months Before the Rome Conference," 24 November 1999; available from <http://www.hrw.org/campaigns/icc/icc-main.htm>; Internet; accessed 24 November 1999.

<sup>44</sup> Ibid.

<sup>45</sup> United Nations Association of the United States of America, "International Criminal Court - Overview," 12 November 1999; available from <http://www.unausa.org/icc/>; Internet; accessed 12 November 1999.

<sup>46</sup> Gregorian, p. 5.

<sup>47</sup> Ibid.

<sup>48</sup> James Podgers, "War Crimes Court Under Fire"; ABA Journal, September 1998, p. 64.

<sup>49</sup> Ibid.

<sup>50</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Resolution F, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998. Hereinafter Resolution F; available at <http://www.un.org/law/icc/prepcom/commission.htm>; Internet; accessed on 19 November 1999.

<sup>51</sup> UN Preparatory Commission for the International Criminal Court, First and Second Sessions, 16 to 26 February and 26 July to 13 August 1999; available from <http://un.org/law/icc/prepcom.prepfab.htm> and <http://un.org/law/icc/prepcom.prepjuly.htm>; Internet; accessed 19 November 1999.

<sup>52</sup> Human Rights Watch, "Commentary to the Third Preparatory Commission Meeting on the International Criminal Court,"; available from <http://www.igc.org/icc/html/hrw199911.html>; Internet; accessed 10 January 2000.

<sup>53</sup> Rome Statute, Article 3.

<sup>54</sup> Ibid., Article 34.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid., Article 115.

<sup>57</sup> Ibid., Article 112.

<sup>58</sup> Ibid., Article 36.

<sup>59</sup> Ibid., Article 38.

<sup>60</sup> Ibid., Article 39.

<sup>61</sup> Ibid., Article 43.

<sup>62</sup> Ibid., Article 68.

<sup>63</sup> Ibid., Article 75.

<sup>64</sup> Ibid., Article 48.

- <sup>65</sup> Ibid., Article 50.
- <sup>66</sup> Ibid., Article 51.
- <sup>67</sup> Ibid., Article 52.
- <sup>68</sup> Ibid., Article 42.
- <sup>69</sup> Ibid.
- <sup>70</sup> Ibid., Article 53.
- <sup>71</sup> Ibid., Article 13; Article 14.
- <sup>72</sup> Ibid., Article 58.
- <sup>73</sup> Ibid., Article 66.
- <sup>74</sup> Ibid., Article 67.
- <sup>75</sup> Ibid.
- <sup>76</sup> Ibid., Article 53.
- <sup>77</sup> Ibid.
- <sup>78</sup> Ibid.
- <sup>79</sup> Ibid., Article 57.
- <sup>80</sup> Ibid.
- <sup>81</sup> Ibid., Article 99.
- <sup>82</sup> Ibid., Article 86.
- <sup>83</sup> Ibid., Article 87.
- <sup>84</sup> Ibid., Article 72.
- <sup>85</sup> Ibid., Article 74.
- <sup>86</sup> Ibid., Article 77.
- <sup>87</sup> Ibid., Article 81.
- <sup>88</sup> Ibid., Article 83; Article 84.
- <sup>89</sup> Ibid., Article 16.
- <sup>90</sup> Ibid.

<sup>91</sup> Giulio M. Gallarotti and Arik Y. Preis, "Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court," Australian Journal of International Affairs, 53 (April 1999), p. 99.

<sup>92</sup> Rome Statute, Article 5.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid., Article 6; Article 7; Article 8.

<sup>96</sup> Ibid., Article 9.

<sup>97</sup> Ibid., Article 70.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid., Article 71.

<sup>100</sup> Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 102; Hereinafter Genocide Convention.

<sup>101</sup> Rome Statute, Article 6.

<sup>102</sup> Ibid., Article 7.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid., Article 8.

<sup>107</sup> Ibid.

<sup>108</sup> Kenneth Roth, "The Court the US Doesn't Want," November 19, 1998; available from [www.nybooks.com/nyrev/wwwarchdisplay.cgi?19981119045F](http://www.nybooks.com/nyrev/wwwarchdisplay.cgi?19981119045F); Internet; accessed 12 January 2000.

<sup>109</sup> Rome Statute, Article 5.

<sup>110</sup> Eric Schmitt, "Pentagon Battles Plans For International War Crimes Tribunal," New York Times, 14 April 1998; Foreign Desk, p.1.

<sup>111</sup> Rome Statute, Article 9.

<sup>112</sup> Vienna Convention on the Law of Treaties. U.N. Doc. A/conf. 39/27, May 23, 1969, (entered into force January 27, 1980), Article 34.

<sup>113</sup> Ibid, Article 38.

<sup>114</sup> David J. Scheffer, "The United States and The International Criminal Court", The American Journal of International Law, p. 18.

<sup>115</sup> Rome Statute, Article 124.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Rome Statute, Article 121.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid., Article 120.

<sup>123</sup> Grigorian, p. 9.

<sup>124</sup> Rome Statute, Article 29.

<sup>125</sup> Rome Statute, Article 11.

<sup>126</sup> Scheffer, American Journal of International Law, p. 18.

<sup>127</sup> Ibid.

<sup>128</sup> Rome Statute, Article 12.

<sup>129</sup> Human Rights Watch, "The ICC Jurisdictional Regime; Addressing U.S. Arguments," 1999; available from [www.hrw.org/campaigns/icc/icc-regime.htm](http://www.hrw.org/campaigns/icc/icc-regime.htm); Internet; accessed 20 November 1999.

<sup>130</sup> Rome Statute, Article 13.

<sup>131</sup> Ibid., Article 14.

<sup>132</sup> Ibid., Article 15.

<sup>133</sup> Amigo, p. 6, at Note 53.

<sup>134</sup> Rome Statute, Preamble.

<sup>135</sup> Rome Statute, Article 17.

<sup>136</sup> Ibid.

<sup>137</sup> Gary T. Dempsey, "Reasonable Doubt, The Case against the Proposed International Criminal Court," 16 July 1998; available from [www.cato.org/pubs/pas/pa-311.html](http://www.cato.org/pubs/pas/pa-311.html); Internet; accessed 5 January 1999.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Bland, p. 14.

<sup>142</sup> Ibid.

<sup>143</sup> Brett D. Schaefer, "The International Criminal Court: Threatening US Sovereignty and Security," The Heritage Foundation Executive Memorandum, 2 July 1998; available from <http://www.heritage.org/library/execmemo/em537.htm>; Internet; accessed 12 January 2000.

<sup>144</sup> Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, 105<sup>th</sup> Cong. 2<sup>nd</sup>. Sess. S. Hrg. 105-724, (1998) (Questions by Senator Grams during statement of Michael P. Scharf, Professor of Law).

<sup>145</sup> Rome Statute, Article 17(2). This article would allow for a second prosecution of an individual where the ICC determined that the first prosecution was done to shield a person or the proceedings were inconsistent with bringing the person to justice.

<sup>146</sup> Ibid., Article 20.

<sup>147</sup> David J. Scheffer, "Challenges Confronting International Justice Issues," Address at New England School of Law to New England Law Professors of the Boston Area, 14 January 1998, New England International and Comparative Law Annual, 4, pp. 1 - 6.

<sup>148</sup> U.S. Statement Before the U.N. General Assembly Sixth Committee "The Rome Treaty on the International Criminal Court," 21 October 1999, available from <http://www.icc.org/icc/html/us19991021.html>; Internet; accessed 22 January 2000.

<sup>149</sup> Ibid.

<sup>150</sup> Scheffer, American Journal of International Law, p. 15.

<sup>151</sup> Ibid, 12.

<sup>152</sup> U.S. Statement Before the U.N. General Assembly Sixth Committee "The Rome Treaty on the International Criminal Court," 21 October 1999, available from <http://www.icc.org/icc/html/us19991021.html>; Internet; accessed 22 January 2000.

<sup>153</sup> Ibid.

<sup>154</sup> Council on Foreign Relations, "Toward an International Criminal Court? Three Options Presented as Presidential Speeches," 1999 available from <http://www.foreignrelations.org/public/pubs/CriminalCourtCPI.html>; Internet; accessed 5 January 2000.

<sup>155</sup> Rome Statute, Articles 121; 122.

<sup>156</sup> Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, 105<sup>th</sup> Cong. 2<sup>nd</sup>. Sess. S. Hrg. 105-724, (1998) (Statement of Senator Jesse Helms).

<sup>157</sup> Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, 105<sup>th</sup> Cong. 2<sup>nd</sup>. Sess. S. Hrg. 105-724, (1998) (Statement of Hon. John Bolton, former Assistant Secretary of State for International Organization Affairs).

<sup>158</sup> Section 2502 of the Foreign Affairs Reforms and Restructuring Act of 1998, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, PubL. No. 105-277, 112 Stat. 2681 (1998).

<sup>159</sup> Omnibus Consolidation Appropriations Act, Public Law 106 – 113, Sections 705 and 706.

<sup>160</sup> William L. Nash, "The ICC and the Deployment of American Armed Forces," American Academy of Arts and Sciences, The International Criminal Court and U.S. National Security, prepublication, p. 265

<sup>161</sup> Sarah Sewall, Carl Kaysen, and Michael Scharf, "The International Criminal Court and U.S. National Security," Chapter 1, American Academy of Arts and Sciences, prepublication, pp. 12-17..

<sup>162</sup> Cara Levy Rodriguez, "Slaying the Monster: Why the United States Should Not Support the Rome Treaty," 14 American University International Law Review 805 at Note 151.

<sup>163</sup> Amigo, p. 6 at note 50 referring to QDR Report.

<sup>164</sup> Ibid., at note 51 citing an article in the Washington Post.

<sup>165</sup> Casper W. Weinberger, "There They Go Again: The International Criminal Court," Forbes; New York, 24 August 1998; p. 42.

<sup>166</sup> Wright, p. 28.

<sup>167</sup> Associates of American Law Schools, "Panel Discussion: Associates of American Law Schools Panel on the International Criminal Court," 36 American Criminal Law Review 223, Spring 1999, p. 38, (Discussion of Professor Hablerstam).

<sup>168</sup> Carlotta Gall, "G.I.'s in Kosovo Face Barrage of Complaints; Beatings and Other Misconduct Reported," New York Times, 29 January 2000, p. A6.

<sup>169</sup> Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, 105<sup>th</sup> Cong. 2<sup>nd</sup>. Sess. S. Hrg. 105-724, (1998) (Statement of Ambassador David Scheffer).

<sup>170</sup> Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, 105<sup>th</sup> Cong. 2<sup>nd</sup>. Sess. S. Hrg. 105-724, (1998) (Opening Statement of Senator Helms). In his statement, Senator Helms indicated that he would not support keeping U.S. forces in Germany "if Germany insists on exposing them to the jurisdiction of the ICC."

<sup>171</sup> A new National Security Strategy for the United States was published in December 1999. A new National Military Strategy will be published in 2000.

<sup>172</sup> Scheffer, American Journal of International Law, p. 19.

<sup>173</sup> Rick Maze, "U.S. Seeks Changes to International Court," Army Times, 24 August 1998, p.6.

<sup>174</sup> John M. Shalikashvili, Chairman, US Joint Chiefs of Staff, "National Military Strategy: Shape, Respond, Prepare Now: A Military Strategy for a New Era," (Washington, D.C. Government Printing Office, 1997).

<sup>175</sup> Ibid. The National Military Strategy discusses types of operations and engagements that will shape the international environment.

<sup>176</sup> Brett D. Schaefer, "The International Criminal Court: Threatening US Sovereignty and Security," The Heritage Foundation Executive Memorandum, 2 July 1998; available from <http://www.heritage.org/library/execmemo/em537.htm>; Internet; accessed 12 January 2000.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Nash, p. 259.

<sup>181</sup> Marcella David, "Grotius Repudiated: The American: Objections to the International Criminal Court and the Commitment to International Law," 20 Michigan Journal of International Law 337, Winter 1999, p. 397.

<sup>182</sup> Rodriguez, at note 134.

<sup>183</sup> Ibid.

<sup>184</sup> David, pp. 351 – 353. Author reviews three options for defining the crime of aggression that were discussed in Rome during negotiation leading up to the signing of the Rome Statute.

<sup>185</sup> Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, 105<sup>th</sup> Cong. 2<sup>nd</sup> Sess. S. Hrg. 105-724, (1998) (Statement of Ambassador David Scheffer).

<sup>186</sup> Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations of the United States Senate, 105<sup>th</sup> Cong. 2<sup>nd</sup> Sess. S. Hrg. 105-724, (1998) (Opening Statement of Senator Helms).

<sup>187</sup> Steven Lee Myers, "Kosovo Inquiry Confirms U.S. Fears of War Crimes Court," New York Times, 3 January 2000, p. A6.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Gary T. Dempsey, "Reasonable Doubt, the Case Against the Proposed International Criminal Court," available from <http://www.Cato.org/pubs/pas/pa-311/html>; Internet; accessed 18 November 1999.

<sup>191</sup> Jordan J. Paust, M. Cherif Bassiouni, Sharon A. Williams, Michael Scharf, Jisimie Gurule', Bruce Zagaris, International Criminal Law (Durham, NC; Carolina Academic Press, 1996), pp. 30 – 45.

<sup>192</sup> Statute for the International Criminal Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Article 7.

<sup>193</sup> Stephen Solarz, David Aronson, Stephen Weissman, "Genocide in Rwanda While Washington Dithered," Herald International Tribune, 21 February 2000, p. 10.

<sup>194</sup> Rome Statute, Article 121.

<sup>195</sup> Ibid., Article 21.

<sup>196</sup> Charles Truehart, "France Splits with Court over Bosnia; Generals Won't Testify Before the Tribunal," 9 December 1997, Washington Post, p. A 22.

<sup>197</sup> Ibid.

<sup>198</sup> Dempsey, p. 9.

<sup>199</sup> Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>200</sup> DoD Directive 5100.77, previously cited at note 15.

<sup>201</sup> Operational Law Handbook, p. 5-1 lists the applicable regulations of the individual services.

<sup>202</sup> DoD Directive 5100-77, Sections 1.2 and 5.6.

<sup>203</sup> Department of the Army, "Training in Units," Army Regulation 350-41 (Washington, D.C.: U.S. Department of the Army, 19 March 1993), p. 14-1.

<sup>204</sup> Department of the Army, "Training," Army Regulation 350-1 (Washington, D.C.: U.S. Department of the Army, 1 August 1981), p. 4-5.

<sup>205</sup> A search of the Pentagon Library indicates that AR 350-216 was rescinded.

<sup>206</sup> AR 350-1, para 4-6c, 4-2 – 4-3.

<sup>207</sup> <sup>231</sup> Operational Law Handbook (2000), JA 422, Hereinafter Operational Law Handbook; International and Operational Law Dept., The Judge Advocate General's School, United States Army, Charlottesville, VA, p. 5-1 lists Field Manuals and Training Circulars for use in training soldiers in the law of war.

<sup>208</sup> Department of the Army, Training Development Management, Processes and Products, Training and Doctrine Command Regulation 350-70, (U.S. Department of the Army, Training and Doctrine Command).

<sup>209</sup> U.S. Department of the Army, Training and Doctrine Command (TRADOC), "U.S. Law of War and Human Rights Training," 1996 – 1997 Comprehensive Review and Report on the School of the Americas, available from <http://www.benning.army.mil/usarsa/certif/consist.htm>; Internet; accessed 8 February 2000.

<sup>210</sup> DoD Directive 5100.77 Section 3.

<sup>211</sup> Ibid., Section 5.1.2.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid., Section 5.1.3.

<sup>214</sup> Michael Newton, Major, "Law of War Training", 1998 Reserve Component Judge Advocate Officer Advanced Course (JAOOAC) Deskbook, Chapter 7, available from <http://www.jagcnet.army.mil/jagcne...4ead7852565e20004898d3?OpenDocument>; Internet; accessed 16 February 2000.

<sup>215</sup> Wright, p. 21. Author indicates that customary international law status for the Rome Statute is possible, however, because of the lack of support by the most populous nations on earth, it would be difficult to achieve.

<sup>216</sup> Brian N. Durham, "The Law of War – Bombing Iraq". 17 December 1998 available from <http://legalindustry.about...ustry/library/weekly/aa121798.htm>; Internet; accessed 9 February 2000.

<sup>217</sup> Ibid.

<sup>218</sup> David Lloyd Roberts, Lt Colonel, UK, Ret. "Training the armed forces to respect international humanitarian law, The perspective of the ICRC Delegate to the Armed and Security Forces of South Asia," International Review of the Red Cross, 319, 1 July 1997, available from <http://www.icrc.org/irceng.nsf/c1256212...add7223f5954125652900210694?OpenDocument>; Internet; accessed 16 February 2000.

<sup>219</sup> Hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 105<sup>th</sup> Cong., 2<sup>nd</sup> Session, "Is a U.N. International Criminal Court in the U.S. National Interest?" July 23, 1998, S. Hrg. 105 – 724, available from <http://www.access.gpo.gov/congress/senate>; Internet; accessed 15 October 1999.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid., p. 8.

<sup>222</sup> House of Representatives, United States Congress, "Protection of United States Troops From Foreign Prosecution Act of 1999," HR 2381, 106<sup>th</sup> Cong., 1<sup>st</sup> Session, H.R. 2381, 29 June 1999, available from <http://thomas.loc.gov/cgi-bin/quer/v/z?c106:H.R.2381.IH.>; Internet; accessed 18 November 1999.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid., Section 5.

<sup>225</sup> Omnibus Consolidation Appropriations Act, cited previously at note 158.

<sup>226</sup> Everett, p. 239.

<sup>227</sup> Ibid. The author summarizes his argument by pointing out that ICC jurisdiction is complementarity, therefore, the United States can best avoid ICC jurisdiction by changing statutory law to broaden jurisdiction and by being prepared for the roles for investigation and prosecution of war crimes.

<sup>228</sup> DoD Directive 5100.77.

<sup>229</sup> Ibid., Sections 1.2 and 5.6.

<sup>230</sup> Ibid., Section 3.2.

<sup>231</sup> Operational Law Handbook, p. 5-17.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Department of the Army, "Judge Advocate Legal Service," Army Regulation 27-1 (Washington, D.C.: U.S. Department of the Army, 3 February 1995), para. 11-6b(1).

<sup>235</sup> United Nations, International Criminal Tribunal for the Former Yugoslavia, Official UN Website; available from <http://www.un.org/icty/jobs/jobs.htm>; Internet; accessed on 28 February 2000.

<sup>236</sup> Interview with Senior Trial Attorney, ICTY, The Hague, Netherlands, 22 February 2000.

<sup>237</sup> Interview with Legal Advisor, U.S. Embassy, The Hague, Netherlands, 22 February 2000.

<sup>238</sup> CNN, "U.N. Investigators unearth evidence of civilian massacre," 13 July 1996, available from <http://www.cnn.co.jp/WORLD/9607/13/bosnia.graves/>; Internet; accessed on 2 February 2000.

<sup>239</sup> Department of the Army, "Imagery Intelligence," Training Circular 34-55, (Washington, D.C.: U.S. Department of the Army, 1 October 1988).

<sup>240</sup> Ibid.

<sup>241</sup> Amigo, at note 56. The author cites the Nuremberg Trials Final Report Appendix on the Apprehension of and Detention of War Criminals.

<sup>242</sup> Ibid.

<sup>243</sup> Srecko Latal, "NATO Troops make their first Bosnia war-crimes arrests," *The Seattle Times*, 10 July 1997; available from [http://www.seattletimes.com/extra/browse/html97/altbosn\\_071097.html](http://www.seattletimes.com/extra/browse/html97/altbosn_071097.html); Internet; accessed 2 February 2000.

<sup>244</sup> Marsha V. Mills, Major, "War Crimes and Command Responsibility," 1998 Reserve Component Judge Advocate Officer Advanced Course (JAOAC) Deskbook, Chapter 12; available from <http://www.jagcnet.army.mil/jagcne...35e35852565e20048b000?OpenDocument>. Internet; accessed 16 February 2000.

<sup>245</sup> Captain Grammel, Information Paper, Task Force Eagle, Subject: "Future Developments on War Criminals," 8 April 1996, available from <http://www.jagnet.army.mil/jagcne...8a5d88525676200527d9e?OpenDocument>; Internet; accessed 16 February 2000.

<sup>246</sup> CNN, "Bosnian Bodies Recovered, despite Serb Obstruction," 5 July 1996, available from [www.cnn.co.jp/WORLD/9607/05/bosnia.mass.graves/index.html](http://www.cnn.co.jp/WORLD/9607/05/bosnia.mass.graves/index.html); Internet; accessed 17 January 2000.

<sup>247</sup> Ibid.

<sup>248</sup> Interview with Senior Trial Attorney, ICTY, The Hague, Netherlands, 22 February 2000.

<sup>249</sup> Ibid., Also, the ICTY official website lists ICTY job openings to establish organic assets for heavy equipment operators, etc.

<sup>250</sup> Ibid.

<sup>251</sup> Interview with Legal Advisor, United States Embassy, The Hague, Netherlands and Senior Trial Attorney, ICTY, 22 February 2000. Both individuals indicated that there is an ICTY trust fund where monies for the tribunal are pooled. Both also indicated that United States military support to the ICTY was in many cases incidental to military mission and no cost sharing or reimbursement was involved.

<sup>252</sup> Ibid. Legal Advisor discussed attachment of FBI agents to the military to assist in forensics investigation role. Senior Trial Attorney mentioned non-governmental organizations that provide DNA analysis and civilians roles in identification of victim bodies in mass grave situations.

<sup>253</sup> Jordan J. Paust, M. Cherif Bassiouni, Sharon A. Williams, Michael Scharf, Jisimie Gurule', Bruce Zagaris, *International Criminal Law* (Durham, NC; Carolina Academic Press, 1996), p. 454.

<sup>254</sup> Interview with Senior Trial Attorney, ICTY, The Hague, Netherlands, 22 February 2000. She indicated that the Kosovo operation has war crimes tribunal support stated in the core document, whereas the Bosnia operation, when it was initiated, only mentioned war crimes in an annex to the operations plan. In addition, both the military and the tribunal are more experienced in matters of roles and support.

<sup>255</sup> Ibid.

<sup>256</sup> Operational Law Handbook, p. 8-1.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Chairman, Joint Chiefs of Staff Instruction 3121.01, "Standing Rules of Engagement for U.S. Forces", 1 October 1994.

<sup>260</sup> Ibid., Enclosure A, 1i.

<sup>261</sup> Captain Tellitocci, Information Paper, Task Force Eagle, Subject: "Policy Guidance on Detention of War Criminals", 6 February 1996, available from <http://www.jagcnet.army.mil/jagcne...ae31e85256762006e3907?OpenDocument>; Internet; accessed 16 February 2000.

<sup>262</sup> Michael Newton, Major, "Law of War Training", 1998 Reserve Component Judge Advocate Officer Advanced Course (JAOAC) Deskbook, Chapter 7: Law of War Training; available from <http://www.jagcnet.army.mil/jagcne...4ead7852565e2004898d3?OpenDocument>; Internet; accessed 16 February 2000.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Interview with Senior Trial Attorney, ICTY, 22 February 2000.

<sup>266</sup> Ibid.



## BIBLIOGRAPHY

- Amigo, Andrew J. "The International Criminal Court and the Triggering of Prosecutorial Action." 10 October 1999. Available from <http://miser.suffolk.edu/law/ihrhlp/docs/amigo.html>. Internet. Accessed 10 October 1999.
- Associates of American Law Schools. "Panel Discussion: Associates of American Law Schools Panel on the International Criminal Court." 36 American Criminal Law Review 233, p. 238.
- Bland, Mark A. "An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects". 1-31.
- Bogert, Carroll. "Pol Pot's Enduring Lesson." Financial Times, 16 March 1998, p.16.
- CNN. "U.N. Investigators unearth evidence of civilian massacre." 13 July 1996. Available from <http://www.cnn.co.jp/WORLD/9607/13/bosnia.graves/>. Internet. Accessed 2 February 2000.
- \_\_\_\_\_. "Bosnian Bodies Recovered, despite Serb Obstruction." 5 July 1996. Available from [www.cnn.co.jp/WORLD/9607/05/bosnia.mass.graves/index.html](http://www.cnn.co.jp/WORLD/9607/05/bosnia.mass.graves/index.html). Internet. Accessed 17 January 2000.
- Convention on the Prevention and Punishment of the Crime of Genocide. Adopted 9 December 1948, 78 U.N.T.S. 277.
- Council on Foreign Relations. "Toward an International Criminal Court? Three Options Presented as Presidential Speeches." 1999. Available from <http://www.foreignrelations.org/public/pubs/CriminalCourtCPI.html>. Internet. Accessed 5 January 2000.
- David, Marcella. "Grotius Repudiated: The American: Objections to the International Criminal Court and the Commitment to International Law." 20 Michigan Journal of International Law 337. Winter 1999. 337 – 411.
- Dempsey, Gary T. "Reasonable Doubt, The Case against the Proposed International Criminal Court." 16 July 1998. Available from <http://www.cato.org/pubs/pas/pa-311.html>. Internet. Accessed 5 January 2000.
- Durham, Brian N. "The Law of War – Bombing Iraq." 17 December 1998. Available from <http://legalindustry.about...ustry/library/weekly/aa121798.htm>. Internet. Accessed 9 February 2000.
- Everett, Robinson. "American Servicemembers and the International Criminal Court." American Academy of Arts and Sciences. Prepublication Draft. 2000. pp. 222 – 248.
- Gall, Carlotta. "G.I.'s in Kosovo Face Barrage of Complaints: Beatings and Other Misconduct Reported." New York Times. 29 January 2000. P. A6.
- Gallarotti, Giulio, M., and Preis, Arik Y. "Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court." Australian Journal of International Affairs, 53 (April 1999): 95-112.
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War. 12 August 1949. 6 U.S.T. 3316, 75 U.N.T.S. 135.
- Globalissues. "Geopolitics." October 1999. Available from <http://www.globalissues.org/Geopolitics/ICC.asp>. Internet. Accessed 13 October 1999.

- Grammel, Captain. Information Paper. Task Force Eagle. Subject: "Future Developments on War Criminals." 8 April 1996. Available from <http://www.jagnet.army.mil/jagcne...8a5d88525676200527d9e?OpenDocument>. Internet. Accessed 16 February 2000.
- Green, Leslie, C. "War Crimes, Crimes against Humanity, and Command Responsibility." Naval War College Review L (Spring 1999): 26-68.
- Grigorian, Ellen, Congressional Research Service. CRS Report for Congress: The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns. Washington, D.C.: U.S. General Accounting Office, January 1999.
- Hague Convention No. IV Respecting the Laws and Customs of War on Land. 18 October 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto.
- Hall, Christopher Keith. "The first two sessions of the UN Preparatory Committee on the establishment of an International Criminal Court." The American Journal of International Law 91 (January 1997): 177-188.
- \_\_\_\_\_. "The third and fourth sessions of the UN Preparatory Committee on the establishment of an International Criminal Court." The American Journal of International Law 92 (January 1998): 124-134.
- House of Representatives. United States Congress. "Protection of United States Troops From Foreign Prosecution Act of 1999." 106<sup>th</sup> Congress. 1<sup>st</sup> Session. H.R. 2381. 29 June 1999. Available from <http://thomas.loc.gov/cgi-bin/query/z?c106:h.R.2381.IH>. Internet. Accessed 18 November 1999.
- Human Rights Watch. "Commentary to the Third Preparatory Commission Meeting on the International Criminal Court." Available from <http://www.icc.org/icc/html/hrw1999II.html>. Internet. Accessed 10 January 2000.
- Information Paper. Task Force Eagle. Subject: "Policy Guidance on Detention of War Criminals." 6 February 1996. Available from <http://www.jagnet.army.mil/jagcne...ae31e85256762006e3907?OpenDocument>. Internet. Accessed 16 February 2000.
- \_\_\_\_\_. "Non-Governmental Organization Action Alert." May 1999. Available from <http://www.hrw.org/campaigns/icc/may99aa-1.htm>. Internet. Accessed 28 September 1999.
- \_\_\_\_\_. "Rome Statute Signature & Ratification Chart." 17 May 1999. Available from <http://www.hrw.org/campaigns/icc/icc-main.htm>. Internet. Accessed 17 November 1999.
- \_\_\_\_\_. "The ICC Jurisdictional Regime; Addressing U.S. Arguments." 1999. Available from <http://www.hrw.org/campaigns/icc/icc-regime.htm>. Internet. Accessed 20 November 1999.
- \_\_\_\_\_. "The Months Before the Rome Conference." 24 November 1999. Available from <http://www.hrw.org/campaigns/icc/icc-main.htm>. Internet. Accessed 24 November 1999.
- Lamont, Beth K. "Establishing an International Criminal Court." Humanist 58 (Nov./Dec. 1998): 16-20.
- Latal, Srecko. "NATO Troops make their first Bosnia war-crimes arrests." 10 July 1997. Available from [http://www.seattletimes.com/extra/browse/htm197/altbosn\\_071097.html](http://www.seattletimes.com/extra/browse/htm197/altbosn_071097.html). Internet. Accessed 2 February 2000.
- London, Ephraim, ed. The Law in Literature. New York, NY: Simon and Schuster, 1960.

MacPherson, Bryan F. "Building an International Criminal Court for the 21<sup>st</sup> Century." Connecticut Journal of International Law 13 (1998): 1-14.

Maze, Rick. "U.S. Seeks Changes to International Court." Army Times. 24 August 1998. P.6.

Mills, Marsha, Major. "War Crimes and Command Responsibility." 1998 Reserve Component Judge Advocate Officer Advanced Course (JAOAC) Deskbook. Chapter 12. Available from <http://www.jagcnet.army.mil/jagcne...35e35852565e20048b000?OpenDocument>. Internet. Accessed 16 February 2000.

Myers, Steven Lee. "Kosovo Inquiry Confirms U.S. Fears of War Crimes Court." New York Times. 3 January 2000. P. A6.

Nash, William L. "The ICC and the Deployment of American Armed Forces." American Academy of Arts and Sciences. Prepublication Draft. 2000. pp. 249 – 266.

Newton, Michael. Major. "Law of War Training". 1998 Reserve Component Judge Advocate Officer Advanced Course (JOAAC) Deskbook, Chapter 7: Available from <http://www.jagcnet.army.mil/jagcne...4ead7852565e2004898d3?OpenDocument>. Internet. Accessed 16 February 2000.

O'Hara-Forster, Brigid, and Comiteau, Lauren. "Justice Goes Global." Time Canada, 27 July 1998, 32 – 33.

Paust, Jordan J., Bassiouni, M. Cherif, Williams, Sharon A., Scharf, Michael, Gurule', Jisimie, Zagaris, Bruce. International Criminal Law Durham, North Carolina; Carolina Academic Press, 1996.

Roberts, David, Lloyd. Lt Colonel. UK Ret. "Training the armed forces to respect international humanitarian law; The perspective of the ICRC Delegate to the Armed and Security Forces of South Asia." International Review of the Red Cross. 319. 1 July 1997. Available from <http://www.icrc.org/icrceng.nsf/c1256212...add7223f5954125652900210694?OpenDocument>. Internet. Accessed 16 February 2000.

Rodriguez, Cara Levy. "Slaying the Monster: Why the United States Should Not Support the Rome Treaty." 14 American University International Law Review. 805 – 840.

Roth, Kenneth. "The Court the US Doesn't Want." 19 November 1998. Available from <http://www.nybooks.com/nyrev/WWWarchdisplay.cgi?19981119045F>. Internet. Accessed 12 January 2000.

Scheffer, David J. "The United States and the International Criminal Court." The American Journal of International Law. 93 (1999) 12 - 22.

\_\_\_\_\_. "Challenges Confronting International Justice Issues." Address at New England School of Law to New England International Law Professors of the Boston Area. 14 January 1998. 4. 1 - 6.

Schmitt, Eric. "Pentagon Battles For International War Crimes Tribunal." New York Times. 14 April 1998. Foreign Desk, p. 1.

Sewell, Sarah, Kaysen, Carl, and Scharf, Michael. "The International Criminal Court and U.S. National Security." American Academy of Arts and Sciences. Prepublication Draft. 2000. pp. 1 – 17.

- Shalikashvili, John, M. Chairman, US Joint Chiefs of Staff. "National Military Strategy: Shape, Respond, Prepare Now - A Military Strategy for a New Era." Washington, D.C.: U.S. Department of Defense, 1997.
- Solarz, Stephen, Aronson, David and Weissman, Stephen. "Genocide in Rwanda While Washington Dithered." Herald International Tribune. 21 February 2000. P. 10.
- Tellitocci, Captain. Information Paper. Task Force Eagle. Subject: "Policy Guidance on Detention of War Criminals." 6 February 1996. Available from <http://www.jagnet.army.mil/jagcne...ae31e85256762006e3907?OpenDocument>. Internet. Accessed 16 February 2000.
- The Judge Advocate General's School. Operational Law Handbook. JA 422. Charlottesville, VA: U.S. Department of the Army, 2000.
- Truehart, Charles. "France Splits with Court over Bosnia; Generals Won't Testify in War Crimes Cases." Washington Post. 9 December 1997. A 22.
- U.S. Department of Defense. Standing Rules of Engagement for U.S. Forces. Chairman of the Joint Chiefs of Staff Instruction 3121.01. Washington, D.C.: U.S. Department of Defense, 1 October 1994.
- \_\_\_\_\_. U.S. Department of Defense. DoD Law of War Program. Department of Defense Directive 5100.77. Washington, D.C.: U.S. Department of Defense, 9 December 1998.
- U.S. Department of the Army. Peace Operations. Field Manual 100-23. Washington, D.C.: U.S. Department of the Army, 30 December 1994.
- \_\_\_\_\_. Judge Advocate Legal Service. Army Regulation 27-1. Washington, D.C.: Department of the Army, 3 February 1995.
- \_\_\_\_\_. Training. Army Regulation 350-1. Washington, D.C.: U.S. Department of the Army, 1 August 1981.
- \_\_\_\_\_. Training Development Management, Processes and Products. Army Regulation 350-70. Washington, D.C.: U.S. Department of the Army.
- \_\_\_\_\_. Imagery Intelligence. Training Circular 34-55. Washington, D.C.: U.S. Department of the Army, 1 October 1988.
- \_\_\_\_\_. Report of 1996 - 1997 Comprehensive Review of the School of the Americas. Internet. Available from <http://www.benning.army.mil/usarsa/certif/consist.htm>. Accessed 8 February 2000.
- United Nations General Assembly Resolution. 50/46, U.N. GAOR, 50<sup>th</sup> Session, U.N. Doc. A/Res/50/46, 1995.
- \_\_\_\_\_. 51/207, U.N. GAOR, 50<sup>th</sup> Session, U.N. Doc. A/Res/51/207, 1996.
- Weinberger, Casper W. "There They Go Again: The International Criminal Court." Forbes. 24 August 1998. 42 - 44.
- Wright, Daniel V. Colonel. Strategic Implication of U.S. Non-Support For The International Criminal Court. Carlisle Barracks, PA: U.S. Army War College, 31 March 1999: 1-33.