United States Military Law of War Doctrine: Making the International Criminal Court Irrelevant to the Ground Combat Forces of the United States in the Early Twenty-First Century

Rex A. Childers

In response to questions regarding the policies of the United States government and its relation to the International Criminal Court (ICC), and specifically the topic "Accountability in the Current War on Terrorism," a discussion will be offered to magnify issues that are not readily available to the general public and are often overlooked by those within the debate itself. A differentiation between *external* and *internal* factors affecting military policies will be made, with a focus on the effectiveness of the *internal* policies. In pursuit of this goal, a synopsis of the present political and social climate will be shared, followed by a hypothetical proposal to allow the reader to engage the imagination to focus on the main arguments offered. Once the reader has been "strategically" deployed into this "hypothetical alternative world," it should be possible to set aside any pre-conceived ideas regarding the "Global War on Terror," the United States Government, its enemies, and its allies. The goal is to enable the reader to "step into the boots" of a ground soldier in combat and realize the environment in which a member of the United States armed forces operates while deployed to a conflict. The requirements placed upon the lawful combatant and their impact on the ability of the United States military to prosecute a war within Law of Warfare (LOW) guidelines, as well as the possible consequences for criminal deviance facing a non-compliant soldier, will be considered. Finally, the potential institutional and national implications of criminal behavior and punishment inside the military will be reviewed.

The arena of discourse on political, legal, and moral challenges facing the United States and its allies in the current conflict does not suffer from a lack of commentators working to achieve success in influencing the actions of the U.S. government. This is as it should be in an open society, and it is even more important during a period of war. In the commentary surrounding the current "War on Terror," one of the common complaints about the Bush administration concerns its unwillingness to submit to "international review" of its conduct. Since approximately 3,000 people were

killed in the attacks on the World Trade Center in New York on September 11, 2001, the Bush administration has aggressively interpreted its powers, both domestically and internationally. The fact that in 2002 the United States announced the withdrawal of the Clinton administration's signature of the Rome Statute in 2000 opened the United States up to charges of arrogance and even *hubris*. In the imaginative logic of critics, the ICC would add a missing piece of international legal and moral authority that would act to regulate the behavior of the United States military. This is an example of an *external* factor, and the possibility that this structure could serve a broader purpose in dealing with the actions of the preeminent superpower (in both an economic and a military sense) carries deeper international implications.

In Johnathan Swift's classic *Gulliver's Travels*, the character of Gulliver represents the superpower in a new world. Having fallen from his ship and washed ashore only to be tied down by the Lilliputians while he sleeps, Gulliver is forced to agree to a treaty with the "monarch of all monarchs" in order to gain his physical freedom:

> First, the Man-Mountain shall not depart from our dominions, without our licence under our great seal. Second, he shall not presume to come into our metropolis, without our express order; at which time, the inhabitants shall have two hours warning to keep within their doors. Third, the said Man-Mountain shall confine his walks to our principal high roads, and not offer to walk or lie down in a meadow or field of corn … Sixth, he shall be our ally against our enemies in the island of Blefescu, and do his utmost to destroy their fleet, which is now preparing to invade us.[1]

The Lilliputian restrictions on Gulliver require some assistance from Gulliver himself. In order to be secured by the ropes (institutions) initially by the miniature inhabitants of Lilliput, Gulliver has to be rendered immobile and unaware for some significant period of time, which he effects by allowing himself to take a drunken nap on a foreign shore. Once he has been restricted, the ability of the Lilliputians to convince him to submit to their conditions is enhanced. His captors offer him a limited form of freedom, but they have only been able to restrain him *after* he incapacitated himself.

The goal of the ICC is similar: many of the earliest and most supportive states in this treaty made a rational decision to participate based on a pre-

1 Jonathan Swift, *Gulliver's Travels* (New York: The MacMillan Co., 1927), 35–36.

ferred outcome (restriction of a superpower) at relatively minimal cost. Among the current participants in the ICC, it is not likely that states as diverse as Albania, Colombia, and Ghana voluntarily ceded significant sovereign capacities without considering how they could benefit from the institution as envisioned in this structure. The possibility that a state's political leadership could be held accountable for the offenses initially listed in the ICC—genocide, war crimes, and crimes against humanity—and potentially for the crime of aggression (yet to be defined by the ICC) offers a form of protection against deployable militaries, a form of anti-superpower invasion insurance.

In relation to the U.S. military, which is guided by a legal code of conduct and where members can and have been charged and convicted of crimes, the impact of an international or "extra-sovereign" structure like the ICC must be classified as an *external* force, secondary to the internal requirements. To the extent that such a structure would become normative and impact the application of law inside the military, the public discourse surrounding the issue is valuable; nevertheless, the assumption that the United States military operates in disregard of the applicable law of war guidelines it is bound to through treaty ratification or in adherence to the body of international law referred to as customary international law is based more on fiction than on fact.

The theory of customary international law and its applicability is significant to the issue of the International Criminal Court. In addition to the forms of law that have traditionally bound states in their actions toward each other (i.e., treaty law), customary international law has achieved status in defining international norms through another method beyond the explicit agreement by the state. Jack L. Goldsmith and Eric A. Posner describe the traditional understanding as follows:

> Customary international law is typically defined as the general and consistent practices of states that they follow from a sense of legal obligation. This definition contains two elements: there must be a widespread and uniform practice of states, and states must engage in the practice out of a sense of legal obligation.[2]

While the ICC is a multilateral treaty form of international law, there is no assumption that its jurisdiction will be interpreted solely on the basis of treaty law. A substantial amount of influence on the normative practice in

2 Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), 23.

international law, including international humanitarian law, where law of warfare is generally classified, comes from the progressive nature of *opinio juris*, the second element of Goldsmith and Posner's definition above, which poses a significant challenge to the ICC in the instance where a nation may be a signatory of one form of treaty law but not another. In such a case, which international standard is to be used?

The United States is a case in point. During the twentieth century the United States agreed to most international law of war guidelines, including the Geneva Conventions of 1949. However, the U.S. has never ratified a major international revision known as the *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.* The significance of this revision—and the decision by the Carter administration to act in variance against the dominant will of the international community—has been discussed in a recent article by Samuel Jones. The political process and the international environment of the 1970s led to a final treaty that blurred the important distinctions between civilian and combatant, vastly changing one of the major tenets of law of warfare, "the reciprocal nature of armed conflicts and the justification for IHL [International Humanitarian Law]": "The classical view that distinction between civilians and combatants should always be observed was subordinated to the apparent social or political desires of certain nations to protect insurgents."[3] So in the hypothetical case of the ICC investigating charges of an American violation involving the issue of status (civilian or combatant), which standard would be used, The Geneva Conventions of 1949, of which the United States is a signatory and compliant member, or the murky guidelines of Protocol I? Is it improbable that the international standard would be applied to the case using Protocol I under the justification of customary international law, even though the United States has consistently rejected that treaty?

The relevance of the ICC to the United States military is moot because the U.S. government is not a signatory; however, for the purposes of this paper, the reader is encouraged to "imagine" the United States as a complying member of the ICC, stipulating that the ICC's reach is also subject to the complementarity enforcement limitations of the statute. The ICC

3 Samuel V. Jones, "Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence between Contract Theory and the Scope of Civilian Immunity during Armed Conflict," *Duke Journal of Comparative and International Law* 16 (Spring 2006), 249.

includes the concept of complementarity as one of the principles of the Rome Statute itself, as noted in both the Preamble and in Article 20, 3:

> No person who has been tried by another court for conduct proscribed under article 6, 7, or 8 shall be tried with the court with respect to the same conduct unless the proceedings in the other court:
>
> a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or
> b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person to justice.[4]

According to Xavier Philippe "the principle of complementarity is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction."[5] This compromise places the state at the forefront of the process of enforcing the international laws surrounding war, subject to the possibility that the ICC may rule independently within the conditions listed above. The idea depends on numerous factors, including the development and sophistication of the national judicial system, and the willingness of the international community to accept the judgment of the sovereign legal system. Philippe continues:

> If one person is accused of an international crime but insufficient evidence is gathered or the rules for a fair trial are not met, national judges may be reluctant or refuse to prosecute the accused. They would comply with their national judicial framework, but not necessarily with the international requirement. Would the ICC accept such a situation, or would it initiate proceedings on grounds of unwillingness or inability to prosecute war criminals?[6]

Although the national judicial processes involved in the United States military can be considered developed when viewed in the context of comparative national military systems, it is not beyond the realm of possibility that

---

4 *Rome Statute of the International Criminal Court*, revised January 2002, 22, www.icccpi.int/library/about/officialjournal/Rome_Statute_English.pdf.

5 Xavier Philippe, "The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?" *International Review of The Red Cross* 88.862 (June 2006), 380.

6 Philippe, 391.

the ICC and its member states would find its processes to be insufficient to meet international criteria. The subjective nature of the global political environment, as well as the potential focus of the ICC on the leadership of a state or its military, makes the complementarity principle problematic, but not entirely prohibitive to its applicability.

From this point on, the relevant question on the ICC's impact can be considered on the basis of the "in theater" effect on the decision-making and actions of the uniformed military service. In order to accelerate the orientation, some *Operation Iraqi Freedom* (OIF) history follows.

In November 2003, on a highway outside Kirkush, Iraq, a series of three explosions rocked a small convoy of Ohio Army National Guard Military Police Humvees. The improvised explosive devices had been buried under the road and were detonated by wire from a nearby location. These explosives were large, a characteristic of rigged heavy artillery shells. In response to the explosion, Sergeant Leon Schultz, manning an automatic weapon in the turret of one of the vehicles which had been spun around by the blast and was sitting motionless, observed a likely location for the source of the detonation: a small building standing alone by the road. The insurgency tended to follow a pattern, with a detonation from a point of observation, followed by a concentration of fire on immobile vehicles or soldiers lacking cover or attempting to rescue fellow soldiers. On this basis, Sergeant Schultz, after clearing his head from the effects of the blast, directed his fire at the building while his vehicle driver worked to get the Humvee started and moving out of the kill zone. Sergeant Schultz continued providing fire as the vehicles pulled out of the center of the ambush site, in compliance with his standing orders and the rules of engagement (ROE).[7]

In a second incident, in the early morning darkness of May 28, 2003, a squad-sized element of United States Army Military Police performing its assigned mission on a main supply route outside Camp Anaconda (formerly an Iraqi Airbase in Balad, Iraq) came under heavy automatic weapon fire from approximately 500 meters away, across the Tigris river. The fire was timed and sustained, tracking the 3 light-armored humvees along their normal route outside the perimeter of the massive base on the eastern tip of the Sunni triangle, north of Baghdad. The contact continued for approximately 20 minutes, but the squad continued its reconnaissance mission without casualties or damage. The soldiers, part of the Ohio Army National Guard from Toledo, Ohio, had entered Iraq in the second stage of the offensive portion of Operation Iraqi Freedom as part of the Fourth In-

7 Leon Schultz, personal interview, May 11, 2006, in Toledo, Ohio.

fantry Division. The unit had settled into its mission after moving through Baghdad and had experienced fire before. The non-commissioned officer in charge of the mission, Staff Sergeant Paul Blake, continued to order all 3 of his vehicle gunners to refrain from firing their grenade machine guns toward the sources of the fire. The combat load of ammunition and the capability of this weapon in this situation, with targets well inside its effective range, could silence much of the fire with a blanket of high explosive grenades fired at a rate of three rounds per second. Staff Sergeant Blake, a 24-year veteran of the army with many international deployments behind him, made the judgment based on numerous factors: his experience, his awareness that the area being used by the enemy was a residential area containing families, and the rules of engagement (ROE) in force in the Iraq theater.[8]

The ROE Card is carried by all soldiers in theater, usually inside their helmet, and is the guide to use of force. Staff Sergeant Blake relied on the first rule of the Operation Iraqi Freedom ROE Card: (1a) "Positive Identification (PID) is required prior to engagement. PID is a reasonable certainty that the proposed target is a legitimate military target," and (1d) "Do not fire into civilian populated areas or buildings unless the enemy is using them for military purposes, or if necessary for your self-defense. Minimalize collateral damage."[9] Facing the possibility that his squad might incur casualties from the fire while continuing their mission, Staff Sergeant Blake determined that the combination of factors (low visibility, mission completion, and ROE requirements) did not justify unleashing up to 500 rounds of high explosive grenades into a civilian area:

> I knew from traveling through that area during daylight that families lived there. I felt that the fire did not pose great danger, even though it was heavy. It seemed to be probing and systematic, as if the varied firing positions were hoping to get us to stop and direct fire into the area. Also, there was the possibility that the enemy was attempting to draw us into firing into a civilian area, a tactic we had been warned about as it tended to get the local population angry at us and made a great story for press outlets opposed to the war.[10]

---

8 Paul F. Blake, personal interview, May 11, 2006, in Toledo, Ohio.

9 *United States Military Operational Law Handbook*, JA 422 (Charlottesville, VA: International and Operational Law Department, The Judge Advocate General's Legal Center and School, 2006), 120.

10 Blake interview.

He was willing to hold his fire, potentially risking his own life and the lives of the 9 other soldiers he was accountable for. What makes this ROE Card so powerful that an entire squad of soldiers would resist their capability to deliver deadly ordnance on a combatant position?

There are 3 dominant *internal* mechanisms that prepare a small unit leader to make this type of decision: doctrine, training, and the existing Uniform Code of Military Justice (UCMJ). In the case of doctrine influencing mission behavior, the rules of engagement originate from doctrinal practice and, as noted in the 2006 edition of the U.S. military's *Law of War Handbook*, "U.S. Law of War obligations are national obligations, binding upon every soldier, sailor, airman, or Marine." [11] The law of war originating from "international law that regulates the conduct of armed hostilities" is communicated down through the chain of command and support through intensive review and the production of briefings and training guides by the Judge Advocate General Corps (JAG). In addition, the JAG corps trains and tasks its members, military lawyers, to be assigned directly to advise battlefield commanders in the support of training standards for law of war guidelines, as well as review of the commander's written orders for operations. JAG lawyers are an integral part of drafting written operation orders for units and are tasked with insuring that "1) law of war issues have been addressed, and 2) legally and practically sufficient rules of engagement (ROE) have been defined."[12] In both operational and training modes, the role of doctrine is a critical primary *internal* force affecting the actions of United States military personnel.

The second important *internal* force that impacts the United States combat soldier is training. Few other organizations can match the depth and regimentation of the training module for all levels of its members. Through a combination of training and field manuals, the doctrinal guidelines are merged into written policies that are communicated to all appropriate levels of the organization. The integration of national and international law into practical guidelines that provide for the accomplishment of the mission of the troops is critical to prosecuting the "War on Terror" within the parameters of the laws of the United States and all applicable international treaties and obligations. Using these manuals, soldiers in leadership roles are responsible for conducting realistic and relevant training for their subordinates. As a consistent thread throughout combat training, the individual soldiers remain responsible for their own actions in bat-

11 *United States Military Operational Law Handbook* (2006), 12.
12 Ibid., 542.

tle, and soldiers in leadership roles are trained to standard when they accept responsibility for their own behavior as well as that of their subordinates. Each soldier under the command of a leader, as in the case of SSG Blake, is trained to understand the importance of distinguishing between a "lawful" and an "unlawful" order. A lawful order is one that "requires the performance of a military duty or act … it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime."[13]

Another distinction that is part of both initial and ongoing training of troops has to do with the term "civilian," which, often used to cover a wide range of individuals in theater, requires further clarification and distinction. In the conduct of a war involving an insurgency that remains non-uniformed in order to blend into the "civilian" population, the correct terms to classify individuals would be "non-combatant" and "combatant," as provided for in customary law of war language. While a non-combatant may be assumed to be a civilian, this is not universally true. An individual who lacks the characteristics that usually identify a combatant (uniform of a state, open display of weapons, ID card that specifies compliance and status under the Geneva Convention, etc.) can be classified as a combatant if they are engaged in warfare. By using known areas of civilian population to engage U.S. forces, such individuals endanger the lives of non-combatant civilians. In the incident previously reviewed that occurred in Balad, Iraq, the combination of individual training, discipline, and leadership within the military worked to avoid unnecessary death and destruction in an area populated by civilians. These internal controls on use of force worked, even though the actions of the enemy made their locations a legitimate military target for the purpose of self-defense (force protection).

The final *internal* force to be discussed regulating the behavior of U.S. military personnel is the Uniform Code of Military Justice (UCMJ) as expressed in the *Manual for Courts-Martial, United States*. This is the legal structure that provides the military with its ability to prosecute its members for crimes committed while enlisted or commissioned in the service. In principle, the jurisdiction of the UCMJ includes both the U.S. Constitution and international law, including law of war. [14] As an example, according to Article 118, the crime of murder can be punished by imprisonment for a period to be determined by a court, a mandatory life or a mandatory

13 *Manual for Courts-Martial United States* (Washington, DC: United States Government Printing Office, 2000), 4:19.

14 Ibid., 1:1.

death sentence, depending upon circumstances, and according to Article 120, the crime of rape (including specifications regarding carnal knowledge of minors) also carries a potential death sentence.[15] These are just two examples of the existing legal ramifications facing American ground forces with respect to their conduct both in peacetime and in war. For the soldier deployed to perform a mission in a hostile theater, the specter of criminal punishment for behavior is not a primary daily concern, but it is important to note that each soldier is aware of the basic requirements of law of war guidelines as standing regulation that cannot be overridden by operational orders.

With a military that depends on an all-volunteer pool of recruits, the United States has an important interest in maintaining a system of justice internally that addresses any criminal deviance of its members. As in any large organization or society, there are individuals who do not feel compelled to comply with the rules of the organization, and unless they can be identified by their leadership as substandard and either required to receive additional training or, in the case of a more severe pathology of disobedience, separated from service by discharge, they can pose a threat to the mission and the military. Although such individuals may represent a very small percentage of the personnel, their deviant acts reflect negatively on the work of the military. For this reason, the focus of the military justice system during the "Global War on Terror" must remain clear in its application of criminal charges, and those personnel who are found to be guilty of crimes—whether or not they rise to the level of crimes that would be in the jurisdiction of an International Criminal Court—must receive appropriate sentencing. It is not an adequate defense for a member of the military simply to argue that "they were just following orders" (a defense that Nuremberg negated) when the behavior is clearly outside the training and doctrine of their profession.

In the practice of military operations, the United States military must depend on its *internal* mechanisms for accountability. Doctrine, training, and the existing Uniform Code of Military Justice form the basis for complying with domestic and international law. Until the U.S. military begins to deploy combat companies full of trained lawyers to "prosecute" the war, the world will have to hope that 26-year-old platoon sergeants, 23-year-old lieutenants, and 21-year-old privates manning crew-served weapons are sufficient to uphold the internal forms of accountability and dispense justice. To the lawful combatant of the United States military, national obligations

15 Ibid., 4:62–64, 66–67.

are assumed and met entirely through these *internal* forms of normative practice. Operating in a daily environment of extraordinary stress and occasional fear, they must balance their own basic needs for survival, as well as their obligations to their comrades in protecting their safety, against the real possibility that their own actions may result in a form of disciplinary action, judicial punishment, or even imprisonment. In addition, the effects of their behavior in the political and media arenas on the mission are clearly under consideration. It cannot be disputed that illegal behavior by a small number of members of the United States armed forces, as in the case of the convicted guards at Abu Ghraib prison, harms the international image of the U.S. military. This is especially likely in a media environment driven by a dominant narrative ("the war is unpopular or should be") and commercial motivation to sell the story using the most graphic descriptions of behavior. The Abu Ghraib story served to confirm the worst prejudices against the war and the U.S. military. A systematic or doctrinal mistreatment of prisoners was alleged, but numerous critical facts were omitted from the public discourse, including that the story had not been broken by an investigative reporter, but through the efforts of an enlisted soldier who became aware of the behavior and reported it to his superiors. The *internal* system of normative behavior brought the crimes to the attention of the military justice system. The release of information to the public was made possible by the system, not by an *external* method of enforcement.

As Nuremberg ushered in a new era of international legal oversight in the conduct of war, it is worth remembering that Nuremberg and other post-World War II courts and tribunals conducted to address the atrocities of the Axis powers became possible only through the complete and unconditional surrender of the enemy. The incongruence of this reality with the idea of the progressive improvement in international relations, as in the case of the debate over a permanent body of jurisdiction to deal with crimes of international conflict, is striking. A structure to ameliorate the impact of brutality in the case of wars between states is a worthy and idealistic goal, and to the extent that the institution promoted in the ICC adds to the transmission of normative values through a communicative process that allows for states to make rational choices in their conduct of foreign policy (including war), the benefits may outweigh the risks to an individual nation in becoming a participating member of the ICC. However, it is not true that the stroke of a pen can transform the basic security interests of a state from a sovereign responsibility into an international form based upon collective cooperation. Each state must judge its own interests and those of its citizens in the historical context of the international communi-

ty as it has existed in history. For the United States, the international record on delivering desired results has been marginal at best, and particularly in the area of national security. Proponents of the ICC as the structure that would provide the missing international enforcement mechanism to limit the behavior of states in the area of warfare are disregarding a fundamental conceptual element: the responsibility of sovereignty. For the United States military in the twenty-first century, the existence of the ICC will remain an external influence, but largely irrelevant to its mission of providing national security for its citizens.