

AMERICAN MILITARY JUSTICE AND INTERNATIONAL CRIMINAL COURT
COMPLEMENTARITY: THE CASE OF UCMJ ARTICLE 60

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“Our Nation expects and enforces the highest standards of honor and conduct in our military... Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable international criminal court.”

– President George W. Bush¹

Introduction

Although the American military is effectively one of the most potent of international institutions, discussions of its regulation have been oddly domestic. The court-martial – the single most important institution for disciplining military forces, preventing atrocities and punishing offenders – has seen its jurisdiction and procedures hotly debated, but most often by those in uniform or individuals interested in domestic

¹ Remarks to the 10th Mountain Division at Fort Drum, New York, 38 WEEKLY COMP. PRES. DOC. 1228 (July 22, 2002) .

military policy. This paper aims to internationalize the discussion, recognizing that the discipline of American military forces is of major concern to both international law and U.S. foreign policy. By exploring the interaction between a major innovation in international law – the International Criminal Court – and the extensive clemency powers exercised by military commanders under the laws governing U.S. courts-martial, I hope to demonstrate that a systematic rethinking of American military justice is now necessary in light of changed international conditions.

* * *

The Statute of the International Criminal Court was adopted by a vote of 120 to 7 late in the evening of 17 July 1998. For those voting in favor of the final draft, the lack of unanimity – and the presence of the United States and China among the nations opposed to adoption – was nearly irrelevant. For them and many prominent Non-Governmental Organizations, the mere existence of such a court would help end impunity for major crimes against international law, and would act as a permanent deterrent to despots and tyrants.²

² See, e.g., Toni Pfanner, “ICRC Expectations of the Rome International Conference,” 322 INTL. REV. RED CROSS 21 (1998) (“an independent and efficient international criminal court would serve as a serious deterrent, saving countless persons in the future”); Statement of Louis Michel, Deputy Prime Minister and Minister of Foreign Affairs of Belgium, 11 April 2002 (“[the Court] will act as a deterrent and will help to promote international humanitarian law and human rights”), *available online at*: <http://www.diplomatie.be/en/press/homedetails.asp?TEXTID=168>; Statement by the Permanent Representative of Chile to the United Nations, Ambassador Juan Gabriel Valdes, on behalf of the member states of the Rio Group, 12 November 2001 (“It is our belief that the Court’s establishment will also be a powerful deterrent against future authors of such atrocities). *But see* Michael L. Smidt, “The International Criminal Court: An Effective Means of Deterrence?,” 167 Mil. L. Rev. 156, 188 (2001) (an offender has “about as much chance of being prosecuted as ‘winning the lottery’”).

The Court as constituted was given substantial powers, as it was intended to have the teeth to act as a true international court, reliant only tangentially on the United Nations and certainly independent of any particular state.³

The participants in the Rome Conference recognized that the powers of the court could invite attempts to capture its authority for political ends. Consequently, a series of checks on the jurisdiction of the court were integrated into the Court's statute, including limits on its territorial and subject-matter jurisdiction. The most powerful check on the new institution, however, was the principle of complementarity: the court would not hear any case unless the state or states that would have municipal jurisdiction were "unwilling or unable genuinely" to prosecute the offender.⁴

Complementarity should be a major cause for relief in the United States. The U.S. government has consistently argued that the far-flung military obligations of the United States, and its unique role in global security with the end of the Cold War, make it uniquely vulnerable to politically motivated prosecutions before the ICC.⁵ With a half-century-old system of military justice dating back to the Second World War and with roots in British and Roman law, the United States seems well-positioned to avail itself of the benefits of complementarity.⁶ Surely, if complementarity is to mean anything, a system of hundred of uniformed lawyers and judges dedicated solely to policing the

³ I discuss the jurisdictional scheme of the International Criminal Court in depth at pages 4-18, *infra*.

⁴ See n. 55, *infra*, and accompanying text.

⁵ See, e.g., Marc Grossman, United States Under-Secretary of State for Political Affairs, "American Foreign Policy and the International Criminal Court," Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002, *available online at* <http://www.mtholyoke.edu/acad/intrel/bush/rome.htm> ("The United States has a unique role and responsibility to help preserve international peace and security. At any given time, U.S. forces are located in close to 100 nations around the world conducting peacekeeping and humanitarian operations and fighting inhumanity. We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations").

⁶ The history of our military justice system is addressed at pages 22-23, *infra*.

armed forces must signal an “ability and willingness” to prosecute the grave offenses within the ICC’s purview.

The United States is justifiably proud of its military justice system. Changes over its history have taken a discipline-centered system rooted in pre-Revolutionary War British law and evolved it in the direction of civilian principles of substantive justice. With the changes inaugurated with the Uniform Code of Military Justice in 1950, an American court-martial is similar in most respects to a civilian criminal trial. Nonetheless, military law is rooted in the unit discipline that wins – or loses – wars, and this concern, central to military prosecution and absent from civilian criminal law, has been the principal point of contention in debates over the future of military justice. Traditionally, this dispute has taken the form of a conversation between those who want greater commander control over courts-martial, believing this will further the aims of unit cohesion and discipline, and those who favor lessened command influence out of a concern for the procedural rights of accused servicemembers.⁷

This paper suggests a different take on this debate. The emergence of the International Criminal Court and the concept of complementarity provides the possibility of the U.S. system of military justice being exposed to significant international scrutiny. If the U.S. invokes complementarity to block an ICC prosecution, it must be prepared to defend the UCMJ before a world body likely to be skeptical of military justice generally and the United States’ version in particular. Exhibit A in the international court’s analysis will be the effectiveness of the U.S. court-martial system and the extent to which it is viewed as willing to prosecute Americans for atrocities. And a major component will be the influence those in the accused’s chain of command – and therefore those

⁷ See pages 25-26, *infra*, and accompanying citations.

potentially implicated in their crimes under the doctrine of command responsibility⁸ – have over the selection of charges, conduct of trials, and punishment of the convicted.

While the question can be viewed from many angles, this paper concentrates on one particular element of command influence in the U.S. military justice system: the right of a commander to reverse or reduce sentences imposed on convicted servicemembers. This example is a telling one for several reasons. First, this power does not effect the conduct or legitimacy of the court-martial itself, but *does* impact an element of particular interest to an international court: sentencing and deterrence. Second, unlike many commander powers that seem to work to the disadvantage of the accused, this power is generally accepted as a merciful and praiseworthy part of the overall system. While many of the ways commanders can influence the administration of justice are objected to on due process grounds, this particular power avoids that challenge. Consequently, it is one of the less-discussed issues whenever the need for revisions to the UCMJ is considered. However, because this authority could serve as a procedural shield for accused servicemembers, it is precisely the sort of command influence most likely to be thoroughly examined by an international court considering prosecution of an American.

Ultimately, this paper has two goals. First, to suggest that elements of the Uniform Code of Military Justice should be re-examined not merely from the point of view of due process, as has been done with great ability,⁹ but also by considering the

⁸ See Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) (hereafter “ICC Statute”), at Article 28 (establishing criminal responsibility for commanders who are aware of crimes committed by subordinates, or reckless with regard to such knowledge, and fail to take all reasonable steps to prevent such crimes or submit the perpetrators to investigation and punishment).

⁹ See “Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice” (Cox Commission), May 2001. Available online at: http://www.nimj.com/documents/Cox_Comm_Report.pdf. The commission, chaired by a retired Chief Judge of the United States Court of Appeals for the Armed Forces independently heard testimony and formulated numerous recommendations that were forwarded to the appropriate committees of the United States Congress. Many of the Cox Commissions

military justice system's role as the primary wall between American servicemembers and trial by the International Criminal Court. Second, this paper is intended to join the growing chorus of voices¹⁰ calling for a systematic review of the U.S. military justice system with an eye toward its interaction with the international community and international law.

I. The Context: Jurisdiction of the International Criminal Court

Subject Matter Jurisdiction

The Court's jurisdiction *ratione materiae* is limited to "the most serious crimes of concern to the international community as a whole."¹¹ Specifically, the Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹² The first three offenses are defined in the Statute itself, and with the exception of crimes against humanity, are largely uncontroversial. Defining genocide was particularly simple, as the definition was simply borrowed directly from the Genocide Convention of 1948,¹³ a formulation recognized as codifying customary international law.¹⁴

recommendations related to concerns over the ability of U.S. military law to "keep pace with... standards of procedural justice." *Id.* at 2.

¹⁰ *See, e.g.*, Hon. H. F. Gierke, "Five Questions about the Military Justice System," 56 A. F. L. REV. 249, 259-60 (2005). The author is a Judge of the United States Court of Appeals for the Armed Forces.

¹¹ ICC Statute, Article 5.

¹² *Id.*

¹³ *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, Article 2. The United States has been a party to the Convention since 1988. (<http://www.unhcr.ch/html/menu3/b/treaty1gen.htm>).

¹⁴ The Prosecutor versus Jean-Paul Akayesu; Case No. ICTR-96-4-T; Judgment 85, available at <http://www.ictr.org/english/cases/Akayesu/judgment/akay001.htm> (noting that the Genocide Convention is "undeniably considered part of customary international law"). *See also* Reservations to the Convention on Genocide (Advisory Opinion), 1951 I.C.J. 23 (May 28) (declaring the Genocide Convention to be customary international law).

The definitions of crimes against humanity and war crimes, however, were more hotly debated. The definition of crimes against humanity contained in Article 7 of the Rome Statute is significantly broader than that contained in the oft-cited Statutes of the Yugoslav and Rwandan tribunals.¹⁵ Specifically, the list of acts included in Article 7, paragraph 1 includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence as possible actions triggering the jurisdiction of the Court.¹⁶ The list further includes forced transfer of population, enforced disappearance of persons and apartheid among prohibited acts.¹⁷ Such acts, however, must be committed as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack”¹⁸ and there must be “multiple commissions of [the specified act]... pursuant to or in furtherance of a State or organizational policy to commit such attack.”¹⁹ These last requirements significantly limit the scope of ICC jurisdiction over crimes against humanity, even given the comparatively broad list of offenses in paragraph 1. Because they must be directed against a civilian group, and because there must be a state policy to commit such attacks, it will be comparatively difficult to prove a charge of crimes against humanity. The numerous elements of the offense, and the evidentiary difficulty of proving them, makes the successful prosecution of a United States soldier or civilian leader for crimes against humanity unlikely.

¹⁵ Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 31 (1999).

¹⁶ ICC Statute, Article 7.

¹⁷ *Id.*

¹⁸ ICC Statute, Article 7(1).

¹⁹ ICC Statute, Article 7(2)(a).

War crimes, however, do not have these heavy evidentiary requirements, and consequently the definition of war crimes should be of particular interest to the United States, with its vast, widely deployed military. The Rome Statute divides war crimes into four categories:²⁰ “(a) [g]rave breaches of the Geneva Conventions of 12 August 1949”; “(b) [o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”; (c) [i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions”; and “(d) [o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”²¹ The United States is unlikely to be responsible for war crimes committed in “armed conflict not of an international character,” but even the provisions of Article 8 that deal with international conflicts pose problems. Paragraph (b) borrows heavily from the Protocol Additional to the Geneva Conventions of 1949, a 1977 update to which the United States is not a party.²² The rules contained in paragraph (b) severely restrict a state’s discretion to choose means of combat it considers appropriate to the military situation on the ground by enforcing a particularly high duty of care toward civilians. While many of the rules derived from the First Protocol could be considered binding under customary international law, the Rome Statute still contains innovations -- including a provision prohibiting an occupying power

²⁰ This organizational structure was adopted to simplify negotiation, but survived to the final draft.

Arsanjani, *supra* note 5, at 33.

²¹ ICC Statute, Article 8.

²² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 While not a party, the United States is a signatory to Protocol I. [Http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S](http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S).

from transferring its own people into an occupied territory.²³ Similarly, “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes...” are outlawed. While protection of religious, art, science or charitable purposes are based on the Convention for the Protection of Cultural Property of 1954²⁴ -- to which the United States is not, in any event, a party²⁵ -- the language protecting educational sites is an innovation suggested by New Zealand and Switzerland at the Rome Conference itself.²⁶

While similar expansions of the scope of crimes against humanity are tempered by the requirement that there be multiple acts and they be part of an organized policy,²⁷ this is not true for war crimes. The final language of the Statute states that “[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”²⁸ While the Court is guided to take jurisdiction of a suspected war crime only when part of large-scale policy, the words “in particular” make it clear that this is not a requirement. The language does not preclude jurisdiction over a *single* act defined in Article 8(2), and says nothing about the rank or status of the person committing that single act.²⁹ Indeed, as a

²³ Christopher M. Van de Kieft, “Uncertain Risk: The United States Military and the International Criminal Court,” 23 *CARDOZO LAW REVIEW* 2325, 2333 (2002).

²⁴ See Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 UNTS 240.

²⁵ <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E>

²⁶ Arsanjani, *supra* note 9, at 34.

²⁷ ICC Statute, Article 7(2)(a).

²⁸ ICC Statute, Article 8(1).

²⁹ “Even though both the International Law Commission and the pre-Rome negotiations considered suggestions to limit the competence of the Court to the *leaders* of those responsible for such crimes, the Rome Conference decided otherwise. The negotiators reasoned that the crimes listed in the Statute are so grave that their prosecution cannot be limited to a handful at the top; no one who has committed such crimes should escape prosecution and, if appropriate, punishment. See Mahnoush H. Arsanjani and W. Michael Reisman, “Developments at the International Criminal Court: the Law-in-Action of the International Criminal Court,” 99 *A.J.I.L.* 385, 399 (2005). Arsanjani and Reisman go on to consider how resource scarcity may require the Court to focus on atrocity leadership, and that, perhaps, extension of

severe but legally sound example, the decision by a junior officer to direct fire toward snipers using a religious structure for cover could serve as a basis for a war crimes indictment under certain circumstances.³⁰ The lack of textual guidance essentially throws the entire question back on the Court's discretion under Article 17(1)(d) to determine whether a case is of "sufficient gravity to justify" its consideration.

The crime of aggression, the last set forth in the Statute, was not defined. The Rome Statute essentially punts the question, stating that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted... defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."³¹ Such a definition must take the form of an amendment to the Statute itself.³² This cannot be proposed until seven years have passed from the entry into force of the Statute, and must be passed by a two-thirds vote of the States Party.³³ Notably strict protections are in place to prevent the majority from forcing an expansion of the core crimes on a minority. If any state opposes an amendment to the definitions of crimes found in article 5 through 8, "the Court shall not exercise its jurisdiction regarding a crime covered by the amendment *when committed by that State Party's nationals or on*

prosecutions to lower-ranking persons must be done "henceforth, if at all, only episodically or opportunistically."

³⁰ The Court would be required to find that this order had no "military objectives." ICC Statute, Article 8(2)(b)(ix). However, the potential political fallout from such a situation is clear, and there is no reason to believe that international judges with no experience of combat are better qualified than a U.S. court-martial to decide such a fact-specific question -- especially given the ICC's very limited resources and the difficulty of procuring evidence in a combat zone. These are precisely the sorts of concerns that led to limited ICC jurisdiction in the first place. *See* Office of the Prosecutor of the International Criminal Court, "Paper on Some Policy Issues before the Office of the Prosecutor" at pages 2-4 *available online at* http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (discussing the need to carefully select targets of investigation given the Office's limited resources and the difficulties of on-the-ground investigations).

³¹ ICC Statute, Article 5(2).

³² *See Id.*

³³ ICC Statute, Article 121.

*its territory.*³⁴ This broad exemption significantly undermines concerns that states party could be “trapped” by an overly expansive definition of the crime of aggression. In addition, the statute provides that “[i]f an amendment [is] accepted by seven-eighths of States Parties... any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect.”³⁵ This provides yet another protection for states party against an overzealous expansion of the definition of crimes within the ICC’s jurisdiction.

It is essential to note however, that these protections apply *only* to States Party. If a party rejects an amendment to the definition of a crime, both its nationals *and* its territory are outside the jurisdiction of the Court with regard to that crime. An example involving two fictional countries may help illustrate the point. If a definition of the crime of aggression is adopted, and State A were to reject the amendment, its nationals could not be tried for the crime of aggression *regardless of where the crime occurred*. On the other hand, if State A *were* to accept the amendment the definition would apply to crimes committed on its territory. If State Y (a non-party) were to commit an act of aggression on State A’s territory, State Y’s nationals would not be able to avail themselves of the immunity provision available to a State Party. Rather, the Court’s jurisdiction over crimes committed on State A’s soil would remain intact. However, if State A had chosen *not* to accept the new definition of aggression, State Y’s citizens could *not* be tried for any acts of aggression taken on Party’s soil.

The hypothetical reveals another point. Because the Court can only take jurisdiction over aggression if the state being attacked is a party, states needing the threat

³⁴ ICC Statute, Article 121(5) (emphasis added).

³⁵ ICC Statute, Article 121(6).

of ICC prosecution to secure their territorial integrity are likely to accept whatever definition is offered. These are also precisely the same states that are likely to push for a particularly robust definition of aggression. Strong states party will consequently be left with a choice: accept a robust definition and ICC jurisdiction over their troops abroad, or reject it, and win immunity for those same troops. Provided a strong state can dispense with the deterrent effect of ICC jurisdiction over its territory, there is little incentive for it to accept *any* definition of the crime of aggression: by rejecting the definition, they win free use of their troops abroad.³⁶ This is a strong argument for powerful, aggressive states becoming states party in order to avail themselves of this protection. It is also a potentially serious flaw in the ability of the ICC to exercise jurisdiction over precisely those states most likely to commit a crime of aggression. It is always possible, of course, that the whole system is at least implicitly targeted at the only states that can lose out on this bargain: non-parties.

While much of the Court's subject matter jurisdiction is premised on crimes defined either by widely accepted treaties or customary law, several concerns remain. The most pressing is the scope of the war crimes language in the Statute. Combining a wide range of prohibited acts and minimal checks on the required scope of their consequences, the Court's subject-matter jurisdiction provides enormous leverage for the Court to second-guess decisions made in the field. There is nothing, outside of the Court's own self-regulation, to prevent a war crimes charge for a single targeting of an educational institution. Given the likelihood for international outcry over sufficiently terrible, if honest, mistakes under battlefield conditions, and the necessary lack of

³⁶ As regards the crime of aggression: the ICC would retain jurisdiction over war crimes, crimes against humanity, and genocide.

omniscience in intelligence gathering, the war crimes jurisdiction of the ICC is ready-made for a political prosecutor. Similarly, the Crime of Aggression has yet to be defined, but the mechanisms for its future definition are fraught with potential for gamesmanship, and should make responsible nations wary of the result.

Personal and Territorial Jurisdiction

The International Criminal Court's jurisdiction may be exercised if "one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may... accept the exercise of jurisdiction by the Court with respect to the crime in question."³⁷

This jurisdiction is significantly narrower than that suggested by some states. Some proposed a scheme grounded in the concept of universal jurisdiction, which would have shackled the Court with very few constraints concerning jurisdiction *ratione personam* or *ratione territorium*.³⁸ Even a more modest Korean proposal, which would have allowed jurisdiction if a range of states were parties to the statute – the state having custody of the accused, the state where the crime was committed, the state of the accused's nationality,

³⁷ ICC Statute, Article 12. It should be noted that these restriction apply only to cases where the Prosecutor initiates an investigation on his own authority or on referral of a State Party: cases referred by the United Nations Security Council meets with no such restrictions. *Id.*

³⁸ Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 60-61 (2000).

or the state of the victim's nationality³⁹ – did not end up in the final draft despite significant support during the drafting process.⁴⁰ The final statute seems to reflect a compromise with the final United States position, which would have allowed jurisdiction if *both* the territorial state and the national state of the accused were parties to the Statute.⁴¹ In any event, the final version of the Statute gives the ICC jurisdiction over crimes committed on the territory, *or* by the nationals, of ratifying states. Consequently, a state cannot shield its nationals from prosecution for crimes committed on the territory of another state.⁴²

The Statute does allow states to block ICC jurisdiction under specific circumstances. First, a state, on becoming a party to the Statute, may invoke a one-time seven-year immunity against prosecutions for war crimes committed by its nationals or on its territory.⁴³ Second, and more controversially, Article 98 provides that:

“The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”⁴⁴

The United States has interpreted this section as allowing for bilateral agreements whereby a state may promise not to surrender nationals of a foreign state to the Court.⁴⁵ This is by no means a universally accepted interpretation – the European Union for instance views such provisions as inconsistent with the “object and purpose” of the treaty,

³⁹ *Proposal Submitted by the Republic of Korea*, U.N. Doc. A/CONF.183/C.1/L.6 (1998).

⁴⁰ Van der Vyver, *supra* note 31, at 62.

⁴¹ *Proposal Submitted by the United States of America*, U.N. Doc. A/CONF/183/C.1/L.70 (1998).

⁴² With the exception of the narrow case described above where a state party rejects an amendment putting forward a definition of the crime of aggression.

⁴³ ICC Statute, Article 124.

⁴⁴ ICC Statute, Article 98(1).

⁴⁵ *See, e.g.*, John R. Bolton, *American Justice and the ICC*, WASHINGTON POST, Dec. 13, 2003, at A21.

and hence invalid.⁴⁶ While the validity of such agreements has not yet been tested, 17 states⁴⁷ have concluded Article 98 agreements promising not to surrender U.S. nationals, suggesting that there is at least some significant support for the United States position.

Finally, the United Nations Security Council – in a nod to its prime responsibility under the U.N. Charter to safeguard “international peace and security”⁴⁸ – may block an investigation or prosecution for a renewable period of twelve months by so “requesting.”⁴⁹ This provision has in fact been invoked. On June 30, 2002, the United States vetoed a resolution extending the mandate of the U.N. peacekeeping mission to Bosnia.⁵⁰ In order to lift its veto, the United States demanded an Article 16 resolution exempting from ICC jurisdiction any peacekeepers of states not party to the Treaty of Rome.⁵¹ After an extensive debate, the Security Council opted to invoke Article 16 to protect “current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or

⁴⁶ “The Assembly considers that these “exemption agreements” are not admissible under the international law governing treaties, in particular the Vienna Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and purpose of a treaty.” Risks for the Integrity of the Statute of the International Criminal Court, Eur. Parl. Assemb., 2002 Sess., Res. 1300 (2002), *referencing* Vienna Convention on the Law of Treaties, May 23, 1969, Art. 18 1155 U.N.T.S. 331, 8 I.L.M. 678 (1979). *See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15; *see also* Contemporary Practice of the United States Relating to International Law: U.S. Bilateral Agreements Relating to ICC, Edited by Sean D. Murphy, 97 A.J.I.L. 200, 202 (2003).

⁴⁷ As of January 2003. *See* Contemporary Practice, *Id.* at 201.

⁴⁸ U.N. Charter, Article 39.

⁴⁹ ICC Statute, Article 16.

⁵⁰ *See* Thomas M. Franck and Stephen H. Yukan, *The United States and the International Criminal Court: Unilateralism Rampant*, 35 N.Y.U. J. INT’L L. & POL. 519, 524 (2003).

⁵¹ *Id.*

authorized operation.”⁵² The Council also expressed an intention to renew the resolution each year,⁵³ although the resolution was only renewed once.⁵⁴

While Articles 16 and 98 do provide potential limits to the Court’s jurisdiction, they rely on specific political action, specifically bilateral negotiations and resolutions of the Security Council. The greatest and most pervasive check on ICC jurisdiction is, however, a structural one: the principle of complementarity whereby the Court may conduct a prosecution for the most heinous offenses against international law *if and only if* states are unable or unwilling to do so themselves.

Complementarity is a relatively new principle in international law. The very word was given a radically new meaning by the International Law Commission in its *Draft Statute*,⁵⁵ where it was first used to connote complementarity between legal systems.⁵⁶ The draft’s Third Preambular Paragraph suggested that the Court “be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.” In its commentary on this clause, the ILC noted that the Court would be intended for cases where there would be “no prospect” of an accused being duly tried in national courts, and that it was not intended “to exclude the existing jurisdiction of national courts, or to affect that right of States to seek extradition

⁵² SC Res. 1422 (July 12, 2002). The decision has been strongly criticized as contrary to the spirit of the Rome Charter. *See generally* Mohamed El Zeidy, “The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422,” 35 VAND. J. TRANSNAT’L L. 1503 (2002).

⁵³ *Id.*

⁵⁴ SC Res. 1487 (June 12, 2003). Subsequent attempts by the United States to renew the resolution were unsuccessful.

⁵⁵ *Report of the International Law Commission on the Work of its 46th Session*, U.N. GAOR, 46th Sess., Supp. No. 10, U.N. Doc A/49/10 (1994).

⁵⁶ Van der Vyver, *supra* note 31, at 66. Professor van der Vyver points out that the most common technical use of the term prior to the ILC *Draft Statute* was in Roman Catholic teaching, where it was used to “denote a certain symbiosis in the relationship between the sexes.” *Id.*

and other forms of international judicial assistance under existing arrangements.”⁵⁷

While any complete exploration of the ILC’s view of complementarity is complicated by the lack of specific references to it in the actual language of the proposed ICC Statute, this commentary betrays a relatively unambitious vision of the court: The recommendation that the ICC be used only where “trial procedures may not be available or may be ineffective” suggests that only when national courts were *unable* to prosecute would the ICC be an appropriate forum. The particularly high bar that there be “no prospect” of an effective national prosecution would seem to allow states ample opportunity to hedge and stall the functioning of their judicial machinery without triggering the Court’s jurisdiction. In essence, the ILC does not appear to have considered the scenario where a state would actively use its judiciary as a shield against ICC jurisdiction, or viewed such action without great alarm, and its vision of complementarity does not, as a result, have the teeth later found in the Rome Statute itself.

Yet, while the ILC’s vision of the Court’s jurisdiction was undeniably weaker than the Court’s final powers under the Rome Statute, complementarity remains one of the cornerstones of the ICC regime⁵⁸ and its central jurisdictional innovation.⁵⁹ The Tenth Preambular Paragraph of the ICC Statute proclaims that “the International Criminal Court established under this Statute shall be complementary to national criminal

⁵⁷ *Report of the International Law Commission on the Work of its 46th Session*, *supra* note 48, at 44, para. (1).

⁵⁸ ICC Statute, Article 1.

⁵⁹ The tribunals for the Former Yugoslavia and Rwanda both proceeded on the opposite assumption: that their jurisdiction specifically overrode that of national courts. *Statute of the Tribunal for the Former Yugoslavia*, art. 9(2), S.C.Res. 827, U.N. Doc. S/RES827 (1993); *Statute of the Tribunal for Rwanda*, art. 8(2), S.C. Res. 955, U.N. Doc. S/Res/955 (1994). Available online at <http://www.un.org/icty/basic/statut/stat2000.htm> (ICTY) and <http://65.18.216.88/ENGLISH/basicdocs/statute.html> (ICTR). It should be noted that the ICTY has the authority under Rule 11*bis* of its Rules of Procedure and Evidence to essentially “remand” cases to national courts for prosecution. ICTY R.P. & Evid. 11*bis*, U.N. Doc. IT/32/rev.22 (2001).

jurisdiction.”⁶⁰ Remedying the defect of the ILC Draft, the Rome Statute spells out the practical effect of this complementarity in Article 17, under the heading of “Issues of Admissibility”:

“Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that the case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;⁶¹
- (d) The case is not of sufficient gravity to justify further action by the Court.”⁶²

The statute is clear that national courts have the first right and duty to prosecute perpetrators of international crimes, and that ICC jurisdiction is available only to complement that responsibility. But the ICC is empowered to intervene not only where existing national judicial machinery is insufficient to allow a successful prosecution, but also where national governments are unwilling to fulfill their responsibility to prosecute.

⁶⁰ ICC Statute, preamble.

⁶¹ While the principles of Article 20 enshrine a broader conception of double jeopardy than that available under United States domestic law, in so far as double-jeopardy protection applies to the underlying conduct instead of any particular charge, Paragraph 3 stipulates instances where the principle of *ne bis in idem* will not apply. These include where the purpose of an earlier trial was to shield the defendant from criminal responsibility, or where the proceedings were not conducted independently and impartially or in accordance with due process as recognized by international law. *Cf. e.g., United States v. Dixon*, 509 U.S. 688, 703-704 (1993) (noting that U.S. double jeopardy protections attach unless each crime contains an element not present in the other, and specifically overruling precedent suggesting that two crimes may not be charged from the same conduct).

⁶² ICC Statute, Article 17.

Article 17(2) of the Statute gives the Court concrete guidance should it be forced to evaluate a state's willingness to prosecute:

“In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court...;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”⁶³

This language preserves the deference to national courts embodied in the “Issue of Admissibility” section found earlier in Article 17. The standard is set very high: only a complete refusal to prosecute or a fatally flawed proceeding can defeat the state's presumptive right to bar ICC jurisdiction by initiating its own prosecution. Even a refusal or flawed proceeding may only be ignored if a specific intent element is met: the state must be acting *for the purpose* of shielding the relevant individual from criminal liability. This intent element is most strongly evidenced by the language of 12(2)(c), where even a biased proceeding may only be branded an “unwilling prosecution” if it is “inconsistent with an intent to bring the person concerned to justice.” This question of the state's “intent” is therefore central to the ability of the ICC to take jurisdiction of a case that has already been investigated or prosecuted by a national court.

⁶³ ICC Statute, Article 17(2).

While the evidentiary bar is certainly set rather high, the provision remains a major expansion of the complementarity provision of the *Draft Statute* since the Court itself would determine whether a national judiciary's actions are "consistent with an intent to bring the accused to justice." In short, while the statute may seem principally concerned with protecting national court jurisdiction, in fact it invites the Court to evaluate national court decisions to a previously unparalleled extent.⁶⁴ A national investigation or prosecution prevents ICC jurisdiction only when the ICC itself says it does.

To summarize and recap, ICC jurisdiction may threaten the United States in several ways. First, the expansive definitions of the crimes included in the Rome Statute may impose harsher standards of behavior on United States nationals than those accepted at present by U.S. officials. Second, as a non-party, the U.S. has no say over any future definition of the crime of aggression, and it is always possible that it will be defined so as to implicate actions taken by U.S. forces operating abroad. Third, the ICC's jurisdiction over all crimes committed on the territory of states party puts U.S. forces at risk whenever they operate on such territory. Finally, the principle of complementarity which is supposed to protect states against unwise or unjust prosecutions by the court is, in practice, a matter for the discretion of the Court. There is, at bottom, no way to ensure that Americans will not be exposed to the ICC's jurisdiction, and thus held to legal standards that the U.S. cannot control.

United States' Reaction to the ICC: a Policy of Opposition

⁶⁴ As noted above, the ICTY simply supplanted Yugoslav jurisdiction – but did so *not* as a matter of judicial process, but rather at the command of the U.N. Security Council.

The United States' reaction to these realities of the Rome Statute was at first mixed. While the United States "had not achieved the silver bullet of guaranteed protection [for U.S. nationals]," the chief American negotiator at the Rome Conference argued that a "sophisticated matrix of safeguards" checked the ability of the Court to initiate politically motivated prosecutions.⁶⁵ President Clinton chose to sign the Statute on December 31, 2000 – the last day it was open for signature.⁶⁶ In doing so, he expressed hope that "a properly constituted and structured [Court] would make a profound contribution in deterring egregious human rights abuses worldwide," and emphasized that "the treaty requires that the ICC not supercede or interfere with functioning national judicial systems"⁶⁷ However, he noted "significant flaws" – principally that U.S. personnel could still come under the Court's jurisdiction without U.S. ratification – and demanded a "chance to observe and assess the functioning of the court" before acquiescing to its claimed jurisdiction.⁶⁸ He characterized the signature as an opportunity to "influence the evolution of the court" while explicitly declining to recommend submission of the treaty for Senate ratification.⁶⁹

The newly elected Bush administration was yet more hostile, evidencing no interest in cooperating with the Court and specifically disavowing any intention of becoming party to the Treaty or abiding by the legal consequences of President Clinton's signature.⁷⁰ The Congress was yet more direct: only three days after the Administration

⁶⁵ David J. Shceffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 63 (2001).

⁶⁶ See Statement on the Rome Treaty of the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 4 (January 8, 2001).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Neil A. Lewis, *U.S. Rejects All Support for New Court on Atrocities*, N.Y. TIMES, May 7, 2002, at A11.

formally disavowed any connection with the Court, then-House Majority Whip Tom DeLay introduced the American Servicemembers' Protection Act (ASPA).⁷¹ Signed into law later that year, ASPA⁷² bluntly states that “the United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.”⁷³

ASPA's anti-ICC rhetoric comes with impressive enforcement mechanisms. Section 2004 prohibits any federal, state, or local agency – including courts – from providing support for or extraditing to the ICC.⁷⁴ Similarly, it prohibits agents of the Court from conducting any investigation on American soil and requires the United States to:

exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters, multilateral conventions with legal assistance provisions, and extradition treaties, to which the United States is a party, and in connection with the execution or issuance of any letter rogatory, to prevent the transfer to, or other use by, the International Criminal Court of any assistance provided by the United States under such treaties and letters rogatory.”⁷⁵

ASPA also places severe limitations on when and how American forces may be used abroad if they may be subject to ICC jurisdiction. In addition to barring any transfer of intelligence likely to end up in the Court's hands,⁷⁶ the United States is prohibited from giving any military assistance to states party to the Rome Statute.⁷⁷ This requirement may be waived by the President if he finds that it is important to the national interest to

⁷¹ H.R. REP. NO. 107-62, pt. 1 (May 9, 2001).

⁷² American Servicemember's Protection Act, 22 U.S.C. § 7421-7433, PUB. L. NO. 107-206, 116 Stat. 899 (2002).

⁷³ *Id.* at § 7421.

⁷⁴ 22 U.S.C. §7423.

⁷⁵ *Id.*

⁷⁶ 22 U.S.C. §7425

⁷⁷ 22 U.S.C. §7426. This prohibition does not extend to the member states of the North Atlantic Treaty Organization, major non-NATO allies (Australia, Egypt, Israel, Japan, Jordan, Argentina, South Korea, New Zealand), and Taiwan. *Id.* It is significant that the President is required to investigate the degree to which American forces may be put at risk of prosecution even while engaged in operations in support of such close alliances as these, and to take whatever means he may to minimize this danger through appropriate command and operational control arrangements. 22 U.S.C. §7428.

do so, or if a foreign state negotiates an Article 98 agreement shielding American forces from ICC prosecution.⁷⁸ However, the statute also prohibits absolutely the participation of U.S. forces in United Nations peacekeeping operations unless either (1) the Security Council invokes its Article 16 authority in order to shield American troops or, (2) the countries where U.S. forces will be located do not trigger the Court’s territorial jurisdiction.⁷⁹

Finally, and most ominously, 22 U.S.C. §7427 is titled “Authority to Free Members of the Armed Forces of the United States and Certain Other Persons Detained or Imprisoned by or on Behalf of the International Criminal Court.” Therein, “the President is authorized to use all force necessary and appropriate to bring about the release” of certain American personnel.⁸⁰ While the Act is careful to eliminate “bribery or other inducements” from the tools available to the President in securing the release of a suspect,⁸¹ it is difficult to imagine that action to forcibly free a prisoner of the Court would not be authorized by this section.

The findings of ASPA could not be clearer: the policy of the United States is to shield American troops from the jurisdiction of the International Criminal Court. It is possible that brute American power may be able to accomplish this objective. But it is also possible that it will not, and in that eventuality the United States may be forced to

⁷⁸ 22 U.S.C. §7426. This authority has been exercised on numerous occasions. *See, e.g.* Memorandum Waiving Prohibition on United States Military Assistance to Parties to the Rome Statute Establishing the International Criminal Court, 39 WEEKLY COMP. PRES. DOC. 851 (July 7, 2003) (exempting 22 countries by Presidential waiver).

⁷⁹ 22 U.S.C. §7424. *See* Memorandum on Certification Concerning U.S. Participation in the U.N. Mission in Liberia Consistent with Section 2005 of the American Servicemembers’ Protection Act, 39 WEEKLY COMP. PRES. DOC. 1439 (October 27, 2003) (certifying that American troops were “without risk” of prosecution by the ICC due to Security Council waiver under Article 16 of the Rome Statute).

⁸⁰ 22 U.S.C. §7427. The relevant persons are “members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court.” 22 U.S.C. §7432(4).

⁸¹ 22 U.S.C. §7427(d).

think in the Rome Statute's own terms. For all ASPA's bluster, the Rome Statute's principle of complementarity may provide a cleaner way around the threat of ICC prosecution: if the United States is willing to undertake a "genuine" investigation and prosecution of military personnel who commit crimes within the jurisdiction of the ICC, by its own Statute the Court will be unable to act. Since military personnel are prosecuted by the military justice system, this poses a question of the ability of that system to forestall ICC jurisdiction under the Rome Statute. If American military law provides for the criminalization of behavior prohibited by the Rome Statute, and if the investigations and prosecutions undertaken by the U.S. military are "genuine" within the meaning of Article 17, then American troops will likely be beyond the ICC's reach.⁸²

II. The Problem: Distinctive Elements of the U.S. Court-Martial System

American military justice underwent a sea change between the Second World War and the Korean conflict. The separate Articles of War and Articles for the Government of the Navy – passed by the Second Continental Congress and rooted in pre-revolution British military law – were supplanted by the Uniform Code of Military Justice (UCMJ).⁸³ The old Articles were command-centered, with courts-martial viewed as extensions of the military commander's disciplinary powers instead of as independent

⁸² While not directed specifically at the U.S. military justice system, Lieutenant Colonel Michael Newton, a member of the U.S. delegation to the Preparatory Commission on the Establishment of an International Criminal Court, has written an excellent article on the Rome Statute's complementarity provisions. He undertakes an especially deep analysis of the interaction between domestic legal systems and ICC jurisdiction. *See* Michael A. Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court," 167 MIL. L. REV. 20 (2001).

⁸³ This historical overview is taken generally from that provided by: Brigadier General John S. Cooke, "Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition," 165 MIL. L. REV. 1, 4 (2000).

tribunals. Their sole purpose was “to secure obedience to the commander”.⁸⁴ While this was taken for granted during the early periods of the Republic’s history when the standing armed forces were small and not generally based near major population centers, the mobilization associated with World War II and the Cold War made military justice an issue touching a far greater portion of the population.⁸⁵ Inevitably, it became a political issue.⁸⁶ The UCMJ grew out of a political realization that “discipline cannot be maintained without justice”, and that the new realities of the service required that justice be modeled on civilian criminal procedure and its emphasis on due process.⁸⁷

In response to these concerns, Secretary of Defense James Forrestal convened a committee in 1948 under the chairmanship of Professor Edmund Morgan, Jr. of Harvard Law School.⁸⁸ The committee was responsible for drafting a code that would be “uniform in substance and uniform in interpretation and construction”⁸⁹ that would be applied to each of the armed services. The result was the Code submitted to the Congress in 1949, and signed into law in 1950 with only slight modifications.⁹⁰

The Department of Defense was particularly keen to preserve the efficiency of “military functions” in the new Code, with special emphasis on the ability of commanders to maintain discipline in the field.⁹¹ The UCMJ established significant rights for service members accused of crimes and limited commanders’ control over the

⁸⁴ *Id.* at 3.

⁸⁵ During World War II, for instance, more than 4 million courts-martial were convened, and the resulting social impact was great. Major General William A. Moorman, “Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?,” 48 A. F. L. REV. 185, 187 (2000).

⁸⁶ *Id.*, at 6-7. See S. Rep. 81-486, P.L. 81-506, Uniform Code of Military Justice, Sen. Report Number 81-486, June 10, 1949 (hereafter “Senate Report”) at 2225.

⁸⁷ Cooke, *supra* note 76, at 8.

⁸⁸ Senate Report, *supra* note 78, at 2225.

⁸⁹ *Id.*

⁹⁰ Pub. L. No. 81-506, 64 Stat. 108 (1950).

⁹¹ See the statement of Sec. Forrestal in Senate Report, *supra* note 78, at 2265.

outcome of courts-martial. But it did not eliminate the central role of commanders, since that role was considered essential to maintaining discipline among service members. The goal of the UCMJ was to balance this important principle of commander control – and the resulting unit discipline that separates a modern, responsible army from a rag-tag militia – with the interests of the accused to a trial according with modern understandings of due process.⁹²

The Code that resulted from these concerns continues to govern the situation today, where commanders continue to play an enormous role in the administration of military justice. They appoint investigating officers; select the court members (the military equivalent of a jury)⁹³; decide which parties and witnesses get immunity and review the findings of the court-martial for approval.⁹⁴

The commander's extensive authority is tempered by significant constraints. First, the convening authority is guided by the advice of his Staff Judge Advocate, an attorney trained in military law who reviews and prepares advice for the commander at each stage of a court-martial. Second, for any serious crime a military judge presides over the proceedings, ruling on evidence, overseeing the seating of the court members, and with full authority to dismiss charges for multiplicity or considerations of equity, and to enter a finding of "not guilty" if he believes that any charge has not been proven beyond a reasonable doubt.⁹⁵ Third, the UCMJ provides criminal penalties for unlawful

⁹² Beth Hillman, Legal Affairs, *Chains of Command*, May-June 2002, page 50.

⁹³ UCMJ Article 25.

⁹⁴ A convening authority may grant immunity to witnesses, but by doing so disqualifies himself from post-conviction review proceedings, a role then taken on by another officer. Both powers, however, are substantial. *See, e.g., U.S. v. Hillman*, 2 M.J. 830 (ACMR 1976), *see also U.S. v. Kennedy*, 8 M.J. 577 (ACMR 1979).

⁹⁵ Theodore Essex and Leslea Tate Pickle, "A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): 'the Cox Commission,'" 52 A.F.L.R. 233, 237 (2002).

command influence over the court-martial⁹⁶ and allows the military judge to remove a commander from his duties as the convening authority if he is found to be biased.⁹⁷ Finally, the U.S. military justice system provides for an extensive appeals process. Any case resulting in punitive discharge or confinement for a year or more is automatically appealed to the service Court of Criminal Appeals.⁹⁸ Further appeals may be heard by the United States Court of Appeals for the Armed Service, an Article I civilian court with five judges appointed for 15-year terms⁹⁹, which is empowered to review the findings of courts-martial *de novo*.¹⁰⁰ Further review is available to the Supreme Court of the United States by writ of certiorari. It is worth noting that the Congress had special confidence in the ability of this appellate hierarchy to temper abuses of command discretion.¹⁰¹

UCMJ Article 60 and Command Clemency

There is significant pressure to further limit the scope of command discretion, but importantly, almost none of it is directed at commanders' ability to grant clemency.

Rather, complaints are based in concern for the due process rights of the accused, not out

⁹⁶ "No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of his or her functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts..." UCMJ Article 37.

⁹⁷ Convening authorities have been removed when there was a perception that their Staff Judge Advocate was biased (*United States v. Johnson-Saunders*, 48 M.J. 74 (1998)); where the convening authority had personally found probable cause and authorized a search (*United States v. Wilson*, 1 M.J. 694 (1975)); for *potential* personal bias (*United States v. Hernandez*, 3 M.J. 916 (A.C.M.R. 1977)); and for personal remarks (*United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). See *Essex and Pickle*, *supra* note 87, at 246-247.

⁹⁸ Art. 66. For a review of the post-conviction procedures available in the United States Military, see James B. Roan and Cynthia Buxton, "The American Military Justice System in the New Millennium," 52 *AFLR* 185, 209-211 (2002).

⁹⁹ 10 U.S.C. 942.

¹⁰⁰ *Id.* The Court has a particular tendency to heavily examine cases before it, including "traditionally review[ing] meritorious issues that were not assigned by an appellant or his counsel." *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987).

¹⁰¹ *Essex and Pickle*, *supra* note 87, at 5.

of worries that crimes are being under-prosecuted. The most extensive and authoritative criticism of the role of commanders under the UCMJ came out of a commission created by the National Institute of Military Justice under the chairmanship of Senior Judge Walter T. Cox, III, who had recently stepped down from the position of Chief Judge of the Court of Appeals for the Armed Forces.¹⁰² The so-called Cox Commission’s report criticized the extent of command decision-making in the court-martial process, with special emphasis on the selection of the court members.¹⁰³ The concerns largely center on the “impression of unfairness created by the role of convening authorities in military justice.”¹⁰⁴ The Report referred to the current practice whereby commanders appoint the members of the court as “an invitation to mischief [insofar as it] permits – indeed, requires – a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority.”¹⁰⁵ Finally, the Report opined that “[t]he combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.”¹⁰⁶ While largely concerned with the rights of the accused, the Report still noted that “in order to maintain a disciplinary system as well as a justice system commanders

¹⁰² Cox Commission Report, *supra* note 3.

¹⁰³ *Id.* at Sec. III(a). *But see* Essex and Pickle, *supra* note 87, at 244 (noting that the convening authority has a statutory responsibility to pick the “best qualified” persons when selecting the members of a court-martial).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* This view is by no means universal, however. *See* Christopher W. Behan, “Don’t Tug on Superman’s Cape: in Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members,” 176 MIL. L. REV. 190 (2003).

must have a significant role in the prosecution of crime at courts-martial.”¹⁰⁷ The Report, and similar complaints,¹⁰⁸ point yet again to the fundamental tension between the role of commanders as the sources of battlefield discipline, and the need for an independent justice system that protects the accused.

This balance can be found throughout the UCMJ,¹⁰⁹ but is perhaps most striking in the case of Article 60.¹¹⁰ There, the convening authority¹¹¹ is given authority to set aside any finding of guilt by a court-martial, change a finding of guilt on a particular charge to a guilty verdict on a lesser charge, or downwardly modify any sentence imposed by the court-martial.¹¹² This absolute clemency power is exercised as a “sole command prerogative,”¹¹³ but may only be used to the advantage of the accused.¹¹⁴ This is its only constraint.

Article 60 gives a very broad discretion to commanders. While they already are tasked with convening courts-martial (and are given the implied authority to choose not to do so) it is quite another thing to allow them to simply disregard the findings of a duly

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., Beth Hillman, Legal Affairs, Chains of Command, May-June 2002, page 50.; see also Captain Kevin J. Barry, A Face Lift (and Much More) for an Aging Beauty: the Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice, 2002 L. Rev. Mich. St. U. Det. C. L. 57, (2002).

¹⁰⁹ While the accused enjoyed newfound rights to counsel, an independent “law officer” (later military judge) who could rule on questions of evidence, and an inviolable right to exoneration by a finding of “not guilty,” commanders maintain enormous discretion in criminal matters under the UCMJ. Specifically, they determine whether to convene a court-martial, maintain sole jurisdiction over lesser offenses with light penalties, choose the members of a general-court-martial (the equivalent of the jury in a civilian case), and have unrestricted authority to overturn findings of guilt. See Letter of Sec. Forrester in Senate Report, *supra* note 78, at 2265.

¹¹⁰ 10 U.S.C. 860.

¹¹¹ A term of art designating the military officer who convened the court-martial. Under current law, this privilege is limited to the President, Secretary of Defense, Secretary of the relevant service, or commanding officer of the accused’s brigade/fleet (generally a general or flag officer). Lesser officers may be empowered to convene courts-martial by order of the President or the relevant service secretary. 10 U.S.C. 822.

¹¹² 10 U.S.C. 860(c)(2)-(3)

¹¹³ *Id.* at 860(c)(1). The legislative history is explicit in stating that the convening authority “may disprove a finding or a sentence for any reason.” Senate Report, *supra*, note 78, at 2253.

¹¹⁴ *Id.* at 860(e)(2).

constituted judicial panel. In the civilian context, such authority is granted only to the chief executive (the governor in the case of state offenses, or the President for federal crimes). Even there, the power is granted not by statute, but as a constitutional prerogative rooted in the historical role of the monarch.¹¹⁵ Here, it is an institutional part of the process: the accused has a *right* to seek review by the convening authority, whose decision must be guided and informed by a report prepared for the purpose – a significant investment of judicial resources that underscores the centrality of command review of courts-martial. Similarly, while traditional executive clemency is centralized in the chief constitutional executive, here it is devolved at least to the level of a brigade or fleet/base commander. Thus, taking the example of the United States Navy, well over 100 officers have statutory authority to convene courts-martial, and thus Article 60 authority to nullify the findings thereof¹¹⁶ – and this number could be expanded substantially by order of the Secretary of the Navy.

Most of the concerns over the UCMJ have been with its procedural fairness for the accused. While command discretion does present concerns, little has been said about this institutionalized ability of commanders under the UCMJ to shield those under their command from criminal prosecution.¹¹⁷ While the ability of commanding officers to maintain discipline and unit effectiveness by summarily punishing their subordinates has been tempered, they retain their ability to govern morale and unit cohesion through the judicious use of leniency. Put simply, the UCMJ's procedural innovations may have rendered the commander's stick less sturdy, but his carrots remains intact.

¹¹⁵ See Ronald C. Slye; The Legitimacy of Amnesties under International Law and General Principles of Anglo-Saxon Law: is a Legitimate Amnesty Possible?’, 43 VA. J. INT’L L. 173, 236 (2002).

¹¹⁶ There are currently over 200 officers of appropriate rank.

¹¹⁷ See, e.g., Gierke, *supra* n. 10 at 253 (noting several other areas of command influence where action *has* been suggested).

Commanders' Discretion and the Danger of ICC Prosecution

A Commander's discretion in matters of military discipline, firmly rooted in the history of military governance, has potentially enormous ramifications for international criminal law. As discussed above, the International Criminal Court is required to defer to investigations or prosecutions undertaken in good faith by governments. In the military context, however, even a good faith prosecution comporting in every way with the letter and spirit of the half-century-old UCMJ will implicate command discretion.

How, then, should this command discretion be characterized? The closest parallel appears to be pardons. In international law pardons are issued after a person has been found guilty of criminal conduct.¹¹⁸ They remove the punishment attached to a finding of guilt – sometimes after a portion of a sentence has been served. Convening authority action fits this model well: a court-martial has already publicly passed on the guilt of a defendant before Article 60 even comes into play. The central question, then, is whether pardons are consistent with the statute of the ICC. If they are, then the Court will likely defer to an Article 60 action, and consider itself precluded from trying the underlying case. If not, the ICC will view any court-martial where the convening authority invokes Article 60 as potentially not a “genuine prosecution” within the meaning of the Rome Statute's complementarity provision.

The Rome Statute makes no reference to the possibility of pardons or other forms of clemency such as amnesties. This is a stunning omission given the significant debate over the role of amnesties and similar actions in post-conflict states – and related concerns over the possibility of impunity for those involved in serious crimes in those

¹¹⁸ Slye, *supra* note 107, at 22.

states and globally.¹¹⁹ During the drafting of the Rome Statute, attempts to gain ICC jurisdiction over cases involving paroled, pardoned, or amnestied defendants were not successful.¹²⁰ Some states believed that the Court should not be allowed to intervene in the political decisions of a State, whereas others did not believe a specific provision was necessary.¹²¹ These latter believed that the Court had sufficient authority under the Rome Statute's admissibility standards to review cases where an amnesty or pardon was undertaken in "bad faith."¹²² While some states' ratification instruments especially reserved the right to issue amnesties¹²³, the result is that the Rome Statute has no explicit rules on the subject.

However, the text of the admissibility standards does give some guidance. Article 17 can be read as stating that the Court "shall determine that a case is inadmissible where... [t]he case is being investigated." This would suggest that, at a minimum, if a state fails even to investigate a charge the case would be admissible. Of course, pardons in general follow not only an investigation, but an actual finding of guilt. This is

¹¹⁹ This is a particularly vibrant debate in the international and human rights law communities and well beyond the scope of this paper. I mean only to show that the debate exists, and that an anti-amnesty side exists for the ICC to join, should it wish to. *See, generally*, Slye, *supra* note 107 (arguing that while "international law and the domestic legal practice of states at times permit, and even – in some cases – requires, amnesties" this should not be true for serious human rights violations); Naomi Roht-Arriaza and Lauren Gibson, "The Developing Jurisprudence of Amnesty," 20 HUM. RTS. Q. 843 (1998) (arguing for a general prohibition on amnesties in the case of international criminal offenses but noting several contrary national court decisions); Diane F. Orentlicher, "Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime," 100 YALE L. J. 2537 (1991); Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," 78 CAL. L. REV. 449 (1990); Steven R. Ratner, "New Democracies, Old Atrocities: an Inquiry in International Law," 87 GEO. L. J. 707 (1999) (discussing a "generalized duty of accountability" in international law).

¹²⁰ John T. Holmes, *The Principle of Complementarity, in The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* 41, 59-60 (Roy S. Lee, Ed., 1999).

¹²¹ Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 Mich. J. Int'l L. 869, 941-942 (2002).

¹²² *Id.*

¹²³ *See* Dwight G. Newman, "The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem," 20 AM. U. INT'L L. REV. 293 (2005) (discussing, in particular reservation by Colombia). It also bears noting that the first ICC investigation was undertaken in a state, Uganda, that had an amnesty in place. *Id.*

especially true in an UCMJ Article 60 context. The Court’s jurisdiction over a defendant benefiting from command clemency could not, therefore, be based on this reading of Article 17.

Similarly, the *ne bis in idem* provisions of the Rome Statute’s Article 20 provide that “no person who has been *tried* by another court... shall be tried by the [International Criminal Court] with respect to the same conduct unless the *proceedings* in the other court” were intended to shield the defendant from criminal liability.¹²⁴ This provision clearly put the emphasis on the actual proceeding that led to conviction. Since a pardon *follows* such a conviction, the actual proceeding may have indeed been conducted with the intention of securing conviction and punishment, only to have a later action mitigate that punishment. Read strictly, if the proceeding itself were legitimate and genuine, the ICC would be powerless to act.

Two points, however, suggest otherwise. First, the entire thrust of the Rome Statute is to prevent states from shielding persons responsible for the gravest crimes from criminal responsibility. The Court may very well choose not to read Article 20 so strictly. It can do this in one of two ways: by reading the term “proceeding” broadly to include the appellate and executive action taken on a case, or by reading a subsequent pardon as evidence of the lack of required intent to bring the accused to justice.¹²⁵ This last interpretation may be mitigated if the authority overseeing the trial itself is separate from that granting a pardon – as, for example, in a system of divided powers such as the United States’ civilian courts.¹²⁶ But in the context of Article 60, the UCMJ runs into a serious problem on this front: because the convening authority *both* exercises control

¹²⁴ ICC Statute Article 20 (all emphasis added).

¹²⁵ See Holmes, *supra* note 111.

¹²⁶ ICC Statute, Article 20(3).

over the proceedings (by selecting the court members, choosing the charges, etc.) *and* grants clemency, concerns that the underlying proceedings were intended simply to lead to a pardon and, thus, defeat ICC jurisdiction are at the very least conceivable.¹²⁷

The Court, then, will have to fashion a rule in this area. Its judges should be guided first by the suggestions outlined above, namely, that the text and history of the Rome Statute suggest that the criminal proceeding itself should be the focus of the court's inquiry. This is especially true since the Court must look to whether a state court's proceedings were conducted according to "the principles of due process recognized by international law."¹²⁸ While states have an independent responsibility to prosecute those responsible for certain crimes within the jurisdiction of the Court (or extradite them to others to try them)¹²⁹ it should be noted that there are few areas where this is true.¹³⁰ Importantly, the Court should be informed by the common presence of pardoning powers in the municipal legal systems of states. Thus, while the Court's duty to look at international standards of due process is only one factor to which the Court must "have

¹²⁷ There is also, of course, an independent responsibility to prosecute certain crimes within the jurisdiction of the ICC, such as grave breaches of the Geneva Conventions. A decision to pardon such a grave breach may be seen as particularly good evidence of a desire to shield the accused given the independent obligation under international law to punish and deter such abuses under Common Article I of the Conventions. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31 (Geneva Convention I). Each Geneva Convention includes a provision identical to Article 49 in Geneva Convention I mentioned above. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Geneva Convention IV).

¹²⁸ ICC Statute, Article 17.

¹²⁹ See note 118, *supra*.

¹³⁰ While the Torture Convention specifically requires states to punish violations of individuals' rights, most human rights treaties do not contain such provisions. See, e.g., International Covenant on Civil and Political Rights, 6 *ILM* 368 (1966) (available online at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm); see generally Diane Orentlicher, "Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime," 100 *Yale L.J.* 2537 (1991).

regard” in determining a case’s admissibility, that factor can be seen as weighing in favor of honoring pardons.

However, the teleological arguments from the Rome Statute remain powerful: the ICC was clearly intended to punish the worst individual offenders of international law.¹³¹ Interpretations that make this impossible are likely to be rejected by the Court. But it should be remembered that the Court must determine whether a particular crime is “not of sufficient gravity to justify further action by the Court.”¹³² Given the likely severe constraints on its resources, the Court will have to be careful in selecting cases of “sufficient gravity,” a standard that allows the ICC significant discretion in managing its own docket.

The Court should consider the advantages of trial followed by pardon, including the truth-finding role played by trials, the clear and unambiguous condemnation of the underlying behavior by a competent tribunal, and the real costs to the accused that flow from public conviction. A finding that a person committed serious crimes in the context of war will have a serious effect, will create precedent within the state, and will serve as a deterrent to others who do not want to undergo the ordeal that a public trial on such charges involves. A trial followed by pardon, especially pardon that simply *reduces* rather than eliminates the sentence, is a far sight better than simple impunity. The Court may well see this as a significant enough difference – especially given the concerns outlined above concerning the emphasis on the *proceedings* instead of the result, and the prevalence of pardons in municipal legal systems – to concentrate its efforts on cases where no reasonable trial was undertaken, no condemnation was made, and no costs

¹³¹ See ICC Statute, Preamble. (“Determined to put an end to impunity for the perpetrators of these crimes”) (emphasis in original).

¹³² ICC Statute, Article 17(1)(d).

accrued to the lawbreaker. This is especially attractive in the arena of military law where, in addition to the above concerns, issues of unit cohesion, command responsibility, and military discipline support the use of a wider clemency power than is available in a civilian context.

On the other hand, the United States must realize that allowing the convening authority both significant control over the court-martial itself *and* the right to take post-conviction action conflates clemency with the original proceeding. This undermines any argument based on the Rome Statute's concentration on the legitimacy of the underlying proceeding by contaminating it with the subsequent clemency action. Amending the Uniform Code of Military Justice to require that someone other than the convening authority exercise article 60 powers, or by giving the professional Judge Advocates General corps (which operates on a separate chain of command from field officers) greater control over the actual court-martial in such key areas as charge and court-member selection, would go a long way towards ensuring that the ICC will decline jurisdiction over cases where UCMJ Article 60 has been invoked. Consequently, such changes would help bring American military law into line with the rapidly developing demands of international criminal law while simultaneously having the least effect on the principles of command responsibility, unit cohesion, and military discipline that serve a special role in the government of military forces.

Conclusion

Traditionally, the level of command influence over U.S. courts-martial has been the result of a compromise. On one hand, commanders argued that their ability to

discipline members of their units was central to unit effectiveness and cohesion. On the other, considerations of humanity and democratic sensitivities argued strongly for a more robust view of military due process. The creation of an International Criminal Court lifts this debate out of its traditional domestic context and injects considerations of international law and the politics of international institutions. If the United States is to give effect to its strong policy of avoiding ICC jurisdiction, it must continue to pursue a range of political and diplomatic strategies. Among these should be an attempt to find safe harbor in the complementarity principle central to the Court's international role. Such a strategy may require us to rethink the terms of our domestic debate over the role of commanders in military justice.