THE INTERNATIONAL CRIMINAL COURT: IS THE JURISDICTION OVER U.S. MILITARY PERSONNEL TOO BROAD?

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It is the outlaws of the international community – men of the like of Saddam Hussein, Slobodon Milosevic, and most recently, Foday Sankoh of Sierra Leone – who have frequently and deliberately cast aside all standards of decency in mistreating civilian populations through ethnic cleansing and atrocities against innocent civilians.¹

I. INTRODUCTION

Would the average U.S. citizen object to seeing Saddam Hussein or Slobodan Milosevic prosecuted before an international tribunal and punished for human rights abuses against defenseless Kurds in Northern Iraq or oppressed Albanians in Kosovo? On the other hand, would the average U.S. citizen object to seeing a US military commander prosecuted before an international tribunal for human rights violations associated with military operations against Hussein or Milosevic? That is precisely the question that U.S. political leaders are faced with in deciding whether the United States should submit to the jurisdiction of the International Criminal Court ("ICC") by ratifying the Treaty known as the Rome Statute ("Treaty").

Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, fiercely rejects the idea of ratifying the Treaty. As stated by Helms,

"I will make...protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress."² While other political leaders have used "softer" language in expressing their disdain of the Court, their criticism suggests that the international community should not hold its collective breath waiting for the U.S. to ratify the Treaty.³ In fact, in one of his final acts as president, Bill Clinton signed the Treaty but acknowledged that it contained many defects.⁴ The principle defect, according to the Clinton Administration, is the overly broad exposure of U.S. military personnel to punishment before the Court for acts committed during the course of U.S. military operations.⁵

Is Helms correct? Does the Treaty grant too much jurisdiction over the military personnel of member nation-states, specifically, U.S. service members? That is the focus of this paper. In short, this paper concludes that the Senate should ratify the Treaty because it is sufficiently deferential to the national judicial systems of the member nation-states. In support of establishing the ICC, this paper examines the provisions of the Statute that are the most applicable to military personnel. Next, it analyzes arguments both in favor of and against the establishment of the Court. Finally, this paper concludes by arguing that the

³ Id.
⁴ Id.
⁵ Id.
benefits of ratifying the Treaty outweigh the potential exposure of U.S. military personnel to the Court.

II. BACKGROUND

A. THE SIGNING AND NON-RATIFICATION OF THE ROME STATUTE

During the summer of 1998, the city of Rome hosted a historic meeting known as The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. 120 nation-states and 150 intergovernmental and non-governmental organizations participated in the conference. At its conclusion, all but seven countries signed the Treaty. The dissenting countries included the United States, China, India, Russia, Libya, Israel, and Qatar. The United States, however, ultimately signed the Treaty prior to the December 31, 2001 deadline. President Clinton signed the Treaty because he wanted to ensure that the United States would stay “in the game” of influencing the final structure of the Treaty. As declared in the President’s official statement:

The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the December 31, 2000 deadline established in the Treaty. We do so to affirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well

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8 Id.
because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.9

The Treaty will not take effect until sixty countries ratify the treaty, and fewer than 30 countries have ratified the Treaty so far.10 To this point, the U.S. has not ratified the Treaty, and there are no indications that it will in the near future, particularly while Republicans control the Senate.11

B. THE ROME STATUTE AND ITS RELEVANT SECTIONS

The Rome Statute ("Statute") is the Treaty's governing legal document. The Statute defines every aspect of the Court, from its administration and composition, to the relevant crimes that are punishable before the Court. In assessing whether the Treaty's power to prosecute military personnel is too broad, this paper looks at those articles that specifically define the "jurisdiction" of the ICC, and the "crimes" that are punishable in the Court.

1. JURISDICTION

The Statute clearly permits the conviction of state leaders and high level military officials, and any immunities attached to those positions by national or international law are inapplicable.12 Moreover, a person is subject to criminal

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9 Statement by the President: Signature of the International Criminal Court Treaty, Office of the President, December 31, 2000.
10 ICC Statute at art. 126 ("Entry into Force").
11 Bill Nichols, Clinton Backs a World Criminal Court: Treaty Faces Opposition from Many Republicans in Senate, USA Today, January 2, 2001, at 9A.
12 Article 27 ("Irrelevance of Official Capacity"), provides that:
"1. This Statute shall apply equally to all person without any distinction based on official capacity. In particular, official capacity has a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it...constitute a ground for reduction of sentence."
liability in the court even if that person followed a direct order from a commanding officer or superior, unless: "[t]he person was under a legal obligation to obey orders of the Government or superior in question; [t]he person did not know that the order was unlawful; and the order was not manifestly unlawful...Orders to commit genocide or crimes against humanity are manifestly unlawful"\(^{13}\)

In addition, the Statute permits the Court to criminally punish military commanders for acts that are committed by others while under their command.\(^{14}\)

The Statute provides that:

A military commander...shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control..., as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander...either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander...failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.\(^{15}\)

Article 28 is consistent with U.S. law. Courts have long held commanding officers responsible for the acts of their subordinates. The Supreme Court, for instance, upheld the jurisdiction of a U.S. military court over a Japanese

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2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

\(^{13}\) Rome Statute, art. 33.

\(^{14}\) Id. at art. 28.

\(^{15}\) Id.
commander for acts that were committed by his troops in the Philippines. Consequently, Article 28 codifies a well-established principle in U.S. military jurisprudence.

2. WAR CRIMES

The Statute empowers the Court to punish individuals who commit genocide, crimes against humanity, war crimes, and crimes of aggression. While a member of the U.S. military could be subject to criminal liability for each enumerated crime, opponents of the Treaty are primarily concerned with U.S. exposure under the war crimes provisions in Article 8. Article 8 makes it a crime to commit (1) "grave breaches" of the Geneva Conventions of 12 August 1949 and Additional Protocol I, (2) violations of the international laws that relate to armed conflicts that were promulgated in the Hague Conventions, and (3) armed conflicts of a non-international nature. The Statute considers it a grave breach to commit against "persons or property" the following acts: "willful killing, torture or inhumane treatment, willfully causing great suffering, extensive destruction and appropriation of property not justified by military necessity, compelling prisoners of war to serve in the forces of a hostile power, depriving prisoners of war the right to a fair trial, unlawful deportation transfer or confinement, and taking of hostages."

17 The Court will not have jurisdiction over Crimes of Aggression until member-nations agree upon an acceptable definition. See Gregory P. Noone and Douglas William Moore, supra note 6, at 122-23.
18 Gregory P. Noone and Douglas William Moore, An Introduction to the International Criminal Court, 46 Naval L. Rev. at 139-40; see also ICC Statute, art. 8.
In addition, the specific acts that are punishable under the armed conflict provisions of the Statute include:

Intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities.

Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.\(^{19}\)

Furthermore, the Statute forbids acts committed against persons that are not “active[ly] part [of] the hostilities,” including military personnel who have “laid down their arms” or are sick, wounded or detained.\(^{20}\) Finally, the Statute does not extend jurisdiction to “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”\(^{21}\)

Consequently, the Statute distinguishes between international armed conflicts, non-international armed conflicts, and internal disturbances.\(^{22}\) U.S. military personnel would be subject to the jurisdiction of the Court in both international and non-international armed conflicts.

III. ANALYSIS

\(^{19}\) Id. at art. 8(b)(i)(ii) and (iv).
\(^{20}\) Id. at art. 8(c)
\(^{21}\) Id. at art. 8(d)
\(^{22}\) Gregory P. Noone and Douglas William Moore, An Introduction to the International Criminal Court, 46 Naval L. Rev. at 140.
Proponents of the Treaty contend that there are numerous safeguards built into the Treaty that make it unlikely that a U.S. military member would be wrongly prosecuted by the Court. This paper will examine these arguments, as well as the arguments from those who oppose the Treaty.

A. ARGUMENTS IN SUPPORT OF RATIFICATION

1. COMPLIMENTARITY

Proponents of the Treaty believe that the principle of Complimentarity, which is engrained in the Statute, alleviates any concern that a military member will be improperly tried before the Court. Complimentarity ensures that that the Court will seek only to assist, rather than replace, national court systems. Therefore, the Court cannot punish a person if the State has a functioning criminal justice system. This differs from the ad hoc tribunals in the former Yugoslavia and Rwanda because those courts have concurrent jurisdiction with the national courts. The ad hoc tribunals are set up this way because it is assumed that the national courts are either non-existent, not capable, or unwilling to punish criminals. In the case of the ICC, the Court's jurisdiction is inferior to the jurisdiction of the national courts.

Article 17 of the Statute sets forth the test for determining whether a state has sufficiently implemented its own national court system, and it places the

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23 Noone and Moore, An Introduction to the International Criminal Court, 46 Naval L. Rev. at 140-41.
24 Id.; see also Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704, Article 9 (ICTY Statute), May 3, 1999; Security Council Resolution 955 (1994), S/RES/955, Article 8 (ICTY Statute), November 8, 1994.)

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responsibility for determining whether the ICC will act in the hands of the Pre-
Trial Chamber.

1. The Court shall determine that a case is admissible 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...25

The Statute, therefore, does not require a State to prosecute, but to conduct
a good-faith investigation into the acts or conduct that is in question. The State
merely must be "willing" and "able" to prosecute, and it must not "shield" a
person from criminal punishment. The question then becomes what standard
the Statute implements to determine whether a State is willing and able. This
standard is set forth in Article 17 as well.

2. 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...

   (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.

25 ICC Statute at art. 17.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.  

The Pre-Trial Chamber is responsible for determining whether a State is capable of implementing its own judicial system. Its functions and responsibilities are set forth in Article 39. The duties of the Pre-Trial Chamber are “carried out either by three judges of the Pre-Trial Division or by a single judge of that division,” and the judges in the Pre-Trial Chamber should have extensive “criminal trial experience.”

2. RELAXED PROPORTIONALITY RULE

Not only does the Statute incorporate the principle of Complimentarity, but it also comports with traditional norms and duties of international law. Specifically, the Statute simply incorporates the provisions of the 1949 Geneva Conventions to which the U.S. is already a party. More importantly, however, the Statute relaxes the rule of proportionality considerably. The proportionality rule is a long-standing principle that governs the extent to which a military can use force to achieve a military objective. Under Additional Protocol I to the Geneva Conventions, the rule of proportionality declares an attack unlawful

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26 Id.
27 It is not clear whether the Pre-Trial Chamber’s recommendation would require a three judge panel or just a single judge.
28 ICC Statute at art. 39.
"which may be expected to cause incidental loss of civilian life... which would be excessive in relation to the concrete and direct military advantage anticipated."\(^\text{30}\)

In response to U.S. objections\(^\text{31}\), the Statute incorporates a more lenient proportionality rule. Under the Statute, an attack is unlawful only if it "would be clearly excessive in relation to the concrete military advantage anticipated."\(^\text{32}\)

The U.S. insisted on a more lenient proportionality rule because of the large number of military operations in which the U.S. participates. For instance, the U.S. was criticized for bombing electrical grids in both Iraq and the Balkans, and some believed that a disproportionate number of civilians were killed as a result of the attacks. The U.S. believed that, under the general proportionality rule, it would be more susceptible to scrutiny before the Court, or that it would be subject to a politically motivated investigation or prosecution. The relaxed proportionality rule solves this problem by adding the "clearly" language to the general rule.

**B. ARGUMENTS AGAINST RATIFICATION**

The Treaty has been roundly criticized in the U.S. Senator Helms, for instance, offered a bill known as the "American Serviceman Protection Act of 2000,"\(^\text{33}\) which would, if adopted, make it impossible for the U.S. to become a party to the Treaty, or to cooperate with the Court in any way. Furthermore, it

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obligates the President to use “all means necessary to bring about the release of
U.S. military personnel and certain other persons held captive by or on behalf of
the Court.”

The proposed legislation states that:

American servicemen and women deserve the full protection of the
United States Constitution when they are deployed around the world to
protect the vital interests of the United States. The United States
Government has an obligation to protect American servicemen and
women, to the maximum extent possible, against criminal prosecutions
carried out by the United Nations officials under procedures that deny
them their constitutional rights.

According to its critics, the Treaty is dangerously deficient because its safeguards
are disingenuous and meaningless, U.S. military members are subjected to the
jurisdiction of the Court disproportionately because of the U.S.’s numerous
peacekeeping responsibilities, and the U.S. has a functioning national court
system that sufficiently punishes U.S. military members for crimes that are
committed during the course of a military operation.

1. DISINGENUOUS SAFEGUARDS AND DISPROPORTIONATE
EXPOSURE

Critics do not believe that the Complimentarity principle effectively
guards U.S. military personnel from politicized prosecutions. This argument has
merit. The Pre-Trial Chamber could impose jurisdiction over a U.S. military
member who, for instance, is investigated – but not charged or is tried – but not
convicted. The Complimentarity principle is not a safeguard, but a procedural
mechanism that gives States a chance to deal with the problem “in house,” before

32 ICC Statute at art. 8(2)(b)(iv) (emphasis added).
the ICC gets involved. This could lead to over zealous investigations and illegitimate prosecutions by the State against a "sacrificial" commanding officer, the purpose of which is not to punish a violator of the laws of war, but to avoid the scrutiny and embarrassment that would come from the submission of jurisdiction by the ICC. Therefore, while the jurisdiction of the Court is technically inferior to that of the national judicial system of a member-state, it is still possible for the Court to exercise jurisdiction if members of the Chamber feel as though the state is not enforcing its laws properly.

In addition, it is not certain that the change in the proportionality rule would in fact lessen the criminal exposure of States that use force. The rule is nearly the same as before except that it now requires that the use of force be "clearly excessive," rather than "excessive." In nearly all military campaigns, one could allege that the use of force violates the proportionality principle. In the Kosovo intervention, for instance, the U.S. and its NATO allies were severely criticized for tactics that it took against the Serbian government. On numerous occasions, the U.S. targeted buildings and power plants that were relied on by the civilian populations both in Serbia and in Kosovo. In fact, it is alleged that 500 civilians died as a result of unnecessary and excessive bombing raids.36 For

34 Id.
35 Id. at §7.
instance, the Human Rights Watch ("HRW") claimed that at least "90 to 150 civilians died from cluster bombs that were used by the U.S. and Britain."\textsuperscript{37} Moreover, NATO's intervention may have violated international law because it bombed the Serb Radio and Television headquarters in Belgrade, a Belgrade Heating Plant, and the Marshall Tito Bridge in Novi Sad.\textsuperscript{38} The Court would likely be faced with countless claims of unlawful targeting and disproportionate attacks.

This has led some critics to argue that the Court would simply interfere with peacekeeping operations.

Allowing an international tribunal to subpoena peacekeeping troops could interfere with how peacekeeping commanders make their decisions in the future; that is, commanders would feel pressure to the put their soldier's in harms way when they otherwise would not, or risk being second-guessed if they or their soldiers were called before an international court to provide testimony about crimes they witnessed but did not stop. As a result, peacekeeping troops could find themselves effectively forced into combat situations to avoid a court-induced perception that they were negligent bystanders.\textsuperscript{39}

This could have the unintended effect of reducing the presence of the U.S. military in military operations around the world. This would particularly be troublesome because the international community relies heavily upon U.S. forces in its peacekeeping missions.\textsuperscript{40} Therefore, the establishment of an ICC could put

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{40} See Michael Ignatieff. Virtual War (2000).
the U.S. in a “Catch 22.” On the one hand, the U.S. could be obligated to use military force but in a manner that is ineffective. On the other hand, the U.S. would not want to commit troops to a conflict that it knows would result in a charge, investigation, or even the prosecution of a military member or commander. In the realm of public opinion, the U.S. already stands on shaky ground when it comes to committing troops to international conflicts.41 If the U.S. committed troops with the additional probability that a service member would be prosecuted before an international tribunal, it would become even more difficult to convince the American public that submitting troops for humanitarian purposes is a worthy cause.

2. THE U.S. PROSECUTES ITS MILITARY PERSONNEL IN MILITARY PROCEEDINGS

Critics of the ICC also argue that the U.S. already vigorously prosecutes military members who violate international law, so it is unnecessary for an international tribunal to “oversee” the work that the U.S. already does. The United States, through its military justice code, prosecutes service members that violate international law. Perhaps the most famous case involving the punishment of a U.S. military member for crimes that were committed during the course of a military operation was the United States v. Calley case.42 There the U.S. prosecuted and convicted First Lieutenant Calley for the “premeditated murder of 22 infants, children, women, and old men, of assault with intent to

41 Id.
murder a child of about 2 years of age."43 These murders took place in the now infamous event known as the massacre of My Lai. The prosecution of Calley indicates, according to critics, that the U.S. has, and always will, vigorously regulate the activities of its military personnel. Moreover, the U.S. adheres to customs and norms of international law and at all times takes steps to ensure that it abides by the duties that have been imposed on it by the international community. According to Ruth Wedgwood:

The law of war is designed to protect the dignity and safety of men in conflict who may have the misfortunes of falling into the hands of the enemy as prisoners of war. It is designed to protect civilians against deliberate mistreatment in occupied areas. And it is designed to prevent terror tactics that abuse the innocent civilians for whom our military fights. The American military trains and fights according to the standards of international humanitarian law. The Pentagon deploys judge-advocate general into the field, in peace and in war, to give advice to our military commanders on any questions that may arise on the requirements of the law of war.44

Therefore, critics believe that the ICC is unnecessary because the U.S. properly punishes military personnel who violate international law, and it has the unintended consequence of making to more difficult for the U.S. to intervene militarily in conflicts where gross human rights violations are occurring. Would the U.S. have intervened in Kosovo, where 1.9 million Kosovar Albanians were allegedly displaced, if the U.S. was a party to the ICC? That is a risk that the Senate would be taking if it chose to ratify the Treaty.

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43 Id. at 536.
IV. RECOMMENDATION: THE U.S. SHOULD RATIFY THE TREATY

Despite these arguments, the U.S. should still ratify the Treaty. It is unlikely that the U.S. would be wrongly targeted by the ICC for acts that are committed during the course of its interventions. The Kosovo conflict is a perfect example of the realities of investigations of this sort.

After the conclusion of the U.S. led Kosovo intervention, two prominent international human rights groups, Human Rights Watch and Amnesty International, requested that the International Criminal Tribunal for the former Yugoslavia prosecute NATO military commanders who allegedly violated international humanitarian law norms during the course of the bombing campaign. In support of its defense, NATO released a statement on June 7, 2000 in which it said that it:

[s]crupulously adhered to international law, including the law of war, throughout the conflict and made every effort to minimize civilian casualties. Unfortunately, as we have always acknowledged, among over ten thousand bombing missions, in a few cases mistakes were made, or weapons malfunctioned, leading to civilian deaths or injuries. We deeply regret such incidents. But such incidents must be weighed against the atrocities that NATO’s actions stopped.45

The Chief Prosecutor, Madame Carla del Ponte, agreed with NATO. In support of her decision not to bring charges, she stated that:

I am very satisfied there was no deliberate targeting of civilians or of unlawful military targets by NATO during the bombing campaign...I am now able to announce my conclusion, following a full consideration of my team’s assessment of all complaints and allegations, there is no basis

for opening an investigation into any of those allegations or into other incidents related to the NATO bombing.46

The Kosovo intervention is a great example of how difficult it is to prosecute military commanders for acts that are conducted during the course of a military operation.

Even if the U.S. were investigated, the U.S. would probably be able to wage a strong defense due to the burdens that are imposed on the Pre-Trial Chamber. For public policy purposes, the ICC would encourage the U.S. and its allies to properly document the process of making operational decisions, and it would ensure that an intervening nation would conduct a proper post-intervention assessment after the conflict. This was one of the principle weaknesses of the Kosovo conflict. NATO was never required to conduct an extensive study of the effect of its bombing campaign on civilians after the intervention ceased. As a result, there is no reliable data on the number of civilians that were killed during the course of the intervention, nor is there a comprehensive determination of the overall impact of the intervention on civilians.47 Finally, The Kosovo conflict demonstrates that the U.S. and its allies will intervene even where there is a possibility that it could be subjected to liability before an international tribunal.

The principle weakness of the Statute is that it does not require that a member of the Court have extensive knowledge of the legal implications of

46 Id.
military operations. That is, a seat should be reserved for a judge that has experience in the area of peacekeeping missions, military interventions, and operational law. The Statute provides only that:

3.(a) The judge shall be chosen from among persons of high moral character, impartiality and integrity who possesses the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court. (see ICC Statute at. Art. 36).

The Court obviously must have judges that are experienced in criminal and international law. But, if a U.S. military member were prosecuted before the ICC, it would likely be for acts that were committed during the course of a tactical operation. Therefore, it is necessary for the Court to have an experienced panel that can decipher the unique conditions and circumstances that are associated with those operations.

Despite this shortcoming however, the benefits of ratifying the Court far outweigh the potential exposure of U.S. military members to the jurisdiction of

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the Court. If the U.S. is to take the lead in the promotion of international human rights, then it must promote a Court that would assist it in that endeavor.

V. CONCLUSION

In conclusion, the Rome Statute does not improperly subject U.S. military personnel to the jurisdiction of the ICC. As stated by one prominent international law scholar, "The import work of the ICC can be fully reconciled with concerns about U.S. sovereignty and the U.S. role in the world. The ICC provides another way to discipline rogue regimes and to prevent the foreign outrages that often call U.S. troops to the field."48

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